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IN THE SUPREME COURT OF WISCONSIN

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No. 2008-AP-0658-CR

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STATE OF WISCONSIN,

*Plaintiff-Respondent,*

*v.*

MICHAEL A. SVEUM,

*Defendant-Appellant-Petitioner.*

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**BRIEF AND SHORT APPENDIX OF  
DEFENDANT-APPELLANT-PETITIONER**

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On Review from Wisconsin Court of Appeals,  
District IV

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Dean A. Strang  
*Wisconsin Bar No. 1009868*  
Marcus J. Berghahn  
*Wisconsin Bar No. 1026953*

HURLEY, BURISH & STANTON, S.C.  
Counsel for Michael A. Sveum  
33 East Main Street, Suite 400  
Madison, Wisconsin 53703  
[608] 257-0945

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## ISSUES

1. When police officers three times attached Global Positioning System (GPS) devices to Michael Sveum's car in the driveway of the home in which he resided, and then electronically monitored that car's movement in public and private places for five weeks, did they effect a "seizure" or a "search," or both, within the meaning of the Fourth Amendment to the United States Constitution?

The circuit court held that there was no search for purposes of the Fourth Amendment. R116:106.<sup>1</sup> The Wisconsin Court of Appeals held that there was neither Fourth Amendment search nor seizure. *State v. Sveum*, 2009 WI App 81, ¶19, 319 Wis. 2d 498, 769 N.W.2d 53, 60.

2. Does the Wisconsin Electronic Surveillance Control Law, WIS. STAT. §§ 968.27 – 968.31, require police to obtain judicial approval to place a GPS device on a car and to monitor its travel?

The circuit court held that WESCL does not apply to the police conduct here. R113. The court of appeals agreed that WESCL does not apply, because a GPS unit is a "tracking device" excepted from the definition of "electronic communications." *Sveum*, 2009 WI App 81, ¶¶24-30.

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<sup>1</sup> Sveum uses this format for citations to the record and its docket numbers.

**STATEMENT ON ORAL ARGUMENT  
AND PUBLICATION**

The Court already has set oral argument. The reasons for granting review also counsel publication, which rightly is this Court's usual practice.

## STATEMENT OF THE CASE

**Nature of the Case.** This is a direct appeal from Michael Sveum's criminal conviction in Dane County Circuit Court. On October 13, 2009, this Court granted review to determine whether the warrantless placement of a Global Positioning System (GPS) device on a car by the police, and the subsequent continuous monitoring of the car's location in public and private places, violated the Fourth Amendment to the United States Constitution. It also granted review on the question whether the Wisconsin Electronic Surveillance Control Law, WIS. STAT. §§ 968.27 through 968.31, requires judicial approval before police place a GPS device on a car.<sup>2</sup>

**Procedural Status.** The state charged Sveum in Dane County Circuit Court with aggravated stalking in 2003. R1, R9. He had a jury trial and lost, R58, R62-64, but before and after trial preserved the challenges at issue here. R7, R 23, R, 24, R29,, R30, R93, R95. Following a timely post-conviction motion, the circuit court, Hon. Steven D. Ebert presiding, denied post-conviction relief on the issues this Court has agreed to review and on others. R126.

Sveum then pursued a timely *pro se* appeal to the Wisconsin Court of Appeals, District IV. The court of appeals affirmed his conviction. *State v. Sveum*, 2009 WI App 81, 319 Wis. 2d 498, 769 N.W.2d 53. It expressly addressed and rejected the two issues on which Sveum sought this Court's review. *Sveum*, 2009 WI App 81, ¶¶6-22 (Fourth Amendment issue), ¶¶23-30 (WESCL issue).

**Disposition in Courts Below.** Sentenced to 7-1/2 years of initial confinement for this aggravated stalking conviction, with 5 years of

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<sup>2</sup> In his *pro se* petition for review, Sveum cited WIS. STAT. §§ 968.27 through 968.37. Nothing beyond § 968.31 arguably applies here, though.

extended supervision to follow, R77, R81, Sveum is in prison now. As he notes above, the Wisconsin Court of Appeals affirmed his conviction.

*Facts.* On April 22, 2003, police obtained a court order allowing them to place a GPS device on Michael Sveum's car, to enter and re-enter the car, to replace the GPS unit's batteries as needed, and to monitor Sveum's movement in the car for up to 60 days. R116:31 & Ex. 18. Faced with concerns that this court order was both overbroad, *Sveum*, 2009 WI App 81, ¶6, and technically not a warrant, *id.* at ¶6 n.3, the Wisconsin Court of Appeals eventually addressed only the question whether the police conduct constituted a Fourth Amendment search or seizure at all. *Id.* at ¶6.

After obtaining the order, in the early morning hours on April 23, 2003, four police officers entered the Cross Plains property where they believed Sveum was living. R116:86-87. His car was in the driveway. That driveway was approximately the length of two cars with a garage at the end. Sveum's car was parked close to the garage, pointed toward the street. R116:73. The rear of the car was "only a couple of feet" from the closed garage door. R116:74. Officers approached the car and attached a GPS device to the rear undercarriage of the car with a magnet and tape. R116:42-43. Attaching the device involved officers lying on their backs under the car. R116:74. One of the officers, Det. Mary Lou Ricksecker, earlier had consulted with a DCI agent who assisted in attaching the GPS device to Sveum's car. That agent had reported to Ricksecker that he assisted other police agencies in placing GPS devices "quite routinely and often." R116:41.

Because the GPS device ran on a battery, it required replacement every 14-21 days. R116:45. Accordingly, after perhaps two weeks or a bit less, officers went to the home again, removed the original device from Sveum's car in the driveway, and attached a new one in the same

manner as the first. R116:46, 72, 86. Officers then downloaded the information from the first GPS device. R116:46-47.

They repeated this procedure once more, removing the second GPS device and attaching a third. R116:47, 72. Officers removed that last device from the car on May 27, 2003. R116:47. At least some information from the GPS devices made its way into a May 27 application for two search warrants directed at Sveum. R116:51-52.

Sveum later moved to suppress the results of the GPS devices and of three search warrants<sup>3</sup> that followed the use of the GPS devices. R23, 24, R29, R30.

After hearing testimony from two police officers at a suppression hearing on November 4, 2005, the trial court denied Sveum's motions. R113, R116. The court held that it could not find that going into the driveway was a "violation of curtilage." R116:106. Further, as to the GPS devices, the court found that no search occurred. R116:106.

A jury later convicted Sveum. R68 On post-conviction motion, the circuit court again refused to suppress the results of the GPS devices. R93, R96 (motion), R113 (order).

The Wisconsin Court of Appeals affirmed Sveum's conviction. It "agree[d] with the State that neither a search nor a seizure occurs when the police use a GPS device to track a vehicle while it is visible to the general public." *Sveum*, 2009 WI App 81, ¶8. The court of appeals also agreed "with the State that the police action of attaching the GPS device to Sveum's car, either by itself or in combination with

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<sup>3</sup> A third warrant to search the hard drive and tower of a computer followed the two May 27, 2003 warrants. R116:58-59, Ex. 23.

subsequent tracking, does not constitute a search or seizure.” *Id.* at ¶12.

Responding to Sveum’s argument that because the GPS device also transmitted the location of the car when out of public view, all tracking information should be suppressed, *id.* at ¶16, the court of appeals disagreed. While the court of appeals conceded that the police presumably obtained location information while Sveum’s car was inside areas not open to surveillance, it concluded first that, “there is no indication that this same information could not have been obtained by visual surveillance from outside these enclosures. Such surveillance could have told the police when Sveum’s car entered or exited his garage and the garage at his workplace and, therefore, informed them when his car remained in those places.” *Id.* at ¶17. Second, it noted that Sveum suggested no reason why all tracking information should be suppressed even if information about the car’s location in enclosures should have been suppressed. *Id.* at ¶18.

In short, the court of appeals concluded “that no Fourth Amendment search or seizure occurs when police attach a GPS device to the outside of a vehicle while it is in a place accessible to the public and then use that device to track the vehicle while it is in public view.” *Id.* at ¶19. Having reached that result, the court of appeals added:

We are more than a little troubled by the conclusion that no Fourth Amendment search or seizure occurs when police use a GPS or similar device as they have here. So far as we can tell, existing law does not limit the government’s use of tracking devices to investigations of legitimate criminal suspects. If there is no Fourth Amendment search or seizure, police are seemingly free to secretly track *anyone’s* public movements with a GPS device.

*Id.* at ¶20 (italics in original).

After noting similar concerns about private use of GPS surveillance devices, the court of appeals “urge[d] the legislature to explore imposing limitations on the use of GPS and similar devices by both government and private actors.” *Id.* at ¶22.

Addressing Sveum’s separate claim that the use of the GPS device here violated Wisconsin’s Electronic Surveillance Control Law, the court of appeals held that the GPS device fell within the exclusion for “Any communication from a tracking device.” WIS. STAT. § 968.27(4)(d); see *Sveum*, 2009 WI App 81, ¶¶24-29.

Sveum responded with a *pro se* petition for review in this Court.<sup>4</sup> His petition presented two issues. First, “Does the warrantless secret placement of a Global Positioning System (GPS) device on a vehicle by the police, and its subsequent 24-hour a day recording of the vehicle’s location on public roads and inside private premises, violate the Fourth Amendment to the United States Constitution?” Second, “Does the Wisconsin Electronic Surveillance Control Law, codified at Wis. Stat. §§ 968.27-.37, require the police to obtain judicial approval to place a GPS device on a vehicle to record its travels?”

This Court granted review and appointed *pro bono* counsel for Sveum.

Sveum’s argument refers to additional facts as necessary.

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<sup>4</sup> Although Sveum had counsel for most steps in the trial court, he was without counsel in post-conviction proceedings, R93, R95, in the court of appeals, and on petition for review in this Court.

## ARGUMENT

### I. GPS AND THE FOURTH AMENDMENT.

#### A. *Overview of GPS Technology.*

The Court might begin by understanding something about GPS technology and its rapid advance. Most simply, GPS is a satellite-based navigation system. R115:33-37. Present applications of GPS technology to military, commercial and consumer products are countless. At a cost of more than \$10 billion, the United States Department of Defense developed GPS originally for military use. Scott Pace *et al.*, *THE GLOBAL POSITIONING SYSTEM: ASSESSING NATIONAL POLICIES 1-2* (Rand 1995). “The purpose of this massive effort was to provide a highly accurate, secure, reliable way for U.S. forces to navigate anywhere in the world, without having to reveal themselves through radio transmissions.” Pace *et al.*, *GPS: ASSESSING NATIONAL POLICIES* at 1.

But today GPS guides much more than military materiel and personnel. It has found its way into cell phones, cameras, surveying equipment, navigational aids for airplanes and passenger vehicles, tracking devices for management of truck fleets, gadgets for tracking dogs or children, and even tools for monitoring sex offenders. See WIS. STAT. § 301.48; *see generally*, David Schumann, *Tracking Evidence with GPS Technology*, 77 WIS. LAWYER 5 (2004). The device can be active or passive, depending on whether the application calls for documenting the travels of a subject in real time or in historical terms.

GPS consists of three different components: a space segment, a control segment, and a user segment. Pace *et al.*, *GPS: ASSESSING NATIONAL POLICIES* at 1-2; Schumann, *supra*. The first two

are under government control. The space segment is composed of a minimum of 24 geo-synchronous satellites that follow the same orbital track and configuration over any point on earth in less than 24 hours. The satellites orbit the earth in six orbital planes with at least four satellites in each that are equally spaced sixty degrees apart and are inclined at about fifty-five degrees with respect to the equatorial plane. At any point in time, this means that the space segment includes between five and eight satellites visible from any point on earth. The satellites continuously transmit signals from space.

The control segment is the second part of GPS. That control segment is based at a master control facility at Schriever Air Force Base in Colorado. The control facility measures signals coming from the satellites, which are then incorporated into orbital models for each satellite. The stations measure precise orbital data and determine satellite clock corrections for each satellite which data is then returned to the satellite so that, in turn, the satellite sends back subsets to GPS receivers by radio signal. Schumann, *supra*; Pace *et al.*, GPS: ASSESSING NATIONAL POLICIES at 1-2.

The final component of the GPS system is the user segment. GPS receivers, whether installed in cell phones, OnStar, GPS navigational aids or emergency locating beacons convert data received from the satellites into position, velocity and time estimates. The non-military uses of GPS have exploded since the 1995 Rand Institute report that Sveum cites above. Some of those uses are purely commercial. But some involve domestic police surveillance – an application hardly foreseen just more than a decade ago. The potential uses of GPS technology in policing and surveilling the citizenry got barely a mention in that 300+ page Rand Institute study, including appendices. See Pace *et al.*, GPS: ASSESSING NATIONAL POLICIES at 15.

Today GPS technology in fact provides police with a powerful and inexpensive method to track remotely in great detail the

movements of an individual over a prolonged period of time, whether in public or private areas. As a practical matter, GPS does much more than merely augment the senses of police officers. The technology provides a complete replacement for human surveillance. It permits round-the-clock surveillance at nominal cost. The technology enables police to monitor cars in private places and on public roads in essentially unlimited numbers.

And GPS enables police surveillance for unlimited time. Consider Wisconsin. Some child sex offenders now are subject to lifetime GPS surveillance. WIS. STAT. § 301.48(2). Monitoring the every movement of ex-offenders for the rest of their lives would have been wholly infeasible, as a budgetary matter if not a technological one, less than two decades ago.

This technology far exceeds the capability of devices that the police used when the United States Supreme Court last examined the Fourth Amendment implications of radio tracking beacons. *United States v. Knotts*, 460 U.S. 276 (1983); *United States v. Karo*, 468 U.S. 705 (1984). Both in *Knotts* and in *Karo*, human surveillance was necessary for the electronic beepers to fulfill their purpose. Here, advances in technology allow police to detail investigating officers to other cases while the GPS device collects information that officers can download later. The technology does not require police officers to follow or make any personal observations of the subject once they install the device. See also *United States v. Garcia*, 474 F.3d 994, 998 (7th Cir. 2007) (noting that GPS permits “wholesale surveillance” and commenting, “Technological progress poses a threat to privacy by enabling an extent of surveillance that in earlier times would have been prohibitively expensive”).

The device that police officers attached to Sveum’s vehicle collected location and directional data. R115:33. It could not identify who was operating the car. R115:37. Before the battery life expired

officers removed the device and downloaded the data onto a police computer. R116:45. The GPS tracking unit installed on Sveum's car automatically recorded movements and location regardless whether the automobile was in motion. R115:35; R116:45-46 ("If the vehicle is in motion, the device can be set at a variance of time to record that location of that vehicle and it can be as short as you want it from ten seconds to up to every two minutes that if the vehicle is in motion, the device will click and record where that vehicle is located"). The police then translated accumulated data about the car's movements into maps that graphically illustrated where the car had gone in those five weeks. R115:34, Ex. 2.

The upshot of the device's simplicity is that today police can, without court oversight, track unlimited numbers of people for days, weeks, months or years without officers leaving the station house. However, as the Supreme Court has warned, "[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment." *Arizona v. Gant*, 129 S. Ct. 1710, 1723 (2009), quoting *Mincey v. Arizona*, 437 U.S. 385, 393 (1978).

## B. Searches.

1. Given the potential for widespread, even indiscriminate, tracking of thousands, or hundreds of thousands, of citizens with relatively cheap GPS units, the Wisconsin Court of Appeals' concerns were serious. See *Sveum*, 2009 WI App 81, ¶¶20-22. But the court of appeals' basic conclusion – that the monitoring here did not invoke Fourth Amendment protections – is at least partly at odds with its worries about overbroad police surveillance. At bottom, the interest the court of appeals identified is privacy; a rightful wariness of government snooping. That is the very concern that animates the Fourth Amendment and its assurance against unreasonable searches and seizures. See, e.g., *Minnesota v. Dickerson*,

508 U.S. 366, 380 (1993) (Scalia, J., concurring) (“The purpose of the [Fourth Amendment], in other words, is to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted – even if a later, less virtuous age should become accustomed to considering all sorts of intrusion ‘reasonable’”). Yet the court of appeals found the Fourth Amendment an idle bystander to the prolonged police surveillance here, which Det. Ricksecker quoted a DCI technical agent as admitting Wisconsin police agencies engage in “quite routinely and often.” R116:41.

The Wisconsin Constitution might address this issue, but Sveum’s *pro se* petition for review and this Court’s October 13, 2009 order together bar counsel from arguing so here.<sup>5</sup> Sveum notes only that the highest courts in other states have begun to take similar concerns seriously, holding that GPS tracking constitutes a search or seizure for purposes of state constitutional analogs to the Fourth Amendment. See *Commonwealth v. Connolly*, 454 Mass. 808, 913 N.E.2d 356 (2009) (installation and subsequent monitoring of GPS tracking device placed in defendant’s minivan was a seizure under the state constitution); *People v. Weaver*, 12 N.Y.3d 433, 909 N.E.2d 1195 (2009) (placement of GPS tracking device on defendant’s automobile and subsequent monitoring of automobile’s location was a search requiring a warrant under state constitution); *State v. Jackson*, 150 Wash. 2d 251, 76 P.3d 217 (2003) (installation of GPS device on

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<sup>5</sup> Sveum’s *pro se* petition for review addressed only the Fourth Amendment, not Article I, § 11 of the Wisconsin Constitution. This Court’s order granting review then forbade the defendant-appellant-petitioner to “raise or argue issues not set forth in the petition for review unless otherwise ordered by the court.” ORDER at 1 (Wis. Sup. Ct. October 13, 2009). Counsel accordingly cannot argue here that the Wisconsin Constitution provides broader protection than the Fourth Amendment, if in fact the Fourth Amendment permits the GPS monitoring at issue here. But Article I, § 11 remains open to this Court’s consideration.

defendant's automobile involved a search and seizure requiring a warrant); *State v. Campbell*, 306 Or. 157, 759 P.2d 1040 (1988) (use of beeper to locate automobile belonging to burglary suspect was a search under Oregon constitution and violated defendant's constitutional rights absent warrant or exigency).

Within the scope of Sveum's petition and this Court's order granting review, the Court could adapt the reasoning of *Connolly*, *Weaver* and *Jackson* as to the Fourth Amendment's protection against unreasonable searches. Those decisions make a compelling case that the GPS surveillance here is a search within the Fourth Amendment's ambit.

Neither *Knotts* nor *Karo* foreclose the conclusion that this GPS device resulted in searches within the scope of the Fourth Amendment. Both cases concerned older beeper technology that required active human involvement, tracking the beepers' emitted signals with a receiver. *Knotts*, 460 U.S. at 277-79; *Karo*, 468 U.S. at 708-10. Moreover, in *Knotts*, the defendant who sought suppression arguably had no privacy interest at stake: the beeper was in a drum, with the consent of the seller of the drum, and the defendant was not the buyer or in possession of the drum until it entered his cabin. When it did, agents no longer monitored the beeper. *Knotts*, 460 U.S. at 278-79, 284-85. The facts were similar in *Karo*, except that agents did monitor the beeper once the drum was inside a home that several defendants shared. But the Supreme Court distinguished *Knotts* and held that monitoring the beeper inside the home *was* a warrantless search that the Fourth Amendment barred. *Karo*, 468 U.S. at 714-19.

Here, the police affixed the GPS units to Sveum's car and thrice entered private property where he resided to attach the devices. Plainly Sveum had a privacy interest in his car, and in the home if police were within the curtilage when they attached the GPS devices. As he notes above, too, the GPS technology does not rely on human or

visual surveillance, so its potential intrusiveness is greater than the beepers in *Knotts* and *Karo*. Finally, as in *Karo*, the police here presumably obtained GPS monitoring information about Sveum's movements in his car while it was in private places. See *Sveum*, 2009 WI App 81, ¶17.

2. Even assuming, though, that installation of the GPS unit on Sveum's car was not a search, the entry to his property surely was. Although the trial court declined to find that officers entered the curtilage of the home, R116:106, that conclusion clearly was erroneous.

Curtilage is a question of constitutional fact as to which this Court employs a two-step standard of review. *State v. Martwick*, 2000 WI 5, ¶¶2, 16-24, 231 Wis. 2d 801, 810-14, 604 N.W.2d 552, 556-58. This Court will review the circuit court's findings of historical fact only for clear error, including evaluation of the four factors that the United States Supreme Court laid out in *United States v. Dunn*, 480 U.S. 294, 301 (1987). *Martwick*, 2000 WI 5, ¶24, 231 Wis. 2d at 814, 604 N.W.2d at 558. Then it will review *de novo* the ultimate determination of the extent of curtilage. *Id.*

In *Dunn*, the Supreme Court identified four factors for "particular reference" in separating curtilage from public areas or open fields. These are:

[T]he proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.

*Dunn*, 480 U.S. at 301.

The undisputed testimony was that the driveway of the home where Sveum stayed was relatively short: about two car-lengths. R116:73. Officers crawled under the rear of Sveum's car, which was "only a couple of feet" from the garage door because the car was backed into the driveway. R116:74.

That area was very close to the home. The back of the car was within two feet of the garage door. The garage itself was attached to the single family ranch home at the north end. R116:48, Ex. 19 at 1 (complaint for search warrant). The two feet between the car and the garage was within the zone of the home's intimate activities. Basketball hoops, flower beds, vegetable gardens, sandboxes or swingsets, and patio furniture all commonly are farther than two feet from a garage door or a wall of the house, yet emblematic of the private activity that makes a house one's home. For that matter, the police approached the home even closer than Sveum had parked his car, and parking a car nearby for safekeeping is among the activities of home life.<sup>6</sup> The manner in which Sveum placed his car also tended to protect its rear end from public view.

In sum, the space between car and garage was a place in which the home's occupants had both a subjective and an objectively reasonable expectation of privacy. If Sveum or his mother had looked out of the window in the dead of night to see people lurking within two feet of their garage door and crawling under the car, they surely would have taken those people as prowlers and called the police or taken other action to protect their property and privacy. To the extent that the circuit court's historical findings are inconsistent with the undisputed facts elicited at the suppression hearing and set out here, the circuit court clearly erred.

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<sup>6</sup> The Court may consider the reality that, for many homeowners, a car is their most expensive possession after their home.

Further, this Court independently should conclude that the area here was within the curtilage. If the space within two feet of an attached garage, and behind a resident's parked car, is not a home's curtilage, it is hard to imagine what is. A home's curtilage cannot be so stingily understood today that it extends less than an arm's-length from the detached, single family home itself. So even if placing the GPS unit was not a search, entering the property of this private home as the police did three times to place the unit was a search.

**C. *Seizure: The Overlooked Simplest Ground.***

There is a still simpler concern that the courts below largely overlooked, so Sveum applies Occam's Razor. Physically placing the GPS devices here inescapably entailed temporary seizures of Sveum's car. Those seizures fit comfortably within the class of temporary seizures to which the Fourth Amendment applies, under longstanding, stable precedent of the United States Supreme Court.

Sveum also explains why the GPS unit itself, once installed on his car by temporary, physical seizure, constituted a related but additional electronic seizure. That device anchored Sveum's car to an electronic tether with government agents at the other end, just as surely as a collar anchors a dog to a leash. That the leash here was electronic, not woven rope, and that it had almost limitless length made it no less a tether by which the police had Sveum's movements constantly in hand.

As Sveum's case comes to this Court, those seizures were without a valid warrant. The Wisconsin Court of Appeals tacitly treated them that way. As warrantless seizures, the state—not Sveum—had the burden of justifying them by pointing to a recognized exception to the Fourth Amendment's warrant requirement. The state did not do that.

Failing that burden, the state still might have tried to avoid application of the exclusionary rule by proving an independent source for the same information that the GPS unit provided, or by convincing a court that discovery of that information or the materials it later seized pursuant to the May 27 search warrants was inevitable. The court of appeals erred in intimating that Sveum bore the burden of disproving an independent source or inevitable discovery. *See Sveum*, 2009 WI App 81, ¶¶16-17. The state, which instead had that burden, never sought to prove an independent source or inevitable discovery.

On the solid foundation of the United States Supreme Court's long interpretation of the Fourth Amendment, then, the state cannot escape exclusion of the products of these warrantless seizures, which fall into no recognized exception to the warrant requirement and have not the saving grace of an independent source or inevitable discovery. This Court should reverse the court of appeals' decision and remand.

## **II. PLACING THREE GPS DEVICES INVOLVED TEMPORARY "SEIZURES" OF SVEUM'S CAR WITHIN THE SCOPE OF THE FOURTH AMENDMENT, AS DID ELECTRONICALLY MONITORING THE CAR IN PRIVATE PLACES.**

### **A. *The Fourth Amendment and Temporary Seizures.***

The text of the Fourth Amendment provides in full:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing

the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

The threshold question here is what governmental interferences with possessory interests or detentions the Fourth Amendment covers. In other words, what is a seizure? The court of appeals found no seizure within compass of that amendment. *Sveum*, 2009 WI App 81, ¶¶8, 12, 19. The reasonableness of a seizure is a question this Court need address only if it first finds some “seizure” within the meaning of the Fourth Amendment.

A quite broad array of temporary governmental interferences with things and people invoke the Fourth Amendment’s protection. As to things, “A ‘seizure’ occurs when there is some meaningful interference with an individual’s possessory interests in that property.” *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *Karo*, 468 U.S. at 712. A seizure of a person is “meaningful interference, however brief, with an individual’s freedom of movement.” *Jacobsen*, 466 U.S. at 113. n.5.

Police actions within the Fourth Amendment’s understanding of “seizure” include “seizures that involve only a brief detention short of traditional arrest.” *Reid v. Georgia*, 448 U.S. 438, 440 (1980) (per curiam). Short detentions solely to secure fingerprints are seizures within the meaning of the Fourth Amendment. *Davis v. Mississippi*, 394 U.S. 721, 727 (1969).

Traffic stops entail temporary seizures of both driver and passengers that ordinarily last reasonably for the duration of the stop. *Arizona v. Johnson*, 129 S. Ct. 781, 788 (2009). Brief investigative stops of a person on the street are seizures. *Terry v. Ohio*, 392 U.S. 1, 16 (1968). Even more so are compelled trips to a police station, on less

than probable cause and without formal arrest. *Dunaway v. New York*, 442 U.S. 200, 206-07 (1979).

Brief investigative detentions of things are “seizures” under the Fourth Amendment even when they do not affect a privacy interest and only minimally delay a possessory interest in the item. They may be reasonable on less than probable cause in some circumstances, but they are seizures all the same. This is the rule for first-class mail held briefly at a post office after deposit there for mailing, *United States v. Van Leeuwen*, 397 U.S. 249, 252-53 (1970), and for luggage in the possession of a passenger leaving an airport, *United States v. Place*, 462 U.S. 696, 701-06 (1983).

The Fourth Amendment allows seizures and searches at or near national borders without a warrant, probable cause, or even suspicion. That is true not because these fail to count as searches and seizures, but because the historical interdiction of people and things at borders simply is reasonable. The rule applies to seized and searched mail, *United States v. Ramsey*, 431 U.S. 606, 616-19 (1972), and to people in cars at or near a border. See generally *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). When there is more than just the border crossing to justify the seizure, longer temporary detentions may be reasonable. See, e.g., *United States v. Montoya de Hernandez*, 473 U.S. 531, 537-44 (1985) (on reasonable suspicion that traveler at border was alimentary canal smuggler, 16-hour detention reasonable).

Away from the border, temporary seizures of cars (and the people in them) at highway checkpoints may be reasonable if tied to traffic safety and not random. But they *are* seizures. *Delaware v. Prouse*, 440 U.S. 648, 653-63 (1979) (random spot checks for license and registration were unreasonable seizures); *Michigan Dep’t. Of State Police v. Sitz*, 496 U.S. 444, 450-55 (1990) (drunk driving checkpoints were reasonable seizures). However, even brief seizures of cars and

the people in them at checkpoints that serve only general law enforcement purposes are unreasonable. *City of Indianapolis v. Edmond*, 531 U.S. 32, 40-44 (2000) (drug interdiction highway checkpoints were unreasonable seizures).

What these cases all have in common is that the temporary, compelled detention of things, including cars, or people is a “seizure” for purposes of the Fourth Amendment. That is true “even though the purpose of the stop is limited and the resulting detention quite brief.” *Delaware v. Prouse*, 440 U.S. at 653. Some of these seizures are reasonable without a warrant and some are unreasonable. But they all are seizures in the first instance.

#### **B. *The Seizures Here.***

Three times police officers approached Sveum’s car in his mother’s driveway, where Sveum was staying. Three times the officers shimmied under his car, lay on their backs, and attached a GPS device to the underside of the car by magnet and tape. During the time the police officers were under the car, working to attach a foreign device to it, that car was under police control. The police obviously would not have allowed Sveum to move or drive the car while officers were at work underneath it. At least four officers were present and, of those, at least one stood by on watch. R116:42-43, 72, 74, 86.

These three episodes were akin to other temporary, brief seizures that the Supreme Court consistently has recognized as subject to the Fourth Amendment. However briefly, the police here temporarily put hands on Sveum’s car, attached something to it, and while doing so prevented its movement and interfered with his possessory interest in using it. The intrusion was not great. But the Fourth Amendment requires no great intrusion at the threshold to qualify a temporary detention or interference as a “seizure.” Police officers three times physically seized Sveum’s car for brief periods

when they crawled under it and attached a GPS unit to it under the watch of other officers.

The police also interfered in two more nuanced and prolonged ways with Sveum's possessory interest in his car, and with Sveum himself. As to his possessory interest, they affixed something to his car that eroded his ordinary property right to determine what accessories his car would bear, and what accessories it would not. To a significant extent, the police appropriated Sveum's property interest in the car by affixing something that served a government purpose, not the owner's purpose. As to his own autonomy, the police in effect attached him to an electronic leash by which they could know remotely his every movement in the car.

1. Affixing the GPS device to Sveum's car served only the purposes of the police and the state. Sveum neither knew that the state had added an accessory to his car nor wanted that accessory, for all the record shows. This was a partial seizure of the possessory interest in the car with which ownership imbued him. Suppose by analogy that the police had seized Sveum's car for a short time to apply a bumper sticker to its rear end, without his knowledge. Imagine that Sveum did not discover the sticker or, if he did, that he could not remove it. Suppose further that the bumper sticker bore a slogan that would offend passing police officers or otherwise draw their notice, and thus would subject Sveum to unwanted police attention by reason of the message that the state forced him to display when it affixed the bumper sticker to his car. The seizures at issue would not be limited to the initial brief time during which the government applied the sticker. A more lasting, if subtle, seizure would be the erosion of Sveum's control of his property, and the transfer of some of that possessory interest to the state so that Sveum's car served in measure a purely governmental interest by displaying a slogan that would invite further police attention.

That is very much like the seizure of possessory rights that occurred here. As the owner of the car, Sveum ordinarily would have the sole right to decide what accessories it would carry: what messages to display on his bumper, if any; what attachments to fly from his radio antenna, if any; what trinkets to hang from his rear view mirror. But here the state commandeered or seized some of that possessory control. The car now carried an accessory that served only a government interest, and contradicted Sveum's own interests.<sup>7</sup>

2. Having attached the GPS unit, police officers in effect also had placed a collar on the car that gave them control over an electronic leash. While Sveum could drive the car as he pleased, officers now could track its (and his) every movement, once they removed and downloaded the GPS unit. During the five weeks that the three GPS units were in place, hidden under his car, Sveum's car was on a high-tech, electronic leash.

It was not just the car on the tether, for that matter. Cars go nowhere without a human being operating them. When a human being drives a car, he goes where the car does. It is he whose movements the police really monitor with a GPS device, not the car's. A 1990 Chevy Beretta commits no crime, stalks no one, and holds no police interest by itself. It is the man who drives the car who holds police interest: unlike the inanimate car, he may stalk and commit a crime.

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<sup>7</sup> This hypothetical example is unlike the license plate and registration sticker that cars display, for several reasons. Licensing and registration are laws of universal application to all motorists. These laws are known or knowable before one buys a car, or elects to drive the car on Wisconsin's public roads. One can own a car without affixing a license plate or registration sticker, too, for those are mere conditions of operating the car lawfully on public roads. The mere presence of a proper license plate and registration sticker also draws no police attention and does not single out the motorist. All of these points distinguish the license plate and registration sticker from the GPS device here or the hypothetical bumper sticker.

3. This reveals the Seventh Circuit's mistake in *United States v. Garcia*, 474 F.3d 994 (7th Cir. 2007). The mistake had two aspects. First, in concluding that a GPS device installed on a car effected no "seizure" under the Fourth Amendment, 474 F.3d at 996, *Garcia* considered only the ongoing use of the car itself, not the initial surreptitious installation of the device. Sveum agrees that the GPS unit here did not impede operation of his car after installation; there was no seizure in that sense. But the fact remains that installation itself involved a temporary, physical seizure of the car – three times. It also entailed affixing an accessory to the car that Sveum had not chosen, and this was an appropriation of his property rights of control. Sveum's car carried a government fixture for five weeks that he did not want and that served only the government's purposes, not the purposes that the property owner intended.

Second, the *Garcia* court did not consider the electronic seizure of the car and the driver. It considered only the physical nature of the car itself. But the Fourth Amendment does not exist to serve inanimate objects or places. It exists to protect people. *See Katz v. United States*, 389 U.S. 347, 351 (1967). In places public and private, Sveum was tethered electronically to the government when he drove his car for five weeks. That it gave him unlimited leash is not the issue. The issue is that the state held the other end of the leash.

**C. *In the Absence of a Valid Warrant, the State Must Justify these Warrantless Seizures.***

In the court of appeals, the state did not defend the validity of the April 22, 2003 court order that purported to allow attaching a GPS device to Sveum's car and monitoring that device for up to 60 days. Rather, the state argued that no Fourth Amendment event, no search or seizure, occurred at all.

Following the state's cue, the court of appeals tacitly assumed the invalidity of the court order. It addressed instead the underlying Fourth Amendment question, concluding that the police neither searched nor seized Sveum's car. *Sveum*, 2009 WI App 81, ¶¶8, 12. That conclusion mooted questions about the sufficiency or propriety of the court order.

As the case arrives in this Court, then, the police actions were without a valid warrant. In the absence of a valid warrant, the longstanding rule is that a search or seizure is presumptively unreasonable. "The United States Supreme Court has consistently held that warrantless searches are *per se* unreasonable under the fourth amendment, subject to a few carefully delineated exceptions." *State v. Murdock*, 155 Wis. 2d 217, 227, 455 N.W.2d 618, 622 (1990); *see also State v. Williams*, 2002 WI 94, ¶18, 255 Wis. 2d 1, 10, 646 N.W.2d 834, 838 ("Warrantless searches are *per se* unreasonable under the Fourth Amendment"). "The exceptions to the rule that a search must rest upon a search warrant have been jealously and carefully drawn," Justice Harlan wrote for the Supreme Court more than fifty years ago. *Jones v. United States*, 357 U.S. 493, 499 (1958). The sovereign bears the burden of demonstrating that some recognized exception to the warrant requirement saves the seizure. *State v. Sanders*, 2008 WI 85, ¶27, 311 Wis. 2d 257, 268, 752 N.W.2d 713, 718, citing *Chimel v. California*, 395 U.S. 752, 762 (1969).

While the Supreme Court often has applied this rule to warrantless searches, it also has applied the rule to a warrantless seizure. "In the ordinary case, the Court has viewed a seizure of personal property as *per se* unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized." *United States v. Place*, 462 U.S. 696, 701 (1983) (going on to note that seizure pending a warrant application may be proper when there is probable cause to believe the item contains

contraband or evidence of a crime, if there is exigency or some recognized exception to the warrant requirement); see *United States v. Edwards*, 415 U.S. 800, 802 (1974) (considering post-arrest seizure of clothing and applying “incident to arrest” exception; “The prevailing rule under the Fourth Amendment that searches and seizures may not be made without a warrant is subject to various exceptions”); *Edwards*, 415 U.S. at 809 (Stewart, J., dissenting) (applying the same burden of proof to the justification of warrantless seizures as to warrantless searches; disagreeing that this seizure was incident to arrest); see also *State v. Johnston*, 184 Wis. 2d 794, 806, 518 N.W.2d 759, 762 (1994) (“The burden is on the state to show that the search and seizure in question fall within one of the recognized exceptions to the warrant requirement”).

The burden of proof is critical. An accused has no obligation to disprove the application of possible exceptions to the warrant requirement when he challenges a warrantless seizure. The opposing burden instead rests on the state. The state must convince a court that an established exception does apply.

In Sveum’s case, the state made no effort to justify these seizures, if they occurred, on the basis of any recognized exception to the warrant requirement. Sveum knows of no possibly applicable exception, in any event. While there is an automobile exception to the warrant requirement, that exception applies only to *searching* cars upon probable cause. It does not apply to *seizing* them, temporarily or otherwise. The reason lies in the twin rationales integral to the exception: first, probable cause to believe that the vehicle contains evidence; and second, the exigent circumstance that a motor vehicle’s mobility often presents. See *Carroll v. United States*, 267 U.S. 132, 149-53 (1925); *Thompson v. State*, 83 Wis. 2d 134, 141, 265 N.W.2d 467, 470 (1978); *Maryland v. Dyson*, 527 U.S. 465, 466-67 (1999) (per curiam) (no separate exigency requirement for automobile exception; “If a car is readily mobile and probable cause exists to believe it contains

contraband,'" the automobile exception applies; quoting *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) (per curiam)); *but see also California v. Carney*, 471 U.S. 386, 391 (1985) ("Even in cases where an automobile was not readily mobile, the lesser expectation of privacy resulting from its use as a readily mobile vehicle justified application of the vehicular exception").

