STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2022AP000146-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THOR S. LANCIAL,

Defendant-Appellant.

On Appeal from a Judgment and an Order
Entered in the Dunn County Circuit Court,
the Honorable Rod W. Smeltzer, Presiding

BRIEF OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Did the state present sufficient evidence to prove beyond a reasonable doubt that Mr. Lancial knowingly possessed child pornography on the date alleged?

The jury found Mr. Lancial guilty of each count of possession of child pornography as alleged in the information.

2. Did the search of Mr. Lancial's cell phone exceed the scope of the search warrant for the residence from which the phone was seized?

The circuit court denied Mr. Lancial's motion to suppress the evidence obtained from his cell phone.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Publication may be warranted under Wis. Stat. § 809.23(1)(a) as this case may clarify or resolve a conflict regarding whether the state needs to obtain a warrant to search the contents of a cell phone seized during execution of a search warrant for the premises on which the cell phone is found.

Mr. Lancial does not request oral argument, though he would welcome it if the court were to deem it helpful.

STATEMENT OF THE CASE AND FACTS

On July 12, 2019, the state filed a complaint charging Thor S. Lancial with ten counts of possession of child pornography. (2:1-6). The complaint alleged that "on or about July 9, 2019, in the City of Menomonie," Mr. Lancial knowingly possessed photograph(s) of a child engaging in sexually explicit conduct. (15:1-6).[1]

As a factual basis, the complaint asserted that on April 30, 2019, Investigator Maloree Zassenhaus was notified of a cyber tip indicating that an image of child pornography was uploaded to BingImage on March 3, 2019, using an IP address owned by Richard Lancial. (2:6). Thereafter, on July 9, 2019, Investigator Zassenhaus executed a search warrant at Richard Lancial's residence. (2:6). While executing that search warrant, she seized a Samsung cell phone belonging to Mr. Lancial. (2:7). A download of the cell phone was conducted and multiple images of child pornography were found in the cache folder of the phone's gallery application. (2:7-9).

The case was eventually set for trial. Prior to trial, Mr. Lancial, through defense counsel, filed a motion to suppress evidence. (48). In it, he asked for suppression of any and all evidence obtained as a result of the illegal search of his cell phone. Mr. Lancial argued that, at the time the phone was

[1] Count 10 of the original complaint had an offense date of March 3, 2019. (2:5). This was amended to July 9, 2019, in an amended complaint and information filed later. (14; 15).

searched, Investigator Zassenhaus "had not received a warrant to search any phone." (48:1-2).

A motion hearing was held on April 8, 2021. (148). Investigator Zassenhaus was the sole witness. She testified that she obtained a search warrant on July 8, 2019, and executed that warrant on July 9, 2019. (148:7-8). Exhibit 3 – the search warrant – was introduced as evidence; it states that Investigator Zassenhaus informed the court that, at Richard Lancial's residence:

> *there are now located and (concealed)(in plain view) certain things, to-wit: laptops, tablets, or any electronic device that has user generated data stored in internal and external memory including e-mail, photos, video or other form of electronic communications or data included therein.*
>
> which things may constitute evidence of a crime, to-wit: possession of child pornography contrary to Wis. Stats. Section 948.12 and the subs thereunder.
>
> And prayed that a search warrant be issued to search said premises or phones for said things.

(57:1; App. 7)(*emphasis* added). At the bottom of the warrant, the circuit court ordered:

> NOW, THEREFORE, in the name of the State of Wisconsin, you are commanded forthwith to *search the said premises, vehicle and persons for said things*, and if the same or any portion thereof are found to bring the same and the person in possession, if the same are found, and return this warrant within 48 hours before this Court and be dealt with according to law.

(57:1; App. 7)(*emphasis* added). Investigator Zassenhaus testified that she seized various items while executing this search warrant, including a Samsung cell phone. (148:9-10). A download of that phone was completed on July 9, 2019, and reviewed on July 10, 2019, at which time child pornography was located. (148:10).

