STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

STATE OF WISCONSIN

Plaintiff,

vs. Case No. 2014-CF-4185

THOMAS KREINBRING

Defendant.

NOTICE OF MOTION AND SECOND MOTION FOR SUPPRESSION OF FRUITS OF POLICE SEARCH AND A REQUEST FOR A *FRANKS* HEARING

To: Honorable Judge Stark
Milwaukee Circuit Court Branch 17
901 N. 9th Street
Milwaukee, WI 53233

John Chisholm
District Attorney
821 W. State Street
Milwaukee, WI 53233

The Defendant, THOMAS L. KREINBRING, respectfully moves this Court for an order excluding all evidence obtained in a violation of his constitutional rights, including but not limited to the following: all alleged contraband and items found within his room.

The Defendant brings this motion pursuant to section 971.31(2) and (5) of the Wisconsin Statutes on the grounds that the evidence was seized from the premises of 3321 North Oakland Avenue, "Room 5," City of Milwaukee, Wisconsin, in violation of the rights guaranteed the Defendant under the Fourth and Fourteenth Amendments to the United States Constitution; Article I, sections 1, 2, 9, and 11 of the Wisconsin Constitution; chapter 968 of the Wisconsin Statutes; and *Franks v. Delaware*, 438 U.S. 154 (1978), *Arizona v. Gant*, 556 U.S. 332 (2009), *Chimel v. California*, 395 U.S. 752 (1969), *Terry v. Ohio*, 392 U.S. 1 (1968), *Katz v. United States*, 389 U.S. 347 (1967), and *Mapp v. Ohio*, 367 U.S. 643 (1961).

Defendant also moves for exclusion from use as evidence all derivative evidence. *Taylor v. Alabama*, 457 U.S. 687 (1982); *Dunaway v. New York*, 442 U.S. 200 (1979); *Brown v. Illinois*, 422 U.S. 590 (1975); *Davis v. Mississippi*, 394 U.S. 721 (1969); *Wong Sun v. United States*, 371 U.S. 471 (1963); *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899; *State v. Harris*, 199 Wis. 2d 227, 544 N.W.2d 545 (1996).

INTRODUCTION

Discovery in this case has been protracted. The State and UW-Milwaukee Police Department (herein "UWMPD") sought to suppress investigative reports and forced the defense to file a Motion to Compel. (Adams Affidavit at ¶ 1). Their reluctance is understandable: the discovery materials shed light on UWMPD's blatant and deliberate misleading of the Court Commissioner and Judge (herein "reviewing judicial officials") who approved the search warrants executed at Defendant's home. The extent of the Police's misconduct is nothing short of outrageous and led to a media firestorm.

The most shocking example of the Police's misconduct was their decision to exclude from their search warrant affidavit the most probative evidence of the entire case, to wit: within the first hours of the investigation, the Police learned firsthand from the intoxicated students' treating physician, an Emergency Medical Specialist, that there was no indication that the students brought to her for care were drugged and there was no evidence of anything afoot other than highly-intoxicated students. The doctor's findings are consistent with UWM's troublingly prevalent and well-known student drinking culture. (Adams Affidavit at ¶ 2, 3).[1] [2]

Regrettably, the doctor's expert and firsthand opinion was dismissed by the Police in

[1] In 2012, UW-Milwaukee issued some 430 Disciplinary Referrals for Liquor Violations.
[2] Binge drinking (defined as having at least five (5) drinks within two (2) hours) is commonplace at the UWM campus. In 2011, 70% of surveyed students reported drinking. Of these students, 58% report binge drinking.

favor of a misguided investigation led not by evidence, but by the biases of the Police themselves.

The warrants' appearance of probable cause crumbles further upon learning facts the Police deliberately omitted and misconstrued. After a *Franks* hearing, the affidavit statements will be so diminished that no inkling of probable cause will remain within the documents.

The injustice that has resulted to Defendant may never be corrected. However, exposing the UWMPD misconduct in obtaining a search warrant based on conjecture, bias, half-truths, and deliberate omissions of material facts will at least begin to stop the perpetuation of the injustice.

BASIC FACTS OF SEARCH WARRANT EXECUTION AND DEFENDANT'S STANDING

This motion comes as a result of two search warrants applied for and executed by the UWMPD on September 16, 2014. (2014SW02019 and 2014SW02059). Each warrant was attached to 19-paragraph affidavits subscribed and sworn to by Ashley Hageman, a UW-Milwaukee Police Department officer. The majority of the affidavits relay the statements of UWMPD Officer Brandon Ackley. The affidavits (redacted by the State) are attached. (Adams Affidavit at ¶ 4).

According to their records, the Police entered the multi-tenant house located at 3321 North Oakland Avenue (herein "multi-tenant house") at approximately 2:24 p.m. on September 16, 2014. The Police cleared and searched the common areas of the building, but did not search the rest of the house without a second warrant that stated the tenants of the house occupied separate, locked rooms. The second warrant was obtained at 4:24 p.m. and the Police resumed their search of the residents' separate rooms. (Adams Affidavit at ¶ 5).

Thomas Kreinbring's room ("Room 5") was searched and inventoried after 6:00 p.m. Within Defendant's room, the Police reportedly found just over half an ounce of marijuana and

9.5 prescription Adderall pills. (Adams Affidavit at ¶ 5, 6). Defendant admits to occupying "Room 5." (Adams Affidavit at ¶ 7).

LEGAL STANDARD

Probable cause within affidavit necessary for issuance of a search warrant.