In short, neither rationale supports an exception to the warrant requirement for seizing a car here. First, the quest for contraband or evidence of a crime concerns a car's contents, not the car itself. Second, seizing the car would obviate any exigency.

Beyond that, Sveum's case never presented an exigency of the sort that the United States Supreme Court associates both with automobiles generally and with the need to search them without delay. To the contrary, the police held a hope, not a fear, that the car would move. The law enforcement objective was that Sveum eventually would drive the car away and use it to stalk the complaining witness. R116:45.<sup>8</sup> In the end, the police gained precisely that evidence supporting a probable cause finding because the car did move.

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<sup>8</sup> At the suppression hearing, this exchange occurred on the prosecutor's direct examination of Det. Ricksecker, who sought the GPS device:

Q Does it [the GPS device] in any way impair the owner or possessor from using the vehicle as they would normally use it?

A No.

Q In fact, your hope is that they use it as if they would normally use it; is that correct?

A That's correct.

R116:45.

R116:51-52. The utility of the GPS device, attached to the car during a temporary police seizure, was that it collected evidence of location as the car moved. With the GPS unit affixed, there was no danger of loss of evidence when the car moved. There was the opposite prospect of gaining evidence. The exigency necessary to support the automobile exception was missing altogether. It was negated, in fact.

The state surely has not pointed to any other exception, or explained why the automobile exception would cover three temporary physical seizures of Sveum's car, and a five-week seizure by electronic tether that the temporary physical seizures made possible. This was and is the state's burden. It has not carried that burden. These warrantless seizures stand unjustified by any exception to the Fourth Amendment's warrant requirement.

**D. *The State Alternatively Had the Burden of Proving Inevitable Discovery or an Independent Source.***

The court of appeals below conceded that "the police presumably obtained location information while Sveum's car was inside areas not open to surveillance." *Sveum*, 2009 WI App 81, ¶17. Note well that under *Karo*, this was tantamount to a concession that a Fourth Amendment search presumably did occur here. *Karo*, 468 U.S. at 714-17. As the case comes to this Court, that search was warrantless. On that presumption of an illegal search while the car was in private areas, the court of appeals then implicitly shifted the burden to Sveum to prove that the police could not have obtained the same information by visual surveillance from outside the private places. *See Sveum*, 2009 WI App 81, ¶17 ("there is no indication that this same information could not have been obtained by visual surveillance from outside these enclosures. Such surveillance could have told the police when Sveum's car entered or exited his garage and the garage at his workplace and, therefore, informed them when his car remained in those places").

Regardless what the police “could” have done, the court of appeals implicitly flipped the burden of proof entirely.

Whether as to an illegal seizure, which Sveum offers as the simplest basis of decision, or as to an illegal search as *Karo*, *Connolly*, *Weaver*, and *Jackson* frame the issue, the state had the burden of proving the court of appeals’ hypotheses. Sveum did not have the burden of disproving them. The exclusionary rule prohibits evidentiary use of tangible materials seized during an unlawful search, *Weeks v. United States*, 232 U.S. 383 (1914), and of testimony concerning knowledge acquired during an unlawful search, *Silverman v. United States*, 365 U.S. 505 (1961). The rule also prohibits the introduction of derivative evidence, both tangible and testimonial, that is the product of the primary evidence or the indirect result of the unlawful conduct, up to the point that the connection with the unlawful search becomes “so attenuated as to dissipate the taint.” *Nardone v. United States*, 308 U.S. 338, 341 (1939); see also *Wong Sun v. United States*, 371 U.S. 471, 484-485 (1963).

Before a court may excuse an illegal seizure, the state must show either that the evidence would have been discovered independently of any constitutional violation, *Nix v. Williams*, 467 U.S. 431 (1984), or that evidence would have been discovered inevitably even without the constitutional violation. There is a functional similarity between these two doctrines: both assure that a constitutional violation does not leave the police in a worse position than they would have occupied absent the violation. *Nix*, 476 U.S. at 446. The exclusionary rule aims to deter, not to punish. If the prosecution can prove by a preponderance of the evidence that it would have obtained the same evidence independently or inevitably by lawful means, then courts do not apply the exclusionary rule.

An independent source means that the police actually obtained evidence legally, notwithstanding some earlier illegal

conduct. *Murray v. United States*, 487 U.S. 533 (1988). The independent source doctrine “does not rest upon . . . metaphysical analysis, but upon the policy that, while the government should not profit from its illegal activity, neither should it be placed in a worse position than it would otherwise have occupied. So long as a later, lawful seizure is genuinely independent of an earlier, tainted one (which may well be difficult to establish where the seized goods are kept in the police’s possession) there is no reason why the independent source doctrine should not apply.” *Murray*, 487 U.S. at 542.

The inevitable discovery doctrine in turn assumes the validity of the independent source doctrine as applied to evidence initially acquired unlawfully. *Murray*, 487 U.S. at 539. Inevitable discovery requires that the state show the police would have found the same evidence by legal means. *Nix v. Williams*, 467 U.S. 431.

Wisconsin requires a three-part showing under the inevitable discovery doctrine. First, the state must show a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct. Second, the state must prove that police possessed the leads making the discovery inevitable at the time of the misconduct. And third, the state must prove that prior to the unlawful search, it was actively pursuing the alternate line of investigation. *State v. Lopez*, 207 Wis. 2d 413, 427-28, 559 N.W.2d 264, 269 (Ct. App. 1996); *State v. Schwegler*, 170 Wis. 2d 487, 500, 490 N.W.2d 292, 297 (Ct. App. 1992).

Here, the state made no effort to prove an independent source for the data seized. Neither did it prove inevitable discovery. While it is possible for the state to argue that Sveum’s travels could have been observed by police, in fact he was not surveilled during the five weeks the GPS tracking unit was attached to car. The trial court did not address either doctrine when finding that the placement of the GPS unit on Sveum’s car was not a search. R49:106.

E. *The Exclusionary Rule Applies.*

Under settled Fourth Amendment standards, the police temporarily seized Sveum's car physically three times to attach GPS devices. More subtle seizures of some of his possessory interest and of Sveum himself, through an electronic tether, continued for five weeks. The record demonstrates that these were temporary seizures within ken of the Fourth Amendment. Two or more law enforcement officers crawled under Sveum's car each time to attach a device, magnetically and by tape, to the car's undercarriage that Sveum never approved and about which he did not even know. Sveum could not have moved the car while officers were engaged in that activity. Constitutionally, the installation process was no different than temporarily impounding the car. And the seizure of part of his possessory control over the car, as well as the placement of an electronic tether on him, in effect, continued for weeks. While he might continue to use it, the car was attached continuously to a government tether during the time it bore the GPS unit, which itself was an accessory that served the state's interest, not the car owner's.

There also were warrantless searches here. As the court of appeals all but conceded, the police monitored Sveum's car while it was in private places, not just on public roads. *Sveum*, 2009 WI App 81, ¶17. *Karo* surely suggests that this was a search for purposes of the Fourth Amendment. In monitoring the car, the police were monitoring Sveum, of course – they were tracking not just a car, but the activities of the man who drove the car. Earlier, the police three times entered the curtilage to place the GPS devices.

The court of appeals treated the events here as warrantless, and so the case arrives in this Court. On that point, there were good reasons for the court of appeals' approach: the April 22, 2003, court order well may have been overbroad, and it may not have been a

warrant within the meaning of the Fourth Amendment anyway. See *Sveum*, 2009 WI App 81, ¶6.

Again applying longstanding, unchallenged Fourth Amendment principles, even temporary warrantless seizures are presumptively unreasonable. The state has the burden of establishing that some exception to the warrant requirement applies. The state never has attempted to shoulder that burden here. Sveum knows of no recognized exception to the warrant requirement that would have applied to these seizures in any event.

Without an exception to the warrant requirement that saves these seizures, the exclusionary rule applies unless the state can point to an independent source or inevitable discovery doctrine. This is the state's burden; Sveum has no burden to disprove the existence of an independent source or to demonstrate that discovery was *not* inevitable. See *Murray*, 487 U.S. at 541-44 (not expressly deciding burden of persuasion, but intimating government burden); *Nix*, 467 U.S. at 444 (explicitly establishing preponderance standard, with government bearing burden, for inevitable discovery doctrine); *Lopez*, 207 Wis. 2d at 427-28, 559 N.W.2d at 269 (state's burden under inevitable discovery doctrine). Once more, the state never has sought to shoulder the burden of demonstrating an independent source or inevitable discovery. Indeed, Det. Ricksecker and the prosecutor in the circuit court conceded that the subsequent May 27, 2003 warrant applications included information from the GPS device. R116:51-52.

Accordingly, this Court confronts in the end warrantless seizures within the meaning of the Fourth Amendment that the state neither has justified as reasonable by pointing to a recognized exception to the warrant requirement, nor excused by proving an independent source or inevitable discovery. The exclusionary rule applies as a matter of settled law under the Fourth Amendment, as the United States Supreme Court understands and construes that

amendment. The contrary conclusion of the court of appeals is incorrect. This Court should reverse and remand with appropriate instructions, now that the existence of seizures – and searches – within the Fourth Amendment’s concern is clear.

### III. THE COURT OF APPEALS CORRECTLY REJECTED SVEUM’S CHALLENGE UNDER THE WISCONSIN ELECTRONIC SURVEILLANCE CONTROL LAW.

Sveum raised a statutory challenge under the WESCL in the trial court and in the Wisconsin Court of Appeals. Both courts rejected his challenge. While Sveum’s Fourth Amendment claim is sound, his statutory claim is not. Appointed counsel concludes that the court of appeals was correct: a GPS device is a “tracking device” and its communications are excluded from the definition of “electronic communications.” WIS. STAT. § 968.27(4)(d); *Sveum*, 2009 WI App 81, ¶¶25-29.

While the wisdom of that statute is open to doubt, its meaning is not. At least three other Wisconsin statutes expressly treat a GPS unit as a “tracking device.” See WIS. STAT. §§ 100.203(1)(e); 301.48(1)(a), (1)(c), 2(d); 946.465. Even if this Court accepted Sveum’s argument below, that the electronic communication was from the GPS satellites and that the GPS unit on his car merely intercepted those communications rather than making any electronic communications, Sveum would face two additional serious obstacles. First, he would have to prove that he then is an “aggrieved person” under WIS. STAT. § 968.27(1). Second, he would have to avoid the exception under WIS. STAT. § 968.31(2)(b), for if the GPS unit only intercepted the communications, then the police probably were consenting parties to the intercepted communications. In the end, counsel would undermine the Fourth Amendment argument, which he believes has merit, and

disserve Sveum, the Court, and his ethical obligations by pursuing the statutory claim.

Again, as a matter of wisdom, there are good reasons for this statute or another to cover the placement of GPS devices on cars, whether the police or private actors place those devices. The court of appeals explained some of those reasons. *Sveum*, 2009 WI App 81, ¶¶20-22. But the fact that the WESCL does not apply to GPS units simply underscores the court of appeals' concerns. That fact does not make the statute apply to something outside its scope.

Appointed counsel had a telephone conversation with Michael Sveum concerning his decision to concede the inapplicability of WESCL to the GPS unit at issue here.

## CONCLUSION

Michael Sveum requests that this Court REVERSE the judgment of the Wisconsin Court of Appeals and REMAND for proceedings consistent with this Court's opinion.

Dated at Madison, Wisconsin, December 28, 2009.

Respectfully submitted,

HURLEY, BURISH & STANTON, S.C.  
Counsel for Michael A. Sveum,  
*Defendant-Appellant-Petitioner*

---

Dean A. Strang  
*Wisconsin Bar No. 1009868*  
Marcus J. Berghahn  
*Wisconsin Bar No. 1026953*  
33 East Main Street, Suite 400  
Madison, Wisconsin 53703  
[608] 257-0945

## CERTIFICATION

I certify that this brief conforms with the rules contained in WIS. STAT. §§ 809.19(8)(b) and (c), for a brief produced using proportional serif font. The length of the portions of this brief described in WIS. STAT. § 809.19(1)(d), (e) and (f) is 9,533 words. See WIS. STAT. § 809.19(8)(c)1.

Dated this \_\_\_\_ day of December, 2009.

HURLEY, BURISH & STANTON, S.C.  
Counsel for Michael A. Sveum

---

Dean A. Strang  
*Wisconsin Bar No. 1009868*  
Marcus J. Berghahn  
*Wisconsin Bar No. 1026953*  
33 East Main Street, Suite 400  
Madison, Wisconsin 53703  
[608] 257-0945

**CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of WIS. STAT. § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

\_\_\_\_\_  
Dean A. Strang

**CERTIFICATE OF COMPLIANCE WITH RULE 809.19(13)**

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of WIS. STAT. § 809.19(13). I further certify that:

This electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on the opposing party.

---

Dean A. Strang

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## CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with WIS. STAT. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decisions of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portion of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this \_\_\_\_ day of December, 2009.

---

Dean A. Strang  
*Wisconsin Bar No. 1009868*  
Marcus J. Berghahn  
*Wisconsin Bar No. 1026953*  
33 East Main Street, Suite 400  
Madison, Wisconsin 53703  
[608] 257-0945

**AFFIDAVIT AND REQUEST FOR AUTHORIZATION TO PLACE  
AND MONITOR AN ELECTRONIC DEVICE**

**RECEIVED**  
**12-28-2009**  
**COPY**

State of Wisconsin  
County of Dane

**CLERK OF SUPREME COURT  
OF WISCONSIN  
AFFIDAVIT**

Affiant, being duly sworn on oath states that as follows:

That the affiant is a state certified law enforcement officer currently assigned as Detective with the Madison Police Department. Your affiant has worked full-time as a law enforcement officer for approximately 22 years. Your affiant has investigated numerous cases involving harassing phone calls, violation of restraining orders, domestic violence, sexual assaults and stalking. Your affiant has received formal training in the investigation of stalking and has trained law enforcement officers on the investigation of the crime of Stalking, in violation of Wisconsin Statute 940.32.

On 12-21-1994 Michael As Sveum, dob 08-04-67, was convicted of Violation of a Domestic Abuse Order in Dane County Wisconsin under Court Case case # 94CM003703. The complaint in the case was Jamie Johnson. On 12-11-1995 Sveum was convicted in Dane County case #95CM000894 of 3 cts of Violation of a Domestic Abuse Order. Your Affiant knows the facts in this case were based on hang-up calls received by Jamie Johnson at her residence.

On 10-09-1996 Sveum was convicted in Dane county case #96CF000891 of Felony Stalking, Violation of a Harassment Restraining Order, and Harassment. The victim in this case was Jamie Johnson. Your affiant investigated this criminal case and knows the facts of the complaint. Johnson was receiving hang-ups during the course of the criminal behavior, which ceased upon him becoming incarcerated. Two hours after Sveum was released on bail from the Dane County Jail on 7-8-1996 she reported a hang-up call.

Your affiant received the above court information from the Consolidated Court Automation Programs kept in the normal course of business by the Wisconsin Circuit Courts and believe it to be true and reliable.

Your affiant knows, Sveum, subsequent to the above conviction was incarcerated from 10-06-1996 until 7-02-2002 when he was released on concurrent parole and probation. He is currently employed in the City of Madison and living at 6685 Cty Tk K Blue Mounds.

On 3-28-03 Jamie Johnson a resident in the City of Madison reports that where she currently resides with the phone number is 608-288-8920. Since 3-3-03 thru 4-12-03 she and her housemate have received nine hang-up calls at that number. She reports that the caller ID information lists "PRIVATE". She indicates prior to this they have not had any hang-up calls. Johnson advised your affiant that TDS Metrocom is the service provider for 60-288-8920. Your affiant believes the information provided by Johnson to be truthful and reliable as it was gained by her as a witness to the events above.

Your affiant contacted TDS Metrocom for records of the incoming hang-up calls reported by Johnson. Your affiant believes the information kept by TDS and given to this affiant to be truthful and reliable as it kept in the normal course of business. Your affiant knows that hang-up calls could be criminal harassment or felony stalking.

From the information provided by TDS Metrocom and information from the Dane County 911 dispatch center, your affiant learned the hang-up calls were made from pay phones located at the the Meadowood Library 5740 Raymond Rd, Party City located at 223 Junction Rd., American TV located at 2404 W. Beltline hwy, Super America located at 2801 Fish Hatchery Rd, Kohl's food store located at 3010 Cahill Rd, and Kitt's Korner Sports Bar and Grill located at 3738 County Rd P. All of these locations are in the County of Dane. Your affiant believes the information provided by 911 Dispatch to be truthful and reliable as it is kept in the normal course of business.

Your affiant has found in the course of this investigation that Michael Sveum is the primary user and/or exercises dominion and control over a 1980 black Chevy Beretta Coup with a Wisconsin license plate number of 754 ELL and a VIN number of 1G1LZ14A2LY130646, which is stored and/or parked at an address of 6685 County Trunk K in Iowa County, Wisconsin or stored or parked at 2426 Valley Street, Cross Plains in Dane County, Wisconsin, herein after referred to as "the Target Vehicle."

Your affiant did a records check with the Wisconsin Department of Transportation which indicates the owner of the aforementioned Target Vehicle with the license plate number of 754 ELL, is listed to a Michael Sveum with a VIN number of 1G1LZ14A2LY130646, at an address of 2426 Valley Street, Cross Plains, Dane County, Wisconsin.

Your affiant believes the records kept by the Wisconsin Department of Transportation to be truthful and reliable as they are records kept by them in the normal course of their daily business.

Your affiant spoke with Department of Corrections Probation Officer Doug Timmerman, who informed your affiant that Sveum is under supervision by him, currently on concurrent probation and parole. Timmerman informed your affiant that Sveum is currently residing at 6685 Highway County Trunk K in Iowa County, Wisconsin.

Your affiant believes that Sveum resides at one of the two locations aforementioned and maintains dominion and control over as well as being the primary user of the aforementioned vehicle.

Your affiant knows from past investigations that the State of Wisconsin has no explicit statute under Chapter 968, that addresses the issue of installing tracking devices on private property. Your affiant has reviewed related cases addressing the installation of tracking devices and transponders such as *United States v Karo* 468 F.S. at 718, 104 S.C.t. at 3305, (1984), and *United States vs Michael*, 645 F.S.D.252, 256, (5th cir. 1981), for the proposition that a court order is required to install a monitoring device on private property. In addition, the standard used to determine the need for a trap and trace device in the State of Wisconsin under Chapter 968.35 is that the information likely to be obtained is relevant to an on-going investigation. Your affiant states that the information

gained from the tracking device is relevant to the on-going investigation and is not more intrusive in a request for a trap and trace device on a telephone.

Your affiant states that there is probable cause to believe based on the above information that the Target Vehicle is presently being utilized in the commission of a crime to wit, stalking, in violation of Chapter 940.32 of the Wisconsin Statutes. Your affiant states that there is probable cause to believe that the installation of a Global Positioning System (GPS) tracking device on the Target Vehicle in conjunction with the monitoring, maintenance and retrieval of information from that Global Positioning System (GPS) tracking device will lead to evidence of the aforementioned criminal violations including the places of the violation and the means of the violation and the identification of associates assisting in the aforementioned violations.

Your affiant states that the Global Positioning System (GPS) tracking device, which is covertly placed on a criminal suspect's automobile, is equipped with a radio satellite receiver, which, when programmed, periodically records, at specified times, the latitude, the longitude, date and time of readings and stores these readings until they are downloaded to a computer interface unit and overlaid on a computerized compact disc mapping program for analysis.

Your affiant states that other law enforcement officers assigned in the investigation have been involved in the installation, monitoring, maintenance, and retrieval of similar Global Position System (GPS) tracking devices on automobiles.

Your affiant states that in order to effectively conduct the long term surveillance of the Target Vehicle, your affiant or assistant law enforcement personnel, may have to enter the premises located at 6685 County Trunk K, Iowa County, Wisconsin or 2426 Valley Street, Cross Plains, Dane County, Wisconsin, for the purpose of installing, monitoring, maintaining and retrieving the aforementioned Global Positioning System (GPS) tracking device.

Your affiant states that the particular nature of the suspect's activities necessitates the use of power to run the Global Positioning System (GPS) tracking device to be taken from the Target Vehicle in order to extend the use of monitoring of the aforementioned automobile in this criminal investigation.

That based upon the affiant's experience, the Global Positioning System (GPS) tracking devices internal battery packs limited use necessitates the use of the suspect's automobile battery power in order to effectively install, monitor, and maintain the Global Positioning System (GPS) tracking device over an extended period of time and therefore your affiant is often required to obtain a key to operate the vehicle for temporary times and move the vehicle to a secure location to install the device and to open both the engine compartment and the trunk area of the vehicle for installation. Your affiant requests permission to do the above acts in order to secretly install the device.

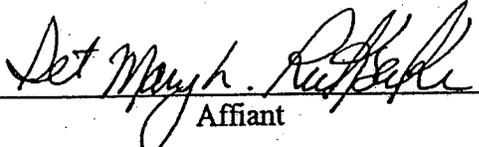
Your affiant is aware that persons involved in criminal activities or conspiracies maintain the means and fruits of their violations, often in remote locations including garages, homes and storage sheds. Your affiant believes that the installation of the Global Positioning System (GPS) tracking device has been shown to be a successful supplement

to visual surveillance of the vehicle due to the inherent risks of detection of manual, visual surveillance by the target of law enforcement personnel. The Global Positioning System (GPS) tracking device lessens the risk of visual detection by the suspect and is generally considered more reliable since visual surveillance often results in the loss of sight of the Target Vehicle.

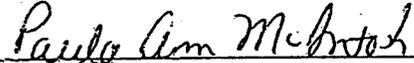
**VEHICLE FOR WHICH AUTHORIZATION TO MONITOR ELECTRONIC TRACKING DEVICE IS SOUGHT**

A 1990 black Berretta Coup with Wisconsin license plate number of 754 ELL and a VIN number of 1G1LZ14A2LY130646. Your affiant believes that the aforementioned information demonstrates that a Global Positioning System (GPS) tracking device application could provide relevant information to the criminal investigation of the crime of stalking, in violation of Section 940.32, the Wisconsin Statutes.

It is likely that the vehicle your affiant wishes to monitor will be taken into private as well as public places therefore your affiant respectfully requests the courts permission to install and monitor the tracking device inside such private and public areas and the affiant requests permission to obtain a key to operate the motor vehicle, if necessary, and requests permission to use the same methods to retrieve the device. Your affiant is requesting that the order be authorized for a period of time not to exceed 60 days from the date the order is signed.

  
Affiant

Subscribed and sworn before me this  
22nd day of April, 2003

  
Notary Public

My commission expires 8-24-03

STATE OF WISCONSIN  
DANE COUNTY

CIRCUIT COURT

---

IN THE MATTER OF THE APPLICATION OF  
THE MADISON POLICE DEPARTMENT FOR  
AUTHORIZING THE PLACING AND MONITORING  
OF AN ELECTRONIC TRACKING DEVICE

---

**ORDER**

---

This matter came before the court at the request of Detective Mary Ricksecker to place and monitor an electronic tracking device on a vehicle that may enter private areas. The request is for a time period not to exceed 60 days. Based on the information provided in the affidavit submitted by Detective Ricksecker, the court finds that there is probable cause to believe that the installation of a tracking device in the below listed vehicle is relevant to an on-going criminal investigation and that the vehicle is being used in the commission of a crime of stalking, contrary to Chapter 940.32 of the Wisconsin Statutes.

The court hereby orders that:

1. The States request to install and monitor a tracking device on the below listed vehicle is granted based on the authority granted in *United States v Karo*, 468 U.S. at 718, 104 S.Ct. at 3305 (1984).
2. The Madison Police Department is authorized to place an electronic tracking device on a 1990 black Beretta with a license plate number of 754 ELL and a VIN of 1G1LZ14A2LY130646, and they are hereby authorized to surreptitiously enter

and reenter the vehicle and any buildings and structures containing the vehicle or any premises on which the vehicle is located to install, use, maintain and conduct surveillance and monitoring of the location and movement of a mobile electronic tracking device in the vehicle and any and all places within or outside the jurisdiction of Iowa or Dane County, including but not limited to private residence and other locations not open to visual surveillance; to accomplish the installation, agents are authorized to obtain and use a key to operate and move the vehicle for a required time to a concealed location and are authorized to open the engine compartment and trunk areas of the vehicle to install the device.

3. It is further ordered that the Madison Police Department shall remove the electronic tracking device as soon as practicable after the objectives of the surveillance are accomplished or not later than 60 days from the date the order is signed unless extended by this court or another court of competent jurisdiction.

Signed and dated this 22<sup>nd</sup>  
Day of April, 2003

  
Judge, Branch 6 Dane County Circuit Court

STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY

\*\*\*\*\*

STATE OF WISCONSIN,

Plaintiff,

vs.

Case No. 03 CF 1783

MICHAEL A. SVEUM,

Defendant.

\*\*\*\*\*

PROCEEDINGS:

MOTION HEARING

DATE:

November 4, 2005

COURT:

Circuit Court Branch 4  
The Honorable Steven D. Ebert,  
Circuit Court Judge, Presiding

APPEARANCES:

**COPY**

ROBERT KAISER, Assistant District  
Attorney, appeared on behalf of  
the Plaintiff: to-wit, the State  
of Wisconsin.

DETECTIVES MARY RICKSECKER and  
VICKI ANDERSON, appears in  
person.

ERIC SCHULENBURG, Attorney at  
Law, appeared on behalf of the  
Defendant: to-wit, MICHAEL A.  
SVEUM, who appeared in court in  
person.

\*\*\*

Nadine M. Ripp, Official Court Reporter

RECORDED & INDEXED  
NOV 10 2005  
05 NOV 29 PM 12:00

INDEX OF EXHIBITS CONTINUED

EXHIBIT NO.	DESCRIPTION	IDENTIFIED	RECEIVED
11	Photo of vehicle	23	30
12	Photo of envelope	25	30
13	Photo of printout	25	30
14	Photo of desk	23	30
15	Photo of floor	24	30
16	Photo of computer	26	30
17	Photo of computer	26	30
18	Photo of affidavit	31	89
19	Search warrant	48	89
20	Search warrant	48	89
21	List of items seized	50	89
22	Calendar	58	58
23	Search warrant	58	89
24	6-10-03 police report	60	89
25	List of items seized	62	89

P R O C E E D I N G S

(On the record at 8:53).

THE COURT: State of Wisconsin v. Michael A. Sveum, 03 CF 1783. May I have the appearances, please.

MR. KAISER: Robert Kaiser on behalf of the State of Wisconsin and Detective Mary Ricksecker and Vicki Anderson of the Madison Police Department.

MR. SCHULENBURG: Mr. Sveum appears in person, represented by Eric Schulenburg.

THE COURT: All right. We're here for a hearing regarding a few of the motions I believe, although I'm not sure exactly. I've got the submissions from defense and from the State. They're your motions, Mr. Schulenburg?

MR. KAISER: Your Honor, in reference to the matters that I think evidence needs to be presented in regards to, I would ask at this time to be allowed to call the detectives only in reference to the motion to suppress which was filed by Mr. Schulenburg to prove up some of the matters in regards to allegations made about how the, how the court orders and affidavits and returns were entered and observations that were made and conclusions formed that form the basis for some of my arguments.

THE COURT: Well, are you referring

specifically to the *Franks/Mann* motion?

MR. KAISER: No because Mr. Schulenburg didn't file that one. The only one I'm proposing to present evidence in regards to, is Mr. Schulenburg's multi-faceted motion to suppress.

THE COURT: Is that your understanding as well, Mr. Schulenburg?

MR. SCHULENBURG: My understanding is we would address what I had raised in my motion, response would be made by the State. I believe the State wishes to introduce evidence in support of their position.

THE COURT: Go ahead, Mr. Kaiser.

MR. KAISER: Thank you. State calls Vicki Anderson.

VICKI ANDERSON,  
called for examination, having been first  
duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KAISER:

Q Would you state your name, spell your first and last name and tell us where you work, please.

A Vicki, V-I-C-K-I, Anderson, A-N-D-E-R-S-O-N. I'm a detective with the City of Madison Police Department.

Q And how long have you had that job?

A I've been employed by the City of Madison Police Department for 25 years.

Q And how long have you been a detective?

A For 16 years.

Q Were you doing that job on May 28, 2003?

A Yes, I was.

Q And on May 28, 2003, did you assist Detective Ricksecker in the execution of a search warrant at 2426 Valley Street in Cross Plains, Wisconsin?

A Yes, I did.

Q During the execution of that search warrant, did you have occasion to locate a computer?

A Yes.

Q And where was the computer?

A It was found in a bedroom located on the east side of the residence.

Q And based on your knowledge regarding the contents of the search warrant and your conversations with Detective Ricksecker, whose bedroom did you conclude that bedroom to be?

A Michael Sveum's bedroom.

Q And, generally, what did you base that on?

A Numerous items found in the bedroom.

Q Showing you what's been marked as Exhibit 1 for identification, does that appear to be Pages 193

through 196 of the discovery part of your police report of that day?

A Yes.

Q Is that a true and accurate summary of the apparent possessions of Michael Sveum that you found in that bedroom, in the same bedroom where you located the computer?

A Yes.

Q Detective, amongst those items, was there an item that had only recently been brought to your attention in result to a court appearance?

A Yes.

Q What was that?

A It was a jacket that I observed hanging in the bedroom closet.

Q And what was it about that jacket that attracted your attention in regards to concluding that the bedroom and its contents belonged to Michael Sveum?

A I had attended a status hearing in the courtroom of Judge Sumi on May 21, 2003, in which Michael Sveum was present and had that same jacket in his possession on that date.

Q And, again, without going through the entire list, those pages that I've asked you to summarize, do they, are they a true and accurate summary of the objects

that you saw there that related to Michael Sveum and, in fact, you recovered as a result of your understanding of that relationship?

A Yes.

Q Showing you what's been marked as Exhibit 2 for identification, could you tell us if you recognize what that document is, please.

A Photocopies of computer-generated photos that were found in Mr. Sveum's bedroom.

Q And where were these computer-generated photographs found in relation to the computer that you recovered?

A On a filing cabinet that was in close proximity to the computer desk where the computer was located.

Q And were you aware- - Let me ask you this question. Can you estimate for the court for approximately how long prior to May 27 and 28 of 2003 you had been assisting Detective Ricksecker with the Michael Sveum case?

A From approximately the year of 1995.

Q Since then?

A Yes.

Q All right. So you were aware of Michael's job as a person who repaired automobiles and aware of the fact that he not only drove a car but also drove a motorcycle; is that correct?

A That's correct.

Q And just so the record is clear, can you tell us what it is about- - I'm sorry. Are these a true and accurate copy of the documents that you recovered from the top of the filing cabinet next to the computer?

A Yes.

Q And could you tell us what it is that appears on that piece of paper that helps you understand or believe that it is a computer-generated document?

A On the bottom edge of the, each one of these photos, are computer or web site addresses that would suggest that they were obtained from a web site off a computer.

Q Detective, was there a printer next to the computer or near it?

A On the computer desk, yes.

MR. KAISER: No further questions.

THE COURT: Mr. Schulenburg?

MR. SCHULENBURG: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. SCHULENBURG:

Q Let me begin with the subject addressed last, that is Exhibit 2. Were you able to tell by looking at those documents when they had been printed?

A Yes, because they do contain a date also on the lower

bottom edge of the page.

Q What was that date?

A 3/19/2003.

Q About two months before the search?

A That would be correct.

Q Were you able to tell from looking at those documents what printer had produced them?

A No.

Q Does your training allow you to evaluate a document and determine the printer that produced it?

A No.

Q Were there other documents in the same place that you thought had also been produced by that printer?

MR. KAISER: Objection, assumes a fact not in evidence, that she said the documents were printed on the printer. All she said was the printer was next to the computer.

THE COURT: What was your question?

MR. SCHULENBURG: I think it's a good objection. Let me back up.

THE COURT: All right. Thank you.

Q (By Mr. Schulenburg) Had you assumed that Exhibit 2 was produced by the printer in that room?

MR. KAISER: Judge, I'm going to object simply because the issue before the court on motion to

suppress is one of probability. And the only question the detective has to answer is whether or not probably it appeared to her to be that it had happened and any assumption that asserts that she knew for sure that, that to be the case is unnecessary and irrelevant in a motion to suppress.

THE COURT: Well, whether she assumed it, would go to the issue of probability. I don't think it's a crucial question one way or the other. I'll allow it.

A Could you repeat the question?

Q Sure. I asked if you had assumed that the documents shown in Exhibit 2 had been printed on the printer in that room.

A I thought it was very likely that was the case.

Q Thank you. You entered this residence, I think, pursuant to a warrant, correct?

A Correct.

Q Did that warrant include within its body a description of what computer equipment might be seizable?

A Are you asking was there a, a specific description of the computer?

Q Yeah. Let me break it down. First of all, did the warrant authorize the seizure of any computer equipment?

A Without reviewing the warrant, I can't say for certain.

Q All right. Let me see if I can find it. I don't have extra copies, but I assume you do so you can refer to it.

MR. KAISER: I only made copies of the stuff that wasn't attached to your motion. I think that is it but- -

MR. SCHULENBURG: I think it is too.

MR. KAISER: Can we have one second, Judge? We'll just short circuit some later stuff and do this now.

THE COURT: Sure.

MR. SCHULENBURG: I think it's attached to my motion. I just think it's fairer to show it to the witness rather than to have her have to guess what's in it. I don't need it marked.

THE COURT: This is just used to refresh recollection.

Q (By Mr. Schulenburg) Detective, I'm showing you, I hope, a document that you recognize. At least could you tell us what it is?

A The document is titled search warrant, State of Wisconsin, County of Dane, and Circuit Court of Dane County.

Q Is that the warrant that authorized the search of the

residence?

A Authorizes the search of a premises at 2426 Valley Street in the Village of Cross Plains.

Q Is that the search that you were speaking of as you answered the questions from the District Attorney?

A Yes.

Q I was asking this question I believe. Does the warrant that you hold-- Well, first of all, does this help refresh your memory as to what the warrant included?

A Yes, it does.

Q And I have no objection to you keeping it while I ask these questions. Did the warrant authorize the seizure of any computer equipment?

A Yes.

Q Was the computer equipment authorized for seizure described by whom may own it?

A Yes.

Q What was the ownership restriction with regards to that computer equipment if there was one?

A Well, if I could read directly from the warrant, in part it says, "excluding any computer equipment belonging to persons other than Michael Sveum."

Q All right. So you were authorized to seize any computer equipment belonging to Michael Sveum?

A Correct.

Q If it belonged to someone else, you were not authorized to seize it; is that correct?

A Yes.

Q Did the- - Were you given direction on how to differentiate computer equipment, the ownership of computer equipment?

A Not on that day, no.

Q Was there anything on the computer or the equipment that you seized to show ownership in terms of a label saying this belonged to so and so?

A Not that I recall seeing.

Q What- - Describe then the training you had that helped you decide the computer equipment seized belonged to Michael Sveum.

MR. KAISER: Objection, relevance. All that matters- -

THE COURT: Sustained.

Q (By Mr. Schulenburg) Were you satisfied to a level of probable cause at least that the computer equipment you seized did belong to Michael Sveum?

A Yes.

Q On what did you base that conclusion?

A On the numerous items that were on and near the computer desk that appeared to be -- to relate to items you could obtain from the computer.

Q Among other things do you speak of what is shown in Exhibit 2?

A Such as Exhibit 2, yes.

Q Can you describe what other items lead you to that probable cause belief standard?

A Well, if I could refer to my report- -

Q The one that's an exhibit?

A Yes, but that's not a complete report.

Q Does that exhibit include any items that helped you reach that conclusion?

A There were numerous floppy disks that were recovered.

Q Did the floppy disks have labels on them that indicated ownership?

A I did note in my report that two of the disks were named, were marked Sveum No. 1 and Sveum No. 2.

Q Did it have a first name on those disks or just the last name Sveum?

A I would say, given the way I recorded the information in my report, is that I recorded it as I saw it on the floppy disk.

Q Let me ask a different question for the moment related to that. The residence being searched, who was the owner of that residence?

A My understanding the owner is a MaryAnn Sveum.

Q Same last name?

A Correct.

Q With that in mind, when you entered the room in which the computer was kept, did you find items to demonstrate that the room belonged to MaryAnn Sveum?

MR. KAISER: Objection. If it's in the house, it belongs to her.

THE COURT: Why do you say that?

MR. KAISER: If it's in the house, it belongs to her. It's part of the house. That doesn't change the fact that if he is the person that uses the room, the room belongs to him.

THE COURT: I don't get what you're getting at. Go ahead and ask your question.

Q (By Mr. Schulenburg) Let me clear the brush if I can. It's true that the house belonged to MaryAnn Sveum; is that right?

A That's my belief.

Q Was it your belief at the time that Michael Sveum had items belonging to him in that house?

A Yes.

Q Please tell me what you believed then that lead you to that conclusion, what items you knew that lead to the conclusion that Michael Sveum had items in the house belonging to his mother.

A That were in the house?

Q Yes. The District Attorney has said it's her house so the things in the house belonged to her. But I think he also is saying that some of those belonged to Mr. Sveum. And I'm asking what you knew then that lead you to believe that some items in the house belonged to Michael Sveum?

A Oh, that belonged to Michael Sveum?

Q Yes.