After testimony, defense counsel argued, among other things, that while the search warrant allowed the state to go into the residence and take various devices, it did not authorize the search of those devices and therefore, the search of Mr. Lancial's phone exceeded the scope of the warrant. (148:23-24).

The circuit court denied the motion, holding:

> I do find there was sufficient specificity to obtain the items that were subject to that search at the address stated in the search warrant and also the line specifically authorizes that based on that affidavit and based on that search warrant, that they could -- a search warrant was issued to search said premise and/or phones for said things and it's specific what they were looking for.

(148:25; App. 10).

The case proceeded to a two-day jury trial on April 12 and 13, 2021. The state called four witnesses: Officer Jeremy Wilterdink, Lieutenant Kelly Pollock, Investigator Maloree Zassenhaus, and Anthony Stofferahn.

At the outset, the prosecutor told the jury that the evidence would show that the ten images at issue were all located "in the gallery applications [sic] cache folder," which was a "hidden folder" within which images will stay even if deleted from the gallery application, and "the user cannot see what is in the folder." (137:88).

As relevant, Officer Wilterdink testified that he had received notification of a cyber tip associated with 2255 Wilson Street in Menomonie. (137:117-118, 122-123). He also informed the jury that on July 9, 2019, he participated in the execution of a search warrant at that address and his job was to collect evidence. (137:123-124). He explained that, during execution of the warrant, he was able to determine that six devices were connected to the wireless network and that he ultimately collected eleven items from the residence, including a phone found in the living room. (137:125-127, 129-130).

Lieutenant Kelly Pollock testified next. She informed the jury that she also assisted with execution of the search warrant on July 9, 2019. (137:154). Lieutenant Pollock testified that she interviewed Mr. Lancial at the scene that day and Mr. Lancial asked if it was possible that their IP had been hacked or if material could have been linked to the IP address due to a pop up. (137:155, 160-161). Mr. Lancial "denied looking at child pornography and said he never would intentionally do that." (137:162). He also informed her that he did not believe his mother or father would look at child pornography and that he did

not know "his brothers [sic] preferences." (137:162). Finally, Lieutenant Pollock testified that Mr. Lancial told her he had a cell phone that could only be used on Wi-Fi, that he had access to Wi-Fi at the residence, and that he "was the sole user of that cell phone." (137:163-164). Mr. Lancial did inform her that a young lady he referred to as his niece used his phone to take photographs of gymnastic related things and may have downloaded some images of the same. (137:165).

Next the jury heard from Investigator Maloree Zassenhaus. As relevant to this appeal, Investigator Zassenhaus testified that, in response to the cyber tip, she obtained and executed a search warrant at Richard Lancial's residence. (137:191-193; App. 15-17). Mr. Lancial was present at the residence with his parents, Richard and Sherry, and waited outside while the residence was searched. (137:194-195; App. 18-19). Investigator Zassenhaus explained that while searching the residence she retrieved a Samsung Galaxy J7 cell phone from the living room. (137:197; App. 21). The cell phone and other items collected were then brought back to the police department and searched. (137:198-199; App. 22-23). No child pornography was found on any of the items except the Samsung cell phone which had been identified as Mr. Lancial's. (137:199-211; App. 23-35).

Specifically, Investigator Zassenhaus explained that there were over 7,200 images on Mr. Lancial's phone, some of which were icons, selfie images, and images of family members. (137:209-210; App. 33-34). She told the jury that the majority of the images were

"of girls either in gymnastics leotards in different gymnastic poses as well as girls in -- young girls in bikinis or swimsuits as well as some of the child pornography." (137:210-211; App. 34-35). She also identified and described ten images of child pornography which were received as exhibits 1-10 and shown to the jury. (137:220-232; App. 44-56).

On cross-examination, Investigator Zassenhaus admitted that she never asked Mr. Lancial if anyone else had access to the black Samsung phone and, when asked if he thought the phone would work with the internet, Mr. Lancial said "I think so." (144:35-36; App. 81-82). She also testified that she could not recall if she had looked for any Bing searches on the devices and noted that none had been documented in her reports despite the fact that the cyber tips had been the result of Bing searches. (144:39-40; App. 85-86).