A warrant is only valid if it is based "upon probable cause, supported by Oath or affirmation…" U.S. Const. Amend. IV; Wis. Const. Art. I, §11. When an affidavit is the only evidence presented to a judge in support of a warrant, then the validity of the warrant rests solely on the strength of the affidavit. *United States v. Peck*, 317 F.3d 754, 755-56 (7th Cir. 2003). In that regard, the affidavit must provide the judge with a substantial basis for determining that probable cause exists. *Illinois v. Gates*, 462 U.S. 213, 228 (1983).

Probable cause is determined by totality of the circumstances – including a review of witnesses' credibility.

When reviewing whether a search warrant for probable cause, this Court should "examine(s) the totality of the circumstances presented to the warrant-issuing commissioner to determine whether the warrant-issuing commissioner had a substantial basis for concluding that there was a fair probability that a search of the specified premises would uncover evidence of wrongdoing." *State v. Romero*, 2009 WI 32 ¶ 4, 765 NW 2d 756, 760. The totality of the circumstances test applies to the reliability of informants and possible witnesses. *State v. Boggess*, 115 Wis.2d 443, 453 (1983). Under this approach, no single factor is dispositive. Instead, the court considers several factors including the basis of the informant's information, the specificity of it, and any independent corroboration by law enforcement. *State v. Moretto*, 144 Wis.2d 171, 186 (1988).

In order to demonstrate a declarant's veracity, "facts must be brought to the warrant-issuing officer's attention to enable the officer to evaluate either the credibility of the declarant or the reliability of the particular information furnished." *State v. Romero*, 2009 WI 32, ¶21. This

can be achieved by "past performance of supplying information to law enforcement" and through "corroboration of details." *Id.* The most direct way to demonstrate the basis for a declarant's knowledge is by "an explanation of how the declarant came by his or her information." ***Id.*** at ¶22. *Franks* was also clear that the Police cannot "insulate one officer's deliberate misstatement merely by relaying it through an officer-affiant personally ignorant of its falsity." *Franks v. Delaware,* 438 U.S. 154 at 163 n. 6.

Franks standard for reviewing search warrant affidavits.

Franks v. Delaware articulates the methodology for assessing whether a defendant must be granted an evidentiary hearing to challenge a search warrant. 438 U.S. 154 (1978). The case held:

> (T)hat, where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.

Id. at 155-156

In *State v. Anderson,* the Wisconsin Supreme Court adopted and explained the *Franks* rubric for determining whether a defendant has made a substantial preliminary mandating an evidentiary ruling.138 Wis. 2d 451, 406 N.W.2d 398 (1987). First, "(t)here must be allegations of deliberate falsehood or of reckless disregard for the truth." *Id*. at 171. Second, "those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons." *Id*. Finally, "that absent the challenged statement the affidavit does not provide probable cause," the defendant meets his burden of production. *Franks* at 156.

Finding "reckless disregard for the truth" is a factual inquiry.

The *Franks* decision is most associated with defendants alleging the inclusion of

deliberately false statements in search warrant affidavits. However, *Franks* also pertains to statements that were included with "reckless disregard for truth." *Id*. The *Anderson* decision defined this term:

> Although *Franks* did not define "reckless disregard for the truth," cases applying *Franks* have held that, to prove reckless disregard for the truth, the defendant must prove that the affiant in fact entertained serious doubts as to the truth of the allegations or had obvious reasons to doubt the veracity of the allegations. Because the defendant must show either intent or reckless disregard, a *Franks* hearing, by necessity, focuses on the state of mind of the affiant.

State v. Anderson at 463-464. (emphasis added).

Further, because the affiant would never signal their recklessness in a statement, circumstantial evidence can be used to prove reckless disregard for the truth. "Because states of mind must be proved circumstantially, a factfinder may infer reckless disregard from circumstances evincing 'obvious reasons to doubt the veracity' of the allegations." *See United States v. Williams*, 737 F.2d 594, 602 (7th Cir.1984) (internal quotations omitted).

The Third Circuit Court of Appeals recently explained two ways that an affiant's conduct may be found to be reckless, "either (1) the affiant actually entertained serious doubts; or (2) obvious reasons existed for him to do so, such that the finder of fact can infer a subjectively reckless state of mind." *U.S. v. Brown*, 631 F.3d 638, 645 (2011). Both are factual explorations made by the reviewing court.

The *Brown* decision goes on to explain:

> The test simply asks the court to discern whether "serious doubts" or "obvious reasons" existed. The answer to each of those questions is a matter of fact. Serious doubts exist or they do not; a reason for doubt exists or it does not and is obvious or is not. If either question …is answered affirmatively, nothing further need be asked before the officer is found reckless. Thus the *Franks* recklessness determination is an "essentially factual" inquiry.

Id. at 645. (internal citations omitted).

Finally, the Sixth Circuit has held that an affidavit prepared by an affiant, that does not accurately reflect the facts known to him at the time the affidavit is sworn, evinces a reckless disregard for the truth. *U.S. v. West*, 520 F.3d 604, 611 (2008).

Statements omitted from search warrant affidavit are treated the same as false statements made deliberately or with reckless disregard for the truth.

As the defense will highlight below, UWMPD made deliberate, material omissions from its search warrant affidavits. In review, this Court should consider these omissions:

> The Seventh Circuit tests an affidavit's allegedly omitted statements under the same standard that the *Franks* Court has established for false statements. The omission of a fact from an affidavit is material only if it amounts to deliberate falsehood or reckless disregard for the truth.

U.S. v. McNeese, 901 F.2d 585, 594 (1990). (internal citations omitted).

DEFENDANT'S PROFFERED FACTS

Exhibit 1 – Defendants proffered facts in relation to search warrant affidavits

As indicated, the search warrant affidavits in this case are comprised of just 19 paragraphs. These paragraphs are riddled with conjecture, bias, half-truths, and deliberate omissions of material facts. To aid the Court in assessing how the Police misconduct affects the document, the defense has created a table attached as "Exhibit 1." The affidavits' statements are described in the left-hand column. The defense's notes for this Court's consideration, based on the instant motion, are notated in the right-hand column. (Adams Affidavit at ¶ 8).