A Clothing items that I observed in that, in that particular bedroom where the computer was located, correspondence in the name of, addressed to Michael Sveum at that same address, numerous legal documents involving Michael A. Sveum. Without referring to my report, it's - -

Q Were all of the documents you've just described in one room of the house or were they in other rooms as well?

A There were other documents found in other rooms of that house.

Q In the room in which you found the computer equipment, was there property that you determined belonged to MaryAnn Sveum?

A I don't have a specific recollection of a specific item that I can say that belonged specifically to MaryAnn Sveum that I found in that particular bedroom.

Q Do you recall going, examining a filing cabinet in that

room?

A There was a filing cabinet in that room, yes.

Q Do you recall determining whose documents or property was in that filing cabinet?

A Well, I don't have a specific recollection whether- - I know I looked in it. If I found other documents belonging to someone other than Mr. Sveum, I don't believe I had any reason to take them or record them.

Q When you executed this warrant, was it under the supervision of someone else?

A I was there in the capacity to assist Lieutenant Ricksecker who at that time was Detective Ricksecker.

Q Given the time, I'll refer to her as Detective Ricksecker because that's what she was then. Was she in possession of- - I should say this. Did she convey to you what you needed to do to do your work in executing the warrant?

A Yes.

MR. SCHULENBURG: All right. I don't have any more questions of you then. Thank you.

THE COURT: Any redirect?

REDIRECT EXAMINATION

BY MR. KAISER:

MR. KAISER: Yes, thank you.

THE COURT: Yes. Before you start, is there

going to be more exhibits?

MR. KAISER: Oh, yeah.

THE COURT: All right. Go ahead.

MR. KAISER: Thank you.

Q (By Mr. Kaiser) Detective, you rely on your normal human life experiences to make decisions about what you think is or is not probable when you're making arrests or executing a search warrant; is that correct?

A Yes.

Q Or even asking for one, right?

A Yes.

Q One of the questions that you were asked-- Eric, can I borrow that back one more time?

MR. SCHULENBURG: The warrant?

MR. KAISER: Yes.

MR. SCHULENBURG: I can find it given enough time.

Q (By Mr. Kaiser) Looking at the same warrant that Mr. Schulenburg showed you, does it use the word ownership anywhere in there?

A If you're referring to the page numbered 2, no.

Q Okay. It talks about the computer. What word does it use instead of ownership?

A Belongings.

Q So when you-- For instance, how many kids do you

have?

A Two.

Q And how old are they?

A 22 and 19.

Q So- -

MR. SCHULENBURG: The question should be how old were they because they weren't that age then.

MR. KAISER: I'll subtract two and we'll go from there. Mary has a calculator and we'll go from there.

MR. SCHULENBURG: That's not a crucial fact.

Q (By Mr. Kaiser) But you raised them in your house?

A Yes.

Q So your experiences allow to you assess a person's belongings and where they are; is that correct?

A I believe so.

Q So as you assessed the belongings in the room where the computer was, what conclusion did you reach about whose room it was?

A I believed I was in the bedroom of Michael Sveum.

Q And I'm going to show you a group of pictures, and at the end, I'm going to ask you whether or not they truly and accurately show the room as you saw it on the day when you went in. All right. Exhibit No. 5, what portion of the room does that depict? I'll ask it a

different way. What stuff in the room does that depict?

A It depicts a twin-sized bed in one corner or along one wall of the bedroom.

Q That one person would sleep in normally?

A Normally. A fan.

Q And what's on the right side of the picture?

A An office-style desk on rollers and -

Q Desk chair?

A Desk chair.

Q And what's on the chair?

A A jacket.

Q What jacket is it? When you saw that jacket, what did you remember?

A Well, the jacket I referred to in my report was the jacket I observed hanging in the closet.

Q All right. Showing you what's been marked as Exhibit 7 for identification, could you tell us what that's a photograph of, please.

A The closet located in the bedroom I believed to be belonging to Michael Sveum.

Q And what kind of person's clothes were in that closet?

A It appeared to be all men's clothing.

Q And what, if any, jacket did you find in that closet?

A A jacket that I had earlier referred to in my report.

that was a denim and khaki jacket that I had seen Mr. Sveum in possession of when he was at an earlier status hearing that I attended.

Q Now, asking you to refer, again, to the chair in Exhibit 5, but looking at Exhibit 9, can you tell us what items are depicted in Exhibit 9, please.

A A computer desk or what I would refer to as a computer desk that has a computer screen and keyboard, printer on it.

Q And what chair is there?

A A desk chair.

Q And is it the same desk chair that's depicted in Exhibit 5?

A Yes.

Q So the desk chair that's next to the bed is the desk chair that's next to the desk with the computer on it; is that correct?

A Yes.

Q And is the computer in Exhibit No. 9 the computer you seized?

A Yes.

Q Showing you Exhibit No. 8, could you tell us what's depicted on the left side of that photograph?

A The computer desk.

Q And the same computer desk with the same computer that

you seized?

A Yes, but the computer tower is visible in this photograph.

Q And what's on the floor to the right of the desk?

A Photocopies of legal documents.

Q Showing you what's been marked for identification as Exhibit 10, does that appear to be a photograph closer up of the same legal documents?

A Yes.

Q And what legal case do those documents refer to?

A I cannot recite the court case number but it was a court case involving Michael A. Sveum.

Q All right. And showing you what's been marked as Exhibit 14, is that a closer up shot of the desk with the mouse and the keyboard and the cabinet next to the keyboard?

A Yes.

Q All right. And asking you to focus on what's on top of the cabinet to the left of the computer desk and looking at Exhibit 11, could you tell us what's in Exhibit 11 that also appears in Exhibit 14 next to the desk?

THE COURT: Just a minute. Are you now referring to 11?

Q Yes.

THE COURT: Okay. Go ahead.

A A computer-generated photograph of a vehicle.

Q And is that the same pile of computer-generated vehicle photographs that we previously looked at photocopies of in Exhibit 2?

A Yes.

Q And that filing cabinet was right next to the computer; is that correct?

A Correct.

Q Showing you what's been marked as Exhibit 15 for identification, could you tell us what location in the room that photograph depicts?

A Well, it's the floor area that's located between the single bed and the computer desk.

Q And what is, what are these the legs of? What object is that the legs of in the middle of the photograph?

A The fan stand.

Q And what's on the bottom of those legs on the fan stand?

A Some typed correspondence.

Q And is it also legal correspondence about a case involving the defendant?

A To the best of my recollection it is.

Q And is that the same fan depicted just about in the middle of photograph No. 5 next to the bed; is that

correct?

A That's correct.

Q Asking you to look on the bed, what's on the pillow?

A This is a, a white business-sized envelope.

Q Showing you what's been marked as Exhibit 12, could you tell us what that's a photograph of, please.

A A white business-sized envelope addressed to the name of Michael A. Sveum at 2426 Valley Street in Cross Plains, Wisconsin, with a return address from the Social Security Administration.

Q Showing you what's been marked as Exhibit 6 for identification, does this show other items in the room at the foot of the bed and along that wall?

A Yes, it does.

Q And, generally, what were those items?

A It appears to be seasonal decorations, seasonal gift wrap, including bows, other miscellaneous items.

Q Exhibit 13, and, again, looking at that in relation to Exhibit 9, could you tell us what that appears to be a photograph of in relation to the desk with the computer on it?

A Well, a computer printout, paper.

Q And would that be the same area depicted at the top shelf of the desk table?

A Yes, it is.

Q All right. And showing you what's been marked as Exhibit 16 and 17, could you tell us what those are photographs of, please.

A Photographs of the back side of the computer tower that was placed on the floor underneath the desk.

Q And have you been trained as a detective in seizing evidence, to be sure that you photograph the status of the computer before it's seized to prove that it was hooked up and operational at the time you seized it?

A Yes.

Q And is that what those photographs depict?

A Yes.

Q Detective, based on your training as well as on your experience, not just as a detective, but as just a person, did you conclude from all of what you just described to us in those photographs that Michael Sveum and the possessions in that room belonged to him?

A Yes.

Q Just one more small thing I suppose, but just to be sure that we covered everything. At the bottom of the fan that we talked about earlier with the defendant's documents on it in Exhibit 15, could you tell us, for instance, what the item is next to the radiator?

A I'm not certain. Looks like the head of a Norelco triple head razor, shaving razor.

Q And the items on the floor, what would that be, for instance, in the lower left-hand corner?

A A tube of Colgate toothpaste.

Q So - - And what's right at the center in the lower part of the photograph?

A A small pile of loose change or coins.

Q Are these things consistent with a lived-in room, lived in by a person of the male gender who would use these items and who has a computer and who has his stuff next to the computer?

A Yes.

MR. KAISER: No further questions.

THE COURT: Mr. Schulenburg?

MR. SCHULENBURG: Thank you, Your Honor.

RE-CROSS-EXAMINATION

BY MR. SCHULENBURG:

Q I better return this to you. I have one question about it. This is, again, I think the search warrant, the warrant authorized in search of that residence.

Mr. Kaiser asked with regard to the second page whether the word ownership appears, and you said appropriately it does not, correct?

A Correct.

Q The warrant though does not allow you to seize

property, computer equipment belonging to someone other than Michael Sveum; is that correct?

A That's correct.

Q Okay. Did you have that in your mind when you executed the warrant, that some computer equipment in this residence may not be seizable?

A I can't say if I was specifically thinking that at that time.

Q Did you have in your mind whether or not some items in the room you searched might belong to the owner of the residence instead of Michael Sveum?

A Yes.

Q All right. When you were searching the room, you kept that in your mind?

A Well, I did, and I thought it was evident by some of the items that were in that room.

Q So there is some items in the room that you concluded did not belong to Michael Sveum?

A I thought it was likely that did not belong to him, yes.

Q And those, were those seized or not?

A They were not seized.

Q With the admonition on the second page of the warrant, can you tell me what you would have done had the computer had something on it saying, this belongs to

MaryAnn Sveum?

MR. KAISER: Objection, relevance.

THE COURT: Sustained.

Q (By Mr. Schulenburg) With that admonition on the second page of the warrant-- I'll withdraw that. Did you have anything to do with the computer after it was seized?

A Limited.

Q Describe the limited role you had to play with regard to that?

A Assisted Detective Ricksecker in physically taking the computer from the Madison Police Department over to a special agent with the State of Wisconsin for analysis purpose.

Q So you transported it?

A Yes.

Q Okay.

MR. SCHULENBURG: All right. Then I have no other questions. May I have that back, please.

MR. KAISER: Nothing else.

THE COURT: Can I have all the photographs, please?

MR. KAISER: I move all the exhibits that I've offered at this point into evidence.

MR. SCHULENBURG: I have no objection.

THE COURT: All right. Now, I think that that would be 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17. I don't see that 3 or 4 were identified.

MR. KAISER: And I've also moved 1 and 2 into evidence.

THE COURT: All right. So 1, 2 and 5 through 17 are admitted.

MR. KAISER: Thank you.

(Exhibits 1, 2 and 5-17 are received).

THE COURT: Thank you. You may step down.

(Witness excused).

MR. KAISER: State calls Detective Ricksecker.

DETECTIVE MARY L. RICKSECKER,  
called for examination, having been first  
duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KAISER:

Q Would you state your name, spell your first and last name for the record and tell us where you work, please.

A Mary L. Ricksecker, R-I-C-K-S-E-C-K-E-R, for the City of Madison Police Department.

Q How long have you been a police officer?

A Over 24 years.

Q How long were you a detective? Well, you're still a detective. How long have you been a detective?

A Approximately 19 years.

Q And were you doing that job in 2002 and 2003?

A Yes.

Q Showing you what's been marked as Exhibit 18 for identification, could you tell us what that item is, please.

A This is a photocopy of an affidavit and request for authorization to place a monitor and electronic device, an affidavit that I prepared and, and subsequently signed and attested to. At the back of item 18 is the actual order authorizing the application of the electronic tracking device signed by Judge Callaway, Branch 6, dated April 22, 2003.

Q Detective, how long have you been investigating stalking cases?

A Since 1995.

Q What case first got you involved in investigating stalking cases?

A Michael Sveum.

Q Since then, and I think to a certain extent you may describe some of your training and experience in the, in the search warrant, but what sort of specialized training have you received in stalking investigations?

A I've attended several national trainings on the matter of stalking, including a cyber-stalking/stalking conference in Alexandria, Virginia, given by the American Prosecutors Association. I also attended a training in Memphis, Tennessee, that was related to intimate partner stalking issues given by the Stalking Resource Center. I have also attended trainings in San Francisco, which was an international conference on sexual assault, domestic violence and stalking issues in 2004. And I've also attended a conference in San Francisco that was on the use of technology in intimate partner stalking cases that, again, was presented by the stalking -- or arranged for by the Stalking Resource Center. I have also read extensively publications on the investigation of stalking cases.

Q And you keep up with the literature in regards to stalking for what purpose?

A I actively teach and present around the state and the Midwest on safety matters involving stalking issues, education, and law enforcement issues around investigating stalking cases as well as prosecuting stalking cases.

Q So what groups have you trained in regards to aiding victims, investigating and prosecuting stalking cases?

A I've trained many community groups on safety measures

and recognition of stalking behavior. I've also trained multi groups of different types of advocates involving rape crisis, sexual assault advocates, social workers, domestic abuse advocates, victim witness advocates and social workers.

I've also trained UW health services at the University of Wisconsin as well as Edgewood College security and academic advisors at both the University of Wisconsin and Edgewood College. I've also trained Department of Corrections employees, probation and parole officers and security guards at prisons. And I've also presented to prosecutors at a prosecutors' conference in the State of Wisconsin. I have also extensively been involved in training of law enforcement groups around the State of Wisconsin on the stalking statute and investigating stalking and successful prosecution of stalking cases.

Q And aside from your training, does your experience include investigating other cases besides Mr. Sveum's cases?

A Oh, yes. I've investigated many other stalking cases.

Q And because of your reputation for knowing about stalking throughout the state and the Midwest, do people also call you to ask questions and seek advice from you about how to manage their investigation and

prosecution in stalking cases?

A Yes. I receive calls from prosecutors, social workers, advocates, as well as law enforcement throughout the Midwest area referencing stalking cases.

Q Now, you indicate in the affidavit - I'm sorry, I forgot the exhibit number. Is it 18?

A Yes, 18.

Q You indicate in the affidavit, Exhibit 18, that you were aware that the defendant was released from prison on July 2, 2002. Detective, would it be fair to say that until his release from prison you made it a point to continuously monitor where he was in prison and to try to keep track of when it might come to be that he was released?

A Yes.

Q So you were well aware that he was going to be released; is that correct?

A Yes.

Q And prior to the time, or just shortly before the time he was released, who, if anyone else, were you aware of that knew that he might be released?

A I was aware that the victim in the original case that he was in prison for, Jamie Johnson, was aware of the actual date that he was going to be released from prison and we were in communication about that.

Q And would it be fair to say that you assisted her in trying to get through that period of time when she would be aware that he would now be out on the street?

A Yes.

Q Now, did there come a time- - Well, let's see. What, if anything, were you aware of in regards to the defendant's status initially once he was on the street in terms of what, if anything, was being done to control him?

A I communicated with Department of Corrections and learned who his probation agent was going to be and subsequently communicated with him. Doug Timmerman ended up to be the agent that supervised him the most significant amount of time that he was out on supervision. And I learned what his rules were going to be while he was under supervision and where he was residing and where he was working should he become employed, which he did become employed. I also learned that he was going to be on electronic monitoring for a period of time and that at some time that electronic monitoring may end.

Q When did that happen?

A February of 2003. I think about February 11, 2003.

Q And when you heard- - I'm sorry. The affidavit indicates that you learned that on March 28, Jamie

Johnson was reporting that there had been hang-up phone calls received at her residence, is that fair?

A That's correct.

Q And in terms of their number and persistence, what, if anything, did you know from Jamie had not been happening since the time Michael had been in prison and on electronic monitoring?

A She indicated that she had not had any problems with any hang-up calls or any type of pattern of hang-up calls prior to the time that she contacted me, I believe either late February or early March. That she was all of a sudden receiving patterned hang-up calls.

Q And, again, you indicate in the affidavit that she told you from March 3 through March 12 -- April 12 she got nine such calls that could not be identified as to who the caller was; is that correct?

A That's correct.

Q Based on your knowledge of the defendant and his cases throughout the time that -- And just so the record is clear, you were the case detective on the original case where Jamie Johnson was the victim; is that correct?

A That's correct.

Q The one he went to prison for?

A Yes.

Q Based on your knowledge and, and experience with the

defendant and your knowledge regarding his now being out and about without electronic monitoring, what conclusion did you reach to a level of probability as to who would be placing these calls to Jamie?

A I believed that it was probably Michael Sveum making these hang-up calls as he had done that in the past.

Q And did you check with Jamie to see if she had any reason to believe it would be anyone other than Michael?

A Yes, I did.

Q What did she tell you?

A She didn't believe it would be anyone other than him.

Q In order to try to discern where these calls were coming from and whether or not they could be related to the defendant, what did you do with your- - What did you do to try to determine from Jamie's records where those calls came from?

A I subpoenaed her phone records to see what incoming numbers had been coming in, and I also had advised her to start keeping an accurate record of the exact time that the calls were being received at her residence. And the subpoena to her service provider, which I believe was TDS, came back with the information as to where these hang-up calls had been generated from and they were generated from many pay phones around the

area.

Q And, again, for purposes of the record and so the court can follow along, I've used for Exhibit 18 the defense's Exhibit A attachment to their motion because it does have page numbers on it, so I think that can assist us in being able to refer to specific portions of it. On then what is labeled as Page A2 of Exhibit 18, does the second paragraph of that page delineate the location of the various pay phones that you discovered the calls came from?

A Yes, I'll just read that paragraph.

Q No, that's okay.

A It indicated several different addresses in the Madison area that the phone calls were coming from and they were all pay phones at those locations.

Q And, not only just in Madison, but what- - Do you know where this Kitts Korner Sports Bar and Grill is located?

A Actually that one, I have to apologize, I don't believe that that was a pay phone. I believe that that was the actual line number for that establishment.

Q Okay.

A Okay.

Q Which is where?

A Which is located at- -

THE COURT: I know where it's located.

MR. KAISER: Okay.

A It's between the west side of Madison and Cross Plains.

Q Okay. But, Detective, even considering that, as well as the ones in the city, would it be fair to say that one would probably, to a level of probable cause, require a vehicle to get to those different places?

A Yes.

Q All right. Then in an attempt to discern what, if any, vehicle the defendant might have, what did you do?

A I was in communication with Doug Timmerman, Mr. Sveum's probation agent at the time.

Q And what did you find out his rules were in regards to what vehicles he could drive?

A I was advised that the only car that he was to be driving was registered to him, a black Beretta, and I had the license plate number provided for that black Beretta which was registered to him according to the Wisconsin- -

Q Records kept in the regular course of business of the Wisconsin Department of Transportation?

A That's correct.

Q Now, where was the address that that car was registered to?

A The car was registered to 2426 Valley Street, Cross

Plains.

Q Where was the defendant's address supposedly, according to what he told probation and parole?

A Mr. Timmerman stated that Michael Sveum, during the course of his, after he got released from prison and out of the halfway house, he was to be residing with his sister who resided in Iowa County at 6685 County Trunk K. That was to be his residence where he was residing.

Q Detective, as a result of your discovery of the facts that, as you've described them, and the probabilities that you've given us, what, if anything, did you determine you would do to try to establish whether or not -- and of course it could have gone the other way -- whether or not the defendant was making hang-up telephone calls, harassing telephone calls to Jamie Johnson, his previous victim, from various pay phones or phones that were not associated with him personally?

A I was aware of the ability of the Department of Criminal Investigation Unit with Department of Justice with the State of Wisconsin that they had the ability to use GPS devices in criminal investigations to assist us in locating the whereabouts of vehicles.

Q GPS stands for what?

A Global Positioning System I believe.

Q And who did you talk to about the use of a global positioning device at the department?

A I spoke with Gary Martine out of DCI.

Q And what, if anything, did he indicate to you had been for awhile his responsibility in relation to those devices in the Department?

A He stated that that was something that he did quite routinely and often in the normal course of his duties as a, one of their technology experts in DCI as he would assist other agencies in the application of GPS devices.

Q All right. And in terms of application, what, if anything, did he tell you was the manner in which the Department had concluded would be the legally adequate way to go about installing a GPS device?

A He stated that they had in the past used court orders to authorize the application of the device and he subsequently supplied me with a copy of the order that they had used in the past which I reviewed.

Q And that- - And not only the order for the Judge to sign but also a probable cause affidavit to be sworn to by you to support the request for the order; is that correct?

A That's correct.

Q All right. So Exhibit 18 then is the probable cause

affidavit you swore out and it was submitted by you to Judge Callaway on April 22; is that correct?

A That's correct.

Q And after he reviewed and signed the order on April 22, 2003, where did you go then?

A The early morning hours of April 23rd I met with Agent Martine and I believe it was Agent Wall and I believe Detective Parrell- -

Q Is that P-A-R-R-E-L-L?

A Yes. - -we met in the area of Cross Plains and learned that the vehicle in question, the black Beretta, was, in fact, parked in front of 2426 Valley Road in the driveway.

Q And you say this was in the early hours of the morning; is that correct?

A Yes.

Q Like people would still be sleeping?

A Yes.

Q In fact, it was dark?

A Yes.

Q And where was it parked?

A It was parked in the driveway of 2426 Valley Road, Cross Plains.

Q And once the four of you had determined that the car was there, what, if anything, else did you determine

about whether or not anybody was awake or aware of what was going on?

A We determined that there were no lights on at that time at the residence. There appeared to be no one about, or moving about at the residence to detect us as we got onto the property to attach a device.

Q It's not in a garage, not in a covered parking area, it's in the driveway?

A That's correct.

Q And what was done to affix the GPS device to the described Beretta?

A I did not attach the actual device, but I was told that it's attached with magnetic equipment, and some taping items were also used in the attachment of the device to the exterior of the vehicle.

Q In the under-carriage?

A Yes.

Q All right. So no damage is done to the car?

A None.

Q How is the GPS device powered?

A With a battery.

Q So no power was taken from the car?

A None.

Q The car was not moved to install the device?

A No.

Q The car was in plain view in the driveway when the device was installed; is that correct?

A Yes.

Q You and all other officers were in plain view when you were installing the device; is that correct?

A Yes, that's correct.

Q It was dark but you were outside?

A Yes.

Q To the best of your knowledge, did, do you know who - I mean, to the best of your ability to discern it, looking around, did anybody see you guys doing this?

A To the best of my ability, I didn't believe anybody noted that we were there at all.

Q All right. Now, once the device was attached, does it in any way alert the person that is moving the car that it is there?

A No.

Q All right. Does it in any way impair the ability of the person to use the car?

A No.

Q Does it take anything from the car? Does it listen to conversations? Does it remove property from the car, take power from the car, anything?

A No.

Q Does it in any way impair the owner or possessor from

using the vehicle as they would normally use it?

A No.

Q In fact, your hope is that they use it as if they would normally use it; is that correct?

A That's correct.

Q All right. Now, what was done in relation to the device, first, because it's being run on a battery and, second, to obtain from it the information that it provides you?

A My understanding is the device had a limited life with the battery of 14 to 21 days depending on how often the device was activated.

Q And just take a second. I realize you're interrupting my last question by my asking you this question. What is it about the device activating that causes it to maybe use less power sometimes and more power other times?

A If the vehicle is "asleep" as they described it to me, in a not moving phase, it uses a lot less power. It's my understanding that if the vehicle is parked for say 24 hours as in one location and not moved, the device wakes itself up every 20 minutes to just check that it's working and that it's reporting where the vehicle is at. If the device - - If the vehicle is in motion, the device can be set at a variance of time to record

that location of that vehicle and it can be as short as you want it from ten seconds to up to every two minutes that if the vehicle is in motion, the device will click and record where that vehicle is located. So for the battery to be operating, it would take more power if the vehicle is moving more frequently or moving for long periods of time, the battery will take more juice.

Q All right. So in order to obtain the information from the device as to where the car has been and in order to restore power to the device, what, if anything, was done with the device on the car as it stayed on the car?

A Actually the whole device was removed after approximately two weeks and a new device was placed on. It's easier mechanically to take the whole device off and then download it as opposed to removing the battery portion of the device. So to expedite the process of putting it on and taking it off, a new device was placed on.

The device had been there for approximately two weeks and, and I believe it was approximately two weeks after or possibly not even quite two weeks after April 23 we removed it, and then the information from that first device was downloaded into a computer program that, and a computer that DCI

had.

Q How long did you ask Judge Callaway in your affidavit-- How long did you request that you be allowed to have the GPS device on the Beretta?

A 60 days.

Q And you said you installed it on April 23?

A That's correct.

Q And you took it off on what date?

A May 27, 2003.

Q Okay. And, if you know, other than May 27 when you got the car, how many times was the device replaced with a different one while you were monitoring the vehicle during that month?

A Twice.

Q As a result of your continuing investigation--

THE COURT: Just a moment.

MR. KAISER: Oh, I'm sorry.

THE COURT: We need to do a major repair.

(Pause).

Q --as a result of your continuing investigation, what, if anything, did you become aware that Agent Timmerman decided to do with the defendant on or about May 27, 2003?

A I was made aware that he was going to take him into custody on a probation hold at his office when he

showed up for, I believe it was, a routine visit.

Q So that was a previously set appointment; is that correct? If you recall. If you don't- -

A To the best of my recollection, yes.

Q In any event, what did Agent Timmerman tell you occurred- - What did Agent Timmerman tell you he found on May 27 when he took the defendant into custody?

A He advised me that the -- Mr. Sveum had arrived on his motorcycle for the meeting and that in checking his motorcycle, he had found a ski mask in his property on the motorcycle.

Q Based on the totality of all that information, showing you what's been marked as Exhibits 19 and 20, what, if anything, did you do on May 27 in regards to the defendant?

THE COURT: Can you identify those first individually?

Q Yeah. What is each exhibit?

A Exhibit 19 is a search warrant for 2426 Valley Street as well as the complaint for the search warrant for that residence and the return attachment for what was seized from that residence. And it is signed by- - The search warrant is signed by Judge Higginbotham the 27th day of May, 2003.

Exhibit 20 is a copy of the search

warrant for 6685 County Trunk Highway K in Iowa County and the return for that search warrant.

Q Is there anything on that return?

A It says see attached. I don't see the attached list here--

Q Okay. Sorry.

A --by Detective Riesterer. As well as on Exhibit 20 is the complaint for that search warrant for that residence in Iowa County. And the search warrant is signed by Judge Higginbotham, Circuit Court Branch 17 on the 27th of May, 2003.

Q Were you the supervising agent for the purpose of the execution of those two search warrants on May 27?

A That's correct.

Q You know what? I'm sorry, I totally forgot to ask you. So I have to go fix two things. I apologize. First of all, what did you say Doug Timmerman told you he found?

A He found a black knit ski mask on Michael Sveum's motorcycle.

Q And that's what he drove to the appointment that day?

A Yes, that's correct.

Q Do you know where the car was?

A Yes, I subsequently requested that a detective check Michael Sveum's employment and we did find that the vehicle was at his employment, Meineke Car Muffler, on

the west side of Madison.

Q Okay. What was significant to you in terms of probable cause about the finding of the ski mask?

A On the prior case when I had investigated Mr. Sveum in the stalking of Jamie Johnson, he had indicated that in continuing to stalk Jamie, he would use whatever means necessary, including binoculars, flashlights, and ski masks to keep his identity hidden while he was involved in the course of stalking her.

Q And just to fix my deletion from the attachments to Exhibit 20, showing you what's been marked as Exhibit 21, could you tell me what that is, please.

A This appears to be a photocopy of the items that were seized by Detective Riesterer from the Iowa County address and the attachment that would have been on the return for this search warrant.

Q All right. So, and there is nothing on that return apparently that belongs to the defendant; is that correct?

A That's correct.

Q All right. Now, as the supervising detective then in the execution of these warrants, first of all, did those warrants include the information regarding the ski mask seized on May 27 and its significance; is that correct?

A - That's correct.

Q And the warrants also include at least one result from the GPS device that would be in regards to the date of April 25, 2003, would that be correct?

A That's correct.

Q And would you describe for the court what it was about the GPS device and April 25 of 2003 that assisted us in concluding we had probable cause to execute a search warrant for wherever it might be that Michael Sveum was living?

A The vehicle that had the GPS device attached to it on the 25th, left the area of Meineke Muffler I believe and went to the area of where Jamie's house is located. The vehicle sat for awhile in a cul-de-sac there. The vehicle then left at approximately - - It arrived there at approximately 8:13 p.m. and then the vehicle left the area approximately 9:08, and the vehicle had been approximately one block within the distance of Jamie's residence.

Jamie subsequently had responded home at about that time. She had reported that she received a hang-up call at approximately 9:10 p.m. on that evening. The vehicle after leaving the area at 9:08 then proceeds, and we're able to track, I believe it went Todd Drive to the frontage road to the beltline to

the west side of Madison where the vehicle then stops at a pay phone at 223 Junction Road in front of a business called Party Port- -

Q Party City?

A - -Party City. And the vehicle is there for approximately a minute or two and then the vehicle leaves the area, and I can't recall specifically if it went back to the Valley Road address or not. The subpoena from the phone company indicates that hang-up call that Jamie received on April 27 -- I'm sorry, April 25, at approximately 9:10 p.m., came from that pay phone which was located at where the vehicle had been located at, at approximately the exact same time.

Q So, in other words, based on the information from the phone records and the information from the GPS device you were able to put the defendant's car at the phone booth at the Party City at the time the hang-up call was made to Jamie's house?

A That's correct.

Q Detective, based on your training and experience, what do you know about stalkers, and about Michael Sveum in particular, that caused you to believe that were he to be in possession of evidence of his stalking of Jamie Johnson, that it would be there when you went there?

A My training and experience in investigating stalking

cases has lead me to believe that stalkers often keep calendars, journals documenting their stalking behavior, documenting their victim's whereabouts, comings and goings. Stalkers also often keep trophies or keepsakes, or personal items that they've seized from trash or other places where the victim might have discarded items. They often keep a record of locations, residence, friends, family, of their victims in an attempt to keep total control over the knowledge of the whereabouts of the victims.

Q And what, if anything, else does keeping memorabilia regarding the victims allow the stalker to do in terms of, in terms of looking at it periodically?

A They can again relive whatever obsession they have referencing the individual, whether it be love, whether it be hate, but it's more of a matter of the total control over having that personal information that, that's displayed in a photograph, that's displayed in a document, that's displayed in something they may have generated that indicated a person went from A to B to C on this date. That means that they know what this person is up to and they are in control.

Q And who, if anyone, is included in your experience with these kinds of things?

A Obsessive/compulsive types of persons.

Q What persons, specific, a specific person helped you come to know that this is the way stalkers work?

A Michael Sveum.

Q And when did you come to know that about Michael Sveum?

A 1995.

Q What did you- - Did you discover all the things you just listed for us when you searched his place of residence at that time?

A That would have been in 1996.

Q And were those items, many of them, admitted into evidence at the trial?

A Yes, they were.

Q All right. And that has come to be your knowledge in regards to other stalkers, both through your own experience as well as through other training that you've received and other training that you've given?

A And other investigations that I've been involved in that bear that out.

Q Now, what, if anything, does having a computer facilitate in regards to the types of preservation and tracking of the stalking victim that you described for us obviously since 1996?

A Obviously a computer is a very functional record-keeping data base that's available to persons that want to keep track of where people go, what they're doing,

again, as far as a journal or a record. But the access that's available to us via the Internet is, is limitless as far as accessing personal information, public information, accessing persons who will attempt to find that hidden information by giving them -- for a slight fee they will find information that's more difficult to get, that isn't quite as public. There is, you know, just a few data bases, there is CCAP that's available that's on the Internet that has court information. There is assessment information that's available on the Internet, who owns what home. There is, there is assessment into archives of newspapers to do searches on people to find out if they have new jobs. There is just a limitless number of search engines available out there that you can plug in a name, a date of birth, business to get as much information as you can about whatever you want to get information about.

Q Based on your training and experience as you described it in the search warrant then, did you request that not only you be allowed to search the house that apparently Michael was residing in, well, and the one he claimed to have been residing in, but also that in the seizure of things from that home that you would be permitted to seize any computer that belonged to him to the extent

you were able to discern that he was using it?

A. That's correct. I was also aware that part of his supervision rules were that he was not to have access to the Internet other than for legal purposes under a very strict guideline by his probation officer.

Q. In the process of executing Exhibits 19 and 20 on May, was it May 27 or May 28?

A. May 27.

Q. All right.

A. Actually, 28th, I believe the search warrants were drafted.

Q. When you executed those search warrants, what, if anything, was found regarding the defendant in the Iowa County address?

A. They were unable to locate any personal property that could be clearly identified as belonging to him or paperwork belonging to him. And the only item seized by Detective Riesterer at that residence was a billing document for the residence there, Michael's sister, Christine Long and her husband, Joe Long.

Q. Meanwhile, you had an opportunity to see not only the totality of the home that was searched but also the room that's depicted in Exhibits 5 through 17; isn't that correct?

A. That's correct, and I did respond out to both locations

as the search warrants were being executed or evidence was being collected on those days.

Q Did there appear to be any evidence of a person of Michael Sveum living in any room at the Iowa County address?

A Not that we could discern.

Q What, if any, conclusion did you reach to a level of probable cause regarding the room depicted in Exhibits 5 through 17.

A I determined that that was probably where Michael was staying.

Q Would it be fair to say that in a non-technical, non-legal sense, in the normal common, human experience that the contents of Exhibits 5 through 17 would depict a room in which a person was living, a person whose personalty is there with their name on it?

A Yes.

Q And based on that conclusion, what, if any, determination did you make in regards to the computer depicted in that photograph?

A That that was probably the computer belonging to Michael that he was having access at.

Q And you observed the documents in Exhibit 2, the photographs of the cars that were right next to the computer while it was there; is that correct?

A That's correct.

Q So you concluded that-- To the degree that your search warrant authorized you to take a computer that belonged to Michael Sveum, you concluded to a level of probable cause that probably this computer belonged to Michael Sveum and you were going to take it; is that right?

A That's correct.

Q All right. And then I'm showing you what's been marked as Exhibit 22 for identification, could you tell us what that is, please.

A Yeah, that is a depiction of a, the month of June, 2003, calendar form.

Q Is that a true and accurate calendar of the days and days of the week that month?

A Yes. Yes, it is.

MR. KAISER: Move Exhibit 22 into evidence.

MR. SCHULENBURG: No objection.

THE COURT: Any objection?

MR. SCHULENBURG: No, sir.

THE COURT: Received.

(Exhibit No. 22 is received).

Q (By Mr. Kaiser) Showing you what's been marked as Exhibit 23 for identification, could you tell us what that is, please.

A This is a copy of a search warrant for a Dell tower and hard drive therein.

Q And is that the--

A And--

Q Sorry.

A I'm not done. It's signed by Judge Higginbotham on June 4, 2003. Also attached to that is the complaint for the search warrant for that Dell tower. And I was the affiant for that complaint.

Q Detective, what day did the Judge sign that warrant?

A June 4, 2003.

Q And what day did you execute it? The next day; is that correct? And if you need to refer to something, let me know, and I'll show it to you.

A I can't recall the exact date that it was executed. Sometime between June 4 and June 10.

MR. KAISER: Your Honor, I apologize. I have a lot of stuff copied.

THE COURT: Let's take a break.

MR. KAISER: Could we take a break? That's okay?

THE COURT: We'll take our mid-morning break.

MR. KAISER: Thank you very much.

THE COURT: We will be in recess for about 15 minutes.

MR. KAISER: Thank you.

THE COURT: So it's about 17 after.  
Somewhere around 10:30, a little after.

(Off record at 10:17).

(On the record at 10:35).

THE COURT: Go ahead, Mr. Kaiser.

Q (By Mr. Kaiser) Detective, asking you to look at what's been marked as Exhibit 24 for identification, could you tell us what that is?

A It's a photocopy of a police report that I prepared dated June 10, 2003.

Q And is that in regards to when, as to when the search warrant to search the Dell computer was executed?

A That's correct.

Q One question I forgot to ask earlier, and I apologize, Exhibit- - Do you still have the search warrant for the Dell computer up there -- sorry -- Exhibit No. 23. Is the computer that's described there the computer depicted in Exhibits 5 through 17 that was seized from the defendant's bedroom at the Cross Plains address?

A That's correct.

Q And according to Exhibit 24, when did that search warrant begin being executed on the computer at the Department of Criminal justice?

A That- -

THE COURT: Department of what?

Q Criminal Investigation. Thank you.

A June 6, 2003.

Q And what day of the week was June 6?

A June 6 was Friday in 2003.

Q And when did you receive word that the agent-- Who was it that executed the search warrant on the computer?

A Agent Dave Mathews.

Q And just so the record is clear, that's because you know and understand him to be an expert in forensic computer analysis?

A That's correct.

Q When did he tell you that he had completed the execution of the search warrant on the defendant's computer from the defendant's bedroom?

A Late on Monday I received a, either a phone call or message from him that the search was complete and so on Tuesday, June 10, I went over and recovered the computer from him.

Q All right. And then do you have the return that you filed with the court in regards to the Dell computer on the search warrant, Exhibit No. 23?

A Yes, that's on No. 23. It's labeled at the top, 291, Page 291, and it's the return signed by myself.

Q And what day did you return on that search warrant?

A June 10.

Q All right. And that was what day of the week?

A Tuesday.