With respect to when the images were downloaded onto Mr. Lancial's phone, Investigator Zassenhaus testified that there was no meta data containing that information associated with the ten images of child pornography. (144:41-42; App. 87-88). She admitted that she had no information as to when the images were downloaded onto the phone or who downloaded them. (144:42-44; App. 88-90).

On re-direct, the prosecutor had Investigator Zassenhaus confirm that she did not locate any meta data for the ten images of child pornography and, therefore, did not have any

information about when or how they came to be on that phone. (144:54-55, 64; App. 100-101, 110). She could not say whether it was March, June, or some completely different date. (144:54, 56; App. 100, 102).

Finally, Anthony Stofferahn, a digital forensic examiner for the Wisconsin Department of Justice, testified. Mr. Stofferahn testified that he completed a physical extraction of the Samsung phone using Cellebrite. (144:71-73; App. 117-119). He explained that he identified images of child pornography on the phone. (144:75-76; App. 121-122). Mr. Stofferahn also testified that he looked at the web history and search terms from the phone and it "wasn't as extensive as [he] thought it would be." (144:77; App.123). He then found that the phone had a Tor Onion Browser as well as 12 VPNs, which could explain the lack of search history available. (144:78-79; App. 124-125).

With respect to the ten images for which Mr. Lancial was charged, Mr. Stofferahn testified that they were all located "in the cache file within the gallery of the device." (144:88; App. 134). He explained that the gallery application "is where all of your photos are taken and stored, whether it be downloaded or physically taken" with the device. (144:88-89; App. 134-135). Importantly, he stated that the cache folder is not something that the user of the phone would see. (144:90; App. 136). He explained that when the user selects an image in the gallery application, the image gets larger and a cache file, which is the exact same image in a smaller size, is created and placed in the cache folder. (144:92-93; App. 138-139).

If the image itself is deleted from the gallery, the cache file remains but can't physically be seen in the cache folder. (144:93-94; App. 139-140).

On cross-examination, Mr. Stofferahn admitted that he had no information about when the images were downloaded or when they went into the cache folder, and that the original images themselves were not on the phone. (144:100-101, 106-108; App. 146-147, 152-154).

After evidence was received, defense counsel moved for a mistrial and/or directed verdict, which was denied. (144:110-113). Closing arguments were then given and the jury returned verdicts of guilty on all ten counts. (112-121; 144:140-174).

Sentencing was held on July 20, 2021, at which time the circuit court sentenced Mr. Lancial to 14 years and 6 months of prison, divided as four and a half years of initial confinement and ten years of extended supervision, on each count, concurrent. (124:2; App. 4).

This appeal follows.

ARGUMENT

I. The state failed to present sufficient evidence to prove that Mr. Lancial knowingly possessed child pornography.

The evidence presented at trial was insufficient to prove beyond a reasonable doubt that, on July 9, 2019, Mr. Lancial knowingly possessed the ten images for which he was convicted. As a result, Mr. Lancial's convictions must be vacated.

A. Legal standard and standard of review.

"In order to obtain a conviction, the state must prove every essential element of the crime charged beyond a reasonable doubt." *State v. Ivy*, 119 Wis. 2d 591, 606-607, 350 N.W.2d 622 (1984), A conviction obtained without sufficient evidence is a violation of the defendant's right to due process of law. U.S. Const. Amend. XIV; Wis. Const. Art. I, § 1; *In re Winship*, 397 U.S. 358, 365 (1970).