Police's suspicions of "drugging" was immediately eliminated by a Medical Doctor with firsthand knowledge.

While the actual charges of this case remain mundane, the search warrant affidavits were premised on looking for evidence of "Recklessly Endangering Safety" and "Placing Foreign Objects in Edibles." (Adams Affidavit at ¶ 4). The investigation was prompted by a house party held at the multi-tenant house on September 12 and 13, 2014. Four students who attended the party (redacted by the State as "MCN," "MHH," "MCY" and "MMB") were found to be highly

intoxicated and taken to Columbia St. Mary's hospital for alcohol intoxication and cited for underage drinking. (Adams Affidavit at ¶¶ 4, 9).

While an objective observer would see the house party for what it was, a routine (albeit obnoxious) drinking event in the neighborhood surrounding UW-Milwaukee, UWMPD came to hasty and irrational conclusion. UWMPD invented a sinister theory that the fraternity members were mass-drugging guests by putting "date rape drugs" (the two most common such drugs are Rohypnol and gamma hydroxybutyrate ("GHB")) into alcoholic drinks with the purpose of sexually assaulting those who were drugged. This theory was advanced without pause despite the lack of any corroborating direct or plausible circumstantial evidence.

More troubling than the Police's manufacturing of their conspiracy theory was their subsequent decision to bury the following expert opinion about the condition of the intoxicated students as told to Officer Ackley by Dr. Lori Benson of Columbia St. Mary's:

> I spoke with Dr. Lori Benson of CSM who was the presiding physician for all four patients. **Dr. Benson informed me that from her assessment that none of the four individuals had any signs and were not symptomatic of any other intoxication or drug use, other than alcohol. In Dr. Benson's professional opinion, all four had been severely over served and or over consumed a significant amount of alcohol.** Dr. Benson informed me that all patients were asleep upon arrival and were placed in their respective rooms. (Adams Affidavit at ¶ 10).

This fact, the real-time (September 13, 2:50 a.m.) professional assessment and opinion of the physician treating "MCN," "MHH," "MCY" and "MMB," goes to the heart of whether there was probable cause of wrongdoing evidenced in the search warrant affidavits. The opinion is listed on the first page of the police reports generated by the investigation, but nowhere in the search warrant affidavits. Further troubling is Dr. Benson's conclusions are only nominally rebutted by the later recollections of the intoxicated students themselves, who because of their intoxication, should obviously not be treated as accurate historians of September 13, 2014.

(Adams Affidavit at ¶ 9).

The deliberate decision of the affiant, Ashley Hageman, to omit this crucial and probative evidence from the search warrant affidavit is inexcusable. Her intent is obvious: had the reviewing judicial officials read the conclusion of Dr. Benson, they would not have found probable cause of wrongdoing. Rather, the reviewing judicial officials would have seen the subsequent facts clearly as "severely over served or over consumed" drinkers reacting appropriately to high BACs. In short, Dr. Benson's conclusion would have shed light on every other statement within the search warrant affidavits.

Police's suspicions of "drugging" was dispelled by their own search during the house party.

Affiant Ashley Hageman also deliberately omitted facts as to the observations of the UWMPD during their search of the multi-tenant house on September 13. Thomas Kreinbring gave voluntarily consented to allow both UWMPD and Milwaukee Police Department (herein "MPD") officers into the house while the party was on-going. UWMPD searched the property and found no evidence of drugging at that time. Specifically, paragraph 7 of the search warrant affidavits state the UWMPD entered the house and observed the basement and first floor of the house. The affidavit deliberately omits the scope of the Police search.

In fact, the UWMPD and MPD conducted a full-scale search of the entire home. According to the MPD memorandum recording their actions at the house, they searched all areas of the house, but for locked rooms on the 2nd floor that belong to non-fraternity members who live in the house. (Adams Affidavit at ¶ 11). Thomas Kreinbring's "Room 5" was searched. (Adams Affidavit at ¶ 7) UWMPD and MPD observed that none of the 42 UW-Milwaukee student partying in the house basement were in medical distress. (Adams Affidavit at ¶ 11). This search, and the lack of evidence found that could have been used in, or was evidence of, a crime

is the most probative evidence of available to the Police during their investigation.

Further, these extensive observations of the students at the house party destroy the Police narrative that "date rape drugs" were being used to drug party guests. "Date rape" drugs are fast-acting (according to GHB takes 15-30 minutes and Rophynol takes 15 to 20 minutes to affect those who ingest it), but are slow to wear off (GHB takes 3-6 hours and Rophynol takes 12 hours). (Adams Affidavit at ¶ 12).

Therefore, it is inarguable that the UWMPD's imagined "conspiracy" alleged by the Ashley Hageman in her affidavits clearly was not occurring; the fraternity members/party hosts had no tipoff that the Police would be breaking up their party and therefore would not have stopped their drugging scheme. The omitted facts clearly contradict the UWMPD's fabricated narrative.

The lack of medically-distressed women among the 42 UW-Milwaukee students at the party also reveals the obvious flaw in the Police's imagined "conspiracy." The women who were brought to Columbia St. Mary's emergency room for alcohol intoxication were found at a UW-Milwaukee dormitory, not at the party house. It defies logic to explain why the only "drugged" students were found at facilities other than the house as a scheme to drug and rape women would necessarily be predicated on keeping those who had been drugged at the house.