Q Detective, in Exhibit 23, the search warrant for the computer, did you not only allege your expertise in regards to your belief and understanding about what the computer would contain, but did you also allege what it is you discovered as a result of the execution of the search warrant at the Cross Plains address that would cause you to believe there would be evidence of stalking inside the computer?

A Yes.

Q Asking you to look at what's been marked as Exhibit No. 22 -- I'm sorry, Exhibit No. 25 for identification, is that exhibit a compilation of the items discovered during the execution of the search warrant in Cross Plains that contained various web sites that could be used for purposes of stalking?

A This is just a few of the pieces of paper that had web sites listed on them.

Q And are those some of the web sites that you listed in the complaint for a search warrant for the Dell computer?

A Yes, that's correct.

Q Turning then to discovery Page E317, which of the web sites is listed there?

A WWW.switchboard.com.

Q And this is contained in a letter from who to who?

A This is contained in a letter from Michael Sveum to his sister, Renee Sveum.

Q Who was also charged in this case; is that correct?

A That's correct.

Q And what- - Could you read the question that that, that that web site appears in?

A I'll read the sentence before it to put it in context.

"Lastly, I sent you some Internet addresses you might be able to use to locate information. May www.switchboard.com know Jamie's unlisted number?"

Q Turning to the second page of Exhibit 24- -

A 25 I believe.

Q 25.

THE COURT: Wait a minute. Wait a minute.  
Exhibit 25?

A It's Exhibit 25, there are four pages.

THE COURT: I didn't have that marked yet.

Q Sorry, I apologize. Exhibit 25, is that the pages that are some of the pages that were discovered in the execution of the search warrant on that Cross Plains address?

A Yes. Exhibit 25 is a photocopy of six actual individual pages which are some of the pages that were recovered at the search warrant.

Q And to find these web sites that this computer might have been taken to by the defendant to explain and justify the search of the contents of the computer, you read thousands of pages of paper that were recovered from the defendant; is that correct?

A That's correct.

Q All right. Turning to the second page of Exhibit 25, which would be discovery Page No. E319, which of the web sites did you find listed there?

A Www.switchboard.com, www.classmates.com, www.docusearch.com.

Q Detective, also in the ten years that you've been investigating cases and crimes -- cases against and crimes committed by the defendant, can you tell us how familiar you've become with his handwriting?

A Very.

Q Would it be fair to say that as we go through this and look at these different handwriting documents, that based on your experience with the defendant's handwriting, you believe these to have been written by the defendant?

A That's correct. They're very consistent with his

handprinting and handwriting.

Q Turning to the third page of Exhibit 25 which is evidence, I'm sorry, discovery Page No. E399, which computer web sites appear on that page?

A Antistalking.com, privacy rights.org/fs/fs14/stk.htm along with several other search engines which are also listed on this page.

Q And Page E401 of discovery, the next page in Exhibit 25, which web sites appear on that page?

A Antistalking.com, privacyrights.org.

Q And the next page of Exhibit 25, discovery page E406, which of the web sites that you alleged in the computer search affidavit appear on that page?

A Http://directory.superpages.com, HTTP:dash, dash-

Q No, slash, slash.

A //www.bigyellow.com.

Q And what does the defendant write about those two web sites?

A "To find someone's address, telephone number, and neighbors."

Q And the last page of Exhibit 25, E410 of the discovery, what web site is listed there?

A Anybirthday.com.

Q And what was it about these web sites that you believed indicated that probably he is using the computer to

engage in stalking of Jamie?

A They are different web sites that have information or access to personal information or tell you how to go to other web sites to get personal information on individuals.

Q And what does the web site, antistalking.com do for a stalker?

A Tells them how to be a better stalker.

Q And you know that from your training and experience in what we call cyber-stalking; is that correct?

A That's correct.

Q What does the phrase cyber-stalking mean?

A Cyber-stalking is a pretty generic phrase meaning any type of computer access, information, e-mail, or any other type of stalking behavior or, that's done through computers or computer -- computers being utilized in the crime of stalking to access information.

Q So some jurisdictions have an actual crime of cyber-stalking. In your case when you use that phrase in the search warrant, you were using it in the phrase, in the manner you just described; is that correct?

A That's correct.

Q All right. But in the search warrant for the computer, what was the crime that you listed there that you were asking the Judge to execute the search warrant in

regards to?

A Stalking.

Q Detective, did all the matters about which you talked about on today's date occur in Dane County, Wisconsin?

A All except the execution of the search warrant in Iowa County, yes.

MR. KAISER: No further questions.

THE COURT: Cross-examination?

MR. SCHULENBURG: Thank you.

CROSS-EXAMINATION

BY MR. SCHULENBURG:

Q I think I'll begin- - I'll do this sequentially for the GPS and the residence and then the computer, those issues. I begin with the GPS issue and ask this. Before you applied for the order from Judge Callaway, I think you've been clear about what you knew. Is there anything- - Did you include in the application to Judge Callaway for his order everything that you knew about this case, that you felt was relevant to the application for an order? Maybe it will help if I ask specifics. Let me try it- -

A I know so much more total information, it's hard for me to disseminate your question.

Q Let me ask questions first about the hang-up calls that

were received at the residence where Jamie lived. Was she alone at that residence?

A She had a housemate that lived with her.

Q Had that housemate been with her during the entire time the hang-up calls were received?

A To the best of my recollection he was there for some of them, but not all of them. I'd have to look at each individual call. But to the best of my recollection he was there for some but not for all.

Q I'll ask it differently. Was this a residence which was on a lease?

A This was a single family home.

Q So it was owned by someone?

A Yes. That's correct.

Q Was it owned by either Jamie or the person who was living there?

A By the person who was living there with Jamie?

Q Yes.

A Yes. He was the owner of the residence.

Q So during the time she was there, he had a right to be in the residence as well?

A That's correct.

Q There was a telephone at the residence I assume?

A That's correct.

Q In whose name was the telephone?

A I believe it was in his name.

Q So she was not registered as someone who could be called at that number at least in the phonebook, if it was in the phonebook?

A That's correct.

Q How many hang-up calls were there all together? Do you know?

A Again, I haven't reviewed the specifics. I would say over 10 and less than 20, somewhere in there.

Q Do you remember if any of the hang-up calls originated from other states?

A I believe one did.

Q Could it have been two, one from Florida and one from Kentucky?

A That's correct.

Q Was that information included in the application for, to Judge Callaway?

A No.

Q Did one of the hang-up calls come from a residence belonging to an acquaintance of Ms. Johnson? Do you remember if that was true?

A I can't recall specifically. At the time I knew where each call had originated from.

Q Did you ascertain whether any of the hang-up calls came from a person you could identify?

A Yes. I know that I did go through with her the specific ones that were identified, the out of state ones, and that there was an explanation given for those. That she and her housemate had spoken and we were able to determine who those callers were and what it was about.

Q Were there any hang-up calls from someone you could identify within the state?

A I can't recall specifically without looking through the whole list.

Q Do you remember if any of the calls came from someone who was a female?

A I can't recall right now.

Q When you made a list of the hang-up calls, you have dates attached to them, the day on which the call was made; is that right?

A That's correct.

Q Do you remember whether any of the hang-up calls were made on dates when Mr. Sveum was in jail?

A Yes, I do believe that is correct, that possibly one of them was when he was in jail.

Q Could it have been two?

A Could have been.

Q Was that information included in the application to Judge Callaway?

A No.

Q In the application to Judge Callaway you included a fairly complete description of the actions that would have to be taken with regard to the vehicle of interest. I think you included the possibility that it would have to be taken to a different place; is that right?

A That's correct.

Q And that there might have to be, a key might have to be obtained for its operation; is that correct?

A That's correct.

Q So the order or the permission granted by Judge Callaway included the permission to do all of that if you needed to?

A That's correct.

Q I think your testimony in response to Mr. Kaiser's questions is you didn't need to do all of that; is that right?

A That's correct.

Q It seemed like the application included a potential to use the battery, the automobile battery to power the device; is that accurate?

A That's accurate.

Q This device apparently didn't need that?

A This particular unit that was applied to his vehicle

did not have to be attached to the battery. It had its own single battery source.

Q Were you part of the process by which it was attached to the vehicle?

A I was there. I did not do the actual attachment process.

Q Did you observe it?

A Yes, I did.

Q I believe you testified that at least once that battery had to be changed?

A The battery had to be changed, but for logistics the whole unit was removed and a new unit was replaced. It was much quicker and safer to just remove the whole unit and put a new unit with a new battery on the vehicle.

Q Were you present when that happened?

A Yes.

Q Where did that happen? In what geographic location?

A They all occurred at 26 -- I'm sorry, 2426 Valley Road in Cross Plains. And I'm just trying to recollect, I believe all of the exchanges occurred when the vehicle was parked in the driveway. I'm trying to think -- I believe the vehicle was in the driveway on each time that the unit was either placed or removed other than the last time on May 27th when the item was removed

from the vehicle at a police impound area.

Q How many vehicles were in the driveway the first time the device was installed?

MR. KAISER: Objection, relevance.

THE COURT: I'll let it go. Overruled.

A One.

Q How long is the driveway from garage to street?

A I would be guessing, but I would say it would be the length for possibly two vehicles to fit.

Q Was the vehicle that was parked in the driveway closer to the street or to the garage?

A Mr. Sveum's vehicle the first night that we placed it on, is that what you're asking, that vehicle?

Q I mean the vehicle to which this device is attached. Others don't interest me as much.

A On the first time we placed the item on the vehicle on April 23rd, the vehicle was closest to the garage, facing to the street.

Q So the headlights were facing the street then?

A That's correct.

Q What, to what part of the vehicle was the device attached? Was it--

A Somewhere to the rear, towards the rear bumper area.

Q Would it have been-- Does this vehicle have a trunk?

A Yes, I believe it does.

Q Would it have been under the trunk area?

A Could have been. Again, I was not there to actually see the actual placement. They described it to me but I believe it was somewhere near the rear bumper under the plastic area near a metal portion under the vehicle.

Q I'm sorry?

A Under the vehicle.

Q Did you watch them install it?

A No. I was there while they were installing it, but they were on their backs underneath the car and I was not down there with them when they were putting it on.

Q How far were you from the car?

A A few feet.

Q How close were they to the garage door as they were on their backs under the car?

A Very close if I recall. There was only a couple of feet between the end of the back end of the vehicle and the garage door which was shut at the time.

Q Was this a one or two-car garage, do you remember?

A I should know, but, at this point, I can't recall. I believe-- I'm not going to say. I should know but I can't recall.

Q Okay. I'd like to move, if I may, to the search of the residence. You've given an impressive description of

your training with regard to stalking. Did you help execute the warrant, the search of the residence authorized by that warrant?

A Yes.

Q How many other people helped you execute that warrant?

A The warrant in Cross Plains- -

Q Yes.

A - -because I, I- - I assigned Detective Anderson as the evidence collector. Again, without reviewing a report, I would say six to eight law enforcement personnel as well as there was a Cross Plains officer that came and stood by or possibly a Dane County deputy because the Cross Plains officer might not have been available. We had one uniformed officer there with us while we were executing it.

Q When you say you assigned Detective Anderson to be in charge, what does that mean?

A I had had a briefing before the execution of both of these warrants and I read the search warrants to everybody involved in the execution for both locations. The language was quite similar in both search warrants as to what we were going to be searching for. I also at that time briefed him on some other names of papers that should they find, that I should be notified, reference family members or names that are associated

with the victim that I did not specifically name in the search warrant. I wanted them to make me aware if they were finding something with these particular names and I would look at it.

I then went to the Cross Plains address and was there while we entered the residence and the execution began and the search began. There was no one home at the residence at the time. As issues came up I spoke with the detectives at the scene and dealt with those issues or questions as to whether a piece of evidence should be seized or not, as I had some of the best knowledge as to the totality of, of Michael's past crime in relation to the new crime. Detective Anderson also had significant prior knowledge, and I felt confident that she would also be able to evaluate the decision as to whether a particular piece of evidence would be seized or not.

Q Did Detective Anderson have the training you've described in stalking and cyber-stalking?

A Not as extensive as mine, no.

Q Has she had any?

A I think she's attended some trainings, yes.

Q Was there any limitation placed on those doing the searching by yourself with regard to the dates of documents you considered important? For example, was

the telephone bill dated 2000, the year 2000 considered important enough to be seized?

A If it had something else of evidentiary nature on it. The telephone bills were mainly to show residence and occupancy and as to who was residing there as well as if there was any other significant evidence of this crime.

Q Now, there were specific names listed in the warrant. I think Jamie Johnson, Bonnie or Jay Gould. Were there other names that you had asked people to be aware of during this search besides those three?

A That's correct.

Q Were there others?

A There were other names that I wanted them to be aware of. Should they find those names on a document, they should contact me.

Q Were any other- - Were any documents with those other names found?

A Oh, yes.

Q Those names were not included in the application for the warrant though; is that right?

A That's correct.

Q Did anyone know those names other than yourself before you conveyed it to other people helping with the search?

MR. KAISER: Objection, what's the relevance of that question. The people that matter are the people she conveyed it to. She's saying that's what she did. She conveyed those names.

MR. SCHULENBURG: Well, my concern is this, Your Honor. There is a list of names beyond those included in the application and in the warrant. And I'm probing whether there is authority to seize those other things. I don't really know if there was and what the connection is to this crime.

THE COURT: What would be the standing of Mr. Sveum to contest seizure of something not belonging to him?

MR. SCHULENBURG: Well, first, I think the District Attorney said in his brief that he is not contesting standing. It's going to - - I'm concerned if this is used against him, I don't know if it will, I'd rather see it get suppression now.

THE COURT: This is not evidentiary. You're not on discovery but I'm going to allow some latitude. And if I think you're going too far, I'll cut you off and I'm sure Mr. Kaiser will also object if you're going too far.

MR. KAISER: I didn't have a problem with him asking her what the names were. And if she needs to

refresh her recollection, I don't have a problem with that. He was asking her, who would have known those names before you told them, and that's the part I don't think is relevant. What's relevant is, who are the detectives that were there and what names did you give them?

THE COURT: And, also, how can she answer that? There is no foundation for her to answer that.

MR. KAISER: Right. So let's just leave that. I agree with that.

MR. SCHULENBURG: I think that's a sound analysis.

MR. KAISER: Thank you.

Q (By Mr. Schulenburg) What names did you tell to those who were helping with the search?

A The specific names or - -

Q Yes.

A Lynn Johnson, Jamie Johnson's sister; her boyfriend - -

Q So that's - -

A - -I wondered if there was one more. Other people who I was aware that Michael had utilized in the first case to access information about Jamie by getting their personal information. I think - - I believe, to the best of my recollection, it was only those two names, Jamie's sister and her boyfriend/husband at the time.

Q Is there a reason you did not include those names in your application for the warrant?

A Not that I can think of.

Q Did you know of them when you applied for the warrant?

A I knew that he had accessed information about those persons in the past. I, I didn't know if the searching officers would recognize the significance if that name was on a document.

MR. SCHULENBURG: Thank you. Could I have a couple moments here, Your Honor, please?

THE COURT: Yes.

MR. SCHULENBURG: Thank you.

(Pause).

MR. SCHULENBURG: I'm near the end. Thank you for allowing the time.

Q (By Mr. Schulenburg) I'd like to ask a question with regard to the computer. You heard the questions I asked earlier about the ownership of the computer. Did it come to your attention that Mr. Sveum's mother was claiming ownership of at least some of the computer equipment that had been seized?

A Yes.

Q Do you know when that came to your attention? Do your records show that? I should ask it differently. Did it come to your attention before you applied for the

warrant?

A The warrant for the residence?

Q The warrant for the computer -- the search of the Dell tower and the computer equipment.

A I can't recall specifically when that came to my attention that she was alleging that it was her computer, that would be Ms. MaryAnn Sveum.

Q Would, would some of the reports that you wrote indicate when you determined that?

A Yes, I believe I did document in a report when she either sent a letter or it came to the Department-- I believe she came to the Department and sent a letter.

Q Do you remember her doing that?

A Yes.

Q Did you speak with her directly?

A I attempted to.

Q What-- You imply by that answer that you were not able to?

A She was quite upset on the occasion that I spoke with her at the Madison Police Department and, I believe, even one time on the phone she hung up on me.

Q Was that on the same day?

A I had a couple of communications with her after the execution of the search warrant at her residence, and I, I can't tell you the exact dates of my communication.

with her in person or by phone without refreshing my recollection.

Q And your recollection still is that you're not sure if that contact with her was before or after you applied for the search warrant of the Dell tower?

A I can't recall. I believe I documented it though.

Q If it is reflected in one of your reports, would that be an accurate date?

A Yes.

MR. SCHULENBURG: All right. I have no other questions, Your Honor.

THE COURT: Is there going to be some redirect?

MR. KAISER: Yes.

THE COURT: And is it to refresh recollection with a report?

MR. KAISER: There is just a couple of other things besides that.

THE COURT: Do you need any assistance finding anything there?

MR. KAISER: I think I found what I need.

THE COURT: Okay.

REDIRECT EXAMINATION

BY MR. KAISER:

Q Detective, showing you, for purposes of refreshing your

recollection and not evidentiary really, Page 223 of the discovery. Does that refresh your recollection as to when, at all, you heard from Ms. Sveum?

A Yes. This reflects that I received a letter from Ms. Sveum about the return of the computer.

Q On what day?

A June 16th.

Q Did she ever claim to you or to anyone who reported it to you that she was the only sole user of the computer as opposed to being the person that bought it?

A As I'm sitting here and recalling, I believe it was the day the search warrant was executed or possibly the next day, Ms. Sveum came to the City-County Building -- or a couple of days thereafter, I can't tell the exact date -- demanding copies of the search warrants. And the search warrants I believe had been sealed and, again, I recall an attempt at a conversation with her in the Madison Police Department lobby area and she was quite irate. And at that time she, I believe she did indicate that the computer was her computer that we had seized.

Q Okay. But my question was, do you recall, as the best as you can recall it now, that she said to you that she's the only person that uses it and that Michael doesn't use it?

A No, I don't recall that.

Q Okay. Detective, in reference to making a decision about what, if anything, to take from the defendant's home, would it have ever been possible for you to go through almost 2,000 pages of documents to decide whether or not they were the ones, they were ones that had to do with the defendant and his stalking based on your knowledge and experience while you were at the house?

A No.

Q Okay. So based on your briefing with the detectives, what was it your expectation that they would do based on your briefing them about names, and about what was in the search warrant?

A To search for items that appeared to be located, that they located that might have this information on it.

Q All right. And did you subsequently go through many thousands of pages of documents in order to discern whether or not they related to stalking or other activities?

A Yes.

Q Including violations of probation because that was part of your investigation, wasn't it?

A That's correct.

Q For instance, if it was a condition of the defendant's

probation that he not use the computer except under very limited circumstances, then whether or not the user of the computer pertained to stalking or not, using the computer could have been a violation of probation, isn't that right?

A That's correct.

Q And you participated in eventually the defendant's revocation of his probation based on your investigation, didn't you?

A That's correct.

Q Based on your knowledge of the crime of stalking, part of the crime of stalking has to do with the level of emotional distress of a victim; isn't that correct?

A That's correct.

Q All right. And the fear that they experience as a result of the conduct towards them, isn't that right?

A That's correct.

Q All right. And that could result from - - And based on your training and experience, and based on investigating other stalking cases, that could come from something as apparently innocuous to another person as the delivery of roses to a workplace; isn't that right?

A That's correct.

Q There is no limitation on how many or how few hang-up

phone calls from anonymous phone booths a person needs to receive before they fear that the stalker is stalking them again; isn't that right?

A That's correct.

Q And you delineated in the affidavit in support of your request for the GPS device, the phone calls that came anonymously from phone booths or from this Kitts Korner place which had no other apparent source other than these were disturbing for Jamie; isn't that correct?

A That's correct.

Q You said earlier that every time you, every time the GPS device had to be replaced the car was where?

A In front of the residence at 2426 Valley Road in the driveway.

Q And this is in the middle of the night when it's dark; is that right?

A That's correct.

Q All right. And where was he supposed to be living according to what he told his probation officer?

A He was supposed to be living with his sister in Iowa County.

Q Now, not looking as a legal technician but looking as a normal person in a normal course of human events, what probable inference did you draw from the fact that the car was parked there in the middle of the night for how

many nights?

A For over two and a half weeks I had that information that at the time of the application of the search warrant the car had been there every night according to the GPS.

Q And so, therefore, about where the defendant was living, what conclusion did you come to?

A I concluded that he was residing or spending every night at his mother's house in Cross Plains.

Q Detective, I appreciate what you went through to try to remember two years ago about what Mrs. Sveum said to you. Detective Anderson stayed after her testimony and I believe has assisted us. Showing Page 154 of the discovery, does that assist you a couple paragraphs down in refreshing your recollection about what Mrs. Sveum may or may not have said and what day that happened on?

A Yes, this does.

Q Okay. What day was it?

A May 30th.

Q All right. So that's two days after you executed the search warrant?

A That's correct.

Q All right. And what did she say to you?

A She- -

Q Is this report by you? I apologize. Is this report by you by the way?

A Yes, it is.

Q All right. What did she tell you?

A She wanted a copy of the search warrant and wanted an open records request. And I had been called up there reference that request. And I advised her that the search warrants had been sealed by a Judge at this time and would not be released. And I asked her if she'd accompany me over to the detective bureau and I would answer her questions. And she said that she didn't have anything to say to me. She was very upset about the damage that had been done to her daughter's, as she described it, her daughter's room's door. And she stated she thought we copied Michael's keys, and I advised her that we had not copied his keys and that they had been placed back into his property. And I also told her that I had contacted the jail to give them a message to inform Michael of where his vehicle was located at.

Q So on that day there is nothing about the computer; is that correct?

A No.

Q It was only after the June 13 letter that you heard anything from her about the computer being hers?

A That's correct.

MR. KAISER: All right. Nothing else.

THE COURT: Mr. Schulenburg?

MR. SCHULENBURG: Just one thing.

RE-CROSS-EXAMINATION

BY MR. SCHULENBURG:

Q I think you said this already. The computer warrant was issued on June 4, isn't that right- -

A That's correct.

Q - -2003. Thank you. I have nothing else.

THE COURT: Okay. Thank you. You may step down.

(Witness excused).

MR. KAISER: Thank you, Detective. I move the remainder of the exhibits into evidence.

MR. SCHULENBURG: No objection.

THE COURT: All right. I believe everything is in evidence, 1 through 25, excluding 3 and 4. To your knowledge did you use 3 and 4?

MR. KAISER: No, I did not.

THE COURT: Did you withdraw them?

MR. KAISER: I'm asking to be allowed to withdraw them.

THE COURT: Exhibits 3 and 4 are withdrawn.

(Exhibits 18-21 and 23-25 are received).

(Exhibits 3 and 4 are withdrawn).

MR. KAISER: State rests.

THE COURT: Any evidence, Mr. Schulenburg?

MR. SCHULENBURG: No, sir.

THE COURT: I guess I'd like to hear from you first, Mr. Schulenburg.

MR. SCHULENBURG: Well, most of what I would argue is I think already in my brief. There have been some additional facts included that were not apparent when I wrote the brief, I could comment on those.

With regard to the installation of the GPS device, it is, I think, apparent from the testimony that what was necessary to install it was less than that which was authorized. They could have taken the vehicle and driven it away. My argument remains that the, it's the extent to which the authority is granted that decides whether that application and the granting of the request is constitutional. What was requested, our position is, went well beyond activity that should be allowed without a warrant first being granted.

I've already included my, the citations for that argument. But, in this case, our argument is, that because they used less, does not make that document more constitutionally acceptable. It still

authorized much more than it ought to. Secondly--

THE COURT: What if they just changed the name on the top of the affidavit and request for authorization to search warrant?

MR. SCHULENBURG: Well, if they change the name and it becomes a search warrant, then, as will be shown with the computer warrant, it has to be executed and returned within five days. They wouldn't have had to do this until 60 days were out. That's a substantial protection.

THE COURT: Okay.

MR. SCHULENBURG: We also got some testimony concerning where they were with regard to the residence when this device was installed. I asked about that because there is the concept of curtilage. And the closer you get to a residence, the more the curtilage of that residence is apparent. It was on the driveway and it was next to the garage, which makes this in terms of the Fourth Amendment, an invasion on private property. One that is, in this case, not allowed by warrant but instead by something that's not a warrant. That's why I asked those questions.

With regard to the GPS device then, the two points I make that are not included in my brief are those. That this is curtilage and that it doesn't

matter how much of the authority they had that was used, the authority that was granted was too extensive. I think my other arguments are not changed by the evidence that you've heard today. We still argue that the taint from the installation of the GPS device extends to the warrant granted for the search of the residence and to the warrant granted for the search of the computer. Those are two different warrants.

In addition, I don't count days the way Mr. Kaiser does in trying to reach the five-day limit at which a return of a warrant has to be made. I think, at least there is no dispute about the proposition that the computer warrant was issued on the 4th of June and the return was on June 10th. Mr. Kaiser says that from June 5 to June 10, that's five days. But I, I don't count them that way. If you count the 4th, the 5th day is June 8th. If you go to the 5th, the 5th day is June 9th. I don't see how you don't count either the 4th when the day, it's the day it's issued and the day it's returned, on the 10th. Those are countable days. I think my other arguments are in the brief and I'd be repeating myself.

THE COURT: Okay. Thank you. Mr. Kaiser?

MR. KAISER: Thank you, Your Honor. Working backwards, counting has never been my specialty. I've

had juries correct me. So I need to look things up when I'm counting. So what I looked up was, 990.001(4)(b) and (c). This is a cite from *State v. Edwards*, which I cited in my brief, which tells us that the day of the signing of the warrant does not count towards the five days.

So aside from that case, which says that the five days doesn't start running until the 5th, what these two statutes tell us, (b) tells us that the day, "that if the last day when an act is done or has to be done falls on a Sunday, the act may be done or the proceeding had or taken on the next secular day." So we know at least one of the days between June 6 and June 10 was a Sunday so there is one day eliminated right there which puts us back to the five days required. But, in addition, (c) tells us that, "When the last day in which the proceeding is to be had or the return filed," and it specifically uses the word return, "is a Saturday, then the proceeding may be taken or the act done the next succeeding day that is not a Sunday or a legal holiday." So by eliminating Saturday and Sunday, that gets us to Wednesday and we issued the return on Tuesday.

One of the requirements in regards to Saturdays is that the duly established office hours are

not in effect on that day and that's true here. I asked-- I suppose-- Well, I never thought to ask the court to take judicial notice during the evidentiary portion that our court clerk's office is not open on a Saturday, but I think you can probably opine as to that when you issue your ruling assuming that you rule in my favor. If you don't, then I guess it doesn't matter. So I think that between *Edwards* and the statutes, that from June 6, which would have put 48 hours on a weekend for the return, that that gets us to Tuesday.

And, again, because *Edwards* says, this is not a matter of something that is counted by hours-- *Edwards* specifically said, this is not about counting hours. This is about counting days. And so I believe that, that between *Edwards* and the statute, that we've complied with both the five-day rule as well as the 48-hour rule. In regards--

THE COURT: Point me to search warrant. I'm having difficulty finding it in the statute.

MR. KAISER: 968--

THE COURT: Got it. Okay. Thanks.

MR. KAISER: And it's two different provisions in that regard. One of the provisions is that the-- 968.15 says, "A warrant must be executed

and returned not more than five days after the date of issuance." And that's the question which demonstrates that it doesn't count the fourth which is the day that the warrant was signed by the Judge. The five days starts running on the fifth according to *Edwards*.

And then the second portion that's relevant is 968.17 which says, "The return shall be made within 48 hours after execution." And what the testimony shows, is that the execution began on June 6th which would have put the end of the 48 hours on Sunday and that that, so Saturday and Sunday don't count and it's within the five days to then return it according to the statute by Tuesday.

I believe that the search warrants provided an adequate basis for the seizure of the documents. And I think one of the comments that I want to make at this point, Judge, and I didn't make in my brief because there was no evidence, is I have six volumes of papers here. I have three other boxes. We have other physical evidence downstairs. I was wondering as we went into the briefs and came into today's proceeding, what exactly it is that he's asking to be suppressed. The only inference I can draw from the evidence that's been presented on today's date in the cross-examination, is that the defense is asking

you to find that if you believe, and it would be purely speculation on your part because there is no evidence of this, that if you believe that some pieces of paper out of the thousands of pieces of paper that were taken from the house that Detective Ricksecker went through, and kept and have been enumerated, as many have been demonstrated on the record today, that if any of those pieces of paper somehow don't pertain to Michael Sveum and crimes or violations of probation, that, therefore, you should quash the warrant and declare that all things seized as a result of that search warrant should be suppressed. There is no case law to support that. And, there is no list of evidence given to you of what they say was illegally seized which puts us back to the question of probable cause to search.

And unless the court has some specific questions about the affidavit, I believe that the record here shows without any problem at all, that looking at the probable cause portion of the affidavit in support of these search warrants, that one finds probable cause to believe that these residences contained evidence of a crime.

The one, if he was actually living there, would have. He wasn't. Which is further evidence of the fact that the one that did have all of

his stuff in it, contains evidence of a crime because he is lying to his probation officer in the first place about where he is living, and that was in the search warrant for the Cross Plains address. Why would you lie to your probation officer? Why would you disobey your probation officer about where you're supposed to be living if you're not trying to hide evidence of a crime in the place where you are living? That, by itself, provides probable cause to search. So I believe there is probable cause and that we should be able to admit into evidence anything we seized as a result of that search warrant.

Which backs us up to the question of the use of the GPS device. First of all, what we spread of record today is that the agents who routinely did these as a matter of course, used these affidavits and orders to carry it out. It was their belief that that was the law, and Detective Ricksecker took their advice and operated on that belief.

Subsequently we've had an opportunity as a result of this litigation to do the research which I've presented to you. And I think that the question that you put to counsel is exactly the question that must have never been asked in Oregon and Washington, Judge. Somebody must have never bothered to ask them,

if we make it a search warrant, what exactly is it, what thing is it, because people are to be secure in their property and their places. Okay? So what thing is that that we're searching for? That's why a search warrant is not appropriate.

Because, as counsel pointed out, if it's a search warrant, they've got to return it within five days which totally defeats the purpose of the device. He could have not gone to a phone booth for five days. Now the search warrant has to be returned. And then on the sixth day he goes to a phone booth, not because the GPS device is on the car, but because that's what he chose to do. That was his pattern of conduct. He wasn't- - He had to work for five days, whatever it is. So that's why using a search warrant to engage in the activity that we engaged in here makes no sense.

The New York case I cited to you makes much more sense. The Maryland case I cited to you makes much more sense. Maryland says, we never need to go to the question of whether or not a search warrant was needed because what we did was we executed a probable cause affidavit to carry out this non search.

And what I want to emphasize to the court, is this is not a search. Even when we're installing the device on the curtilage outside of the

house, this is not a search. Nothing is seized. The defendant is not deprived of any property. He is in no way deprived of the use of his property. And, in fact, we're hoping he'll use it just like he always used it as Detective Ricksecker testified. So this is not a search. This is not a seizure. Counsel is claiming a seizure was authorized. A seizure only long enough to return the car so that it could be continued to be used in the manner it's normally intended to be used. So it's not a search. It's not a seizure.

A search warrant should not be required and I claim you don't even have to reach the question because an adequate probable cause affidavit was presented to Judge Callaway to justify more than the actions the police took here in order to be able to discover the defendant's activities, which activities were probably going to be activities engaging in stalking of Jamie Johnson. And, as long as that was probably true, we have met the requirements of any perception of an invasion of privacy if that's the analysis, of a Fourth Amendment analysis. We have justified our action to an independent magistrate.

And when we go all the way back to *Coolidge v. New Hampshire*, that's all the court is looking for, is does an independent magistrate make a

determination of probable cause? That happened here. You can find, based on that affidavit, that Judge Callaway had an adequate basis to find probable cause to believe that this had been going on. There is a pattern of conduct. Detective Ricksecker explains her expertise in the affidavit. And we believe the affidavit is adequate, that it forms an adequate basis for the search warrant and that the search warrant forms an adequate basis for the seizure. That that seizure of the computer was supported by additional probable cause discovered during the execution of the search warrant at the home such as the search engines, and that that execution of that search warrant on the computer was timely. I ask you to deny all the motions.

THE COURT: Anything further,

Mr. Schulenburg?

MR. SCHULENBURG: I would largely be repeating myself, although we did say that, aside from the GPS unit, there are deficiencies in the application for the search of the residence including there was no time limit at all set on the kinds of documents that would be relevant, that the last known violation by Mr. Sveum was many years before that. I understand he was in prison for most of that time. But still, there

are other objections as well. Still, beyond that, I'd be repeating myself.

If the GPS unit stands, then there are other analyses necessary. If it doesn't, it taints everything else. That's really our argument.

THE COURT: And assuming the GPS affidavit is good, how does that affect your position? Do you still think the search warrant for the residence is invalid?

MR. SCHULENBURG: Yes. There is an interesting opinion by Justice Scalia. It doesn't really, it's not on point exactly, but it was interesting to see that Justice Scalia, of all justices on that court, decided that thermal imaging of a residence was a Fourth Amendment violation. Of course this isn't that. But he had an interesting footnote as well beginning to describe the kinds of devices available to law enforcement that encroach on privacy interests. Again, he didn't speak about this one, but he spoke in a way I wouldn't expect him to speak about other devices that law enforcement uses. He was alarmed.

THE COURT: Is that the justice that went duck hunting in Louisiana with a party that had a case before the Supreme Court?

MR. SCHULENBURG: Yes, but he attached no

thermal imaging devices to ducks and, therefore, whatever he bagged was sportsmanlike.

THE COURT: All right. Thank you. There were other motions that had been made previously by Mr. Sveum, largely regarding trial issues I believe, and I think the motions to suppress all pretty much flowed from the same core activities as well as, which I think is a part of this as well, and that is the claim that the affidavit, and I think you alluded to that, for the GPS, that there was either material misstatements or that there was material omissions that should have been considered by the issuing Judge.

Starting at that point, I reviewed the affidavit to obtain the GPS as a whole and then I reviewed it with the statements redacted which would have been the statements that Johnson was receiving hang-ups during the course of the criminal behavior which ceased upon him being incarcerated for two hours. After Sveum was released on bail from the Dane County Jail on 7/8/96, she reported hang-up calls. There is argument made that that's a material misstatement. So I considered the affidavit without that. And I consider it as well if we had added on the information which you brought out that, well, you didn't, other than in the brief or in the original motion, that there

was a conversation with Bonnie Gould about a person named Tiffany who obtained the telephone number, and that there were two out-of-state calls placed and that there were calls, hang-ups when Mr. Sveum was in custody that should have been added and that would have made the affidavit insufficient.

The affidavit on its face establishes the affiant, Detective Ricksecker's, background; experience, and to a certain extent knowledge in this case. That includes her information concerning Mr. Sveum and his history going back to the violation of the domestic abuse injunction in December of '94 where Ms. Johnson was the victim. The fact that there was a conviction there. There was a subsequent conviction for another domestic abuse injunction where Johnson was the victim involving hang-up calls. And in '96 there was the conviction for stalking as well as the domestic abuse injunction violation. Again, Ms. Johnson was the victim.

Between '96 and July of 2002, Mr. Sveum was incarcerated. Subsequent to his release, he was employed in the Madison -- in Madison and living in the Madison area but not in Madison, and that Ms. Johnson did report to the detective that she was now receiving hang-up calls. Her telephone server was TDS and TDS

records indicated that the hang-up calls were made from six different locations around the west side of Madison, from six different locations separate, one from the other.

It's also established in the affidavit that the defendant was the primary user or driver of the Beretta. That the license number on the Beretta was registered to him. That he was residing, in all probability, where the Beretta had been parked and that the affiant was relying on stated and good case law from the United States Supreme Court as well as statutory provisions in the Wisconsin Statutes. From that she concluded there was probable cause.

Probable cause, I think the law would indicate, must excite an honest belief in a reasonable mind that something exists and that that something is linked with the commission of a crime. This is-- The court's have traditionally, the appellate courts have taken a differential standard when looking at the issuing Judge's finding of probable cause, and have suggested to the courts that an affidavit should be interpreted in a common sense rather than a hypertechical manner.

And, further, according to the Chief Justice, probable cause for a search warrant, and this

is most akin to a search warrant, is less than that required for bind over at a preliminary hearing. And that requirement is a reasonable inference of probability or a belief or a plausible account. Considering the omissions, let's assume those were placed in the affidavit, and considering the case law as I've just indicated that I believe it is in assessing probable cause at a preliminary hearing, even if there is contrary but believable evidence supporting the defendant's position, the court can't weigh the State's case against that evidence favorable to the defendant. I think even with, without the statement that I've dictated or including the other pieces of information, that that affidavit was sufficient to obtain the order.

I don't think-- Based upon the cases that were cited that I've read, and that is all of the cases contained in both briefs, I'm coming down on the side that holds that because the car is operated on a public road and while it's being operated on a public road, there is no expectation of privacy, and that the cases have held that information obtained or gained through GPS tracking could have been obtained by regular police surveillance.

The GPS has been interpreted as a tool

used to assist the law enforcement officers in their duties. And I find this case is more like the *Berry* case and that it is permitted in light of the cases of *Knotts* and *Karo*, K-A-R-O. I do not find that there is sufficient evidence for me to find that going into the driveway, as has been testified to, is - - I can't even determine that that's the curtilage. I don't know whether there was anything standing between the public thoroughfares and the driveway and the location of the vehicle.

