STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT III

CASE NO. 2023AP1888-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RYAN D. ZIMMERMAN,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUES PRESENTED

This case involves child sexual assault allegations that Ryan Zimmerman has consistently denied. He went to trial on eight counts, and the jury acquitted him of three. He appealed his convictions for the remainder, raising four issues, and the court of appeals affirmed in a decision recommended for publication. He now petitions this Court to review just one of his appellate claims, albeit in two steps:

1. Does the Fourth Amendment's reasonableness requirement apply to the government's retention of private property, or solely to its initial taking?

   The circuit court did not address this issue directly.

   The court of appeals assumed without deciding that the Fourth Amendment's reasonableness requirement applies to the government's retention of private property.

2. Police obtained Zimmerman's cellphone in 2015 in connection with an unrelated criminal investigation. Though police conceded there was no reason to hold onto the phone after that 2015 case concluded, they never got rid of it. In 2019, when the allegations underlying this case emerged, police realized they still had the phone and sought Zimmerman's consent to search it again. Was law enforcement's years-long retention of the phone unreasonable under the Fourth Amendment, tainting Zimmerman's consent to its reexamination?

   The circuit court denied Zimmerman's motion to suppress but did not directly address the retention issue.

   The court of appeals affirmed, finding law enforcement's retention of the cellphone reasonable.

CRITERIA FOR REVIEW

Few constitutional provisions have garnered as much scrutiny, scholarship, or litigation as the Fourth Amendment. It is thus surprising that an issue as basic as the one presented here remains unresolved. That issue is: does the Fourth Amendment govern the government's retention of private property, or does its reasonableness requirement apply only to the moment property changes hands?

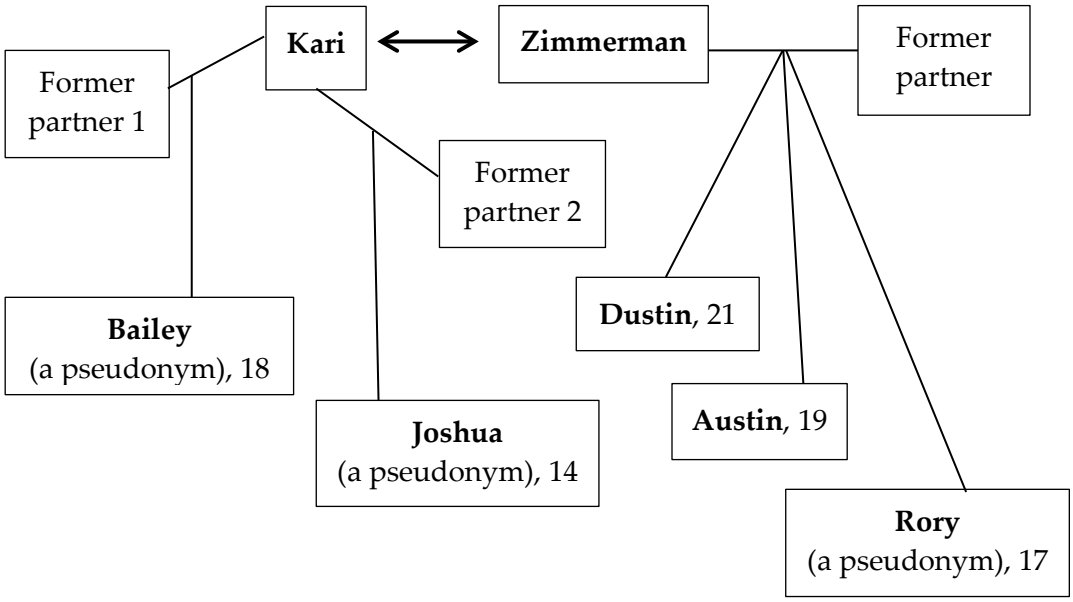
When police seize a *person*, the seizure may continue only so long as it's constitutionally reasonable. *State v. Griffith*, 2000 WI 72, ¶¶37-38, 54, 236 Wis. 2d 48, 613 N.W.2d 72. That is, the Fourth Amendment's protections apply for the duration of the seizure. *See id.* Is property different? Some federal circuits say "yes," some say "no," and no binding precedent in Wisconsin resolves the issue.

In the court of appeals, Zimmerman urged publication so that—in Wisconsin at least—law enforcement, litigants, and reviewing courts would know the answer to this foundational question. The court of appeals published its decision but declined to provide that answer. *See State v. Zimmerman*, Appeal No. 2023AP1888-CR, unpublished slip op., ¶29 (Wis. Ct. App. Nov. 25, 2025) (recommended for publication) (App. 14). Instead, it assumed without deciding that the Fourth Amendment governs in this realm and held that law enforcement's retention of Zimmerman's cellphone was constitutionally reasonable. *Id.* (App. 14).

This Court should fill this unusual blank in the case law. That is, because this case presents a "real and significant question of federal or state constitutional law"; because a decision from this Court will develop the law by resolving a "novel" question, "the resolution of which will have statewide impact"; and because the "question presented is not factual in nature but rather a question of law of the type that is likely to recur unless resolved by the supreme court," review is warranted. Wis. Stat. § 809.62(1r)(a), (c).