The UW-Milwaukee Assistant Dean of Students later castigated the party hosts with the following objective statement based on her own investigation of the party:

> While some members reported in our meeting some concern for guests and said they would try to get them to safety, the majority of your members said that they would just ask the intoxicated person to leave, thus admitting that their main concern was to get the intoxicated person out of the house without care for where they would go or their safety.

(Adams Affidavit at ¶ 13). By deliberately omitting the extent of the Police's contemporaneous search and observations during the house party (the most probative time period), UWMPD

guarded the search warrants against any chance that the reviewing judicial officials would question the basis of UWMPD's narrative, and thus the existence of probable cause.

Police knew one of the students reported a negative urine test result for date rape drugs.

The first student observed by police as needing protective custody because of her intoxication was 18-year-old freshman "MCN." Officer Ackley observed her to have "strong odor of intoxicants," speech that was "heavily slurred," "glossy" and "bloodshot" eyes, consistent with her preliminary breath test ("PBT") result of a 0.201 blood alcohol content ("BAC"). (Adams Affidavit at ¶ 15).

According to MCN, after waking up at Columbia St. Mary, she traveled to Aurora Mt. Sinai and had a drug test performed on her urine that came back negative for date rape drugs. According to the Wisconsin Crime Laboratory Bureau's *Physical Evidence Handbook,* GHB can be detected in urine up to 12 hours after ingestion, and Rohypnol can be detected in urine 2-3 days after ingestion. (Adams Affidavit at ¶ 14).Certainly, this fact is extremely probative of whether MCN was metabolizing and passing though urine known date rape drugs such as GHB or Rophynol. Ashley Hageman deliberately omitted facts of MCN's urine drug screening. Further, despite UWMPD's concern, no other students were advised to be tested for drugs. (Adams Affidavit at ¶ 9).

Police's knew students were highly-intoxicated, not drugged, but omitted facts regarding this knowledge.

Within their affidavit, the UWMPD attempt to explain away the incredible level of intoxication[3] of the students taken to Columbia St. Mary's Hospital under Wisconsin's protective custody law, Wis. Stat. §51.45, (which is mandates custody for those substantially impaired by alcohol). UWMPD also omit that they issued each student an underage drinking citation as their

[3] The students' PBT results indicated high BACs. MCN indicated a BAC of 0.201 and MCY indicated 0.225. Within their affidavits, the Police omit the BAC of a third student MHH, who had the highest BAC at 0.261.

alcohol intoxication was obvious. UWMPD's awareness of the students' alcohol use on September 12 and 13th and omission and misconstruction of those facts to improperly imply drug consumption is shocking and was deliberately misleading.

Student MCN

Although UWMPD would include MCN's account to drinking, "minimal and below her tolerance level," within their sworn affidavit, UWMPD knew this was untruthful. (Adams Affidavit at ¶ 4). According to documents obtained by the Defense, at the time of her interaction with campus security on September 13, MCN stated she, "drank half of a 1.75 bottle of vodka." (Adams Affidavit at ¶ 16). For reference, there are just under forty (40) drinks in a 1.75L liquor bottle.[4] It would later be learned this had been MCN's first time at an off-campus party. While this may not have been known to UWMPD, given MCN was a freshman and this was the third weekend of the academic year, it should have played into their decision-making process. (Adams Affidavit at ¶ 16).

Student MCY

Likewise, MCY's drinking on the night in question more than explains her 0.225 BAC, "smell(ing) heavily of alcohol intoxicants," and intoxicated demeanor. (Adams Affidavit at ¶ 15). Like MCN, MCY made admissions about her drinking to the campus security on the night of the party. According to a report, MCY stated she had been to a tavern that night, where she had received a "bloody lip and a chipped tooth" while "breaking up a fight." (Adams Affidavit at ¶ 16). Certainly, MCY going to a tavern at some point prior to returning to the dormitory would be relevant to her level of intoxication. Further, MCY told UWMPD that she had drank "shots of tequila." (Adams Affidavit at ¶ 16). However, this fact was not convenient to further the

[4] There are over 59 ounces in a 1.75 liter bottle. Hard liquor drinks are measured in 1 ½ ounce increments.

UWMPD's conspiracy narrative, it was deliberately omitted from their warrant affidavits.

In addition, UWMPD's first choice in dealing with MCY was not to send her to the hospital, but rather to an unknown male subject who MCY asked to be called. Only after this male subject stopped answering his telephone did the Police decide to have MCY taken to the hospital for protective custody for alcohol intoxication. (Adams Affidavit at ¶ 16). This is a material fact that was deliberately omitted, as why would UWMPD agree to turn over a female student who they legitimately thought to be under the influence of a "date rape drug" to be released to an unknown male? Clearly, at the time of their interaction with MCY, the Police knew she was under the influence of alcohol and alcohol only.

Student MMB

The third woman taken to the hospital, MMB, also made statements that explained her level of intoxication to UWMPD. First, MMB admitted to drinking "beer and wine" on an empty stomach to the Police. UWMPD omitted this fact in favor of the ambiguity of MMB's cause of intoxication. (Adams Affidavit at ¶ 16).

Also notable, is the Police's selective inclusion in their affidavits of the statement regarding MMB's inability "to submit a proficient breath sample for a preliminary breath test." (Adams Affidavit at ¶ 4). This is inserted to amplify MMB's level of intoxication, but also to inject the possibility that she was drugged. In fact, MMB was "sandbagging" UWMPD by purposefully failing to provide a breath sample. After UWMPD's first two attempts to have MMB provide samples, she began sending frowning "SnapChat" photo text messages to her friends – evidently knowing she was in trouble for underage drinking. (Adams Affidavit at ¶ 16). Moreover, this was not MMB's first time getting in trouble with police due to underage drinking, but rather the third time she had been issued an underage drinking citation. (Adams Affidavit at ¶

15).