Nothing in the record suggests that this would be a violation of curtilage, finding the affidavit is appropriate for the obtaining of the GPS tracking. And finding, furthermore, that this was not a search, it was not an invasion, it wasn't an entry into the vehicle. It was much less than that. I am satisfied that's permissible. I'm, furthermore, satisfied that the *Jackson* holding is distinguishable. Because I believe in *Jackson* that state's constitution was read by the courts to protect in a greater sense than the United States Constitution does. Our courts have not found that. I do not believe there is a Wisconsin case that indicates that Wisconsin views the Fourth Amendment or the Wisconsin constitutional counterpart more extensively.

As a matter of fact, I think the case law says that we view our statute or our constitutional provisions the same as the United States Constitution and that we rely on federal case law in that regard.

Finding that the GPS was appropriate and the information obtained from it was appropriate, I'll find that the search warrants for the residence and the house were also appropriate. I think the statute, 968.15 and 968.17, possibly could use some clarification. I think one could make an argument that a search warrant must be executed within the time permitted, that's five days, and that once it's executed, the return must be made within 48 hours after that.

In any event, the record indicates the search warrant for the computer was executed on the 6th and the, I believe the return was filed on the 10th. Was that the evidence?

MR. KAISER: Yes.

THE COURT: So I do find that it was executed within the time limit and that it was, the return was filed within the time limit. It might be an interesting question for an appellate court, but I don't think it controls at this point for my decision-making purposes. I'm denying the motions. Where are

we at now? Do we have a trial date on this?

MR. KAISER: No, we don't have one set yet, Judge.

THE COURT: What's the next step that we need to do?

MR. KAISER: Assuming that, and it's my understanding from the court's comments before the argument, that we're not going to litigate the other motions that were previously filed not by counsel. Then, my position would be that, for the court's scheduling purposes, in that we will need a fairly substantial amount of trial time to go through this history of the defendant and the victim as well as present the incriminating evidence that was discovered in his house. That we would probably need a week for the trial. In other words, if we pick the jury on Monday, we would need Tuesday through Friday to try the case.

THE COURT: One week?

MR. KAISER: Yes.

THE COURT: Do you concur, Mr. Schulenburg?

MR. SCHULENBURG: I don't know yet. I've - - My appointment so far I think was to - - I'm not sure what my appointment was. It certainly was to address some of the issues raised by Mr. Sveum. Others I think

still remain. I didn't brief all of them because there were many. If my appointment includes representing him at trial, I certainly don't object to that.

THE COURT: My- -

MR. SCHULENBURG: I don't have a feeling for how long it would take though.

THE COURT: My appointment of you was a full appointment- -

MR. SCHULENBURG: All right.

THE COURT: - -for the duration. And it was my impression that because Mr. Sveum is a layman, although he appears to be an intelligent person, he is untrained in the law. I wanted him to have not only the benefit of having an experienced, competent defense attorney, but I also, for the efficient use of the court's time and so on, appointed you so that there is legal counsel to avoid the sorts of delays that are inherent when a person is acting pro se. And it was my intent, my understanding that you would review the motions on file and pursue those that you felt were worthy of pursuit.

MR. SCHULENBURG: I pursued those that I, that I thought were most worthy. That is, I briefed those. I have not reviewed the rest of his motions and discussed with him the extent to which we will

expressly waive them. I haven't done that, Judge.

THE COURT: Well, I had numbered the motions and talked about them at one point, and I'm going to do that, again, briefly. Motion No. 1 was to be unrestrained. Well, that's, that's a trial issue and I don't anticipate there will be any problem because there is the belt and whatever we need that's unobtrusive. So I don't think that's an issue.

Motion No. 2 was the motion to dismiss. That's one you may want to pursue or not. That is the interrelationship of the stalking statute as it relates to the facts in this case.

MR. SCHULENBURG: That we wish to pursue.

THE COURT: All right. No. 3, is the motion to sequester witnesses. Again, that's a trial issue. That will be granted.

No. 4, is a motion for the *Franks* hearing which I think we've just had and that's denied.

No. 5, is a motion to suppress. This goes to the GPS. That's denied.

Motion 6, is a motion to suppress, I believe, involving the motorcycle.

MR. SCHULENBURG: That was I think the issue of the ski mask and the seizure of it by his agent.

THE COURT: All right. Are you intending to

pursue that?

MR. SCHULENBURG: I would like some time to consider it. I'm not prepared to waive that yet.

THE COURT: No. - - That was No. 6. Well, I've got two left and that's an 8 and a 9. I have another motion to suppress, that's the premises. That would be denied. And a motion to produce, that's a, basically a discovery issue, and I'll leave it up to counsel to let me know whether or not you believe there is any issue there.

So, as I see it, there is a motion to dismiss based on the statute and its amendment during the times and a motion to suppress relating to the ski mask and the agent's actions. Actually No. 7 was the *Franks* motion so I have accounted for all of them. All right. And Colleen is in here now with the book and counsel believe that at least preliminarily we can have a pick and go for one week.

MR. SCHULENBURG: I know less about the case than Mr. Kaiser. I have no objection to the estimate of one week, however, I have not begun to immerse myself in this case and, therefore, will need time to do that.

MR. KAISER: Judge, the other question I would ask is if we could start the trial on a Tuesday

rather than a Monday afternoon.

THE COURT: That could possibly include a Saturday.

MR. KAISER: I understand.

THE COURT: Any problems with working on Saturday?

MR. KAISER: No.

THE COURT: Okay.

MR. SCHULENBURG: Define working, please.

THE COURT: I meant from any religious perspective.

MR. KAISER: No. Thank you for asking though. I appreciate that.

THE COURT: We'll need some time in case there are any motions filed.

THE CLERK: The week of May 2nd or the 1st.

THE COURT: The week of May 1st?

MR. KAISER: That should be fine.

MR. SCHULENBURG: So far I'm free.

THE COURT: Mr. Sveum, what is your sentence structure right now?

MR. SVEUM: I got all the time in the world.

THE COURT: You're not going anywhere?

MR. SVEUM: Unless the Court of Appeals shows me some love.

THE COURT: Okay. You have something pending in the Court of Appeals?

MR. SVEUM: I just filed a notice of appeal but, it will be pending.

THE COURT: From the revocation?

MR. SVEUM: From the writ of habeas corpus on the original '96 case.

THE COURT: Okay. Well, that doesn't involve me at this point.

MR. SVEUM: No.

MR. SCHULENBURG: This is a pick and go on that Monday?

THE COURT: No, it would be pick- - I guess if it's possible, I would like you to do openings on that day. But we'll see what happens. Mr. Kaiser is requesting to start on Tuesday. As long as we don't waste court time.

MR. KAISER: I understand that, Judge.

THE COURT: Thank you. We're adjourned.

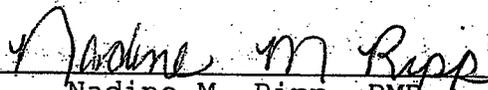
MR. KAISER: Thank you.

(Off the record at 12:00).

\*\*\*

STATE OF WISCONSIN )  
 ) SS  
COUNTY OF DANE )

I, Nadine M. Ripp, a Circuit Court Reporter, do hereby certify that I reported the foregoing proceedings; that the same is true and correct as reflected by my original machine shorthand notes, consisting of 114 pages, taken at said time and place before the Honorable Steven D. Ebert, a Circuit Court Judge presiding in and for the County of Dane, State of Wisconsin.

  
Nadine M. Ripp, RMR  
Official Court Reporter

Dated at Madison, Wisconsin, this 29th day of November, 2005.

The foregoing certification of this transcript does not apply to any reproduction of the same by any means unless under the direct control and/or direction of the certifying reporter.

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 4

COUNTY OF DANE

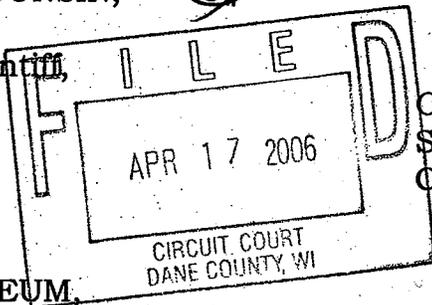
STATE OF WISCONSIN,

Plaintiff,

-vs-

MICHAEL A. SVEUM,

Defendant.



ORDER DENYING  
SUPPRESSION RELIEF  
Case No. 03 CF 1783

IT IS HEREBY ORDERED that the suppression relief, sought by the defendant and considered in a motion hearing held on November 4, 2005, is denied.

BY THE COURT:

Hon. Steven Ebert  
Circuit Court Judge-Branch 4

Dated this 16 day of April, 2006.

46-1

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STATE OF WISCONSIN  
IN SUPREME COURT

**CLERK OF SUPREME COURT  
OF WISCONSIN**

—  
No. 2008AP658-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL A. SVEUM,

Defendant-Appellant-Petitioner.

---

ON REVIEW OF A DECISION OF THE WISCONSIN  
COURT OF APPEALS, DISTRICT IV, AFFIRMING A  
JUDGMENT OF CONVICTION AND AN ORDER  
DENYING POSTCONVICTION RELIEF, ENTERED IN  
THE CIRCUIT COURT FOR DANE COUNTY,  
HONORABLE STEVEN D. EBERT, PRESIDING

---

BRIEF AND APPENDIX OF  
PLAINTIFF-RESPONDENT

---

J.B. VAN HOLLEN  
Attorney General

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

Attorneys for Plaintiff-Respondent

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

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STATE OF WISCONSIN  
IN SUPREME COURT

—  
No. 2008AP658-CR

---

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL A. SVEUM,

Defendant-Appellant-Petitioner.

---

ON REVIEW OF A DECISION OF THE WISCONSIN  
COURT OF APPEALS, DISTRICT IV, AFFIRMING A  
JUDGMENT OF CONVICTION AND AN ORDER  
DENYING POSTCONVICTION RELIEF, ENTERED IN  
THE CIRCUIT COURT FOR DANE COUNTY,  
HONORABLE STEVEN D. EBERT, PRESIDING

---

BRIEF AND OF PLAINTIFF-RESPONDENT

---

ISSUE PRESENTED

Did police violate the Fourth Amendment when they magnetically attached a battery-operated Global Positioning System (GPS) device to the undercarriage of Sveum's car pursuant to a warrant issued by a circuit judge while Sveum's car was parked in his driveway?

A circuit judge issued a warrant on probable cause authorizing the attachment of the battery-powered GPS device to the undercarriage of Sveum's car. The trial court

concluded at the pretrial suppression hearing that the attachment of the GPS device to the exterior of Sveum's car did not violate the Fourth Amendment because: (1) there was no "search or seizure" and Sveum did not have a reasonable expectation of privacy in the information provided by the GPS device, that being the location of his car on public roads; (2) in the alternative, attachment of the GPS device to the exterior of Sveum's car comported with the Fourth Amendment because it was authorized by a warrant issued by a judge on probable cause to believe Sveum was using his car to stalk his ex-girlfriend.

The court of appeals affirmed. It agreed with the circuit court that police attachment of the GPS device to the undercarriage of Sveum's car, and the information obtained from it as to the whereabouts of Sveum's car on the public roads, did not violate the Fourth Amendment because there was no "search or seizure." Having so concluded, the court of appeals did not reach the issue whether the warrant authorizing attachment of the GPS device to Sveum's car was valid.

#### POSITION OR ORAL ARGUMENT AND PUBLICATION

The state assumes that, in granting review, this court has determined the case is appropriate for both oral argument and publication. The state agrees.

#### STATEMENT OF THE CASE

Sveum and his sister, Renee Sveum, were both charged with stalking one Jamie Johnson between September 22, 1999 and May 27, 2003, as parties to the crime, in violation of Wis. Stat. §§ 940.32(3)(b) and 939.05 (9). Renee Sveum eventually entered into negotiations with the state and agreed to testify against her brother in exchange for having the stalking charge against her dismissed if she successfully completed a first of-

fender's program (120:107). After a trial held October 9 through 12, 2006, a Dane County jury returned a verdict finding Sveum guilty as charged of stalking his ex-girlfriend Johnson as party to the crime (68; 122:66-67).

Sveum was sentenced to the maximum 12 1/2-year term for this offense consisting of 7 1/2 years of initial confinement in prison, followed by 5 years of extended supervision, consecutive to any other time being served (123:25-26).

This is not Sveum's first stalking conviction. He was convicted in 1996 of stalking the same victim, Jamie Johnson. After a jury trial held October 8 and 9, 1996, Sveum was convicted of stalking Johnson in violation of Wis. Stat. § 940.32(2), (2m) (1:2). Sveum was also convicted at that time of related charges of harassment, violating a harassment injunction, and criminal damage to property, also involving Johnson. Sveum was sentenced November 5, 1996, to three consecutive, three-year prison terms for harassment, violating the harassment injunction order and criminal damage to property. With regard to the stalking conviction, the trial court imposed an eleven-year term of probation. Sveum remained in confinement for the first three offenses from November 5, 1996, until his mandatory release date of July 2, 2002 (1:2, 6). Sveum remained on probation for the stalking conviction after his release.<sup>1</sup>

The complaint in this case alleged that Sveum and his sister, Renee, acting as parties to the crime, began to stalk Johnson anew beginning in September of 1999 while Sveum was still in prison for his 1996 convictions and continued after his release until his arrest on May 27, 2003 (1:2-8). Because Sveum had been convicted of stalking Johnson in 1996, less than seven years before the stalking began anew in 1999, the state charged him for the aggra-

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<sup>1</sup>Sveum was also convicted of felony bail jumping July 29, 1991, apparently involving another victim. See *State v. Sveum*, 2002 WI App 105, ¶ 1 n.2, 254 Wis. 2d 868, 648 N.W.2d 496.

vated form of stalking the same victim within seven years of the previous conviction, in violation of § 940.32(3)(b).

Sveum filed several pretrial suppression motions. They challenged the legality of the court order authorizing installation of a GPS device on his car, and the subsequent searches of two residences where police had reason to believe he was staying. The trial court held a pretrial evidentiary hearing November 4, 2005. The trial court denied the suppression motions at the close of that hearing (116:102-07; A-Ap. 107-12).

Sveum filed several motions for direct postconviction relief (93-96). Both Sveum and the state filed a number of briefs and memoranda in support of the motions (104-109). The trial court rejected all of the postconviction motions in a Decision and Order issued February 20, 2008 (113). The court specifically rejected Sveum's only argument concerning the GPS device: that it was not a "tracking device" and therefore came within the scope of the Wisconsin Electronic Surveillance Control Law (113:15-16).

Sveum appealed (114) from the judgment of conviction (81), as amended October 8, 2007 (101), and from the decision and order denying direct postconviction relief February 20, 2008, entered in the Circuit Court for Dane County, the Honorable Steven D. Ebert presiding (113). The court of appeals, District IV, affirmed in an opinion issued May 7, 2009. *State v. Sveum*, 2009 WI App 81, 319 Wis. 2d 498, 769 N.W.2d 53; R-Ap. 101-27. The court agreed with the state that the Fourth Amendment was not implicated because no search or seizure occurred when police attached the GPS device to the undercarriage of Sveum's car while it was parked in his driveway, thereby allowing police to monitor the car's movement on the public roads. 319 Wis. 2d 498, ¶¶ 6-15, 19; R-Ap. 105-09, 110, at ¶¶ 6-15, 19.

Sveum filed a *pro se* petition for review. In it, he challenged the attachment of the GPS device on both

Fourth Amendment grounds and under the Wisconsin Electronic Surveillance Control Law.<sup>2</sup> This court granted review October 13, 2009, and appointed counsel for Sveum.

Additional relevant facts will be developed and discussed in the Argument to follow.

## ARGUMENT

SVEUM FAILED TO PROVE A FOURTH AMENDMENT VIOLATION BECAUSE ATTACHMENT OF THE GPS DEVICE TO THE UNDERCARRIAGE OF HIS CAR: (1) INVOLVED NEITHER A "SEIZURE" NOR A "SEARCH"; AND (2) IT WAS JUDICIALLY AUTHORIZED BY WARRANT BASED UPON PROBABLE CAUSE.

- A. Statement of facts relevant to the Fourth Amendment challenge.

On April 22, 2003, Madison Police Detective Ricksecker applied for judicial authorization to install a Global Positioning System (GPS) device on Sveum's automobile for a period of time not to exceed sixty days (40:21-24; A-Ap. 1-4). The affidavit in support of the request for judicial authorization described in great detail the facts that provided probable cause to believe Sveum had been stalking Johnson at least since March 3, 2003, shortly after his release from prison, and that he had been using his automobile to assist in his stalking of her on

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<sup>2</sup>Sveum's attorney has informed this court that he believes the challenge under the Electronic Surveillance Control Law lacks merit. He is, therefore, only pursuing the Fourth Amendment challenge. Sveum's brief at 31-32.

many of those occasions (40:21-23; A-Ap. 1-3). This, the detective alleged, necessitated the installation of a GPS device on Sveum's car to track its movements (40:23-24; A-Ap. 3-4). After detailing the probable cause to support installation of the tracking device on Sveum's car (40:21-22; A-Ap. 1-2), the affidavit alleged the following with regard to the GPS device:

Your affiant states that the Global Positioning System (GPS) tracking device, which is covertly placed on a criminal suspect's automobile, is equipped with a radio satellite receiver, which, when programmed, periodically records, at specified times, the latitude, the longitude, date and time of readings and stores these readings until they are downloaded to a computer interface unit and overlaid on a computerized compact disc mapping program for analysis.

(40:23; A-Ap. 3.)

The affidavit went on to allege:

Your affiant believes that the installation of the Global Positioning System (GPS) tracking device has been shown to be a successful supplement to visual surveillance of the vehicle due to the inherent risks of detection of manual, visual surveillance by the target of law enforcement personnel. The Global Positioning System (GPS) tracking device lessens the risk of visual detection by the suspect and is generally considered more reliable since visual surveillance often results in the loss of sight of the Target Vehicle.

(40:23-24; A-Ap. 3-4.)

Dane County Circuit Judge Callaway issued an order the same day, April 22, 2003, authorizing installation of the GPS device on Sveum's Chevy Beretta for not more than sixty days (116:31; 40:25-26; A-Ap. 5-6). Judge Callaway found, "there is probable cause to believe that the installation of a tracking device in the below listed vehicle is relevant to an on-going criminal investigation and that the vehicle is being used in the commission of a

crime of stalking, contrary to Chapter 940.32 of the Wisconsin Statutes" (40:25; A-Ap. 5).

Pursuant to that judicial authorization, police magnetically attached the GPS device to the undercarriage of Sveum's black 1990 Chevy Beretta parked in the driveway of his mother's home at 2426 Valley Street in Cross Plains, in the early morning hours of April 23, 2003 (116:42-43). The car was registered to Sveum, and it was parked at the Valley Street residence where he was believed to be staying (116:39-40, 86-87). The device was powered by its own battery and no power was taken from the car to run it. Nor did the car need to be moved or opened up to install the device (116:43-44). The device also did not intercept conversations of anyone inside or outside the car; it simply tracked the whereabouts of the car (116:44). Because the battery life is only 14-21 days, police attached a new device in the identical fashion at the same location two weeks later (116:45-46, 72, 74). Police then downloaded the information stored on the first GPS device into a computer program that was provided by the Wisconsin Department of Justice's Division of Criminal Investigation (116:46-47). The GPS device was replaced in the same fashion a second time, and that device was removed May 27, 2003 (116:47). So, a GPS device was attached to Sveum's car for a little more than one month – April 23 to May 27, 2003.

The GPS devices provided police with information that helped them establish probable cause to support search warrants for the Valley Street residence as well as for the computer police found there in Sveum's bedroom (116:48, 51-52, 57-62, 89).

At the close of the pretrial hearing held November 4, 2005, the trial court denied the suppression motions challenging both the attachment of the GPS device to Sveum's car, and the subsequent searches of his two residences (116:102-07). The court held as follows: (1) judicial authorization to attach the GPS device was supported by probable cause as alleged in the affidavit

(116:103-05); (2) attachment of the GPS device was, in any event, lawful because Sveum had no reasonable expectation of privacy in the location of his car on the public roads (116:105-06); and (3) the subsequent searches of the Cross Plains residence and the computer found therein pursuant to warrant were reasonable (116:107).

The trial court issued a written order denying the suppression motion April 16, 2006 (46).<sup>3</sup>

At the postconviction stage, Sveum filed another challenge to the attachment of the GPS device to his car as being in violation of the Wisconsin Electronic Surveillance Control Law (WESCL) (40:6-10). The state opposed the motion, arguing that there was no reasonable expectation of privacy in his car's whereabouts on public roads. In any event, the state argued, attachment of the GPS device was reasonable because it was judicially authorized on probable cause (41:1-14). The state argued that the subsequent warranted search of the Valley Street residence was reasonable (41:15-22). The trial court issued a decision and order denying postconviction relief February 20, 2008 (113). The court held that attachment of the GPS tracking device to Sveum's car did not violate the WESCL (113:15-16).

As noted above, the court of appeals affirmed May 7, 2009. It agreed with the state that the Fourth Amendment was not implicated because no search or seizure was occasioned by attaching the magnetic GPS tracking device to the undercarriage of Sveum's car while it was parked in his driveway.

Accordingly, we conclude that no Fourth Amendment search or seizure occurs when police

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<sup>3</sup>Sveum had also filed a petition in the court of appeals for leave to appeal the pretrial order denying his suppression motion. Leave to appeal was denied due to Sveum's failure to satisfy the criteria for a permissive appeal May 16, 2006 (50).

attach a GPS device to the outside of a vehicle while it is in a place accessible to the public and then use that device to track the vehicle while it is in public view. Because this case does not involve tracking information on the movement of Sveum's car within a place protected by the Fourth Amendment, it follows that the circuit court correctly rejected Sveum's Fourth Amendment suppression argument.

*State v. Sveum*, 319 Wis. 2d 498, ¶ 19; R-Ap. 110, at ¶ 19.

Having concluded that the Fourth Amendment was not implicated, the court did not address the separate issue whether the warrant authorizing attachment of the GPS device to Sveum's car was valid and/or supported by probable cause. *See id.*, at ¶ 6 ("[Sveum] argues that the warrant authorizing police to place the GPS device on his car was overly broad. . . . Because we agree with the State that no Fourth Amendment search or seizure occurred, we do not address Sveum's warrant argument") (footnote omitted).

B. The applicable law and standard for review with respect to Sveum's Fourth Amendment challenge.

As the proponent of the suppression motion, Sveum bore the burden of proof in the trial court that his Fourth Amendment rights were violated. *State v. LaCount*, 2008 WI 59, ¶ 37, 310 Wis. 2d 85, 750 N.W.2d 780. This court reviews *de novo* the trial court's determination that there was no Fourth Amendment violation. *Id.* at ¶ 34. Although review is *de novo*, this court benefits from the trial court's analysis. *Id.*

The Fourth Amendment protects against unreasonable searches and seizures. Its applicability, however, depends on whether the person invoking its protection can claim a reasonable expectation of privacy "that has been invaded by government action." *Smith v. Maryland*, 442 U.S. 735, 740 (1979). Sveum bore the

burden of proving he had a reasonable expectation of privacy in the movement of his car on public thoroughfares. *See Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980); *State v. Trecroci*, 2001 WI App 126, ¶ 26, 246 Wis. 2d 261, 630 N.W.2d 555.<sup>4</sup>

There is no "search" under the Fourth Amendment unless the individual manifests a subjective expectation of privacy in the object of the search that is also an expectation society is prepared to recognize as reasonable. *See Kyllo v. United States*, 533 U.S. 27, 33 (2001); *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

*Katz v. United States*, 389 U.S. at 351.

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<sup>4</sup>Sveum argues that he should not have had the burden of proving at trial that his Fourth Amendment rights were implicated. Sveum's brief at 15. He is incorrect. Sveum must make the threshold showing that the Fourth Amendment was implicated. *See United States v. Villegas*, 495 F.3d 761, 767 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 939 (2008) (defendant bears burden of proving legitimate expectation of privacy in the area searched). If he proved the Fourth Amendment was implicated, the burden would then have shifted to the state to prove the search and seizure was reasonable *had this been a warrantless search*.

Even assuming Sveum had proven in the trial court there was a "search" and "seizure" here, the burden of proof would have stayed with him because this search and seizure was conducted pursuant to a warrant issued by a circuit judge on probable cause (40:25-26; 116:31). *See* discussion at D., *infra*. The trial court ruled at the suppression hearing, in the alternative to its ruling that the Fourth Amendment was not implicated, that Sveum failed to prove the warrant was invalid as not being supported by probable cause (116:103-05). In any event, the state will now take it upon itself to prove that the Fourth Amendment was not implicated here.

A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.

*United States v. Knotts*, 460 U.S. 276, 281 (1983).

Of course the amendment cannot sensibly be read to mean that police shall be no more efficient in the twenty-first century than they were in the eighteenth. *United States v. Knotts*, *supra*, 460 U.S. at 283-84, 103 S.Ct. 1081.

*United States v. Garcia*, 474 F.3d 994, 998 (7th Cir.), *cert. denied*, 552 U.S. 883 (2007).

C. Police attachment of the GPS device to the undercarriage of Sveum's car while it was parked in his mother's driveway involved neither a "seizure" of his car nor a "search" with regard to the movement of that car on public thoroughfares.

But, of course the presumption in favor of requiring a warrant, or for that matter the overarching requirement of reasonableness, does not come into play unless there is a search or seizure within the meaning of the Fourth Amendment.

*United States v. Garcia*, 474 F.3d at 996.

"A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A 'seizure' of property occurs where there is some meaningful interference with an individual's possessory interests in that property."

*Soldal v. Cook County*, 506 U.S. 56, 63 (1992) (quoted source omitted).

## 1. The GPS technology.

GPS devices are powered by one of two methods. A GPS device containing its own internal batteries may be attached easily to the exterior of a vehicle, but the batteries in this type of device require replacement. Alternatively, as with the device at issue here, a GPS device may be installed in the engine compartment of a vehicle and attached to the vehicle's power source (battery). Although this type of device may take more than one hour to install and test, it runs on the vehicle's power, and thus can operate indefinitely without battery replacement. See *United States v. Garcia*, 474 F.3d 994, 995-996 (7th Cir.), cert. denied, 552 U.S. 883, 128 S.Ct. 291, 169 L.Ed.2d 140 (2007); *United States v. Berry*, 300 F.Supp.2d 366, 367-368 (D.Md.2004); *People v. Weaver*, 12 N.Y.3d 433, 436, 882 N.Y.S.2d 357, 909 N.E.2d 1195 (2009).

*Commonwealth v. Connolly*, 454 Mass. 808, 913 N.E.2d 356, 362 (2009).

This case involves the first type – a small battery-powered device easily attached to the exterior of the car.

Such a device, pocket-sized, battery-operated, commercially available for a couple of hundred dollars ... receives and stores satellite signals that indicate the device's location.

*United States v. Garcia*, 474 F.3d at 995.

The court of appeals explained how the GPS device worked here:

The battery-powered GPS device used here periodically receives and stores location information from one or more satellites. To obtain tracking information, the device must be physically retrieved and its information downloaded to a computer. The result is a detailed history, including time

information, of the device's location and, hence, the vehicle's location.

*State v. Sveum*, 319 Wis. 2d 498, ¶ 7; R-Ap. 105-06, at ¶ 7.

2. Attachment of the GPS device to the undercarriage of Sveum's car was not a "seizure."

The mere attachment of a GPS device of the type used here to the undercarriage of a car is not a "seizure" within the contemplation of the Fourth Amendment. It does not impede the operation of the car, does not interfere with the driver's dominion and control over the car, does not interfere with the owner's ownership or possessory interest in the car, does not reveal anything about its contents or its occupants (other than what direction he/she/they are headed), does not intercept conversations, and does not usurp the car's power or interfere with its operation.

The defendant's contention that by attaching the memory tracking device the police seized his car is untenable. The device did not affect the car's driving qualities, did not draw power from the car's engine or battery, did not take up room that might otherwise have been occupied by passengers or packages, did not even alter the car's appearance, and in short did not "seize" the car in any intelligible sense of the word.

*United States v. Garcia*, 474 F.3d at 996. See *United States v. McIver*, 186 F.3d 1119, 1126-27 (9th Cir. 1999), cert. denied, 528 U.S. 1177 (2000) (placement of a magnetic GPS device on undercarriage of a car parked in defendant's driveway neither a "search" nor a "seizure"); *United States v. Coulombe*, No. 1:06-CR-343, 2007 WL 4192005, \*4 (N.D.N.Y. 2007) (no reasonable expectation of privacy in the exterior of a car). Compare

*Commonwealth v. Connolly*, 913 N.E.2d at 369 (warrantless installation of GPS device violated the state constitution where, "installation required not only entry by the police into the minivan for one hour, but also operation of the vehicle's electrical system, in order to attach the device to the vehicle's power source and to verify that it was operating properly. Moreover, operation of the device required power from the defendant's vehicle, an ongoing physical intrusion"); *Osburn v. State*, 118 Nev. 323, 44 P.3d 523, 525-26 (2002) (warrantless attachment of a monitor or beeper to the exterior of a car is neither a search nor a seizure under either the United States or Nevada Constitutions). See generally *New York v. Class*, 475 U.S. 106, 114 (1986); *Cardwell v. Lewis*, 417 U.S. 583, 589-92 (1974) (discussing the greatly diminished expectation of privacy in automobiles, especially in the car's exterior).

3. Police tracking the whereabouts of Sveum's car on the public highways aided by the GPS device was not a "search."

In *United States v. Knotts*, 460 U.S. 276, government agents surreptitiously placed a tracking device (a "beeper") into a five-gallon drum of chloroform which was then sold to the defendant's cohort, an individual suspected of manufacturing illicit drugs. The suspect loaded the container into his car. Police were able to follow the movements of the car both visually and aided by the beeper until it arrived at the defendant's cabin in northern Wisconsin. Police eventually obtained enough information to arrest the defendant. *Id.* at 277-78.

The Court held that the insertion by government agents of the beeper into the drum, and the use by them of that beeper to track the movements of the suspect's car, did not implicate the Fourth Amendment. The Court

reasoned there is no reasonable expectation of privacy in the movement of one's vehicle on public roadways; and insertion of the beeper into the container placed inside the car did not constitute an unreasonable seizure of the car. *Id.* at 281-83. The Court pointed out there was nothing to show government agents used the beeper signal to reveal information about the movement of the drum inside the cabin or about anything that would not have been otherwise visible to the naked eye. *Id.* at 285. *State v. Sveum*, 319 Wis. 2d 498, ¶ 9; R-Ap. 106-07, at ¶ 9.

In contrast, in *United States v. Karo*, 468 U.S. 705 (1984), the Court held that a warrantless search in violation of the Fourth Amendment occurred where police inserted a beeper into another drum but used information from that beeper to track the drum's movements once inside a storage facility. The Fourth Amendment was implicated because police were now using the beeper to obtain "information that it could not have obtained by observation from outside the curtilage of the house." 468 U.S. at 715-16. *State v. Sveum*, 319 Wis. 2d 498, ¶ 10; R-Ap. 107, at ¶ 10. Monitoring a beeper inside a private home violates the rights of those reasonably expecting privacy there. 468 U.S. at 714. *Also see New York v. Class*, 475 U.S. at 112-14 (no reasonable expectation of privacy in the publicly visible exterior of a vehicle, but the interior is subject to Fourth Amendment protection).

From these cases, the court of appeals concluded:

*Knotts* and *Karo* teach that, to the extent a tracking device reveals vehicle travel information visible to the general public, and thus obtainable by warrantless visual surveillance, the use of the device does not normally implicate Fourth Amendment protections. It follows that no Fourth Amendment violation occurred here simply because the police used a GPS device to obtain information about Sveum's car that was visible to the general public.

*State v. Sveum*, 319 Wis. 2d 498, ¶ 11; R-Ap. 107, at ¶ 11.

All courts that have reviewed the Fourth Amendment issue have reached the same result as did the court of appeals here: the Fourth Amendment is not implicated because there is no "search" when police attach a GPS device to the exterior of a car and use it to enhance their ability to observe the movements of the car on public thoroughfares. *United States v. Garcia*, 474 F.3d at 996-97; *United States v. Gbemisola*, 225 F.3d 753, 758-59 (D.C. Cir. 2000); *United States v. McIver*, 186 F.3d at 1126-27; *United States v. Jones*, 451 F. Supp. 2d 71, 88 (D.D.C. 2006); *United States v. Moran*, 349 F. Supp. 2d 425, 467-68 (N.D.N.Y. 2005); *People v. Gant*, 802 N.Y.S.2d 839, 845-48 (Co. Ct. 2005); *Morton v. Nassau County Police Dept.*, No. 05-CV-4000, 2007 WL 4264569, at \*3-4 (E.D.N.Y. Nov. 27, 2007); *Stone v. State*, 178 Md. App. 428, 941 A.2d 1238, 1250 (2008). Also see *United States v. Coleman*, No. 07-20357, 2008 WL 495323, at \*2-3 (E.D. Mich. Feb. 20, 2008) (police use of a suspect vehicle's factory-installed "OnStar" system to track the vehicle's whereabouts did not violate the Fourth Amendment). See David Schuman, *Tracking Evidence with GPS Technology*, Wisconsin Lawyer, May 2004, at 9.<sup>5</sup>

The Seventh Circuit Court of Appeals succinctly explained why tracking a car on public thoroughfares is not a "search":

If a listening device is attached to a person's phone, or to the phone line outside the premises on which the phone is located, and phone conversations are recorded, there is a search (and it is irrelevant that there is a trespass in the first case but not the second), and a warrant is required. But if police follow a car around, or observe its route by means of cameras mounted on lampposts or of satellite imag-

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<sup>5</sup>One court has held that, while there is a "search" when police install a beeper onto a vehicle, they may do so without a warrant if they have reasonable suspicion of criminal activity. *United States v. Michael*, 645 F.2d 252, 257 (5th Cir. 1981).

ing as in Google Earth, there is no search. Well, but the tracking in this case *was* by satellite. Instead of transmitting images, the satellite transmitted geographical coordinates. The only difference is that in the imaging case nothing touches the vehicle, while in the case at hand the tracking device does. But it is a distinction without any practical difference.

There is a practical difference lurking here, however. It is the difference between, on the one hand, police trying to follow a car in their own car, and, on the other hand, using cameras (whether mounted on lampposts or in satellites) or GPS devices. In other words, it is the difference between the old technology—the technology of the internal combustion engine—and newer technologies (cameras are not new, of course, but coordinating the images recorded by thousands of such cameras is). But GPS tracking is on the same side of the divide with the surveillance cameras and the satellite imaging, and if what they do is not searching in Fourth Amendment terms, neither is GPS tracking.

This cannot be the end of the analysis, however, because the Supreme Court has insisted, ever since *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), that the meaning of a Fourth Amendment search must change to keep pace with the march of science. So the use of a thermal imager to reveal details of the interior of a home that could not otherwise be discovered without a physical entry was held in *Kyllo v. United States*, 533 U.S. 27, 34, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001), to be a search within the meaning of the Fourth Amendment. But *Kyllo* does not help our defendant, because his case unlike *Kyllo* is not one in which technology provides a substitute for a form of search unequivocally governed by the Fourth Amendment. The substitute here is for an activity, namely following a car on a public street, that is unequivocally *not* a search within the meaning of the amendment.

*United States v. Garcia*, 474 F.3d at 996-97 (emphasis in original).

Sveum disputes the reasoning of *Garcia*, and by necessary implication, of *Knotts*. Yet, the rationale of those cases is merely consistent with that of precedent

recognizing that the Fourth Amendment is not implicated when police use a pen register to record numbers dialed on a suspect's phone, *Smith v. Maryland*, 442 U.S. at 745-46; or collect and examine trash left by a suspect for collection at the curb, *California v. Greenwood*, 486 U.S. 35, 39-41 (1988); *State v. Stevens*, 123 Wis. 2d 303, 316, 319, 367 N.W.2d 788 (1985). There is also no reasonable expectation of privacy in driveways and porches visible from a public street. *United States v. Evans*, 27 F.3d 1219, 1228-29 (7th Cir. 1994) (and cases cited therein); *United States v. Aguilera*, No. 06-CR-336, 2008 WL 375210, \*1-2 (E.D. Wis. 2008) (installation of a camera on a pole outside defendant's driveway to observe "the comings and goings from his driveway" did not violate the Fourth Amendment. *Id.* at \*2).

Madison Police could have obtained the identical information, at great expense of time and resources, with constant visual surveillance of Sveum's vehicle. The Constitution did not require them to do so when there existed a technological device that allowed them to conduct that surveillance far more efficiently. The conduct of police here was eminently reasonable because it is plain that, like their counterparts in Polk County, Madison Police "are not engaged in mass surveillance" of its citizens. *United States v. Garcia*, 474 F.3d at 998. The application for the search warrant bears that out here.

They do GPS tracking only when they have a suspect in their sights. They had, of course, abundant grounds for suspecting the defendant.

*Id.* Like the Seventh Circuit in *Garcia*, by authorizing GPS surveillance of the movement of Sveum's car based on the ample information Madison police had, this court will not be condoning "dragnet type law enforcement practices." *United States v. Knotts*, 460 U.S. at 284.