"The question of whether the evidence was sufficient to sustain a verdict of guilt in a criminal prosecution is a question of law," which this court reviews de novo. *State v. Smith*, 2012 WI 91, ¶24, 342 Wis. 2d 710, 817 N.W.2d 410. In doing so, this court will uphold the verdict unless the evidence "is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *Id*. (quoting *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)). Stated another way, this court is to "decide whether 'any

possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial.'" *Id.*, ¶44 (quoting *Poellinger*, 153 Wis. 2d at 506.). Should this court determine that the evidence produced at trial is insufficient, it must order a judgment of acquittal. *Ivy*, 119 Wis. 2d at 608-610.

B. The evidence was insufficient to prove that Mr. Lancial knowingly possessed child pornography on July 9, 2019.

In order to prove Mr. Lancial guilty of possession of child pornography, as charged, the state was required to prove four elements beyond a reasonable doubt: 1) that on or about July 9, 2019, Mr. Lancial knowingly possessed a recording; 2) the recording showed a child engaged in sexually explicit conduct; 3) Mr. Lancial knew or reasonably should have known that the recording contained depictions of a person engaged in actual or simulated sexual intercourse or lewd exhibition of intimate parts; and 4) Mr. Lancial knew or reasonably should have known that the person shown in the recording engaged in sexually explicit conduct was under the age of 18 years. *See* WIS JI-CRIMINAL 2146A.

On appeal, the only element at issue is the first element – Mr. Lancial's knowing possession of child pornography on or about July 9, 2019. As the jury was instructed, "'Possessed' means that the defendant knowingly had actual physical control of the recording. A recording is also in a person's possession if it is in an

area over which the person has control and the person intends to exercise control over the recording." (78:3). *See also* WIS JI-CRIMINAL 2146A. With this definition in mind, review of the record reveals that the state's evidence fell short of proving beyond a reasonable doubt that Mr. Lancial knowingly possessed child pornography on the date alleged.

The evidence established that Mr. Lancial's cell phone was seized and searched on July 9, 2019, revealing the ten images of child pornography for which he was charged. All ten images, however, were found in the cache folder of the gallery application on the phone. (144:88; App. 134). Mr. Stofferahn explained what that meant during his testimony. First, he informed the jury that the gallery application "is where all of your photos are taken and stored" regardless of whether the picture is taken with the phone itself or downloaded from the internet. (144:89; App. 135). Next, he explained that the cache folder is not something the user of the phone would see while using the gallery application; the purpose of the cache folder is to allow the gallery application to "open and find" photos faster. (144:90; App. 136). When the user of the phone clicks on an image in the gallery application, that image gets bigger and a cache file, which is a smaller version of the image, is created and placed in the cache folder. (144:92-93; App. 138-139). If the photo in the gallery application is deleted, the cache file remains, though the user "can't physically see the file in the cache folder." (144:93-94; App. 139-140).

In addition to explaining that, due to their location in the cache folder, the images for which Mr. Lancial was charged were inaccessible, Mr. Stofferahn admitted that the original images were not on the phone and that there was no way to know when the images themselves were downloaded or when they were put in the cache gallery. (144:100-104; App. 146-150). Similarly, Investigator Zassenhaus informed the jury several times that the images had no meta data and therefore, she could not say when, where, or how those images were downloaded to the phone. (144:41-43, 54-57, 64; App. 87-89, 100-103, 110). Simply put, the state had no evidence showing when or how Mr. Lancial allegedly downloaded or accessed the original images, or when those images were deleted from the phone.

Unlike prior cases in which this court found sufficient evidence to support convictions of child pornography, here the state presented no evidence that Mr. Lancial had searched the internet for child pornography, visited any websites containing it, or that on the date in question, any images of child pornography were saved in a location where he could access and control them. *See State v. Lindgren*, 2004 WI App 159, ¶27, 275 Wis. 2d 851, 687 N.W.2d 60 (finding sufficient evidence to demonstrate knowing possession because the defendant "repeatedly visited child pornography Web sites, clicked on thumbnail images to create larger pictures for viewing, accessed five images twice, and saved at least one image to his personal folder); *See also State v. Mercer*, 2010 WI App 47, ¶1, 324 Wis. 2d 506, 782

N.W.2d 125 (noting that each case is fact specific "with the bottom line being that the defendant in each case affirmatively reached out for and obtained images of child pornography and had the ability to control those images.").