MMB's experience receiving underage drinking tickets from police explains the statement she made to UWMPD when they asked her a third time to provide a breath sample. MMB refused to provide the breath sample stating, "Unless my parents are here, I'm not blowing into anything." Moreover, Officer Ackley "determined that (MMB) was past her personal limits…" Lastly, Police were told by a third party, MMB's roommate, that MMB had gotten "tanked" at the house party. (Adams Affidavit at ¶ 16). These facts, known to UWMPD, fly in the face of their statement that MMB was merely "unable" to provide a breath sample, and were deliberately omitted from the search warrant affidavits.

Student MHH

Facts, regarding the alcohol intoxication of MHH are crucially important because it was his intoxication that did not immediately play into the UWMPD's conspiracy narrative, as MHH was male and did not have the "red X" on his hand. Because of this, UWMPD omitted facts regarding his intoxication solely from alcohol. Namely, UWMPD omitted MHH's admission at the time of initial contact that "he 'drank way over my limit,'" but more importantly his preliminary breath test showing a BAC of 0.261, the highest of any of the students. (Adams Affidavit at ¶¶ 15, 16). It would later be learned that MHH was drank ten (10) high-alcohol content beers (6.9 ABV compared to normal 4.7 ABV) on an empty stomach. (Adams Affidavit at ¶ 16).

UWMPD are aware of how BACs over 0.20 affect students.

According to University of Wisconsin-Madison Health Services BACs of 0.15 is associated with "Possible blackout (memory loss)" behavior and levels of 0.20 are associated with "confused, disoriented, vomiting" behavior. (Adams Affidavit at ¶ 17). According to a UW-

Milwaukee's own online resources, a BAC between 0.16 and 0.19, "(t)he drinker has the appearance of a 'sloppy drunk,'" and at 0.20 the drinker "(M)ay need help to stand or walk…experience nausea…(b)lackouts are likely at this level..." (Adams Affidavit at ¶ 18).

The intoxicated students' behavior completely matched the University's own online descriptions for persons with similarly high BACs. Previously, UWMPD have properly assessed a student with a high BAC, and rejected a "drugging" defense to an underage drinking citation.

For instance, on September of 2012, UWMPD investigated an intoxicated subject who had a BAC of 0.22 in the Cambridge Commons dormitory. The subject had, like MCN, reported drinking a half bottle of vodka. During the investigation, UWMPD told the subject, "I advised her that based on her PBT result I found it possible that her blackout may have been related to alcohol intoxication rather than a drug. Once learning her BAC she agreed that may have been possible." (Adams Affidavit at ¶ 19). UWMPD know that high BACs result in inability to walk or stand, nausea, and blackouts, yet in this case they still deliberately misguided the reviewing judicial officials to have search warrants issued.

UWMPD were aware the students' later statements of limited drinking were untrue as high BACs could not have been achieved.

Within their affidavits, UWMPD repeat the minimizing statements of the intoxicated students regarding their alcohol use on the night of the party. Every trained Wisconsin police officer would have recognized and noted the clear untruth of the students' statements. Instead the UWMPD packaged these lies together, to further their narrative that the students had been victims of a drugging conspiracy.

The first repeated and misleading minimizing statement comes from MCY to Officer Ackley, which is included in the affidavits at paragraph 7. MCY states she "only had three drinks," at the party. (Adams Affidavit at ¶ 4). Per the Wisconsin Department of Transportation's

Blood/Breath Alcohol Concentration (BAC) calculator, based upon MCY's body weight and the length of the party being 2 hours, had MCY only consumed three drinks her BAC after two hours would have been 0.061. This is less than 1/3rd the BAC found by the UWMPD. (Adams Affidavit at ¶ 20).

Likewise are the statements made by MCN to UWMPD wherein she stated she drank three shots of hard alcohol and "one mixed drink" which is included as fact in the search warrant affidavits at paragraph 11. (Adams Affidavit at ¶ 4). Again using the DOT calculator and MCN's reported body weight, had MCN only consumed four drinks over two hours, her BAC would have been at or near 0.116, or half the BAC found by UWMPD. (Adams Affidavit at ¶ 20).

The UWMPD know of the rampant campus alcohol culture and its effect on UWM students, yet in Ashley Hageman's affidavits she deliberately leads the reviewing judicial officials to a different conclusion: that rather than the obvious alcohol intoxication of the 18 and 19-year-old students, there was an abhorrent conspiracy to drug and rape multiple women. Hageman creates this deliberately false narrative by intentionally omitting information known to her: that the high BAC levels of the intoxicated students could not have been the result of ingesting a date rape drug. Rophynol and GHB do not increase blood alcohol content, period. (Adams Affidavit at ¶ 21). The implication of each of the consistent stories of the intoxicated students of "I only had (minimal) number of drinks" was purposely included to persuade the judicial reviewers of the affidavits that there must have been another substance at play to cause the students' level of intoxication. The inclusion of these statements by UWMPD to support this conclusion were included deliberately and with the knowledge that it was a false conclusion.

UWMPD created the rumor of date rape drugs then used those rumors to justify their search warrants.

It was likely evident to UWMPD that they did not have any credible direct, or even

circumstantial, evidence of date rape drugs. However, they were able to recycle rumors being exchanged among 18 and 19-year-old students via text and Facebook messages to package their narrative for the reviewing judicial officials. The unsubstantiated rumors that circulated around the campus immediately after the UWMPD searched and broke up the September 12-13 party are referenced within the search warrant affidavit (specifically in paragraphs 10-12, 15,16) however the UWMPD deliberately omitted evidence as to the lack of these rumors' reliability. (Adams Affidavit at ¶ 4).