Any operator of a motor vehicle on the public highways understands that his or her vehicle is subject to pervasive state regulation, inspection and substantial police surveillance. One cannot operate the vehicle

without a valid license. License plates must be properly displayed at all times to aid police when they need to obtain immediate information about the car or its registered owner. The speeding motorist is constantly looking out the corner of his eye for state troopers partially concealed in the brush up ahead because he knows they are constantly on the lookout for speeders, especially on holiday weekends on heavily-travelled roads. The speeding motorist might employ his own technology – a radar detector – to thwart police radar. Any motorist with an "I-Pass" understands that, while this device primarily allows him or her to sail through Illinois tolls and pay later, it might also be used by Illinois law enforcement to track the movement of the car should they suspect the driver of criminal activity. Surveillance cameras are now commonplace on public streets and highways allowing police to obtain information about anyone or anything that passes before the camera's lens. A driver might be surprised to find a ticket in the mail weeks after his running a red light was captured on a surveillance camera positioned on a pole at an intersection, enhancing the ability of police to catch violators without having to devote precious manpower to constant surveillance of a problem intersection. A car owner who purchases "On-Star" technology gladly embraces the ability of police to quickly track the car's movements when there is an emergency or if the car is stolen. A driver who uses his car to engage in criminal activity, such as stalking, should reasonably expect that police at the very least might engage in intensive surveillance of the movement of his car on public thoroughfares once they suspect criminal activity.

In short, the Fourth Amendment does not prevent police from "stalking the stalker" by following him and making naked-eye observations of him so long as their observations do not go beyond what any member of the public could observe. Police use of a GPS device to merely enhance their ability to observe the stalker's movements in public, while conserving precious time and

manpower in the investigation, does not run afoul of the Fourth Amendment.<sup>6</sup>

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<sup>6</sup>As one distinguished jurist explained:

It is beyond any question that the police could, without a warrant and without any basis other than a hunch that defendant was up to no good, have assigned an officer, or a team of officers, to follow him everywhere he went, so long as he remained in public places. He could have been followed in a car or a helicopter; he could have been photographed, filmed or recorded on videotape; his movements could have been reported by a cellular telephone or two-way radio. These means could have been used to observe, record and report any trips he made to all the places the majority calls "indisputably private," from the psychiatrist's office to the gay bar (majority op. at 441-442, 882 N.Y.S.2d 361-62, 909 N.E.2d 1199-1200). One who travels on the public streets to such destinations takes the chance that he or she will be observed. The Supreme Court was saying no more than the obvious when it said that a person's movements on public thoroughfares are not subject to any reasonable expectation of privacy (*United States v. Knotts*, 460 U.S. 276, 281, 103 S.Ct. 1081, 75 L.Ed.2d 55 [1983], quoted in majority op. at 440, 882 N.Y.S.2d 360, 909 N.E.2d 1198). What, then, is the basis for saying that using a GPS device to obtain the same information requires a warrant?

The majority's answer is that the GPS is new, and vastly more efficient than the investigative tools that preceded it. This is certainly true—but the same was true of the portable camera and the telephone in 1880, the automobile in 1910 and the video camera in 1950. Indeed, the majority distinguishes *Knotts* on the ground that it involved a beeper—"what we must now . . . recognize to have been a very primitive tracking device" (majority op. at 440, 882 N.Y.S.2d 361, 909 N.E.2d 1199). I suspect that the GPS used in this case will seem primitive a quarter of a century from now. Will that mean that police will then be allowed to use it without a warrant?

The proposition that some devices are too modern and sophisticated to be used freely in police  
(footnote continued)

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investigation is not a defensible rule of constitutional law. As technology improves, investigation becomes more efficient—and, as long as the investigation does not invade anyone's privacy, that may be a good thing. It bears remembering that criminals can, and will, use the most modern and efficient tools available to them, and will not get warrants before doing so. To limit police use of the same tools is to guarantee that the efficiency of law enforcement will increase more slowly than the efficiency of law breakers. If the people of our state think it worthwhile to impose such limits, that should be done through legislation, not through ad hoc constitutional adjudication, for reasons well explained in Judge Read's dissent (Read, J., dissenting at 457-459, 882 N.Y.S.2d 373-74, 909 N.E.2d 1211-12).

The Federal and State Constitutions' prohibition of unreasonable searches should be enforced not by limiting the technology that investigators may use, but by limiting the places and things they may observe with it. If defendant had been in his home or some other private place, the police would, absent exigent circumstances, need a warrant to follow him there, whether by physical intrusion or by the use of sophisticated technology (*see Kyllo v. United States*, 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 [2001] [use of thermal-imaging device to detect relative amounts of heat in the home an unlawful search]; *United States v. Karo*, 468 U.S. 705, 714, 104 S.Ct. 3296, 82 L.Ed.2d 530 [1984] [monitoring a beeper in a private home violates the rights of those justifiably expecting privacy there]). But the police were free, without a warrant, to use any means they chose to observe his car in the K-Mart parking lot.

The theory that some investigative tools are simply too good to be used without a warrant finds no support in any authority interpreting the Federal or New York Constitution.

*People v. Weaver*, 12 N.Y.3d 433, 882 N.Y.S.2d 357, 366-67, 909 N.E.2d 1195, 1204-05 (2009) (Smith, J. dissenting).

4. Sveum's driveway was not part of the curtilage of his mother's home.

As the court of appeals noted, Sveum did not challenge on appeal the circuit court's factual determination that the driveway was not part of the house's curtilage. *State v. Sveum*, 319 Wis. 2d 498, ¶ 14; R-Ap. 108-09, at ¶ 14. The trial court found at the suppression hearing that there was insufficient evidence to establish that the driveway was within the curtilage of the home ("Nothing in the record suggests that this would be a violation of curtilage.") (116:106; A-Ap. 111).

Sveum now argues for the first time that his mother's driveway was included in the curtilage. Sveum contends that, even if police could have attached the GPS device to the exterior of his car if it was parked on the public street in front of his mother's home, they could not attach the device to the car while it was parked in the driveway alongside the home.

This claim is without merit. Because the driveway was not enclosed and was open to public observation from the street, Sveum had no legitimate expectation of privacy to prevent police from attaching the GPS device to the exterior of his car parked there. *United States v. McIver*, 186 F.3d at 1126. *Also see United States v. Aguilera*, 2008 WL 375210, at \*2 (defendant had no reasonable expectation of privacy to prevent police from installing a camera on a pole to observe "the comings and goings from his driveway" so long as "the camera did not record activities within defendant's home or its curtilage obscured from public view").

The extent of a home's curtilage, "is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself." *United States v. Dunn*, 480 U.S. 294, 300 (1987). The constitutional issue is whether the area in question, "is so intimately tied to the home itself that it

should be placed under the home's 'umbrella' of Fourth Amendment protection." *Id.* at 301.

The Court considers four factors in making this determination: (1) the proximity of the area claimed to be within the curtilage; (2) whether the area is within an enclosure surrounding the home; (3) the nature of uses to which the area is put; and (4) steps taken by the resident to protect the area from observation by passersby. *Id.*

As the trial court found, there is nothing in the trial court record to show that the driveway was within any enclosure surrounding the house, that it was put to any specific private use beyond parking vehicles on its apron, or that Sveum took particular steps to protect the driveway from observation by police or any other passersby.

Sveum argues that he took steps to protect the rear of his car from public observation by parking his car on the driveway with its rear facing away from the street (116:73; A-App. 78). Sveum's brief at 14. How that demonstrates a reasonable expectation of privacy protecting against observation of its exterior, including the undercarriage, is anyone's guess. Is Sveum arguing that, by parking his car this way, he was trying to prevent public observation of the rear undercarriage of his car, but not the front undercarriage? If Sveum had only one license plate, and it was on the rear, would police be prohibited from walking onto the apron of his driveway to read it because the plate could not be readily observed from the sidewalk?

Sveum apparently concedes his curtilage argument would not fly if police had attached the GPS device to the front undercarriage of his car because he knowingly exposed the front of his car to public view. Whatever subjective expectation of privacy in the rear undercarriage of his car Sveum might have demonstrated by parking this way, it most assuredly was not an expectation that society is prepared to recognize as a reasonable one.

Even assuming Sveum could prove the trial court erred, and could satisfy this court that his driveway was part of the curtilage, he still does not prevail.

That the area is within the curtilage does not itself bar all police observation. The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible.

*California v. Ciraolo*, 476 U.S. 207, 213 (1986).

Again, Sveum has not demonstrated a reasonable expectation of privacy protecting the exterior of his car, including its undercarriage, from observation by passersby while it was parked on his unenclosed driveway. The mere fact that he parked his car facing the street does not create a reasonable expectation of privacy preventing a police officer from walking onto that driveway to look at the rear of the car for a license number, damage, a distinctive bumper sticker or, in this case, to attach a GPS device to the rear undercarriage to track the car's whereabouts. If Sveum wanted to prevent police from observing the exterior of his car, or from attaching a GPS device to it, he should have parked the car inside the garage and closed the door.

In conclusion, Sveum confuses a possible trespass onto his mother's property with an invasion of a legitimate privacy interest. Mere proof of a trespass, without more, does not necessarily prove an invasion of an area in which the individual had a reasonable expectation of privacy protected by the Fourth Amendment. *Oliver v. United States*, 466 U.S. 170, 182-84 (1984); *United States v. McIver*, 186 F.3d at 1126; *United States v. Berry*, 300 F. Supp. 2d 366, 368 n.2 (D. Md. 2004). Sveum failed to prove a reasonable expectation of privacy in the undercarriage of his car parked out in the open on his

mother's driveway, even assuming he did not expect police to walk behind the car and crawl under it to attach the GPS device to it.

5. This is not the appropriate case for considering the issue whether there was a "search or seizure" under the Wisconsin Constitution.

For a number of reasons, this is not the appropriate case for this court to consider whether Sveum proved there was a "search or seizure" under the Wisconsin Constitution.

Sveum relied only on the Fourth Amendment in his arguments to both the trial court and to the Wisconsin Court of Appeals. Sveum did not present a separate state constitutional challenge as a basis for review in this court, and he concedes he is constrained from raising that issue now. Sveum's brief at 11.

Not only has the separate state constitutional issue been unaddressed by any court below, there is no need for this court to address it here. Even if this court were to conclude as a matter of state constitutional law that attachment of the GPS device was a "search and seizure," it would likely hold that future police GPS surveillance activities will require judicial authorization. The GPS surveillance of Sveum's car *was*, however, judicially authorized here on probable cause. Resolution of the state constitutional question should await a case where: (1) the issue was raised by the defendant and addressed by the courts below; and (2) where there was no warrant. *See United States v. Berry*, 300 F. Supp. 2d at 368 (no need to decide Fourth Amendment issue regarding a warrantless GPS surveillance because the 60-day GPS surveillance in that case was judicially authorized).

Moreover, a state constitutional challenge would likely lack merit. This court has construed the identically-worded art. 1, § 11 of the Wisconsin Constitution to impose the same requirements as does the Fourth Amendment. *State v. Pallone*, 2000 WI 77, 236 Wis. 2d 162, ¶¶ 28, 81, 613 N.W.2d 568; *State v. McCray*, 220 Wis. 2d 705, 709, 583 N.W.2d 668 (Ct. App. 1998). If the Fourth Amendment is not implicated, neither should be art. I, § 11 of the Wisconsin Constitution. While Sveum correctly notes that a few state courts have gone beyond the federal courts and held, as a matter of state constitutional law, that attachment of a GPS device to a suspect's car is a "search and seizure," Sveum's brief at 11-12, at least one court construing its state constitution has held there is no reasonable expectation of privacy. *Osburn v. State*, 44 P.3d at 525-26.

Finally, in light of the myriad policy and technological issues presented, this is an area of law best left to the realm of the state legislature, subject of course to judicial review, as the court of appeals here suggested. *State v. Sveum*, 319 Wis. 2d 498, ¶¶ 20-22; R-Ap. 110-12, at ¶¶ 20-22. *See People v. Weaver*, 909 N.E.2d at 1211-12 (Read, J., dissenting) (discussing the wide variety of legislative approaches to this issue taken by a number of states). The Wisconsin legislature has shown itself quite capable of addressing this type of technological/legal/privacy issue when it enacted the Wisconsin Electronic Surveillance Control Law, Wis. Stat. §§ 968.27-32, and when it regulated the use of pen registers and trap-and-trace devices. Wis. Stat. §§ 968.34-37. It should now be given the opportunity, if there is a perceived need for it to do so, to act in this technological realm as well.

- D. Assuming Sveum proved there was a "search and seizure" here, it was reasonable under the Fourth Amendment because it was conducted pursuant to a court order issued by a judge on probable cause.

This court could opt to avoid the constitutional questions presented by holding that attachment of the GPS device to Sveum's car and police use of that device to observe its movements complied with the Fourth Amendment because it was authorized by a warrant issued by a judge on probable cause to believe GPS surveillance would produce evidence of stalking by Sveum. *See State v. Holt*, 128 Wis. 2d 110, 123-26, 382 N.W.2d 679 (Ct. App. 1985) (the state may argue on appeal any valid ground supported by the record and the law to affirm the trial court's ruling).

The state argued in the alternative at both the trial and appellate levels that, if this was indeed a "search," it was authorized by judicial warrant on probable cause. The trial court ruled in the alternative at the close of the pretrial suppression hearing that any search was judicially-authorized based on probable cause as established in the affidavit provided by Detective Ricksecker (116:103-05).

1. The applicable law and standard for review of challenges to searches conducted pursuant to judicial warrant.

Reviewing courts are to give "great deference" to a magistrate's probable cause determination; it must stand unless the defendant shows the facts are "clearly insufficient" to support the probable cause finding. *State v. Marquardt*, 2005 WI 157, ¶ 23, 286 Wis. 2d 204,

705 N.W.2d 878 (citing *State v. Higginbotham*, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991)).

In *State v. Schaefer*, 2003 WI App 164, 266 Wis. 2d 719, 668 N.W.2d 760, the court explained the role of the magistrate when deciding whether to issue a search warrant and the role of the reviewing court in deciding whether the magistrate properly issued a search warrant.

When considering an application for a search warrant, the issuing magistrate is

to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

*Illinois v. Gates*, 462 U.S. 213, 238 (1983). We give great deference to the magistrate's determination that probable cause supports issuing a search warrant. *State v. Ward*, 2000 WI 3, ¶ 21, 231 Wis. 2d 723, 604 N.W.2d 517. We will uphold the determination of probable cause if there is a substantial basis for the warrant-issuing magistrate's decision. *Id.* This deferential standard of review "further[s] the Fourth Amendment's strong preference for searches conducted pursuant to a warrant." *State v. Kerr*, 181 Wis. 2d 372, 379, 511 N.W.2d 586 (1994) (citations omitted).

266 Wis. 2d 719, ¶ 4. See *State v. Ward*, 231 Wis. 2d 723, ¶¶ 21-24; *State v. Lindgren*, 2004 WI App 159, ¶¶ 15-16, 19-20, 275 Wis. 2d 851, 687 N.W.2d 60.

The quantum of evidence needed to establish probable cause is less than that required for a bindover after a preliminary hearing. *State v. Lindgren*, 275 Wis. 2d 851, ¶ 20. The probable cause determination is made on a case-by-case basis after reviewing the totality of the circumstances. *State v. Schaefer*, 266 Wis. 2d 719, ¶ 17. The magistrate may draw reasonable inferences from the facts asserted in the affidavit. The inference drawn need

not be the only reasonable one. See *State v. Ward*, 231 Wis. 2d 723, ¶ 30; *State v. Jones*, 2002 WI App 196, ¶ 10, 257 Wis. 2d 319, 651 N.W.2d 305.

When giving deferential review in the close case, this court should resolve all doubts in favor of the magistrate's probable cause determination. *State v. Lindgren*, 275 Wis. 2d 851, ¶ 20.

2. The detailed search warrant affidavit provided firm support for the circuit judge's decision to issue a warrant authorizing attachment of the GPS device to Sveum's car.

The prosecutor argued at the suppression hearing that the document issued by Judge Callaway was not technically a "search warrant" that would have to meet the technical requirements of Wis. Stat. ch. 968, but was in the nature of a judicial order authorizing attachment of the GPS device based upon a finding of probable cause to believe Sveum was using his car to stalk Jamie Johnson (116:97-98; A-Ap. 102-03). In upholding the search, the trial court ruled that this judicial authorization was "most akin to a search warrant" (116:104-05; A-Ap. 109-110).

Regardless whether this document is technically considered a "search warrant," a court order, or something else, the state will now demonstrate that it fully complied with the Fourth Amendment because it was supported by probable cause as established in the affidavit in support thereof (*id.* at 103-05; A-Ap. 108-110).

Rather than repeat verbatim the detailed facts set forth in the affidavit prepared by Madison Police Detective Ricksecker April 22, 2003, the state refers this court to that affidavit to determine for itself whether those

facts as alleged add up to "probable cause" (40:21-24; A-Ap. 1-4). The state believes, as did the trial judge, that this affidavit presented evidence sufficient to show the issuing judge Callaway, there was at least a "fair probability" that the requested GPS surveillance would produce evidence of stalking by Sveum. Sveum cannot show the facts alleged are "clearly insufficient" to support Judge Callaway's probable cause determination. This court must, therefore, give great deference to that determination.

Other courts have found similar judicial orders to install GPS devices on probable cause sufficient to satisfy the Fourth Amendment. *United States v. Berry*, 300 F. Supp. 2d at 368 (judicial authorization to attach a GPS device to suspect's car for 60 days); *State v. Jackson*, 150 Wash. 2d 251, 76 P.3d 217 (2003) (although finding this to be a "search and seizure" under the state constitution, the court held attachment of a GPS device was judicially-authorized by a warrant for two separate, ten-day periods of GPS surveillance of defendant's truck, it was supported by probable cause and did not authorize a "fishing expedition"). Such judicial authorization for extended surveillance on probable cause is permissible. *See United States v. Karo*, 468 U.S. at 718.

Sveum may argue that this judicial authorization does not comply with Wis. Stat. §§ 968.15 and 968.17. To this, the state has two responses: (a) if this search was not conducted "[p]ursuant to a valid search warrant" issued under ch. 968, *see* Wis. Stat. § 968.10(3), it was issued by court order on probable cause "[a]s otherwise authorized by law," *i.e.*, the Fourth Amendment. Wis. Stat. § 968.10(6); or, (b) if this judicial authorization was governed by ch. 968, any deviation from its procedural requirements to fit this unusual situation is a "technical irregularit[y]" that does not call for suppression because, there being either no Fourth Amendment violation or full compliance with it by virtue of the judicial authorization on probable cause, any such irregularity did not adversely

affect "the substantial rights of the defendant." Wis. Stat. § 968.22.

In any event, suppression is not justified because the officers executing the warrant had every right to reasonably rely on that authorization issued by a neutral and detached circuit judge in objective good faith. *United States v. Leon*, 468 U.S. 897, 913 (1984); *State v. Marquardt*, 286 Wis. 2d 204, ¶¶ 24-26. The officers who attached the GPS device, "cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient." *United States v. Leon*, 468 U.S. at 921.

The affiant (Detective Ricksecker) did not mislead the judge with facts she knew to be false or were presented with reckless disregard for the truth. Circuit Judge Callaway did not abandon his judicial role by issuing this order. The affidavit was not so lacking in indicia of probable cause that it was entirely unreasonable for the executing officers to believe in its existence. The warrant was not so deficient on its face that the executing officers could not presume it to be valid. The process used in obtaining the warrant involved a sufficient investigation by authorities. Finally, there was sufficient review of the validity of the warrant by a trained investigator familiar with this area of the law. *State v. Marquardt*, 286 Wis. 2d 204, ¶¶ 25-26. *See State v. Eason*, 2001 WI 98, ¶ 63, 245 Wis. 2d 206, 629 N.W.2d 625.

Detective Ricksecker testified at the suppression hearing that she had spoken with an investigator at the Wisconsin Department of Justice, Department of Criminal Investigation about the use of GPS devices in criminal investigations and the ability to obtain a court order authorizing installation of such devices on suspect vehicles (116:40-41; A-Ap. 45-46). The experienced DCI Investigator (Gary Martine) advised her, "that they had in the past used court orders to authorize the application of the device and he subsequently supplied me with a copy

of the order that they had used in the past which I reviewed" (116:41; A-Ap. 46). *Also see United States v. Sager*, 743 F.2d 1261, 1265-67 (8th Cir. 1984) (upholding under the "good faith" exception to the exclusionary rule evidence obtained pursuant to installation of a transponder in an airplane because police reasonably relied on a search warrant whose affidavit turned out to be deficient).

Because the officers who attached the GPS device to the exterior of Sveum's car reasonably relied in objective good faith on a warrant issued by a neutral and detached circuit judge, a warrant that was based on a detailed affidavit sworn out by an experienced investigator who proceeded only after consulting other experienced investigators, and that contained strong indicia of probable cause, the exclusionary rule should not apply here even assuming the affidavit failed to establish probable cause or there were other technical deficiencies in the warrant application.<sup>7</sup>

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<sup>7</sup>Sveum argues that the search was unlawful because it allowed police to obtain incriminating information while the car was parked in his mother's garage. Sveum's brief at 26. Not so. There is nothing to show that any useful information was obtained while the car was anywhere other than on public streets. The critical information obtained from the GPS device occurred April 25, 2003, when it showed that Sveum drove from a muffler shop to the victim's residence, parked a block away in a cul de sac for nearly an hour, then drove to a public pay phone in front of a business; the victim received a hang-up call at the same time his car was observed by the GPS device parked at that pay phone in front of that business; and the car then left as soon as the hang-up call ended (116:51-52; A-Ap. 56-57).

In any event, to the extent the warrant is overbroad, only that information obtained while the car was parked out of public view is to be suppressed. *See United States v. Karo*, 468 U.S. at 719-21; *State v. Petrone*, 161 Wis. 2d 530, 548, 468 N.W.2d 676 (1991); *State v. Noll*, 116 Wis. 2d 443, 451-52, 460, 343 N.W.2d 391 (1984).

## CONCLUSION

Therefore, the State of Wisconsin respectfully requests that the decision of the court of appeals be AFFIRMED.

Dated at Madison, Wisconsin, this 26th day of January, 2010.

Respectfully submitted,

J.B. VAN HOLLEN  
Attorney General

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

Attorneys for Plaintiff-Respondent

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

## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,763 words.

Dated this 26th day of January, 2010.

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DANIEL J. O'BRIEN  
Assistant Attorney General

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

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 26th day of January, 2010.

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DANIEL J. O'BRIEN  
Assistant Attorney General

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STATE OF WISCONSIN  
IN SUPREME COURT

**CLERK OF SUPREME COURT  
OF WISCONSIN**

No. 2008AP658-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL A. SVEUM,

Defendant-Appellant-Petitioner.

---

ON REVIEW OF A DECISION OF THE WISCONSIN  
COURT OF APPEALS, DISTRICT IV, AFFIRMING A  
JUDGMENT OF CONVICTION AND AN ORDER  
DENYING POSTCONVICTION RELIEF, ENTERED IN  
THE CIRCUIT COURT FOR DANE COUNTY,  
HONORABLE STEVEN D. EBERT, PRESIDING

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APPENDIX OF  
PLAINTIFF-RESPONDENT

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J.B. VAN HOLLEN  
Attorney General

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

Attorneys for Plaintiff-Respondent

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

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 26th day of January, 2010.

  
DANIEL J. O'BRIEN  
Assistant Attorney General

CERTIFICATE OF COMPLIANCE  
WITH WIS. STAT. § (RULE) 809.19(13)

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § (Rule) 809.19(13).

I further certify that:

This electronic appendix is identical in content to the printed form of the appendix filed as of this date.

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

Dated this 26th day of January, 2010.

  
DANIEL J. O'BRIEN  
Assistant Attorney General

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 7, 2009**

David R. Schanker  
Clerk of Court of Appeals

**NOTICE**

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

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

**Appeal No. 2008AP658-CR  
STATE OF WISCONSIN**

Cir. Ct. No. 2003CF1783

**IN COURT OF APPEALS**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MICHAEL A. SVEUM,**

**DEFENDANT-APPELLANT.**

---

APPEAL from a judgment and an order of the circuit court for Dane County: STEVEN D. EBERT, Judge. *Affirmed.*

Before Dykman, Lundsten and Bridge, JJ.

¶1 LUNDSTEN, J. Michael Sveum challenges his aggravated stalking conviction. At Sveum's jury trial, the prosecution presented detailed tracking information about the movements of Sveum's car obtained from a Global Positioning System tracking device (GPS device) that police secretly attached to

his car. Sveum argues that the police obtained this tracking information in violation of his Fourth Amendment right to be free from unreasonable searches and seizures. The State responds that no Fourth Amendment search or seizure occurs when police attach a GPS device to the outside of a vehicle while it is in a place accessible to the public and then use that device to track the vehicle while it is in public view. We agree with the State. At the same time, we urge the legislature to consider regulating both police and private use of GPS tracking technology.

¶2 Sveum's other challenges to his conviction include whether the GPS tracking information should be suppressed under the Wisconsin Electronic Surveillance Control Law, whether a search warrant for Sveum's residence and car was valid, whether the circuit court committed error by admitting evidence of Sveum's prior stalking conviction, whether Sveum's trial counsel was ineffective, and whether an erroneous jury instruction requires a new trial. We reject all of Sveum's arguments and affirm the judgment and order.

### *Background*

¶3 Sveum was convicted of stalking Jamie Johnson in 1996 and was later imprisoned for related crimes against Johnson. In 1999, from prison, he began stalking Johnson again with help from his sister. Sveum continued stalking Johnson when he was released from prison in 2002. In March 2003, Johnson reported to the police that she believed Sveum was stalking her again.

¶4 As part of their investigation, police sought and received a warrant authorizing them to covertly attach a GPS device to Sveum's car in order to track it. Based in part on tracking information retrieved from the GPS device, the police obtained a warrant to search one of Sveum's residences and his car.<sup>1</sup> The search revealed additional evidence incriminating Sveum, along with evidence confirming his sister's involvement.

¶5 Sveum was charged with an aggravated stalking offense under WIS. STAT. § 940.32(2) and (3)(b) (2001-02), as party to a crime.<sup>2</sup> The more serious

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<sup>1</sup> The warrant application suggests that there may have been some question as to which of two residences was Sveum's primary residence. That question is not important for purposes here, and we will generally refer to Sveum's residence without specifying which residence we mean.

<sup>2</sup> All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted. The stalking statute under which Sveum was charged provides, in pertinent part, as follows:

(1) In this section:

(a) "Course of conduct" means a series of 2 or more acts carried out over time, however short or long, that show a continuity of purpose, including any of the following:

1. Maintaining a visual or physical proximity to the victim.

....

6. Contacting the victim by telephone or causing the victim's telephone or any other person's telephone to ring repeatedly or continuously, regardless of whether a conversation ensues.

....

(2) Whoever meets all of the following criteria is guilty of a Class I felony:

(continued)

“aggravated” version of the crime was charged based on Sveum’s previous conviction for stalking Johnson. *See* § 940.32(3)(b). The circuit court denied motions by Sveum to suppress evidence obtained from the GPS device and from the search of his residence and car. A jury found Sveum guilty, and the court sentenced him to seven years and six months in prison followed by five years of extended supervision. We discuss additional facts as needed below.

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(a) The actor intentionally engages in a course of conduct directed at a specific person that would cause a reasonable person under the same circumstances to fear bodily injury to or the death of himself or herself or a member of his or her family or household.

(b) The actor intends that at least one of the acts that constitute the course of conduct will place the specific person in reasonable fear of bodily injury to or the death of himself or herself or a member of his or her family or household.

(c) The actor’s acts induce fear in the specific person of bodily injury to or the death of himself or herself or a member of his or her family or household.

....

(3) Whoever violates sub. (2) is guilty of a Class F felony if any of the following applies:

....

(b) The actor has ... a previous conviction under this section ..., the victim of that crime is the victim of the present violation of sub. (2), and the present violation occurs within 7 years after the prior conviction.

Wis. STAT. § 940.32.

## *Discussion*

### *A. Suppression Of GPS Evidence Under Fourth Amendment*

¶6 Sveum challenges the admission of GPS tracking information showing the movements of his car. He argues that the warrant<sup>3</sup> authorizing police to place the GPS device on his car was overly broad. The State responds that the warrant was unnecessary because no Fourth Amendment search or seizure occurred. In reply, Sveum implicitly concedes that placing the GPS device on his car and using it to monitor *public* travel does not implicate the Fourth Amendment. He contends, however, that because the GPS device permitted the police to monitor the location of his car while it was in his garage and in his employer's garage, places out of public view, all of the information obtained from the GPS device should have been suppressed. Because we agree with the State that no Fourth Amendment search or seizure occurred, we do not address Sveum's warrant argument.

¶7 We begin with a recap of the pertinent facts. The battery-powered GPS device used here periodically receives and stores location information from one or more satellites. To obtain tracking information, the device must be physically retrieved and its information downloaded to a computer. The result is a detailed history, including time information, of the device's location and, hence, the vehicle's location. While Sveum's car was in his driveway, police secretly attached the device to the underside of his car with a magnet and tape. The police

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<sup>3</sup> Whether the court order that authorized police use of the GPS device here can technically be considered a warrant is unclear, but resolving this question is not important for purposes of our decision.

tracked Sveum's car with the device for about five weeks. During this time, Sveum parked his car in his enclosed garage and inside a garage at his place of employment, a car care center.

¶8 We agree with the State that neither a search nor a seizure occurs when the police use a GPS device to track a vehicle while it is visible to the general public. The seminal cases on this topic are *United States v. Knotts*, 460 U.S. 276 (1983), and *United States v. Karo*, 468 U.S. 705 (1984).

¶9 In *Knotts*, government agents planted a “beeper”—a radio transmitter emitting periodic signals that permit tracking with a radio receiver—inside a five-gallon drum. *See Knotts*, 460 U.S. at 277-78. Using the beeper, the agents were able to track a vehicle transporting the drum and determine that it had come to rest on the defendant's premises. *Id.* at 277-78, 282, 284-85. The Court held that the monitoring of the beeper while the vehicle was in public view did not invade any legitimate expectation of privacy and, therefore, did not constitute a search or seizure under the Fourth Amendment. *Id.* at 285. The Court reasoned that the device simply made it easier to discover what was already “voluntarily conveyed to anyone who wanted to look.” *See id.* at 281-82. The Court explained:

A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another. When [one of the defendant's accomplices] traveled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property.

... [N]o ... expectation of privacy extended to the visual observation of [the] automobile arriving on [the private] premises after leaving a public highway, nor to

movements of objects such as the drum of chloroform outside the cabin in the “open fields.”

Visual surveillance from public places along [the] route or adjoining Knotts’ premises would have sufficed to reveal all of these facts to the police.

*Id.* (citation omitted). The *Knotts* Court specifically noted that “nothing in [the] record indicates that the beeper signal was received or relied upon after it had indicated that the drum ... had ended its automotive journey to rest on [defendant]’s premises.” *Id.* at 284-85. Similarly, “there [was] no indication that the beeper was used in any way to reveal information as to the movement of the drum within the [premises], or in any way that would not have been visible to the naked eye from outside the cabin.” *Id.* at 285. Thus, the Court concluded, the Fourth Amendment was not implicated. *Id.*

¶10 In contrast, a year later in *Karo*, the Court concluded that when police used a similar beeper planted in a similar container to determine how long the container remained at certain locations and to reveal the specific location of the container within a storage facility, a Fourth Amendment search occurred. *See Karo*, 468 U.S. at 708-10, 717-18 & n.5. The *Karo* Court explained that the government used the device to obtain “information that it could not have obtained by observation from outside the curtilage of the house.” *See id.* at 715-16.

¶11 *Knotts* and *Karo* teach that, to the extent a tracking device reveals vehicle travel information visible to the general public, and thus obtainable by warrantless visual surveillance, the use of the device does not normally implicate Fourth Amendment protections. It follows that no Fourth Amendment violation occurred here simply because the police used a GPS device to obtain information about Sveum’s car that was visible to the general public.

¶12 We also agree with the State that the police action of attaching the GPS device to Sveum's car, either by itself or in combination with subsequent tracking, does not constitute a search or seizure.<sup>4</sup> The State aptly relies on *United States v. Garcia*, 474 F.3d 994 (7th Cir. 2007).

¶13 The *Garcia* court concluded that attaching a GPS device to a car while the car was in a public place did not convert the subsequent tracking into a Fourth Amendment search. *See id.* at 996-98. The court reasoned:

[I]f police follow a car around, or observe its route by means of cameras mounted on lampposts or of satellite imaging as in Google Earth, there is no search. Well, but the tracking in this case *was* by satellite. Instead of transmitting images, the satellite transmitted geophysical coordinates. The only difference is that in the imaging case nothing touches the vehicle, while in the case at hand the tracking device does. But it is a distinction without any practical difference.

*Id.* at 997. Like the Seventh Circuit, we discern no privacy interest protected by the Fourth Amendment that is invaded when police attach a GPS device to the outside of a vehicle, as long as the information obtained is the same as could be gained by the use of other techniques that do not require a warrant.

¶14 Sveum might respond that, unlike *Garcia*, the police here did not attach the GPS device while his car was parked in a public place. However, the circuit court concluded that Sveum's driveway was not constitutionally protected "curtilage," and Sveum does not challenge this ruling or otherwise present a

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<sup>4</sup> In *United States v. Knotts*, 460 U.S. 276 (1983), the Supreme Court did not address the issue because the defendant there believed he lacked standing to challenge the placement of the "beeper." *Id.* at 279 n.\*.

developed argument as to why the police engaged in a search or seizure by entering his driveway.

¶15 Accordingly, we follow *Garcia*'s lead and conclude that the attachment of a GPS device to Sveum's car does not change our view that, under *Knotts* and *Karo*, no Fourth Amendment search or seizure occurred here.

¶16 Sveum argues that all of the tracking information should be suppressed because the GPS device monitored the location of his car when it was out of public view. We reject this argument for two reasons.

¶17 First, although the police presumably obtained location information while Sveum's car was inside areas not open to surveillance, there is no indication that this same information could not have been obtained by visual surveillance from outside these enclosures. Such surveillance could have told the police when Sveum's car entered or exited his garage and the garage at his workplace and, therefore, informed them when his car remained in those places. Sveum does not argue that the police used the GPS device to track his car's movements *within* the enclosures.

¶18 Second, even if the police had obtained some information about the movement of Sveum's car within the enclosures and this information should have been suppressed, Sveum suggests no reason why *all* of the tracking information should be suppressed. Although we need not exhaustively analyze this issue, we note that properly obtained evidence is generally not excluded simply because a search is illegally extended to improperly obtain evidence. See *State v. Noll*, 116 Wis. 2d 443, 454-55, 343 N.W.2d 391 (1984) ("Insofar as the searcher exceeds the scope of the validly authorized search, items so seized must be suppressed. However, as to those items discovered in the lawful execution of the valid part of

the warrant, the Fourth Amendment does not require suppression.”). Similarly, properly obtained and incriminating wiretap information is not suppressed solely because police also overhear unrelated private conversations that they would otherwise have no right to overhear.<sup>5</sup> It is not apparent why a balancing of interests should not produce the same rule when applied to the GPS tracking situation here.

¶19 Accordingly, we conclude that no Fourth Amendment search or seizure occurs when police attach a GPS device to the outside of a vehicle while it is in a place accessible to the public and then use that device to track the vehicle while it is in public view. Because this case does not involve tracking information on the movement of Sveum’s car within a place protected by the Fourth Amendment, it follows that the circuit court correctly rejected Sveum’s Fourth Amendment suppression argument.

¶20 We are more than a little troubled by the conclusion that no Fourth Amendment search or seizure occurs when police use a GPS or similar device as they have here. So far as we can tell, existing law does not limit the government’s use of tracking devices to investigations of legitimate criminal suspects. If there is no Fourth Amendment search or seizure, police are seemingly free to secretly

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<sup>5</sup> We are aware of no constitutional rule that requires suppression of incriminating conversations obtained by an authorized wiretap solely because the wiretap also captures private conversations in which the government has no legitimate interest and could not otherwise intercept. We note, however, that federal and Wisconsin law require that authorities “minimize” the interception of the latter category of conversations. See *Scott v. United States*, 436 U.S. 128, 140 (1978) (“[18 U.S.C. § 2518(5)] does not forbid the interception of all nonrelevant conversations, but rather instructs the agents to conduct the surveillance in such a manner as to ‘minimize’ the interception of such conversations.”); WIS. STAT. § 968.30(5) (2007-08) (Wisconsin’s counterpart to the federal minimization statute).

track *anyone's* public movements with a GPS device. As the Seventh Circuit observed:

The new technologies enable, as the old (because of expense) do not, wholesale surveillance. One can imagine the police affixing GPS tracking devices to thousands of cars at random, recovering the devices, and using digital search techniques to identify suspicious driving patterns. One can even imagine a law requiring all new cars to come equipped with the device so that the government can keep track of all vehicular movement in the United States....

....

Technological progress poses a threat to privacy by enabling an extent of surveillance that in earlier times would have been prohibitively expensive.

*Garcia*, 474 F.3d at 998.

¶21 We are also concerned about the private use of GPS surveillance devices. As the Seventh Circuit and a recent *New York Times* article indicate, GPS technology is available at low cost to the general public. See *Garcia*, 474 F.3d at 995; David Pogue, *Peekaboo, Zoombak Sees You*, N.Y. TIMES, Apr. 23, 2009, at B1, B8. Although there are obviously legitimate private uses, such as a trucking company monitoring the location of its trucks, there are also many private uses that most reasonable people would agree should be prohibited.<sup>6</sup>

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<sup>6</sup> In the stalking context, the “course of conduct” element can now be satisfied with evidence that a defendant used “electronic means” to monitor or record the activities of the victim. WIS. STAT. § 940.32(1)(a)6m. (2007-08). But that conduct alone is not prohibited. There must also be proof, among other elements, that the course of conduct would cause a reasonable person to suffer emotional distress or fear harm. WIS. STAT. § 940.32(2) (2007-08). Thus, using a GPS device to secretly monitor someone, without more, is not prohibited by the stalking statute.