The only evidence provided by the state in this case was that, on July 9, 2019, the day Mr. Lancial's phone was seized and searched, there were images of child pornography contained in the cache folder of the gallery application. The state admittedly had no information about when or how the images in the cache folder came to be on Mr. Lancial's phone. Further, the prosecutor herself described the cache folder of the gallery application as a "hidden folder" – one in which the user of the phone would no longer be able to see or access the images. (137:87-88). According to the state's own witnesses, on July 9, 2019, Mr. Lancial would no longer have knowingly possessed the images – he would not have had actual physical control over them, nor did he intend to exercise control over them - they had been deleted and were no longer accessible.

In sum, the state's case rested solely on the fact that the images were in a hidden, inaccessible folder on the date the phone was searched – July 9, 2019. (*See* 144:170). That evidence was insufficient to establish that Mr. Lancial knowingly possessed child pornography on or about July 9, 2019. *See U.S. v. Flyer*, 633 F.3d 911, 918-919 (9th Cir. 2011)(holding that evidence of images found in the unallocated space of a computer, which cannot be seen or accessed by the

user without the use of forensic software, absent evidence that the defendant could recover or view the images or even knew that they were there, was insufficient to prove that on or about the specific date alleged the defendant possessed child pornography.) The state failed to produce sufficient evidence to demonstrate beyond a reasonable doubt that Mr. Lancial knowingly possessed child pornography on July 9, 2019, as alleged. Consequently, the convictions must be reversed and judgments of acquittal entered.

II. The circuit court erred in denying Mr. Lancial's motion to suppress evidence as Investigator Zassenhaus' search of Mr. Lancial's cell phone exceeded the scope of the warrant.

Mr. Lancial's pretrial motion to suppress evidence in this case should have been granted as the search warrant did not provide officers with authority to search Mr. Lancial's cell phone. Consequently, Mr. Lancial's convictions must be reversed and the case remanded with instructions to suppress all evidence obtained as a result of the unconstitutional search.

A. Legal standard and standard of review.

Both the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution guarantee citizens the right to be free from unreasonable searches and seizures. U.S. Const. Amend. IV; Wis. Const. Art. I,

§ 11. Under these protections, warrantless searches are per se unreasonable, subject to a few well recognized exceptions. *State v. Foster*, 2014 WI 131, ¶32, 360 Wis. 2d 12, 856 N.W.2d 847. The burden is on the state to prove that a search was reasonable. *State v. Nesbit*, 2017 WI App 58, ¶6, 378 Wis. 2d 65, 902 N.W.2d 266. Failure to do so ordinarily results in suppression or exclusion of the evidence obtained from the unreasonable search. *State v. Jackson*, 2016 WI 56, ¶46, 369 Wis. 2d 673, 882 N.W.2d 422; *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963).

On review of the denial of a suppression motion, this court will uphold the circuit court's factual findings unless they are clearly erroneous, however, application of constitutional principles to those facts is a question of law subject to de novo review. *Andrews*, 201 Wis. 2d at 388-389.

Here, the state argued, and the circuit court found, that the search of Mr. Lancial's cell phone was constitutional based on the search warrant issued for his father's residence. However, even searches conducted pursuant to a search warrant are subject to limitation. Although the officers in this case had a valid search warrant for Richard Lancial's residence, their search of Mr. Lancial's cell phone after it was seized from that residence exceeded the authority they were granted.

A "warrant must describe with particularity the place to be searched and things to be seized." *State v. Andrews*, 201 Wis. 2d 383, 390, 549 N.W.2d 210 (1996).

This requirement "satisfies three objectives by preventing general searches, the issuance of warrants on less than probable cause, and the seizure of objects different from those described in the warrant." *Id*. In other words, it prevents the state from "engaging in general exploratory rummaging through a person's papers and effects in search of anything that might prove to be incriminating." *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). It also assures "the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *United States v. Chadwick,* 433 U.S. 1, 9 (1977).