Like a disease epidemic, every rumor begins with a "patient zero" making a statement that is then repeated again and again. In this controversy, it is apparent that the "patient zeros" who began the rumor epidemic were UWMPD officers themselves. The circulated rumors restated in the search warrant affidavits are important for the UWMPD narrative: they are the only "evidence" of drugging put before the reviewing judicial officials. Without these rumors being included, the affidavits would not provide any indication of why UWMPD believed the crimes of Recklessly Endangering Safety or Placing Foreign Objects in Edibles had been committed. Therefore, scrutiny of these statements is paramount.

The inclusions of the rumors begin with Paragraph 10 of the affidavits, with the statement from MMB:, "(MMB) then told Officer Ackley that she was scared because she saw on the UWM Freshman Facebook page that everyone needs to beware because TKE tried to 'roofie' a bunch of girls last night." (Adams Affidavit at ¶ 4). The next paragraph, 11, sheds light on the origin of the rumors. The paragraph records statements from MCN, who stated she received a text message from another student STO, "who told (MCN) that the TKE guys had roofied all of the girls at the party." The next paragraph uncovers the origin of STO's "knowledge" as to the drugging, "(STO) stated her suspicion of roofies was told to her by her friend (redacted as "JO").

(Adams Affidavit at 4).

These statements are included in the affidavit as fact. However, how JO received his "knowledge" of the drugging is extremely troubling. In a police report, Officer Lamar Griffin states the following:

> I asked JO how he received information about people's drinks being "roofied" at the party. JO stated that he heard a campus police officer speaking with Sandburg Security that evening of the party and he shared that information with the people he knew. (Adams Affidavit at ¶ 9).

It should be noted that JO was attempting to take MCY to his room at Sandburg Hall on the night of the party. (Adams Affidavit at ¶ 16). Moreover, JO was interviewed by university staff about a post "on the UW-Milwaukee Class of 2018 Facebook page." It is likely that JO not only was spreading misinformation about the house party via text to STO, which UWMPD later used to create a narrative for their affidavits, but also spread UWMPD's rumor on the Freshman Facebook page mentioned by MMB. (Adams Affidavit at ¶ 16). UWMPD's use of their own recycled rumor is outrageous.

Furthermore, by recycling rumors of unknown origin through freshman college students attempting to get out of underage drinking citations, UWMPD abandoned any attempt to "evaluate either the credibility of the declarant or the reliability of the particular information furnished." *State v. Romero*, 2009 WI 32, ¶21. These rumors lack any credibility, yet UWMPD deliberately foisted them upon the reviewing judicial officials.

UWM knows fraternities engage in "risk management" practices to minimize liability, such as liquor drop-offs and drink cards.

The affidavits make light out of the mysterious nature of the drink cards used at the house party. (Adams Affidavit at ¶ 4). However, the university Office of Student Affairs was knowledgeable about risk management policies that fraternities and sororities abide by. In fact, the risk management policies were discussed during the investigation. An email between an

administrator and the assistant dean of students evidences this fact. ("All, I wanted to follow up with more information about TKE Risk Management policies.") (Adams Affidavit at ¶ 22). The same assistant dean of students was in close communication with the UWMPD starting on Saturday morning after the party until the execution of the search warrants. (Adams Affidavit at ¶ 22).

The fraternity at issue in this case has a published risk management policy regarding how to throw a safe party. This information is made publically available on its international website and articulates guidelines for "BYOB" ("Bring Your Own Beer") events. Most importantly, the guidelines call for the use of "Wristbands" and "Punch Cards" to regulate parties. The "Xs" were used in place of wristbands at the house party. Further, an explanation for the alcohol drop off and "Punch Card" system (repeatedly mentioned without content in UWMPD's affidavits in paragraphs 6, 9, 14, and 16) is clearly articulated in the International Organization's guidelines, stating:

> **Punch Cards**
> • For each and every event, punch cards should be created that are event specific.
> • Punch cards should be about credit card size with the following information: name, birthday, **type of alcohol / amount brought**, date of event, location to punch up to six holes for consume alcohol.
> • Punch cards, unlike tickets are easy to handle and are a more effective means for proper distribution.
> • Punch cards are to be collected at the exits when guests leave the event.

(Adams Affidavit at ¶ 23).

UWM and the UWMPD knew the fraternity proscribed by risk assessment guidelines and the practices used at the house party were, if not consistent with, at least an attempt to abide with the guidelines of the international fraternity.[5] Further, the guidelines call for some members to be sober to oversee safety. (Adams Affidavit at ¶ 23). Also, within the UW-System, limited guest

[5] Admittedly, the party became out of control and the risk management policies were haphazardly followed.

lists, secured rooms, designated sober party-sitters are all seen as admirable traits in a college house parties. (Adams Affidavit at ¶ 24).

Another much discussed aspect of the party was different colored-Xs on the party-goers' hands. (Adams Affidavit at ¶ 4). Like the other risk management procedures the fraternity *attempted* to follow, X's are banal in nature as substitutes for wristbands. UWMPD knew this. After speaking with "STO" who stated she and a group of seven friends came to the party and all received black Xs on their hands. (Adams Affidavit at ¶ 9). Notable, was "STO" and the group came "early" to the party (9:30 to 10:00pm), which clarifies that there was no decision to mark certain guests with certain colors, rather the red markers (wristband substitutes) had not yet arrived at the party. This conclusion has been accepted by the Assistant Dean of Students in her October disciplinary letter to the fraternity wherein she wrote the so-called color-coded Xs "appear(ed) to be false." (Adams Affidavit at ¶ 13).