¶22 Consequently, we urge the legislature to explore imposing limitations on the use of GPS and similar devices by both government and private actors. Such limitations would appear to be consistent with limitations the legislature has placed on electronic intercepts of communications. See Wisconsin's Electronic Surveillance Control Law, WIS. STAT. §§ 968.27-.33 (2007-08).<sup>7</sup>

*B. Suppression Of GPS Evidence Under Electronic Surveillance Control Law*

¶23 As we have seen, the GPS device used here recorded location information that was downloaded from the device after it was retrieved from Sveum's car. The device did not emit a signal permitting the police to contemporaneously track Sveum's car. It is this aspect of the GPS device that prompts Sveum to challenge its use under Wisconsin's Electronic Surveillance Control Law, WIS. STAT. §§ 968.27-.33.

¶24 The Electronic Surveillance Control Law governs the lawfulness and uses of intercepts of "wire, electronic or oral communications." See WIS. STAT. §§ 968.28-.31. The law governs the in-court disclosure of the contents of intercepts of "electronic communications." See WIS. STAT. § 968.29; *State v. Gilmore*, 201 Wis. 2d 820, 825, 549 N.W.2d 401 (1996) ("Wisconsin Stat. § 968.29 states the conditions under which disclosure is authorized.").

¶25 Sveum argues that the GPS evidence here was obtained from "electronic communication[s]" covered by the Electronic Surveillance Control

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<sup>7</sup> All references to Wisconsin's Electronic Surveillance Control Law, WIS. STAT. §§ 968.27-.33, are to the 2007-08 version.

Law and should have been suppressed because of noncompliance with several provisions in the law. The threshold question is whether the GPS device used to track Sveum's car produced covered electronic communications or, instead, is excluded from the law's coverage because it is a "tracking device" under WIS. STAT. § 968.27(4)(d). This threshold question involves the application of a statute to undisputed facts, a question of law that we review *de novo*. *State v. Wilke*, 152 Wis. 2d 243, 247, 448 N.W.2d 13 (Ct. App. 1989). We give statutory language its common, ordinary, and accepted meaning, except that technical or specially defined words or phrases are given their technical or special definitional meaning. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. Also, we must construe statutes to avoid absurd or unreasonable results. *Id.*, ¶46.

¶26 As Sveum acknowledges, the Electronic Surveillance Control Law expressly excludes from the definition of "electronic communication" those communications from tracking devices. WISCONSIN STAT. § 968.27(4)(d) provides, in pertinent part:

"Electronic communication" does not include any of the following:

....

(d) Any communication from a tracking device.

"[T]racking device" is not defined in the statute, but we agree with the State that the GPS device here is such a device because, so far as the record discloses, its sole function was to track the location of Sveum's car.

¶27 Our Electronic Surveillance Control Law is modeled on a federal act, and Sveum asserts that the "statutory history" of the federal act defines a

tracking device as a communication device that “emits a signal” that can be received by special tracking equipment to trace location. Sveum argues that the GPS device here is not a “tracking device” because it does not emit any signal. Rather, it receives signals and stores data that can be retrieved later. We are not persuaded.

¶28 Sveum provides only a record citation for his “statutory history” argument, and it leaves unclear what legal authority he is relying on. Our research, based on the limited information referenced in the record, suggests that Sveum is relying on a Senate Report that accompanied the 1986 update to the federal act. The Report includes a preliminary “glossary,” which defines “electronic tracking devices (transponders)” as Sveum’s argument indicates. *See* S. REP. NO. 99-541, at \*10 (1986). Sveum’s reliance on this Senate Report, however, runs headlong into the express language of the enacted federal law, which broadly defines a “tracking device” as “an electronic or mechanical device which permits the tracking of the movement of a person or object.” *See* 18 U.S.C.S. § 2510(12)(D) (incorporating the definition in 18 U.S.C.S. § 3117). Indeed, the Senate Report, in its “section-by-section” analysis of the act, references the same definition that appears in the enacted statutes. *See* S. REP. NO. 99-541, at \*33-34. Sveum does not explain why the “glossary” definition in the Senate Report should control over this plain-language statutory definition, which obviously covers the GPS device used here. Regardless whether it emitted a signal, the GPS device enabled the police to track, after the fact, the movements of Sveum’s car.

¶29 Sveum also points out that the tracking device exception in our Electronic Surveillance Control Law refers to “[a]ny communication *from* a tracking device.” WIS. STAT. § 968.27(4)(d) (emphasis added). He argues that

this phrasing shows that the exception applies only to devices that emit some sort of signal, not to a device like a GPS device that only receives and records data for access at a later time. Sveum's argument, however, erroneously assumes that the communication "from" the device must be simultaneous with the tracked movement. But the statutory language imposes no such requirement. Although obtained later, the information did indeed come "from" the tracking device.

¶30 Moreover, the distinction Sveum suggests is not reasonable. It is not rational to limit the admission of tracking information based on whether it is obtained in real time by a signal or at a later time by direct access to the device. Thus, Sveum's interpretation of the statute would lead to unreasonable results.

### *C. Search Warrant For Sveum's Residence And Car*

¶31 Sveum divides his challenge to the search warrant for his residence and his car into two categories. First, he argues that the warrant application lacked probable cause. Second, he argues that the warrant did not describe the items to be seized with sufficient particularity. We address each in turn.

#### *1. Probable Cause*

¶32 Our duty on review is limited to ensuring that the warrant-issuing judge had a substantial basis for concluding that probable cause existed. *State v. DeSmidt*, 155 Wis. 2d 119, 133, 454 N.W.2d 780 (1990). We accord great deference to the judge's probable cause determination; that determination will stand unless the defendant establishes that the facts are clearly insufficient to support a finding of probable cause. *State v. Higginbotham*, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991).

¶33 Sveum argues that there was insufficient probable cause for the warrant to authorize seizure of the following items: journals, calendars, logs documenting travel or appointments, binoculars, flashlights, ski masks, documents mentioning Johnson and certain other individuals, and personal information related to Johnson or her family.

¶34 Sveum concedes that the warrant affidavit established that he used or kept many such items in connection with his 1996 stalking conviction, but asserts that the application did not provide probable cause to believe that he was keeping such items in 2003.<sup>8</sup> We disagree.

¶35 The warrant affidavit stated that the affiant was a detective with twenty-two years of experience who had specialized training in stalking crimes. *See State v. Multaler*, 2002 WI 35, ¶43, 252 Wis. 2d 54, 643 N.W.2d 437 (experience and special knowledge of police officers who are applying for search warrant are facts that warrant-issuing judge may consider). The detective explained in the affidavit that, based on her training and experience, individuals who engage in stalking behavior often display an obsessive personality and exhibit a pattern of conduct, including maintaining visual proximity to the victim, contacting the victim, and keeping records, journals, or other documents memorializing their stalking behavior. Also, such individuals often keep evidence of their obsession with the victim, including records, journals, diaries, calendars of the victim's activities or the activities of other family members, personal information, or computer records.

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<sup>8</sup> The complaint states that Sveum's 2003 charge for stalking covered conduct from 1999 through 2003 but, for ease of discussion, we refer to Sveum's conduct only by reference to 2003.

¶36 The affidavit also indicated that the affiant had investigated Sveum's prior stalking crime, and it detailed the many ways that Sveum's conduct surrounding the 1996 conviction was consistent with behaviors characteristically exhibited by individuals who stalk. In particular, Sveum at that time kept calendars marking down anniversary dates of his time with Johnson, tracked the mileage on Johnson's car, documented Johnson's whereabouts, and retained "keepsakes," including earrings, underwear, and a duplicate driver's license of Johnson's. The affidavit also outlined the evidence establishing that Sveum was again stalking Johnson in 2003.

¶37 When we consider all of the information in the warrant affidavit, we conclude that the affidavit established probable cause to believe that the items enumerated could be evidence of Sveum's 2003 stalking crime.

¶38 Sveum argues that the warrant should not have allowed police to seize computer equipment because the warrant affidavit lacked specific facts to show that a computer may have contained evidence of stalking. He asserts that nothing in the affidavit shows that he used a computer in the 1996 stalking. We are not persuaded. It is readily inferable from the warrant affidavit that Sveum's past stalking conduct involved obsessively detailed logging, calendaring, and tracking of information relating to Johnson. Given this inference, along with the increasing prevalence of computerized information and personal computing between 1996 and 2003, the warrant-issuing judge could have reasonably inferred that Sveum may have been using a computer in connection with stalking Johnson in 2003 even if he had not used a computer to stalk Johnson in 1996. *See State v. Benoit*, 83 Wis. 2d 389, 399, 265 N.W.2d 298 (1978) (warrant judge may draw reasonable inferences from the evidence presented in the affidavit).

## 2. Particularity

¶39 Sveum argues that the warrant failed to describe the items sought with sufficient particularity. Under the Fourth Amendment, a warrant must “particularly describ[e] the place to be searched, and the persons or things to be seized.” Our supreme court has recognized that, in practice, this means that a warrant should describe items to be seized “with as much particularity and specificity as the circumstances and the nature of activity under investigation permit[.]” See *State v. Petrone*, 161 Wis. 2d 530, 541, 468 N.W.2d 676 (1991).

¶40 Sveum’s particularity argument is that the many items authorized for seizure were so “non-specific” that the warrant was an invalid general warrant. Police were authorized to seize phone bills, journals, calendars, logs, computers and devices related to computers, cameras and film, binoculars, flashlights, ski masks, audio and/or video recording equipment in any format, and evidence that might identify the residents of the searched dwelling. Sveum also argues that the warrant lacked probable cause to seize some of the types of items identified in the warrant because he and his mother occupied the residence and the warrant lacked objective standards by which the executing officers could differentiate items his mother owned. We reject Sveum’s arguments. We perceive no reason, at least in this case, why guidelines would have been helpful or necessary. Tellingly, Sveum does not suggest what sorts of ownership guidelines would have been required to satisfy his view of the particularity requirement. We conclude that the warrant described the items to be seized with as much particularity and specificity as the circumstances and the nature of Sveum’s alleged stalking activity permitted.

¶41 Furthermore, the two cases on which Sveum places primary reliance actually cut against him. In *People v. Prall*, 145 N.E. 610 (Ill. 1924), the

authorities could have, but did not, describe the stolen property sought with precision by reference to serial numbers. *See id.* at 612. No similar identifying information could have assisted in limiting the seizures here.

¶42 Sveum's reliance on *United States v. Klein*, 565 F.2d 183 (1st Cir. 1977), is similarly misplaced. *Klein* involved whether the description, "pirate reproduction," sufficiently informed the officers executing a warrant how to distinguish between pirated and non-pirated merchandise. *See id.* at 184-87. But that case makes plain the court's view that differentiating between the two types of merchandise was a technical endeavor based on criteria that would not generally have been known to the police officers executing the warrant. *See id.* at 186 & n.5, 188-89.<sup>9</sup>

#### *D. Evidence Of Prior Stalking Conviction*

¶43 Sveum was convicted of aggravated stalking based on his 1996 stalking conviction. Proof of this particular aggravated stalking crime requires proof of a previous conviction for a violent crime or a stalking crime involving the same victim pursuant to WIS. STAT. § 940.32(3)(b). Sveum argues that the circuit court erred by admitting evidence of his prior stalking conviction after he had agreed to stipulate to the conviction. The legal basis for Sveum's argument is difficult to discern, but he relies on *State v. Alexander*, 214 Wis. 2d 628, 571 N.W.2d 662 (1997), a case holding that a defendant's prior drunk driving

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<sup>9</sup> Sveum also argues that the officers exceeded the scope of the warrant when they seized financial documents. Sveum does not, however, indicate what types of financial documents he is talking about or explain why such documents fell outside the scope of the warrant. Accordingly, we consider this argument no further. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not consider arguments that are inadequately briefed).

convictions should not have gone to the jury, even though proof of the prior convictions was necessary to prove the drunk driving charge at issue in that case. Whatever persuasive value *Alexander* may have had in a stalking case was put to rest in *State v. Warbelton*, 2009 WI 6, ¶40, \_\_\_ Wis. 2d \_\_\_, 759 N.W.2d 557. In *Warbelton*, also a stalking case, the court expressly declined to apply *Alexander* and held that *Alexander* applies only to drunk driving prosecutions. *Warbelton*, 2009 WI 6, ¶¶3, 46, 61. We are bound by *Warbelton*.

### *E. Ineffective Assistance Of Trial Counsel*

¶44 Sveum argues that he received ineffective assistance of trial counsel in several respects. The two-pronged deficient performance/prejudice test we apply to such claims is well established and we do not repeat it in further detail here. We address each of Sveum’s ineffective assistance claims in the sections that follow.

#### *1. Jury Selection*

¶45 Sveum argues that counsel was ineffective during jury selection by failing to ask potential jurors whether knowledge of Sveum’s prior conviction for stalking Johnson would prevent them from being fair and impartial. It appears that Sveum has not demonstrated either deficient performance or prejudice, but we will limit our discussion to his failure to show prejudice.

¶46 Sveum’s prejudice argument consists only of the speculative assertion that “due to counsel’s deficiency, *there is no assurance* that Sveum’s ... right to an impartial jury was honored” (emphasis added). In the face of the same argument in the context of a sexual assault charge, we explained that the defendant “needed to show that if his trial counsel had asked more or better questions, those

questions would have resulted in the discovery of bias on the part of at least one of the jurors who actually decided his case.” *State v. Koller*, 2001 WI App 253, ¶¶11-16, 248 Wis. 2d 259, 635 N.W.2d 838. As in *Koller*, Sveum makes no such showing.

## 2. Evidence Of Pending Appeal

¶47 At the time of Sveum’s trial in this case in 2006, an appeal from a denial of a writ of habeas corpus attacking his 1996 conviction was pending. Sveum points to language in WIS. STAT. § 906.09(5) (2005-06), which provides that “[e]vidence of the pendency of an appeal is admissible,” and argues that his trial counsel was ineffective because counsel failed to introduce evidence of his pending appeal.

¶48 The State responds that, because the pending appeal was not a direct appeal but a collateral challenge after Sveum’s direct appeal failed, the pending appeal was not an “appeal” within the meaning of WIS. STAT. § 906.09(5) (2005-06). We need not address this argument because, regardless of the proper interpretation of the statute, Sveum has not demonstrated deficient performance or prejudice. We agree with the State’s alternative argument that it would have been a reasonable strategic choice by counsel not to introduce evidence of the pending challenge to Sveum’s 1996 conviction because the prosecutor would have countered with damaging proof that Sveum’s direct appeal from the 1996 conviction had failed.

## 3. Cross-Examination Of The Alleged Stalking Victim

¶49 At trial, Johnson, the stalking victim, provided strong testimony against Sveum, such as her assertion that, during one encounter in 1994, Sveum

grabbed her and told her that one day when she came home he would be hiding in the bushes and would blow her head off. Sveum argues that it was, therefore, critical to impeach Johnson's credibility and that his counsel rendered ineffective assistance when counsel failed to use information Sveum provided to cross-examine Johnson. For example, Sveum says he advised his counsel about police reports proving that Johnson had voluntary contacts with him after the alleged threat, and that counsel failed to use this information to impeach Johnson.

¶50 We have examined each cross-examination failure Sveum alleges, and conclude that he has failed to show ineffective assistance. For example, we agree that if Johnson had voluntary contact with Sveum after the alleged death threat, such contact might lead a jury to think it less likely that the threat occurred. Sveum cites *State v. Thiel*, 2003 WI 111, ¶64, 264 Wis. 2d 571, 665 N.W.2d 305, to support this common-sense observation. But, just as the *Thiel* court concluded that the failure to use such information to impeach the victim, standing alone, did not undermine the court's confidence in the outcome, *see id.*, ¶81, we similarly conclude that the failure does not undermine our confidence in the jury's verdict here.

¶51 We agree with the circuit court that, given the long history of Sveum's stalking conduct toward Johnson, attempts to impeach Johnson as Sveum suggests could easily have backfired. Moreover, much of the information Sveum relies on could have been readily explainable, and none of it would have been likely to have destroyed Johnson's credibility or made her seem less credible than Sveum. Sveum chose not to testify and, even assuming he had, it strains credulity to think the jury would have found him more credible than Johnson. The evidence at trial, which included Sveum's sister's testimony and correspondence between Sveum and his sister, showed that Sveum was highly deceptive and manipulative.

Accordingly, Sveum has not shown deficient performance or prejudice based on counsel's failure to cross-examine Johnson with the information identified.

#### *4. Failure To Object During Sveum's Sister's Testimony*

¶52 Under cross-examination, Sveum's counsel elicited testimony from Sveum's sister, Renee, that she knew Sveum well and would not have helped Sveum if she thought he would harm Johnson. On redirect, the State asked Renee if she knew that Sveum had threatened to blow Johnson's head off, and Renee replied, "no." Sveum argues that, because Renee was the first witness to testify and Johnson had not yet testified about Sveum's threat, counsel was ineffective by failing to object for lack of foundation. This argument is meritless. Although it appears to be true that the question lacked a foundation when asked because Johnson had yet to testify, we agree with the State that the same question could have been posed to Sveum's sister either by recalling her after Johnson testified or by permitting the question in hypothetical form because it was known that Johnson would testify about the death threat.

#### *5. Failure To Request Limiting Instruction On Other Acts Evidence*

¶53 The prosecutor presented evidence of Sveum's 1996 conviction for stalking Johnson and Sveum's behavior underlying that conviction. This evidence included Johnson's testimony that, among other things, Sveum went into Johnson's car and removed items, had a key made when Johnson got a different car, and left phone messages saying that Johnson would "be sorry" if she did not pick up the phone. Sveum asserts that this was "other acts" evidence and that his counsel should have requested a limiting instruction explaining to the jury that this evidence could not be used to infer that he had a propensity to commit this type of crime.

¶54 Sveum does not explain why a limiting instruction would likely have made a difference in the verdict in light of the types of concerns associated with other acts evidence. Rather, his argument seems to be that counsel's failure to request a limiting instruction was *per se* deficient performance and resulted in *per se* prejudice. We disagree.

¶55 WISCONSIN STAT. § 901.06 (2005-06) provides: "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the judge, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." Thus, this statute requires an instruction when one is *requested*. The logical corollary is that an instruction is not required every time evidence is admitted for one purpose, but is not admissible for another, and, therefore, it is not *per se* deficient performance to fail to request an instruction.

¶56 Sveum also asserts that counsel's failure to request a limiting instruction implicates double jeopardy, the statute of limitations, due process, and equal protection. We agree with the State that these arguments are insufficiently developed and, therefore, address them no further. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not consider arguments that are inadequately briefed).

#### *F. Erroneous Jury Instruction*

¶57 The parties agree that the jury instruction on one element of stalking, under WIS. STAT. § 940.32(3), was partially incorrect. Specifically, as to the "course of conduct" element, the jury was instructed that the acts constituting a "course of conduct" are limited to:

- 1) “maintaining visual or physical proximity to Jamie Johnson,” or
- 2) “contacting Jamie Johnson by telephone or causing Jamie Johnson’s telephone or any other person’s telephone to ring repeatedly or continuously regardless of whether a conversation ensues,” or
- 3) “causing any person to engage in either of the acts described [above].”

The causing-any-person part of this instruction was incorrect because of its reference to the two acts described in items 1) and 2). The “causing any person” alternative did not, at the relevant time, include causing these two acts. *See* § 940.32(1)(a) (2001-02). Thus, the jury was erroneously told that the “course of conduct” element could be met if Sveum *caused his sister Renee* to engage in either of these acts.<sup>10</sup>

¶58 Sveum correctly argues that this type of instructional error was cause for reversal in United States Supreme Court cases as recent as *Boyd v. California*, 494 U.S. 370 (1990). Since *Boyd*, however, the Court has concluded that harmless error analysis applies to such error. *Hedgpeth v. Pulido*, 129 S. Ct. 530, 532 (2008). We agree with the State that the error here was harmless.

¶59 For purposes of our harmless error discussion, we will assume without deciding that Sveum is correct that the proper harmless error test is the one set forth in *State v. Dyess*, 124 Wis. 2d 525, 370 N.W.2d 222 (1985). Under *Dyess*, the State must establish that there is “no reasonable possibility that the error contributed to the conviction.” *Id.* at 543. Sveum argues that the test is not

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<sup>10</sup> In a subsequent version of the statute, the causing-any-person alternative applies to all of the other types of acts listed, including the two listed in Sveum’s jury instruction. *See* WIS. STAT. § 940.32(1)(a) (2003-04).

met here because it is impossible to know whether one or more of the jurors voted to convict him relying solely on evidence that he caused his sister to engage in stalking conduct. We are confident that did not occur.

¶60 The jury heard evidence that Sveum's sister maintained proximity to Johnson or made prohibited phone contacts to Johnson at Sveum's behest while he was in prison. But the jury also heard essentially uncontested evidence that, soon after Sveum was released from electronic monitoring, he began making hang-up calls to Johnson, often immediately after she arrived home. This evidence demonstrated not only that Sveum was engaging in prohibited phone contacts, but that he was also maintaining visual or physical proximity to Johnson on a recurring basis. Moreover, with exceptions not relevant here, Sveum's trial counsel did not attempt to persuade the jury that Sveum did not engage in the conduct alleged after he was released from prison. Rather, counsel disputed other elements. Counsel candidly stated in closing argument: "[Y]ou're asked to take a course of conduct *which obviously is present* and still decide if what happened here is stalking." (Emphasis added.) Counsel continued: "The course of conduct is present but you're being asked to decide if the other elements of the crime are also present ...."

¶61 We perceive no reason why any juror would have rejected evidence of Sveum's post-incarceration behavior and relied instead only on his sister's conduct. Accordingly, we conclude that the instructional error was harmless.<sup>11</sup>

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<sup>11</sup> We note that, consistent with Sveum's charge, the jury was given the party-to-a-crime instruction. Sveum argues that this instruction "compounded" the error because applying the party-to-a-crime statute to the stalking statute would render WIS. STAT. § 940.32(1)(a)10. superfluous. Sveum does not develop this argument until his reply brief, and even then he does  
(continued)

*Conclusion*

¶62 For all of the reasons stated above, we affirm the judgment of conviction and the order denying postconviction relief.

*By the Court.*—Judgment and order affirmed.

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not address case law setting forth the standards for determining whether the party-to-a-crime statute applies. *See, e.g., State v. Tronca*, 84 Wis. 2d 68, 84-85, 267 N.W.2d 216 (1978); *State v. Curbello-Rodriguez*, 119 Wis. 2d 414, 432-33, 351 N.W.2d 758 (Ct. App. 1984). Accordingly, we decline to address this topic further. *See Pettit*, 171 Wis. 2d at 646-47.

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No. 2008-AP-0658-CR

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STATE OF WISCONSIN,

*Plaintiff-Respondent,*

*v.*

MICHAEL A. SVEUM,

*Defendant-Appellant-Petitioner.*

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**REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER**

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On Review from Wisconsin Court of Appeals,  
District IV

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Dean A. Strang  
*Wisconsin Bar No. 1009868*  
Marcus J. Berghahn  
*Wisconsin Bar No. 1026953*

HURLEY, BURISH & STANTON, S.C.  
Counsel for Michael A. Sveum  
33 East Main Street, Suite 400  
Madison, Wisconsin 53703  
[608] 257-0945

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## INTRODUCTION

The state misapprehends both the reality of seizures of private property, which interfered with an owner's possessory right to exclude others, not just with his right to resume use of his property when the police are done attaching something to it. The state also mistakes a court order for a valid warrant, although both the text of the Fourth Amendment and the United States Supreme Court require more of a "warrant" than this order supplied.

## REPLY

### I. SVEUM'S OWN FOURTH AMENDMENT INTERESTS UNDISPUTEDLY WERE AT STAKE.

Focusing primarily on the question of a search, the state suggests now that Sveum failed to prove that state actors invaded his own reasonable expectation of privacy. BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT at 9-10 (January 26, 2010).

That concern is misplaced. As the circuit court correctly found, Det. Ricksecker's affidavit itself established that Sveum was the primary user or driver of the car at issue and that he resided, in all probability, where that car was parked. R116:104. The circuit court was right. The affidavit attested to Sveum's dominion and control over the car and his residence at one of two places, including the home where police attached the GPS unit to the undercarriage of his car. R40:21-22, A. App. 1-2.

After obtaining a court order on the basis of a sworn assertion that this was Sveum's car and also was a place where he resided, the state is in a poor position to complain now about an absence of proof.

## II. THE POLICE REPEATEDLY SEIZED AND SEARCHED SVEUM'S PROPERTY.

The state makes no real effort to address Sveum's principal point: three temporary seizures of his car occurred when the police crawled under it and affixed an object to the undercarriage for their own purposes, without Sveum's knowledge or consent. In framing the issue instead as whether monitoring Sveum's car on public thoroughfares was a search, the state addresses arguments that Sveum does not make.

Sveum does not contend that traveling with the GPS device amounted to a search. He argues that it was a seizure, an electronic tether that interfered with his possessory right to exclude others from making use of his automobile. He also argues that police officers effected a Fourth Amendment seizure when they temporarily appropriated his car three times to crawl under it and attach the GPS device.

The essence of the seizure here was not depriving Sveum of the possessory use of his automobile. It was depriving him of the essential possessory right of excluding others from using his car. "One of the main rights attaching to property is the right to exclude others," Justice Rehnquist wrote for the Supreme Court in *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978), citing Blackstone. And, *Rakas* continued, "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude." 439 U.S. at 143 n.12. It is not that Sveum was unable to use his car; it is that the police *were* able to use his car, without his

knowledge and contrary to his interests. That is a seizure. The Seventh Circuit missed that entirely in *United States v. Garcia*, 474 F.3d 994 (7th Cir. 2007).

### III. THE COURT ORDER WAS NOT A VALID WARRANT.

Faced with the temporary seizures required to attach the GPS device to Sveum's car, and the usurpation of Sveum's right to the exclusive use of his property by attachment of an electronic tether, the state turns to an alternative justification for the judgment of the court of appeals: the April 22, 2003, court order was a search warrant for purposes of the Fourth Amendment. That alternative argument runs headlong into potential trouble under waiver doctrine, given the state's argument to the trial court. Even on its merits, at best the court order met only the probable cause requirement of the Fourth Amendment. It did not meet other constitutional requirements for a warrant. So assuming for the sake of argument that the state demonstrated probable cause, Judge Callaway's order was not a "warrant" that the Fourth Amendment recognizes and no reasonable police officer would have thought that it was.

#### A. Waiver.

Like any other litigant, the state may both forfeit and waive arguments. *See, e.g., State v. Milashoski*, 159 Wis. 2d 99, 108-09, 464 N.W.2d 21, 25 (Ct. App. 1990); *State v. Lopez*, 2001 WI App 265, ¶¶ 23-24, 249 Wis. 2d 44, 60-61, 637 N.W.2d 468, 476-77; *State v. Nawrocki*, 2008 WI App 23, ¶ 2 n.3, 308 Wis. 2d 227, 231 n.3, 746 N.W.2d 509, 511 n.3. In brief, a forfeiture is a failure timely to assert a right or claim. A waiver is the intentional relinquishment of a known right or claim. *See generally State v. Ndina*, 2009 WI 21, ¶¶ 29-30, 315 Wis. 2d 653, 670, 761 N.W.2d 612, 620.

Waiver gets murky, though, when a respondent seeks to support a decision below on alternate grounds. Ordinarily, a respondent may point to any basis for upholding the decision below, even if the lower court overlooked or disclaimed it. The court of appeals even has refused to enforce the waiver rule against the state when it seeks affirmance on appeal on an argument contrary to its position in the trial court. See *State v. Holt*, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679, 686-87 (Ct. App. 1985). The court of appeals later explained *Holt* this way: “we may address a respondent’s argument that is otherwise waived if the respondent seeks to uphold the trial court’s ruling and the argument does not require any fact-finding.” *State v. Ortiz*, 2001 WI App 215, ¶¶ 25, 247 Wis. 2d 836, 848, 634 N.W.2d 860, 866.

But the court of appeals also has distinguished *Holt* more than once and bound the state to its waivers. See, e.g., *Milashoski*, 159 Wis. 2d at 108-09, 464 N.W.2d at 25; *State v. Nicholson*, 220 Wis. 2d 214, 229-31, 582 N.W.2d 460, 467-68 (Ct. App. 1998); *Ortiz*, 2001 WI App 215, ¶¶ 25-26, 247 Wis. 2d at 848, 634 N.W.2d at 866.

In the circuit court, the state well may have waived the argument that the court order here was a search warrant. Specifically, the prosecutor argued to the trial court “why a search warrant is not appropriate.” R116:98. Expanding, he said:

Because, as [defense] counsel pointed out, if it’s a search warrant, they’ve got to return it within five days which totally defeats the purpose of the device. He could have not gone to a phone booth for five days. Now the search warrant has to be returned. And then on the sixth day he goes to a phone booth, not because the GPS device is on the car, but because that’s what he choose to do.

That was his pattern of conduct. He wasn't—He had to work for five days, whatever it is. So that's why using a search warrant to engage in the activity that we engaged in here makes no sense.

R116:98.

The prosecutor went on to note the point that he wished to “emphasize to the court, is this is not a search.” R116:98. He elaborated on why no search or seizure occurred and concluded:

A search warrant should not be required and I claim you don't even have to reach the question because an adequate probable cause affidavit was presented to Judge Callaway to justify more than the actions the police took here in order to be able to discover the defendant's activities, which activities were probably going to be activities engaging in stalking of Jamie Johnson. And, as long as that was probably true, we have met the requirements of any perception of an invasion of privacy if that's the analysis, of a Fourth Amendment analysis. We have justified our action to an independent magistrate.

R116:99.

While the state insisted that there was a probable cause showing and a court order, this Court can understand that argument as an explicit waiver of the proposition that the Fourth Amendment required a *warrant* or that the court order in fact was a warrant within

the ambit of the Fourth Amendment. Further, the Court need not relieve the state of its waiver. A seasoned prosecutor deliberately staked out the position in the trial court that a search warrant “is not appropriate” in the context of surreptitiously attaching and monitoring a car with a GPS device. R116:98.

**B. *Not a Valid Warrant.***

Waiver or no, Judge Callaway’s order fell short of Fourth Amendment requirements\* of a warrant. The state’s argument supporting that order centers on probable cause. Indeed, it addresses nothing else.

Assuming without conceding that Det. Ricksecker’s affidavit established probable cause, that alone does not make the court order a “warrant” under the Fourth Amendment. This order invited multiple entries and seizures on a single showing of probable cause. It found only that installation of a tracking device on Sveum’s car was “relevant to an on-going criminal investigation and that the vehicle is being used in the commission of a crime of stalking,” R40:25, A. App. 5, not that the order itself would lead to seizure of evidence of a crime, let alone where or when. Certainly there was no particular designation of the information or evidence to be seized. The order then allowed open-ended search or seizure, or both, for up to 60 days. It failed to

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\* The court order also failed requirements of Ch. 968 of the Wisconsin Statutes. *See, e.g.*, WIS. STAT. §§ 968.15 (5-day execution requirement), 968.17 (48-hour return requirement), 968.12(1) (the order leaves a question whether it authorized seizing “designated property or kinds of property”). But Sveum limits his discussion here to the constitutional shortcomings of the court order that cannot be excused as harmless. Only a true “warrant” survives minor failings. *See* WIS. STAT. § 968.22. Sveum’s argument is not that this was a warrant marred by technical defects. His argument is that it was not a “warrant” at all, as the Fourth Amendment understands such a document.

provide for notice to the target of the search or seizure after execution of the order. And it required no return to the court.

Those are essentials of a valid warrant. Yet all were absent here. This order was not a warrant as the Fourth Amendment comprehends that word. For good reasons, the court of appeals decided this case on the assumption that the state's actions were warrantless.

1. *Particularity*. The requirement that a warrant identify with particularity the objects to be seized is textual, not judicial. The Fourth Amendment commands explicitly that warrants may not issue unless “particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV. Considering a search warrant that did rest on probable cause and did describe the place to be searched, but did not describe the evidence to be seized, the Supreme Court wrote, “The warrant was plainly invalid.” *Groh v. Ramirez*, 540 U.S. 551, 557 (2004). The fact that the application described items for seizure did not save the warrant. *Groh*, 540 U.S. at 557. To the contrary, “the warrant did not describe the items to be seized *at all*. In this respect the warrant was so obviously deficient that we must regard the search as ‘warrantless’ within the meaning of our case law.” *Id.* at 558 (italics in original); *see generally Marron v. United States*, 275 U.S. 192, 195-96 (1927) (reviewing history and purposes of particularity requirement).

2. *Timely Execution*. The court order here allowed officers to monitor a GPS device on Sveum's car for up to sixty days after issuance of the order. R40:26, A. App. 6. That set a plainly unreasonable expanse of time in which to search and seize, at least on a single application. By statute, Wisconsin allows only five days in which to execute a warrant. WIS. STAT. § 968.15. While that statutory period itself is not necessarily a constitutional requirement, it also has been clear for almost 80 years that a new warrant then is necessary. And

“[t]he new warrant must rest upon a proper finding and statement by the commissioner that probable cause then exists. That determination, as of that time, cannot be left to mere inference or conjecture.” *Sgro v. United States*, 287 U.S. 206, 211 (1932).

Indeed, even executing a warrant within Wisconsin’s statutory five-day period is no guarantee of the necessary reasonableness. “Irrespective of compliance with a rule or statutory time limit within which a search must be executed, a delay in the execution of a warrant may be constitutionally impermissible under the Fourth Amendment.” *State v. Edwards*, 98 Wis. 2d 367, 372, 297 N.W.2d 12, 14-15 (1980). “We also believe,” this Court continued, “that any consideration of the timeliness of the execution of a search warrant necessarily requires an inquiry into the continued existence of probable cause at the time of the execution.” *Edwards*, 98 Wis. 2d at 372, 297 N.W.2d at 15.

The court order here presented a related problem. Sveum’s case is close to *Berger v. New York*, 388 U.S. 41 (1967), where the Supreme Court invalidated a New York eavesdropping statute under the Fourth Amendment in part because “authorization of eavesdropping for a two month period is the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause.” *Berger*, 388 U.S. at 59. A leading academic commentator on the Fourth Amendment observes that “a warrant may be executed only once, and thus where police unsuccessfully searched premises for a gun and departed but then returned an hour later and searched further because in the interim an informant told the police of the precise location of the gun, the second search could not be justified as an additional search under authority of the warrant.” 2 Wayne R. LaFare, SEARCH AND SEIZURE § 4.10(d), at 767 (4th ed. 2004); see also *State v. Parsons*, 83 N.J. Super. 430, 447-48, 200 A.2d 340, 350 (A.D. 1964); *State v. Trujillo*, 95 N.M. 535, 539, 624 P.2d 44, 48 (1981).

Here, the court order purported to invite not just 60 days of continued searches and seizures, but as many re-entries as necessary to replace batteries on the GPS device. R40:25-26, A. App. 5-6. That explicitly invited more than one search or seizure on the authority of a single warrant and a single showing of probable cause, contrary to this rule.

At a minimum, the court order here invited second or subsequent searches well after probable cause may have become stale, contrary to *Edwards* and *Sgro*. These related problems of timeliness and repetition of execution combine to make the court order something outside the ambit of a Fourth Amendment warrant.

3. *Notice.* ““The presence of a search warrant serves a high function,” the Supreme Court noted in *Groh v. Ramirez*, 540 U.S. at 557, quoting *McDonald v. United States*, 335 U.S. 451, 455 (1948). Part of that high function is providing a document that either is known to the person whose home is searched or is available for the person’s inspection, as *Groh v. Ramirez* explained. 540 U.S. at 557. The absence of a requirement for notice was one factor that contributed to the *Berger* Court’s refusal to find New York’s eavesdropping statute congruent with the Fourth Amendment. 388 U.S. at 60 (“the statute’s procedure, necessarily because its success depends on secrecy, has no requirement for notice as do conventional warrants, nor does it overcome this defect by requiring some showing of special facts”).

Notice of the authority for and purposes of a search are important enough to give rise to a due process right. “It follows that when law enforcement agents seize property pursuant to a warrant, due process requires them to take reasonable steps to give notice that the property has been taken so the owner can pursue available remedies for its return.” *City of West Covina v. Perkins*, 525 U.S. 234, 240 (1999). This, of course, is the basic purpose of statutes requiring a

receipt after a search and seizure, just as WIS. STAT. § 968.18 does. The absence of a receipt was one more statutory violation here.

More importantly, the absence of any timely notice to Sveum, either before or after police repeatedly seized his car, secretly attached something to it, and used their electronic tether to monitor his movements in the car for weeks, denied due process under *Perkins*. The denial of due process adds to the unreasonableness of these seizures (and searches).

4. *Timely Return*. Another Fourth Amendment failing that *Berger* identified in New York's eavesdropping statute was that it did not "provide for a return on the warrant thereby leaving full discretion in the officer as to the use of seized conversations of innocent as well as guilty parties." *Berger*, 388 U.S. at 60. This court order has exactly the same failing. It required no return at all.

