**STATE OF WISCONSIN** **CIRCUIT COURT** **DANE COUNTY**
**Branch**

STATE OF WISCONSIN,

Plaintiff, Case No. 18 CF 1694

v.

QUINTEZ R. CEPHUS

Defendant.

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**MOTION TO DISMISS COUNT TWO**
***FRANKS/MANN VIOLATION***

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To: Dane County District Attorney's Office
215 So Hamilton St., Rm. 3000
Madison, WI 53703

An examination of the criminal complaint reveals that the State omitted critical exculpatory facts in its possession. Had these facts been included, they would have fatally impeached the witnesses' statements regarding the level of impairment of both complainants and diminished the overall reliability of the information supporting key elements of the Second Degree Sexual Assault charge. The inclusion of this material is necessary for an impartial judge to fairly determine probable cause.

Therefore, Quintez Cephus, by his attorneys, moves the Court for an order granting a *Franks/Mann* hearing and dismissal of Count Two. As set forth below, the omissions are 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; *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978); and *State v. Mann*, 123 Wis. 2d 375, 367 N.W.2d 209 (1985).

AS GROUNDS IN SUPPORT, the accused submits the following:

**I. Application of the *Franks* rule to a criminal complaint.**

It is well-established that a defendant may challenge the probable cause underlying a criminal charge by way of a *Franks* motion, which challenges the reliability and veracity of the information contained in the complaint. *State v. Marshall*, 92 Wis.2d 101284 N.W.2d 592 (1979). In *State v. Mann*, 123 Wis. 2d 375, 385, 367 N.W.2d 209, 213 (1985), the court extended the *Franks* rule, which allowed a challenge to complaints containing false statements, to challenges to complaints in which there were material omissions of facts known by the prosecutor at the time the complaint is drawn that arguably may bear on the defendant's guilt. As long as the misstatements or omissions are shown to be critical to a probable cause determination, the defense need not establish the intent of the affiant. *Id.* at 386-87. Once the inaccurate or misrepresented section of the complaint is removed from the complaint or the qualified omitted facts inserted, if probable cause does not exist independently, the complaint should be dismissed. *Id* at 387.

**II. Elements of Second Degree Sexual Assault**

Section 940.225(2)(cm), Wis. Stats. provides: "..Has sexual contact or sexual intercourse with a person who is under the influence of an intoxicant to a degree which renders that person incapable of giving consent if the defendant has actual knowledge that

the person is incapable of giving consent and the defendant has the purpose to have sexual contact or sexual intercourse with the person while the person is incapable of giving consent...". Proof regarding the degree of impairment and the defendant's knowledge of it and purpose to take advantage of the impairment are all necessary elements of the offense and the factual basis in the complaint must establish the grounds for these elements.

**III. Argument**

The criminal complaint sets forth the facts in support of the probable cause for Count Two on pages 2 - 4. The information purports to come from an interview with two young women whom the State refers to as Victim 1 and Victim 2. The vast majority of the information was provided by "Victim 1" ( hereinafter , "S.R."). She asserts that "Victim 2" (hereinafter, "I.A.") was "really drunk" when she and S.R. met Cephus at a local bar around 11:30. (Page 2). S.R. also claimed that she was "dying", which she explained meant that she was really drunk. (Page 2). S.R. claimed that after I.A. had sex with Cephus, I.A. was in a condition that was functionally comatose. Alleging that [I.A.'s] eyes were closed and that she "pulled Victim 2's arm" and it "just flopped back down" and "just dropped down". S.R. also said she tried to make I.A. get up from the bed and said that I.A.'s eyes were open and that she "looked possessed" with her "eyes rolled back" and "I could see the whites of her eyes". S.R. told police that I.A.'s speech was hard to understand. The complaint does not provide any information about how or under what circumstances I.A. and S.R. left the apartment and arrived home.

When interviewed by the police a day later, I.A. claimed not to remember anything about meeting Cephus, being introduced to him or being asked her name. She did have a "snapshot" of being in Cephus' car and sprinting out of his apartment crying. That is all she would say she remembered. (Page 4). "I don't remember getting home. I don't remember walking into my apartment. I don't remember anything else." (Page 4).

The defense obtained and provided to the State video footage of both girls leaving the apartment building on Spring Street at around 2:30 a.m. and several text messages between Cephus and I.A. around 3:15 that same morning. (Affidavit of Stephen J. Meyer, ¶¶ 1 & 5). The video footage shows I.A. walking out of Cephus' apartment door, locating the exit without difficulty and starting down the stairs without demonstrating any signs of impairment. (Affidavit of Stephen J. Meyer, ¶¶ 6a & b). Several minutes later, Cephus and S.R. are seen talking at the apartment door for 25-30 seconds. S.R. is standing without any need for support and appears to be conversing normally. (Affidavit of Stephen J. Meyer, ¶ 6d). They both return to the apartment and shortly after, Cephus, Davis, another female and S.R. are seen exiting the apartment and then the building. During this footage S.R. showed no obvious signs of impairment and was able to walk up a short flight of stair without using the handrails for support. (Affidavit of Stephen J. Meyer, ¶ 6e).

At approximately 3:14 a.m., I.A. sent a text message to Cephus in which she explains that she left her "juul", a vape instrument at his house and asked him to let her know if he found it. This demonstrates that she remembered that she knew Cephus, knew his name, knew how to get in touch with him, remembered she was at his house, remembered that

she had her "juul" with her, and remembered that she left it there. She also asked him to contact her if he found it, signifying that she was willing and interested in seeing him again. She closed the text with a heart and a "kiss" emoji, signifying positive feelings toward Cephus. (Affidavit of Stephen J. Meyer, ¶ 6c).

Upon information and belief, there is additional footage of the two young women arriving at their respective dorms and of Cephus and Davis and a third young woman going inside I.A.'s dorm. Based on the footage obtained of their departure, it is reasonable to believe that I.A. and S.R. did not look impaired in the additional footage recorded just a few minutes after the video of their departure from Cephus' apartment. Shortly after his departure from I.A.'s dorm, Cephus received the text messages inquiring about her belongings.

**Conclusion**

Despite the fact the State knew about the evidence set forth in Meyer's affidavit before filing the complaint, they made a conscious decision not to include it. This evidence establishes that S.R. and I.A. exhibited a complete absence of any demonstrative physical impairment. The text messages demonstrate I.A.'s lack of cognitive impairment. The failure to include this evidence in the criminal complaint is a boilerplate *Franks/Mann* violation. But it is also more than a material omission. It is also a material misstatement of fact given the extreme intoxication alleged in the complaint in this case. With the additional facts, which are not reasonably disputable, the complaint lacks probable cause as to essential elements of Count Two and it should be dismissed.

Dated at Brookfield and Madison, Wisconsin, this 22nd day of August, 2018.

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