Instead of stating that the fraternity was attempting to abide by its guidelines, UWMPD deliberately included aspects of the "BYOB," "wristband," and "punch card" guidelines to create a mysterious set of actions taken by the fraternity members, that UWMPD directly stated (by means of unsubstantiated rumors reiterated by a college freshman in paragraph 16) within a sworn affidavit. In doing so, UWMPD acted with utter disregard for the truth and mislead the reviewing judicial officials.

UWMPD and specifically, Affiant Ashley Hageman, has no relevant experience in date rape drug investigation.

Within her sworn search warrant affidavits, Ashley Hageman states her experience (totaling 5 years of law enforcement work) in paragraph 1. (Adams Affidavit at ¶ 4). At paragraph 18, Hageman outlines her knowledge regarding the form that date rape drugs may take, "I know from my training and experience, that there are multiple drugs that can be used to

cause incapacitation; these drugs can be clear and odorless. The drugs could be in liquid, pill or power form and can be stored in numerous types of containers." (Adams Affidavit at ¶ 4).

Citing an officer's "training and experience" has become almost boilerplate language in many documents sworn to by law enforcement. However, in this case the inclusion of the phrase is deliberate falsehood. The defense has researched relevant UWMPD documents and it appears the agency has zero relevant experience in this area of criminal investigation. On November 24, 2014 the defense made an open records request of UW-Milwaukee demanding:

> Any and all records relating to police, public safety, and/or disciplinary actions relating to or mentioning any and all allegations of "date rape drug(s)" (including by not limited to Rohypnol and "GHB") ingestion by University of Wisconsin-Milwaukee students(s) between January 1, 2010 and September 11, 2014. (Adams Affidavit at ¶ 25).

On Friday, January 9, 2015 the University's custodian of records returned documents in response to the Demand. The results were shocking; in nearly five years (perhaps the entire course of Ashley Hageman's law enforcement career) covered by the request, UWMPD has never (1) recovered any GHB, Rohypnol or other date rape drug, or (2) ever participated in the prosecution of a single date rape drug investigation. (Adams Affidavit at ¶ 26). Therefore, the Defense believes UWMPD and Ashley Hageman had no grounds to tout the aforementioned "training and experience" as stated in her affidavit.

UWMPD recklessly cite sexual assault reports despite findings by the Milwaukee District Attorney's Office and a Milwaukee Circuit Court Judge that the allegations were unprovable.

Grasping for justification for a search warrant, UWMPD included a veiled reference to reports of sexual assaults, "(t)he suspect in the Shorewood Police Department's case was TKE member 'MAB.'" The affidavit goes on to state "TKE member 'ARS' was interviewed during the investigation. ARS asked Shorewood Detective Vander Schaaf after the interview how long GHB would stay in someone's system and if it could be detected after several hours." (Adams

Affidavit at ¶ 4). The cherry-picked inclusion of these statements, that there was an investigation involving a TKE member, and that another member asked a question relating to GHB, was done with complete disregard for the truth. It should go without saying that, "(g)uilt by association is not a permissible theory of criminal liability..." *U.S. v. Zafiro*, 945 F.2d 881, 888 (7th Circuit 1991). However, it is only the association, not the merit or relevance of the earlier sexual assault report that UWMPD used to further their narrative.

First, UWMPD failed to present several pertinent facts that would shown the lack of relevance of the included statements. While there was an investigation of MAB, the Milwaukee District Attorney's Office deemed the case "impossible to prove in court." (Adams Affidavit at ¶27). Moreover, several months later, the accusing party, sought a harassment injunction (entitled by statute to a party who has been sexually assaulted) against MAB. The Circuit Court Judge, who heard sworn testimony stated, "I cannot find in the totality of this record that there was a sexual assault," and denied the injunction. (Adams Affidavit at ¶28). Moreover, a urine screen was performed during the investigation, and no indication of date rape drugs was found. (Adams Affidavit at ¶27). UWMPD buried both the District Attorney's and Circuit Court's decisions regarding the allegations.

Moreover, in the Shorewood Police report proceeding the question regarding GHB asked by ARS, he told the detective that, "the older members of TKE preach how to interact with drunk women. They encourage them to assist them getting home and not to take advantage of them." (Adams Affidavit at ¶27). In omitting these facts regarding the sexual assault allegation (and as unprovable and contested, they will only ever be allegations) listed in their affidavit, UWMPD's intent is clear, including the lack of merit of the allegations would have decreased the likelihood of probable cause within their affidavit.

Further, it is troubling that the mention of the MAB allegation is made at all, as neither MAB nor ARS were residents of the house in September of 2014. Their mention in the search warrant affidavits are made only to further the outlandish conspiracy that the entire fraternity was involved in a conspiracy (on-going from Spring of 2013 even) to drug and rape women.

UWMPD falsely present TJT's statements regarding vodka clarity.

In paragraph 16 of their affidavits, UWMPD include a statement by TJT that he was drinking vodka and that "TJT saw that the vodka was not completely clear." (Adams Affidavit at ¶ 4). This is a deliberately false statement included in the search warrant affidavit.

The defense, through discovery demands, received Officer Brandon Ackley's field notes created at the time of TJT's interview. These notes state, "Svedka mango," "plastic glow in dark shots," "could have been cloudy or it could have been mango if changes." (Adams Affidavit at ¶29). UWMPD included this statement despite knowing, from their own walk through of the party as it was occurring, that TJT could not accurately describe his vodka. All of the shot glasses in the party were translucent, colored plastic (bought to react with the basement's "black lights") and therefore would not allow a drinker to be able to speak knowledgably about the clarity of their drink. (Adams Affidavit at ¶29).