**C. *No Reasonable Officer Would Have Thought the Order Adequate Under the Fourth Amendment.***

In whole, the Fourth Amendment makes clear that mere probable cause plus a judge's signature do not a warrant make. Additional requirements of particularity in the items officers may seize, timely execution, notice after a search, and timely return are not new or unforeseen. As *Groh v. Ramirez* held, the facial defect in particularity of the items to be seized alone meant that "no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid." 540 U.S. at 563.

This case is more striking, and less amenable to the good faith exception of *United States v. Leon*, 468 U.S. 897 (1984), because the absence of particularity hardly was the only facial defect in this court order. On its face, the court order did not even claim to be a

warrant. Rightly; it was not. This is no case for saving a warrantless search on good faith.

## CONCLUSION

Michael Sveum requests again that this Court REVERSE the judgment of the Wisconsin Court of Appeals and REMAND.

Dated at Madison, Wisconsin, February 5, 2010.

Respectfully submitted,

HURLEY, BURISH & STANTON, S.C.  
Counsel for Michael A. Sveum,  
*Defendant-Appellant-Petitioner*

---

Dean A. Strang  
*Wisconsin Bar No. 1009868*  
Marcus J. Berghahn  
*Wisconsin Bar No. 1026953*  
33 East Main Street, Suite 400  
Madison, Wisconsin 53703  
[608] 257-0945

## CERTIFICATION

I certify that this reply brief conforms with the rules contained in WIS. STAT. §§ 809.19(8)(b) and (c), for a brief produced using proportional serif font. The length of the portions of this reply brief described in WIS. STAT. § 809.19(1)(d), (e) and (f) is 2,992 words. *See* WIS. STAT. § 809.19(8)(c)1.

Dated this \_\_\_\_ day of February, 2010.

HURLEY, BURISH & STANTON, S.C.  
Counsel for Michael A. Sveum

---

Dean A. Strang  
*Wisconsin Bar No. 1009868*  
Marcus J. Berghahn  
*Wisconsin Bar No. 1026953*  
33 East Main Street, Suite 400  
Madison, Wisconsin 53703  
[608] 257-0945

**CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this reply brief, excluding the appendix, if any, which complies with the requirements of WIS. STAT. § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the reply brief filed as of this date.

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

---

Dean A. Strang

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IN THE SUPREME COURT OF WISCONSIN

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OF WISCONSIN**

\_\_\_\_\_  
Appeal No. 2008AP000658 - CR  
\_\_\_\_\_

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL A. SVEUM,

Defendant-Appellant-Petitioner.  
\_\_\_\_\_

**NON-PARTY BRIEF OF *AMICI CURIAE* AMERICAN  
CIVIL LIBERTIES UNION OF WISCONSIN FOUNDATION,  
AMERICAN CIVIL LIBERTIES UNION FOUNDATION  
AND ELECTRONIC FRONTIER FOUNDATION**  
\_\_\_\_\_

On Review from the Wisconsin Court of Appeals, District IV  
\_\_\_\_\_

Amelia L. Bizzaro  
Henak Law Office, S.C.  
316 N. Milwaukee St., Suite 535  
Milwaukee, WI 53202  
(414) 283-9300

Catherine Crump  
American Civil Liberties Union  
Foundation  
125 Broad Street, 17<sup>th</sup> Floor  
New York, NY 10004  
(212) 519-7806

Laurence Jacques Dupuis  
American Civil Liberties Union  
of Wisconsin Foundation  
207 E. Buffalo St., Suite 325  
Milwaukee, WI 53202-5774  
(414) 272-4032

Jennifer Granick  
Electronic Frontier Foundation  
454 Shotwell St.  
San Francisco, CA 94110  
(414) 436-9633 x. 134

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IN THE SUPREME COURT OF WISCONSIN

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Appeal No. 2008AP000658 - CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL A. SVEUM,

Defendant-Appellant-Petitioner.

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**NON-PARTY BRIEF OF *AMICI CURIAE* AMERICAN  
CIVIL LIBERTIES UNION OF WISCONSIN FOUNDATION,  
AMERICAN CIVIL LIBERTIES UNION FOUNDATION  
AND ELECTRONIC FRONTIER FOUNDATION**

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**ARGUMENT**

**THE STATE CONSTITUTION PROHIBITS LAW  
ENFORCEMENT FROM CONDUCTING REMOTE GPS  
SURVEILLANCE WITHOUT A WARRANT**

For the first time, this Court is presented with the question of whether law enforcement can use GPS technology to track the location of citizens without a warrant. The highest courts in five states have already addressed this question. All but one concluded that law enforcement is required to first obtain a warrant based on probable cause before conducting GPS or similar surveillance. Compare *State v. Jackson*, 150 Wash.2d 251, 76 P.3d 217 (2003) (installation of a GPS tracking device on defendant's car required a warrant), *People v. Weaver*, 12 N.Y.3d 433, 909 N.E.2d 1195 (2009) (same), *Commonwealth v. Connolly*, 454 Mass. 808, 913 N.E.2d

356 (2009) (installation and monitoring of a GPS tracking device on defendant's minivan was a seizure), and *State v. Campbell*, 306 Or. 157, 759 P.2d 1040 (1988) (use of a beeper to locate defendant's car was a search and required a warrant or exigency) with *Osburn v. State*, 118 Nev. 323, 44 P.3d 523 (2002) (attaching a GPS to the bumper of defendant's car was not an unreasonable search requiring a warrant). This Court should reach the same conclusion as the courts in Massachusetts, New York, Oregon and Washington and find that the state constitution requires law enforcement to obtain a warrant and show probable cause before subjecting people to this form of surveillance.

**A. This Court Should Reach the State Constitutional Question**

This case is appropriate for deciding the question of whether law enforcement's use of GPS tracking is a search or seizure under the state constitution. The state's arguments to the contrary are wrong. *See* State's Brief at 25-26. This Court would need to undertake a similar, though not identical, analysis to decide the federal question, judicial economy and clear guidance to law enforcement is served by reaching the state law question, and there are no obstacles to this Court's full and fair review of the issue.

This Court may consider the state constitutional argument analogous to the federal constitutional question where, as here, doing so does not require consideration of additional facts. *State v. Knapp*, 2005 WI 127, ¶56, 285 Wis.2d 86, 700 N.W.2d 899. "This Court may nevertheless decide a constitutional question not raised below if

it appears in the interests of justice to do so and where there are no factual issues that need resolution.” *Bradley v. State*, 36 Wis.2d 345, 359-359a, 153 N.W.2d 38 (1967). There is no need to wait for another case before deciding this issue. *See State’s Brief* at 25-26. Whether the lower courts decided the issue is irrelevant because this Court reviews the matter *de novo*. *See State v. Edgeberg*, 188 Wis.2d 339, 344-45, 524 N.W.2d 911 (Ct. App. 1994).

Deciding the state constitutional question is a good approach to resolving this dispute. This case presents a clean legal issue that is equally amenable to resolution under the state and federal constitutions. Although *amici* believe that Sveum should prevail on his federal constitutional claim, there is little question that, if this Court finds for Sveum, addressing the state constitutional question first would allow this Court to avoid weighing in on an uncertain and novel federal question. Further, because this Court is the final arbiter of the meaning of the Wisconsin Constitution, deciding this case on state constitutional grounds would be an unappealable decision that would bring finality to a dispute that has been in litigation for many years. It would also allow this Court to join its sister states’ highest courts in recognizing that state constitutional protections have a vital role to play in ensuring that fundamental privacy rights are not undermined merely because of technological developments. The state’s arguments to the contrary are unavailing.

Although the state refers to “the myriad policy and technological issues presented,” it never explains exactly what those issues are or why they would require supplemental fact-finding to

determine the state constitutional issue, but not the federal constitutional issue. State's Brief at 26. Here, the facts are undisputed and the only question that remains under the state constitution is a legal one: whether law enforcement's secret attachment of a GPS device to Sveum's car while it was parked in his driveway was a search or seizure. Because this Court's review is *de novo*, the question can and should be answered here. See *State v. Edgeberg*, 188 Wis.2d at 344. Nor is the state constitutional claim meritless. State's Brief at 26. All but one of the state courts to have considered the issue have found that GPS tracking requires a warrant. See *Connolly, supra*; *Weaver, supra*; *Jackson, supra*; *Campbell, supra*.

Passing the buck to the legislature, as the state suggests, is not an answer. As Sveum points out, police agencies are using GPS tracking "quite routinely and often." Sveum's Brief at 11, *quoting* Detective Ricksecker (R116:41). Waiting to see if the legislature takes some action allows this invasive practice to continue without judicial supervision. Criminal defendants should not have to wait to find out what their rights are, particularly in light of the frequency with which police agencies are employing GPS tracking technology. Certainly, there is room for legislation on this issue. But waiting for the legislature to protect the privacy rights of Wisconsinites is not a solution to this prevalent practice, the consequence of which is the loss of liberty. See *Weaver*, 909 N.E.2d at 1198 ("[c]ontrary to the dissenting views, the gross intrusion at issue is not less cognizable as a search by reason of what the Legislature has or has not done to regulate technological surveillance.") Because this Court will be

deciding whether law enforcement needs a warrant and probable cause to track the movement of Wisconsin citizens, opting to resolve this case on state, rather than federal, grounds is an eminently reasonable approach.

**B. The State Constitution Provides Greater Rights than the Federal Constitution**

The federal constitution spells out the minimum rights to which citizens are entitled. Individual states are free to expand upon those rights. Interpretations of the U.S. Constitution do not bind the state's highest courts from interpreting their own constitutions to provide greater protection for individual rights. *Cooper v. California*, 386 U.S. 58, 62 (1967). Where the state constitution follows the language of the U.S. Constitution, the state is still free to interpret its constitution differently. *McCauley v. Tropic of Cancer*, 20 Wis.2d 134, 139, 121 N.W.2d 545 (1963) (“[s]uch decisions are eminent and highly persuasive, but not controlling, authority...on the question of whether the proscription or suppression of a particular piece of material as obscene violates sec. 3, art. I of our state constitution.”)

Although Wisconsin courts typically follow federal court interpretations of federal constitutional provisions that are identical or nearly identical to the Wisconsin constitution's provisions, *see, e.g., State v. Jennings*, 2002 WI 44, ¶39, 252 Wis.2d 228, 647 N.W.2d 142, this Court has rejected a “‘lock-step’ theory of interpreting the Wisconsin Constitution” that would require rote adherence to federal jurisprudence. *Knapp* at ¶59. “[T]his court ‘will

not be bound by the minimums which are imposed by the Supreme Court of the United States if it is the judgment of this court that the Constitution of Wisconsin and the laws of this state require that greater protection of citizens' liberties ought to be afforded.” *Id.* quoting *State v. Doe*, 78 Wis.2d 161, 171, 254 N.W.2d 210 (1977).

Although the language of ART. I, §11 closely tracks that of the Fourth Amendment, textual similarity, while important, “cannot be conclusive, lest this court forfeit its power to interpret its own constitution to the federal judiciary.” *Knapp* at ¶60. For those reasons, this Court departed from federal law in interpreting Wisconsin’s Due Process Clause in ART. I §8, in *State v. Dubose*, 2005 WI 126, 285 Wis.2d 143, 699 N.W.2d 582. There, this Court noted that although the language of the Wisconsin Constitution is similar to the U.S. Constitution, “we retain the right to interpret our constitution to provide greater protections than its federal counterpart.” *Id.* at ¶41. And, while this Court ordinarily follows the Fourth Amendment jurisprudence of the U.S. Supreme Court, *see, e.g., State v. Young*, 2006 WI 98, ¶19, 294 Wis. 2d 1, 717 N.W.2d 729, it has departed from federal Fourth Amendment law when necessary to protect the privacy rights guaranteed by the Wisconsin Constitution.

In *State v. Eason*, for example, this Court required a showing by the government that a “significant investigation” and review by a government attorney or specially trained police officer had taken place before admitting evidence obtained based on an officer’s “good faith” reliance on a defective warrant. 2001 WI 98, ¶63, 245

Wis. 2d 206, 629 N.W.2d 625. The U.S. Supreme Court did not require such a showing, *id.*, but this Court noted that the federal courts “could interpret the fourth amendment in a way that undermines the protection Wisconsin citizens have from unreasonable searches and seizures under article I, section 11, Wisconsin Constitution. This would necessitate that we require greater protection to be afforded under the state constitution than is recognized under the fourth amendment.” *Id.* at ¶60 quoting *State v. Fry*, 131 Wis. 2d 153, 174, 388 N.W.2d 565 (1986).

As with *Eason*, this case demands that this Court exercise its authority – and fulfill its duty – to interpret the Wisconsin Constitution to protect this state’s citizens from warrantless placement of GPS devices on vehicles – a “threat to privacy” that even those courts that have permitted it acknowledge is “more than a little troubl[ing].” *United States v. Garcia*, 474 F.3d 994, 998 (7<sup>th</sup> Cir. 2007); *State v. Sveum*, 2009 WI App 81, ¶20, 319 Wis.2d 498, 769 N.W.2d 53.

### **C. The Wisconsin Constitution Requires a Warrant**

If the Court of Appeals’ decision is permitted to stand, there will be nothing to prevent law enforcement officers in Wisconsin from engaging in continuous GPS surveillance of state residents without any judicial involvement whatsoever. Several states have addressed the issue of whether law enforcement’s use of GPS tracking technology requires a warrant under their individual state constitution. Three of those states – Oregon, Washington and New York – interpreted state constitutional provisions that are either

identical or nearly identical to WIS. CONST. ART. I §11. All but one of the five states held that (1) their state constitutional counterpart to the Fourth Amendment should be interpreted more broadly, and (2) use of GPS technology is a search and seizure requiring a warrant. This Court should draw similar conclusions.

Perhaps most troubling to these state courts was that warrantless tracking of private citizens allows law enforcement unfettered access to private information for any reason or for no reason at all. Such threat of scrutiny impairs the freedom to be let alone as well as the freedom to associate, freedom of religion and of speech. When law enforcement can obtain such an enormous amount of personal information, every human endeavor is chilled. *Campbell*, 759 P.2d. at 1047; *Jackson*, 76 P.3d at 264. “What the technology yields and records with breathtaking quality and quantity is a highly detailed profile, not simply of where we go, but by easy inference, of our associations – political, religious, amicable and amorous, to name only a few – and of the pattern of our professional and avocational pursuits.” *Weaver*, 909 N.E.2d at 1199.

In this way, GPS tracking is far more invasive than ordinary physical surveillance. It does not, as flashlights and binoculars do, enhance viewing of something going on in the present. Rather, it replaces traditional surveillance methods, allowing law enforcement to see into the past. “We perceive a difference between the kind of uninterrupted, 24-hour a day surveillance possible through use of a GPS device, which does not depend upon whether an officer could in fact have maintained visual contact over the tracking period, and

an officer's use of binoculars or a flashlight to augment his or her senses." *Jackson*, 76 P.3d at 223; *see also Campbell*, 759 P.2d 15 171-72 ("use of a radio transmitter to locate an object...cannot be equated to visual tracking. Any device that enables the police quickly to locate a person or object anywhere within a 40-mile radius, day or night, over a period of several days, is a significant limitation on freedom from scrutiny.")

Nor does the fact that a person steps into a public space completely destroy any privacy interest he or she may have in his or her activities and possessions. Cell phone technology may propel conversations from private homes to public streets, but the *Weaver* Court said, such "change in venue has not been accompanied by any dramatic diminution in the socially reasonable expectation that our communications and transactions will remain to a large extent private." *Weaver*, 909 N.E.2d at 1200. *See also Delaware v. Prouse*, 440 U.S. 648, 663 (1979) ("...people are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles.") It is certainly "socially reasonable" to expect that the government cannot physically trespass on one's personal vehicle to install a GPS device and effortlessly collect detailed information on one's comings and goings, without a warrant or probable cause to believe that one is engaged in unlawful activity. Finally, in the absence of judicial supervision, law enforcement has no disincentive to employ widespread mass location tracking. To the contrary, the technology is prevalent, cheap, and easy to use.

To suggest, as the state does here, that a person has no interest in the outside of his car parked in the driveway of his home, is to “seriously undervalue the privacy interests at stake.” *Weaver* at 1201, quoting *Arizona v. Gant*, \_\_ U.S. \_\_, 129 S.Ct. 1710, 1720 (2009). “Although we have recognized that a motorist’s privacy interest in his vehicle is less substantial than in his home...the former interest is nevertheless important and deserving of constitutional protection.” *Gant*, 129 S.Ct. at 1720. It is one thing, the *Weaver* Court said, to suppose that some circumstances do not require a warrant, but entirely another to “suppose that when we drive or ride in a vehicle our expectations of privacy are so utterly diminished that we effectively consent to the unsupervised disclosure to law enforcement authorities of all that GPS technology can and will reveal.” *Weaver*, 909 N.E.2d at 1200.

Given the variety and prevalence of the types of GPS devices in existence, it is no surprise that the cases from other jurisdictions involved multiple types of GPS devices. In *Weaver* and *Campbell*, as here, law enforcement attached a battery-operated device to the underside of the defendant’s car. *Weaver*, 909 N.E.2d at 1195-96; *Campbell*, 759 P.2d at 1041. But in *Jackson* and *Connolly*, law enforcement installed a GPS device into the vehicle itself so that the vehicle powered the GPS device. *Jackson*, 76 P.3d at 223; *Connolly*, 913 N.E.2d at 360. However, the question of whether a search occurred does not depend on the power source of the device or precisely where on the vehicle it was placed, but as the *Campbell* Court pointed out, “whether using the transmitter is an action that

can be characterized as a search” or seizure. *Id.* at 1045-46. “[B]oth laws and social conventions have long recognized the right to exclude others from certain places deemed to be private. If the government were able to enter such places without constitutional restraint, ‘the people’s’ freedom from scrutiny would be substantially impaired.” *Campbell* at 1048.

To decide this case any differently than the majority of states who have addressed this issue is to expose Wisconsin citizens to an unprecedented level of scrutiny that will only get worse as technology advances. “Technological advances have produced many valuable tools for law enforcement and, as the years go by, the technology available to aid in the detection of criminal conduct will only become more and more sophisticated. Without judicial oversight, the use of these powerful devices presents a significant and, to our minds, unacceptable risk of abuse.” *Weaver*, 909 N.E.2d at 1203.

## CONCLUSION

For these reasons, as well as for those stated in Sveum’s Briefs, the American Civil Liberties Union of Wisconsin Foundation, the American Civil Liberties Union Foundation and the Electronic Frontier Foundation ask this Court to consider the persuasive reasoning of the courts in Oregon, Washington, New York and Massachusetts and hold that the Wisconsin Constitution requires law enforcement to obtain a valid warrant prior to conducting GPS tracking of a person or vehicle.

Dated at Milwaukee, Wisconsin, February 4, 2010.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION OF  
WISCONSIN FOUNDATION, AMERICAN  
CIVIL LIBERTIES UNION FOUNDATION  
*and* ELECTRONIC FRONTIER  
FOUNDATION, *Amici Curiae*

HENAK LAW OFFICE, S.C.

---

Amelia L. Bizzaro  
State Bar No. 1045709  
Henak Law Office, S.C.  
316 North Milwaukee Street, Suite 535  
Milwaukee, Wisconsin 53202  
(414) 283-9300

Laurence Jacques Dupuis  
State Bar No. 1029261  
American Civil Liberties Union of Wisconsin  
Foundation  
207 E Buffalo St # 325  
Milwaukee, WI 53202-5774  
(414) 272-4032

Catherine Crump  
*appearing pro hac vice*  
American Civil Liberties Union Foundation  
125 Broad Street, 17th Floor  
New York, NY 10004  
(212) 519-7806

Jennifer Granick  
*appearing pro hac vice*  
Electronic Frontier Foundation  
454 Shotwell Street  
San Francisco, CA 94110  
(415) 436-9633 x134

**RULE 809.19(8)(d) CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in WIS. STAT. (RULE) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,746 words.

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Amelia L. Bizzaro

**RULE 809.19(12)(f) CERTIFICATION**

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

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Amelia L. Bizzaro

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STATE OF WISCONSIN  
IN SUPREME COURT

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OF WISCONSIN**

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No. 2008AP658-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL A. SVEUM,

Defendant-Appellant-Petitioner.

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ON REVIEW OF A DECISION OF THE WISCONSIN  
COURT OF APPEALS, DISTRICT IV, AFFIRMING A  
JUDGMENT OF CONVICTION AND AN ORDER  
DENYING POSTCONVICTION RELIEF, ENTERED IN  
THE CIRCUIT COURT FOR DANE COUNTY,  
HONORABLE STEVEN D. EBERT, PRESIDING

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PLAINTIFF-RESPONDENT'S RESPONSE TO  
NON-PARTY BRIEF OF AMICI CURIAE

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J.B. VAN HOLLEN  
Attorney General

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

Attorneys for Plaintiff-Respondent

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

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STATE OF WISCONSIN  
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STATE OF WISCONSIN,

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---

PLAINTIFF-RESPONDENT'S RESPONSE TO  
NON-PARTY BRIEF OF AMICI CURIAE

---

The plaintiff-respondent, State of Wisconsin, hereby submits this brief in response to the non-party brief filed by *amici curiae* American Civil Liberties Union of Wisconsin Foundation, American Civil Liberties Union Foundation and Electronic Frontier Foundation, as permitted by this court in its order of February 12, 2010.

ISSUE PRESENTED

Should this court outlaw warrantless police use of GPS technology under the Wisconsin Constitution?

This issue was not raised by Sveum in the court of appeals, in his petition for review or in his brief before this court. This issue is raised for the first time in this court by *amici* after the parties had already filed their briefs.

## ARGUMENT

IF RESTRICTIONS ARE TO BE PLACED ON POLICE USE OF GPS TECHNOLOGY THAT DOES NOT OTHERWISE VIOLATE THE FOURTH AMENDMENT, THE EXTENT OF THOSE RESTRICTIONS SHOULD BE ADDRESSED BY THE LEGISLATURE IN THE FIRST INSTANCE.

The court of appeals correctly held, and the state has shown, that police use of GPS technology in this case did not violate the Fourth Amendment to the United States Constitution.

Amici argue, however, that this court should prohibit warrantless use of GPS technology under the Wisconsin Constitution. Amici insist the privacy interests of Wisconsin citizens demand that this court not allow police to use GPS technology without first (a) establishing probable cause, and (b) obtaining a warrant from a judge.

The court of appeals had it right: limitations on the use of GPS technology by law enforcement and by private citizens should be addressed by the legislature in the first instance. *State v. Sveum*, 2009 WI App 81, ¶¶ 20-22, 319 Wis. 2d 498, 769 N.W.2d 53.

- A. This court normally interprets art. I, § 11 of the Wisconsin Constitution in a manner consistent with the United States Supreme Court's interpretation of the Fourth Amendment to the United States Constitution.

In every situation save one, this court has interpreted art. I, § 11 of the Wisconsin Constitution to provide the same protections to Wisconsin citizens that the United States Supreme Court has held the Fourth Amendment to the United States Constitution provides to all citizens. *State v. Kramer*, 2009 WI 14, ¶ 18, 315 Wis. 2d 414, 759 N.W.2d 598; *State v. Arias*, 2008 WI 84, ¶ 20, 311 Wis. 2d 358, 752 N.W.2d 748; *State v. Young*, 2006 WI 98, ¶¶ 19, 30, 294 Wis. 2d 1, 717 N.W.2d 729.

Where, as here, the state and federal provisions are virtually identical, this court has construed the state provision consistently with how the United States Supreme Court has interpreted the federal provision. *State v. Agnello*, 226 Wis. 2d 164, 180-81, 593 N.W.2d 427 (1999). This was so even before the United States Supreme Court made the protections of the Fourth Amendment applicable to the states via the Fourteenth Amendment. *State v. Kramer*, 315 Wis. 2d 414, ¶ 18 n.6; *State v. Arias*, 311 Wis. 2d 358, ¶ 20.

There are sound policy reasons for this consistency in our jurisprudence. By following the Supreme Court's Fourth Amendment jurisprudence in interpreting Article I, Section 11, we impart certainty about what the law requires for those who will apply our decisions with respect to searches and seizures, and we provide distinct parameters to those who must enforce the law while maintaining the constitutionally protected rights of the people. Therefore, were we to conclude that a dog sniff of the exterior of a vehicle in a public place constitutes a search under Article I, Section 11, we would be undertaking a significant departure from the Supreme Court's Fourth Amendment jurisprudence

in interpreting the right to be free of unreasonable searches under the Wisconsin Constitution.

*State v. Arias*, 311 Wis. 2d 358, ¶ 21.

Consistent with that longstanding approach, this court held as had the United States Supreme Court that a drug dog sniff of the exterior of a car is not a "search" under either the federal or state constitution. *Id.*, ¶¶ 14-16, 22-24. See *Illinois v. Caballes*, 543 U.S. 405, 410 (2005); *United States v. Place*, 462 U.S. 696, 707 (1983).

Consistent with that longstanding approach, this court held as had the United States Supreme Court that police may search a car without a warrant when reasonably exercising their "community caretaker" function. *State v. Kramer*, 315 Wis. 2d 414, ¶¶ 18-21. See *Cady v. Dombrowski*, 413 U.S. 433, 441, 446-48 (1973).

The lone case where this court interpreted art. I, § 11 somewhat more expansively than the Fourth Amendment does not provide much comfort to amici. In *State v. Eason*, 2001 WI 98, ¶¶ 3, 37-63, 245 Wis. 2d 206, 629 N.W.2d 625, this court followed the lead of the United States Supreme Court in recognizing a "good faith" exception to the exclusionary rule applicable to Fourth Amendment violations. See *United States v. Leon*, 468 U.S. 897, 913 (1984); *State v. Marquardt*, 2005 WI 157, 286 Wis. 2d 204, ¶¶ 24-26, 705 N.W.2d 878. While it decided to follow the Supreme Court's lead by also recognizing a "good faith" exception under art. I, § 11 of the Wisconsin Constitution, this court imposed a burden on the state to make specific showings not required by the Supreme Court to satisfy the "good faith" exception. 245 Wis. 2d 206, ¶ 63.

The *Eason* decision is the exception that proves the rule of this court's close adherence to United States Supreme Court precedent on search and seizure issues. Its significance is that this court chose to follow the Supreme

Court's lead in recognizing a "good faith" exception to the exclusionary rule when it had the clear opportunity to go a different route under the state constitution. *See State v. Hess*, 2009 WI App 105, ¶¶ 19-21, 320 Wis. 2d 600, 770 N.W.2d 769.

In *Arias*, this court refused to hold under the state constitution that a dog sniff of the exterior of an automobile is a "search." This court recognized that, in the end, the protection is the same under these identically-worded state and federal constitutional provisions.

Arias asserts constitutional protection for a place, the area surrounding the outside of Schillinger's vehicle. However, the proscription against unreasonable searches contained within Article I, Section 11 of the Wisconsin Constitution is meant to protect people, not things or places, aside from their relationships to people affected by government action. *See Katz v. United States*, 389 U.S. 347, 351 (1967); *Garcia*, 195 Wis. 2d at 74. The protection afforded to people in relation to things and places is the expectation that people will be free from government intrusion into places or things in which a person has a reasonable expectation of privacy. *See Katz*, 389 U.S. at 351-52; *State v. Bruski*, 2007 WI 25, ¶¶ 23-24, 299 Wis. 2d 177, 727 N.W.2d 503. As the court of appeals has explained, the occupant of an auto parked in a public place cannot contend that he has a reasonable expectation of privacy in the air space around the exterior of the vehicle. *Garcia*, 195 Wis. 2d at 74. Accordingly, because of the limited intrusion resulting from a dog sniff for narcotics and the personal interests that Article I, Section 11 were meant to protect, we conclude that a dog sniff around the outside perimeter of a vehicle located in a public place is not a search under the Wisconsin Constitution.

*Arias*, 311 Wis. 2d 358, ¶ 24 (footnote omitted).

That reasoning is instructive here where police attached a GPS device to the exterior of a suspect's car. *Id.*, ¶¶ 22-24. As with the dog sniff, the installation of the

magnetic GPS device onto the undercarriage of a car parked on a public street or, as here, on a driveway, is far less intrusive than those activities typically held by the courts to be "searches." *Id.*, ¶ 23. *See United States v. Pineda-Moreno*, 591 F.3d 1212, 1214-17 (9th Cir. 2010).

As with the dog sniff of a car's exterior, the individual has little if any reasonable expectation of privacy in the exterior of his car or in keeping police and their sensory enhancers (*i.e.*, drug dogs, cameras, GPS devices) away from the area immediately surrounding the car. *State v. Arias*, 311 Wis. 2d 358, ¶ 22.

As with the dog sniff, the GPS device reveals only limited information: coordinates showing the car's location at various points over a period of time. *See United States v. Pineda-Moreno*, 591 F.3d at 1216. Establishing through GPS technology what direction someone has driven a suspect's car on the public roads does not subject either the suspect or the car's driver, "to the embarrassing disclosure or inconvenience that a search often entails." *State v. Arias*, 311 Wis. 2d 358, ¶ 23 (citing *United States v. Place*, 462 U.S. at 707).

Just as this court in *Arias* refused to extend state constitutional protection to a particular "place" – the area surrounding the outside of the suspect's car, *id.*, ¶ 24 – this court should not protect the "place" for which amici seek protection under the Wisconsin Constitution – the exterior of a suspect's car.

Just as police could not open up a car to let the drug dog sniff around inside without a warrant, police could not open up a car to install a GPS device without a warrant. *See Commonwealth v. Connolly*, 454 Mass. 808, 913 N.E.2d 356, 369 (2009) (warrantless installation of a GPS device that required police entry into the minivan for an hour to attach it to the minivan's electrical system violated the state constitution).

But, police could use a drug dog to sniff around the exterior of any parked car without a warrant to "seize" the drug odors wafting from within, thereby enhancing their own sensory capabilities without intruding into the car's interior. *See State v. Miller*, 2002 WI App 150, ¶¶ 2-10, 256 Wis. 2d 80, 647 N.W.2d 348 (police used a drug dog to sniff around a number of cars parked on the street near a drug house without probable cause; the dog alerted on one of the cars and drugs were found inside; dog sniff held not to be a "search" in violation of the Fourth Amendment). So, too, police could magnetically attach a GPS device to the car's exterior to enhance their sensory capabilities to maintain surveillance of the car's direction of travel on the public roads without violating the state or federal constitution.

- B. Any restrictions on the use of GPS technology by both the police and the citizenry should be addressed to the legislature in the first instance.

Amici cite to cases from four jurisdictions where those courts (Massachusetts, New York, Washington and Oregon) have held as a matter of state constitutional law that police need a warrant issued on probable cause to install a GPS device onto or into any car. Brief of amici at 1-2. Another court – Nevada – has refused to recognize greater protection under its state constitution because the expectation of privacy is not reasonable. *Osburn v. State*, 118 Nev. 323, 44 P.3d 523, 525-26 (2002). *See United States v. Pineda-Moreno*, 591 F.3d at 1216 n.2.

Many jurisdictions that have addressed this issue so far have, however, wisely chosen to do so by legislation. *See People v. Weaver*, 12 N.Y.3d 433, 882 N.Y.S.2d 357, 909 N.E.2d 1195, 1211-12 (2009) (Read, J., dissenting) (listing statutes). *Also see* Zoila Hinson, *Conversation: GPS Monitoring of Domestic Violence Offenders*, 43 Harv. C.R.-C.L. Law Rev. 285 (Winter 2008)

(discussing state statutory approaches to GPS tracking of domestic violence and sex offenders).

That is precisely the approach Wisconsin has historically taken with respect to the regulation of wiretaps. The state legislature has for decades regulated both the public and private interception of telephone conversations under the Wisconsin Electronic Surveillance Control Law. Wis. Stat. §§ 968.27-32. The same holds true with respect to the state legislature's regulation of the use of pen registers and trap-and-trace devices. Wis. Stat. §§ 968.34-37.<sup>1</sup>

The myriad of technical, legal and policy issues spawned by both the public and private use of GPS technology to track the movement of vehicles on the state's roads lend themselves to legislative hearings, debate and compromise. They do not lend themselves to what would turn out to be piecemeal state constitutional "legislation" by this court on a case-by-case basis. See Martin Marcus & Christopher Slobogin, *Challenges of the Technological Revolution: ABA Sets Standards for Electronic and Physical Surveillance*, 18 Crim. Just. 5, 13-16 (Fall 2003).

Instead of the legislature, this court would have to determine whether the nature of the GPS device – one that is magnetically attached to the outside of a car as opposed to one that requires entry into the car for installation – tips the constitutional scales. It would have to determine whether police could ever use GPS technology without a warrant and, if so, what standard must be satisfied – probable cause or reasonable suspicion. It would have to determine whether there should be exceptions for parolees (such as Sveum) and probationers whose travel is far more restricted than the average citizen. See *State v. Hajicek*,

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<sup>1</sup>It should also be noted that the state legislature has expressly exempted information obtained from a "tracking device" such as a GPS device from the Electronic Surveillance Control Law. Wis. Stat. § 968.27(4)(d); *State v. Sveum*, 319 Wis. 2d 498, ¶¶ 23-30.

2001 WI 3, ¶¶ 35-37, 240 Wis. 2d 349, 620 N.W.2d 781. This court would have to determine the permissible scope of such a warrant in terms of time or area covered, and whether a judicial order not technically a "warrant" would satisfy the state constitution.<sup>2</sup> It would have to determine whether to recognize a "good faith" exception when a defective order or warrant is issued. It would have to determine whether the operator of another's car has standing to challenge GPS tracking of that car. *See People v. Lacey*, 66 A.D.3d 704, 887 N.Y.S.2d 158, 160-61 (2009). Finally, this court will have to revisit these issues when the GPS technology (or technology not yet invented) inevitably changes in the years to come.

Amici apparently believe this court can avoid all of these issues by just adopting a blanket rule: no GPS use of any kind by police without probable cause and a warrant. That is potentially dangerous policy.

Not allowing police to attach a GPS device to a car where they have reasonable suspicion the driver is involved in a string of burglaries or has recently transported a corpse somewhere; where the driver is a parolee prohibited from operating that car at all or about whom police received an anonymous tip that the parolee is about to drive to Chicago for a stash of heroin; where the driver is a released sex offender whom police suspect has been cruising school playgrounds, is dubious policy at best. This court should think long and hard before it decides to displace the legislature's role in making these tough policy choices. The state believes the citizens of this state deserve better protection than that under their constitution.

Finally, a blanket state constitutional rule would control only the investigative conduct of the police. It would not control the use of GPS devices by the general

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<sup>2</sup>For instance, Sveum argues in his reply brief that the judicial authorization here was woefully inadequate, but does not discuss what form of judicial authorization, if any, would satisfy the constitution. Sveum's Reply Brief at 6-10.

public. Mr. Sveum personifies the havoc unregulated private use of GPS devices can wreak on other citizens. A stalker can and will use easily accessible GPS technology to keep close tabs on his victim. It also raises the question whether the state could use incriminating information obtained by a private citizen's use of GPS technology against another citizen. While this court would only be regulating the investigative use of GPS devices by police without regulating the use of those devices by criminals, the legislature could take a comprehensive approach to regulating the use of GPS devices by both law enforcement and private citizens. The legislative process provides the best (albeit not perfect) opportunity for a measured and balanced approach to addressing these difficult issues. Again, this is precisely what was done with the wiretap statute. Any such legislation, of course, would be subject to judicial interpretation and review.<sup>3</sup> See Marcus & Slobogin, 18 Crim. Just. at 14 ("Many of the questions left unaddressed or addressed inconsistently by the courts could be handled more satisfactorily by rules issued by other lawmaking bodies, such as legislatures or law enforcement agencies").

There are strong policy arguments against imposing restrictions on police use of GPS technology, not the least of which are accuracy, efficiency, allocation of police resources and officer safety. See John S. Ganz, Comments, *It's Already Public: Why Federal Officers Should Not Need Warrants to Use GPS Vehicle Tracking Devices*, 95 J. Crim. L. & Criminology 1325, 1354-58

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<sup>3</sup>Amici argue: "Criminal defendants should not have to wait to find out what their rights are, particularly in light of the frequency with which police agencies are employing GPS tracking technology." Brief of amici at 4. Why not, especially when "criminal defendants" have no Fourth Amendment protection from that police activity?

Regardless, "criminal defendants" know what *their* rights are with regard to GPS technology: they can use it however they see fit to follow whomever they choose. Those "criminal defendants" presumably want to retain their unfettered use of GPS technology to further their own interests, while hamstringing the ability of police to use that same technology to investigate their criminal activities.

(2005). As amici concede: "Certainly, there is room for legislation on this issue." Brief for amici at 4. Both the court of appeals and the State of Wisconsin agree. We differ only in that the "legislation on this issue" should be accomplished by the state legislature and not by this court.

## CONCLUSION

Therefore, the State of Wisconsin respectfully requests that this court reject the request of amici that it fashion a rule prohibiting police from employing GPS technology without a warrant under art. I, § 11 of the Wisconsin Constitution.

Dated at Madison, Wisconsin this 24th day of February, 2010.

Respectfully submitted,

J.B. VAN HOLLEN  
Attorney General

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

Attorneys for Plaintiff-Respondent

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

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,997 words.

Dated this 24th day of February, 2010.

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DANIEL J. O'BRIEN  
Assistant Attorney General

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

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 24th day of February, 2010.

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DANIEL J. O'BRIEN  
Assistant Attorney General