Even if a warrant satisfies the particularity requirements set forth above, however, the state's execution of that search warrant may nevertheless be challenged. *Andrews*, 201 Wis. 2d at 390. "A search 'must be conducted reasonably and appropriately limited to the scope permitted by the warrant. Whether an item seized is within the scope of a search warrant depends on the terms of the warrant and the nature of the items seized.'" *Id*. at 390-391. The state's search of Mr. Lancial's cell phone in this case exceeded the scope of the warrant it was granted.

B. The search warrant did not authorize the search of any devices found at the residence.

The warrant in this case specifically authorized the search of the premises located at 2255 Wilson Street, Lot #37, Menomonie, Wisconsin, and any vehicles associated with it. (57; App. 7). It also stated with particularity the items to be seized:

- laptops,
- tablets, or
- any electronic device that has user generated data stored in internal and external memory including e-mail, photos, video or other form of electronic communications or data included therein.

(57; App. 7). Mr. Lancial does not dispute that law enforcement lawfully searched the residence and seized his phone. The warrant, however, did not provide authority for the subsequent search of that phone. The search was unconstitutional, and consequently, all evidence obtained as a result of that search should have been suppressed.

The search warrant itself, "commanded [officers] forthwith to search the said premises [2255 Wilson Street, Lot #37], vehicle [those associated with the premises] and persons for said things [laptops, tablets, or any electronic device]." (57; App. 7). Accordingly, law enforcement was granted permission to search the residence and any vehicles associated with it. Contrary to the circuit court's findings, the terms of the warrant did not authorize

the search of Mr. Lancial, or anyone else's, cell phone. (148:25; App. 10). To the extent the circuit court made a factual finding about the language of the search warrant, that finding was clearly erroneous. While there is a line on the warrant stating that the officer "prayed that a search warrant be issued to search said premises or phones for said things," that is the only place in the warrant that the term "phone" is used. (57:1; App. 7). The warrant specifically authorized only the search of the premises and vehicles associated therewith.

Further, while "[g]enerally a premises warrant authorizes the search of all items on the premises so long as those items are plausible receptacles of the objects of the search," this principle does not extend to cell phones. *Andrews*, 201 Wis. 2d at 389; *See Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018)("police officers must generally obtain a warrant before searching the contents of a phone"); *See also* LaFave, Wayne R., Search and Seizure: A Treatise on the Fourth Amendment, § 4.11(a)(6th ed.) (Dec. 2021)(noting that in light of *Riley v. California,* 573 U.S. 373 (2014), "if a search warrant specifically names a cellphone only as one of the objects to be seized, absent exigent circumstances a search warrant will thereafter be required to authorize a search of that cellphone."). Rather, "[u]nder the original meaning of the Fourth Amendment, law enforcement generally will need a warrant to search the contents of a smartphone." *State v. Burch*, 2021 WI 68, ¶¶37, 47-48, 398 Wis. 2d 1, 961 N.W.2d 314 (Rebecca Grassl Bradley, J., concurring).

In *Riley v. California,* 573 U.S. 373 (2014), the United States Supreme Court "recognized the 'immense storage capacity' of modern cell phones" and "explained that while the general rule allowing warrantless searches incident to arrest 'strikes the appropriate balance in the context of physical objects, neither of its rationales has much force with respect to' the vast store of sensitive information on a cell phone." *Carpenter*, 138 S. Ct. at 2214. This is because, "[m]odern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life.'" *Riley*, 573 U.S. at 403. "[A] cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form – unless the phone is." *Id.* at 396.

The Court also recognized that "[c]ell phones differ in both a quantitative and qualitative sense from other objects," they have "immense storage capacity" and the possible intrusion on privacy is not physically limited in the same way it is with other objects. *Id.* at 393-94. "First, a cell phone collects in one place many distinct types of information…that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible…Third, the data on a phone can date back to the purchase of the phone, or even earlier." *Id.* at 394-95 ("[I]t's no exaggeration to say that many of the more

than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives – from the mundane to the intimate. Allowing the police to scrutinize such records on a routine basis is quite different from allowing them to search a personal item or two in the occasional case.").