Furthermore, Rohypnol is now created with a blue center which will make a clear liquids turn bright blue, and dark liquids turn cloudy. When slipped into a drink, a dye in these new pills makes clear liquids turn blue. GHB is clear and colorless. Neither of these drugs would turn clear vodka "cloudy." (Adams Affidavit at ¶12). TJT's statements lack reliability. Rather than not include the statement, UWMPD instead strip it of its "could have been" framing and present it as fact.

ARGUMENT

UWMPD's entire "conspiracy theory" was irrational and lacked supporting evidence; by adding omitted material facts, there is no probable cause for a search warrant.

The only objective witness with any qualified ability to determine whether a date rape drug was being used at the house party was Dr. Lori Benson of Columbia St. Mary's. Dr. Benson categorically told UWMPD there were no date rape drugs being administered. Rather than accept the humble logic of Occam's Razor ("the simplest answer is usually the right one"), UWMPD created a complex and sinister conspiracy theory.

In this case, the simplest and most logical conclusion was apparent: there were inexperienced drinkers, 18 and 19-years-old, at their first off-campus house party, during the third weekend of their college careers, who drank too much. In place of this most simple explanation, UWMPD created their complex conspiracy of systematic drugging fellow students for the purpose of sexual assault.

As previously stated, the Police appeared on the scene of the party as it was occurring, and monitored the exiting of the party by 42 underage students. Notably, of these students, not a single student required medical attention in the same fashion as MCN, MHH, MCY or MMB.

Furthermore, the students that were in need of medical assistance were thrown out of the party, which does not correspond with UWMPD narrative. After all, if the intent of drugging is to procure women to sexually assault, why were the intoxicated women thrown out of the party? The answer is clear, there was no conspiracy and the UWMPD, who evidently have never even seen date rape drugs on their campus in the last 5 years, should have known better.

UWMPD made a decision regarding the use of date rape drugs and either deliberately, or with reckless disregard for the truth, created a document that largely omitted relevant evidence that would have disproved their theory and would have led to a finding of no probable cause by

the reviewing judicial officials.

Remaining statements in the affidavit contradict themselves and strip basis for conspiracy theory.

Once the omitted facts are entered into the search warrant affidavits, the internal contradictions become more glaring. For instance, it is clear the issues of the "card system" and payment for alcohol varied from one student's version of events to the next. In the affidavits at paragraph 8, "ML" states only women can buy drink cards for $8.00. At paragraph 9 "MCY" claims she bought a card for $3.00. At paragraph 14, "HS Jr." reports dropping off alcohol at the house. At paragraph 16, "TJT" claims paying $15.00 for a drink card. (Adams Affidavit at ¶4).

The contradictions internal to the document also occur regarding the marking of hands (in paragraph 4, 5, 6, 9 "MCN," "ML," "MMB," and "MCY" have red Xs, while MHH has a black X). HS Jr. (a male) states he was supposed to get a "red X" but ended up with a "pen mark instead." However, in paragraph 7, UWMPD state they observed that all 42 of the students at the house party had either red or black Xs, and there was no indication that the students' levels of intoxication or gender corresponded to the color of their X. (Adams Affidavit at ¶4, 9). Additionally, as mentioned, "STO" and her 7 friends all received black Xs without regard to gender. (Adams Affidavit at ¶ 11). Again, the simplest answer is the best answer – that there was no coordination between Xs and party guests.

These internal contradictions cut against the inherent theory of the search warrant, that when considering the "totality of the circumstances presented" to the reviewing judicial officials, there was no "substantial basis for concluding that there was a fair probability that a search of the specified premises would uncover evidence of wrongdoing." *State v. Romero,* 2009 WI 32 ¶ 4, 765 NW 2d 756, 760.

Remaining statements based on unsubstantiated rumors and other hearsay.

The supposed connection between the facts (intoxicated students on a college campus) and the UWMPD's conspiracy theory (drugging of students) are the rumors/hearsay repeated by several students. Because there was no direct evidence available, UWMPD resorted to mining the rumor mill, which circulated via text and Facebook messages like wildfire. It has already been explained that UWMPD began the rumors that they later "collected" from "MMB" in paragraph 10, "MCN" in paragraph 11, and "STO" in paragraph 12. (Adams Affidavit at ¶¶ 4, 9).

This court should evaluate these statements in light of their origin –UWMPD themselves to determine the whether UWMPD had any basis for the its inclusion. Certainly, there was little if any independent corroboration of the statements. *see State v. Moretto,* 144 Wis.2d 171, 186 (1988)). Simply washing the statement through the mouth of a partygoer does not lend the statements credibility. A *Franks* hearing would enable the defense the ability to inquire how the UWMPD weighed all of the hearsay in affidavit paragraphs 10, 11, 12, and 16 for reliability. (Adams Affidavit at ¶ 4).

CONCLUSION

The search warrants executed in this case lacked probable cause.

When the affidavit is viewed as a whole, taking in the totality of the circumstances and the omitted information, it is not probable cause that is depicted, but rather it is a picture of unreliable and uncorroborated hearsay statements of college freshman, perhaps hoping to garner favor with UWMPD who had found them drinking underage. Defendant's home was not the site of a mass-drugging, but rather a lesser, non-felonious offense of hosting a drunken party where alcohol was served to minors. This lesser situation is best held accountable by the City of Milwaukee's civil nuisance mechanisms. *See United States v. Wald,* 216 F.3d 1222, 1226 (10th Cir.2000). In short UW-Milwaukee has a rampant student drinking culture, not a drugging problem, and UWMPD know of this fact. Accordingly, the Defense asks this Court to find that the affidavits are insufficient to support a finding of probable cause or in the alternative, to grant Defendant a *Franks* hearing.

Dated at Milwaukee, Wisconsin, this _____day of February 2015:

ADAMS URFER LLC
Attorney for the Defendant

By:_____
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