While the facts before the Court in *Riley* involved searches of cell phones incident to arrest, the Court did not limit its holding to those circumstances. Rather, the Court clarified:

> Our holding, of course, is not that the information on a cell phone is immune from search; *it is instead that a warrant is generally required before such a search*, even when a cell phone is seized incident to arrest.

Id. at 401(emphasis added). The breadth of this holding has been recognized by several Wisconsin Supreme Court Justices as well as the Supreme Court of Idaho. *See* S*tate v. Russo*, 157 Idaho 299, 306, 336 P.3d 232 (2014)(citing *Riley* and holding that a warrant authorizing officers to search the defendant's residence and seize items, including a cell phone, did not authorize the search of that cell phone); *See also Burch*, 2021 WI 68 (Rebecca Grassl Bradley, J., concurring; Dallet, J., joined by Karofsky and Ann Walsh Bradley, JJ., concurring in part, dissenting in part).

In *State v. Burch*, a case examining whether the search of a cell phone was constitutional under the consent exception, Justice Rebecca Grassl Bradley

stated that, "[b]ecause smartphones contain the 'privacies of life,' law enforcement generally needs a warrant to search the data they hold." *Burch*, 2021 WI 68, ¶¶37-38, 47-51 (Rebecca Grassl Bradley, J., concurring). She specifically found that the *Riley* Court "held that law enforcement generally must obtain a warrant before conducting a search of smartphone data," and went on to state that "[p]ermitting law enforcement to rummage through the data residing in smartphones without a warrant would 'allow [] free rein to search for potential evidence of criminal wrongdoing,' which the Fourth Amendment prohibits. *Id.*, ¶¶47, 52.

Moreover, Justice Dallet, joined by Justices Karofsky and Ann Walsh Bradley, recognized that, "[i]n the Fourth Amendment context, the United States Supreme Court has clearly expressed that cell phone data is in an evidence class of its own because it 'implicate[s] privacy concerns far beyond those implicated by the search of' other physical belongings." *Burch*, 2021 WI 68, ¶72 (Dallet, J., concurring in part, dissenting in part). She found that, "[p]eople have a unique and heightened expectation of privacy in their cell phone data that demands commensurate Fourth Amendment protection." *Id*. It is therefore, "a grave analytical error to 'mechanically apply []' to cell phone data Fourth Amendment rationales that were developed without such invasive technologies in mind." *Id.*, ¶86.

In this case, the search warrant obtained was for Richard Lancial's residence and, while the terms of that warrant authorized seizure of any cell phone or other electronic device found on the premises, it did not authorize a search of those devices. As Mr. Lancial had a "unique and heightened expectation of privacy" in his cell phone, and no exceptions to the warrant requirement existed, Investigator Zassenhaus' search of it was unconstitutional. *See Burch*, 2021 WI 68, ¶86 (Dallet, J., concurring in part, dissenting in part). Consequently, Mr. Lancial's motion to suppress the evidence obtained from that unconstitutional search should have been granted.

CONCLUSION

For the reasons stated above, Mr. Lancial respectfully requests that this court reverse the judgment of conviction and sentence and remand to the circuit court with instructions that judgments of acquittal be entered. Should the court deny that request, Mr. Lancial respectfully requests that this court reverse the judgment of conviction and remand the case to the circuit court with instructions that all evidence obtained as a result of the unconstitutional search be suppressed.

Dated this 6th day of April, 2022.

Respectfully submitted,

Electronically signed by
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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 5,175 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules 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 or 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 one or more initials or other appropriate pseudonym or designation 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 6th day of April, 2022.

Signed:
Electronically signed by
Kathilynne A. Grotelueschen
KATHILYNNE A. GROTELUESCHEN
Assistant State Public Defender