STATEMENT OF THE CASE AND FACTS

This case centers on the Zimmerman family when Zimmerman was married to Kari. Their family tree, and their children's ages at trial, were as follows:



The allegations and investigation.

As 2018 came to an end, Zimmerman was working as a mechanic and raising three children and two stepchildren with his wife, Kari. (*See* 223:5-6; 216:10). He was also helping to care for his mother, who lived in an addition Zimmerman had personally built onto the family's home. (228:3). And, after decades of struggling with alcoholism, he was finally nearing three years of sobriety. (*See* 223:6).

In January 2019, Zimmerman's life, and family, unraveled. (*See* 5:3). Kari's daughter and Zimmerman's stepdaughter, Bailey, alleged that Zimmerman had repeatedly sexually assaulted her years prior, starting when she was in fourth grade and continuing until Zimmerman went to prison for assaulting a 17-year-old acquaintance, Jana (a pseudo-

nym). (5:4; 223:29). Zimmerman had quickly pleaded guilty to that assault charge, went to prison for it in May 2016, and never challenged his conviction or sentence.[1]

After Zimmerman was released from prison—a year later—he moved back in with Kari and the kids. (216:10). According to Bailey, the assaults did not resume. (5:5).

The family had been reunited for about 18 months when Bailey told a couple friends that Zimmerman had once assaulted her. (5:4). Her claim reached the police, which responded by interviewing various witnesses, including Bailey, Zimmerman, and Zimmerman's son Dustin, who Bailey said was present for at least part of one assault. (5:4-7).

Bailey provided more and more details over the course of multiple interviews. (*See* 5:4). She said the incidents all took place in and around their home—often in the detached garage where Zimmerman worked on cars—with the rest of the family nearby. (*See* 5:4-6). Bailey said Zimmerman would retrieve her from the bedroom she shared with her half-brother, Joshua, then assault her. (5:7). She said that Joshua was once on the top bunk while Zimmerman assaulted her on the bottom bunk, and that her stepbrother Rory saw Zimmerman assaulting her. (5:6-7).

Police questioned Zimmerman twice about Bailey's allegations, which he denied. (70:3-4; 167:3-4). He discussed difficulties Bailey was having—at school, at home, and in her relationship—just before she made her allegations. (70:9-11, 15-20). He said Bailey was known for "dramatizations," and he suggested her troubles may have led her to lash out with false allegations. (70:4; 167:4).

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[1] This Court may take judicial notice of the CCAP record for the case involving Jana (Eau Claire County Case No. 15-CF-264), which is available at https://wcca.wicourts.gov/caseDetail.html?caseNo=2015CF000624&countyNo=18&index=0&mode=details. *See* Wis. Stat. § 902.01; *Kirk v. Credit Acceptance Corp.*, 2013 WI App 32, ¶5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522.

During Zimmerman's first interrogation, Detective Don Henning noted that police still had Zimmerman's old cellphone, which they'd seized (with his consent) while investigating Jana's allegations. (70:4-5). Henning provided Zimmerman with a consent-to-search form, commenting that they'd gotten into the phone before and could do it again. (70:4-7). Zimmerman signed. (*See* 167:1).

Zimmerman's second interrogation took place after police reexamined his phone. (167:1). Henning asked him about three photos they'd discovered that appeared to be child pornography—photos law enforcement had apparently missed back in 2015. (167:3-4, 249:151). Zimmerman said he didn't remember taking any sexual pictures of Bailey. (167:3). Henning then showed him a picture in which a female was holding a man's penis, saying Bailey had identified herself and Zimmerman as the people in the picture. Zimmerman responded, "It really looks like it." (5:7) But, he reiterated, he recalled nothing of the sort occurring and couldn't "say anything otherwise about it." (5:7).

Henning interviewed Dustin, as well. (*See* 248:61). At first, Dustin made clear that he'd never heard Bailey's strip poker allegation and had never participated in anything like that. (248:68-69). When prodded, however, Dustin claimed to vaguely recall aspects of the incident. (248:69-70). His statements remained largely equivocal, and what details he provided directly contradicted key parts of Bailey's story. (248:72-73).

Before trial.

The State charged Zimmerman with eight crimes based on Bailey's allegations and the photos discovered on his old phone. (5:1-4).

Pretrial, Zimmerman moved to suppress the evidence derived from law enforcement's reexamination of his phone, which they'd retained after investigating Jana's allegations. (*See* 49). The motion argued that his consent to the search "was not free and voluntary." (49:2). While

the phone was lawfully seized in 2015, "the officers held on to [it] ... for too long with no purpose." (49:2). The lawful seizure transformed into an unlawful one once police lost their justification for retaining the phone, and Zimmerman's subsequent consent was fruit of the poisonous tree. (49:2).

Over the course of three hearings, the State introduced testimony from the property and evidence technician for Eau Claire law enforcement (both city and county); from Detective Jeff Nocchi, who conducted the 2019 phone search; and from Henning, who interrogated Zimmerman and got him to sign consent-to-search forms in both 2015 and 2019. (*See* 62:44; 245:10; 252:4, 20).

In the end, the circuit court denied suppression. (245:92; App. 32). It did not directly address the passage of time between the two phone searches or the question of whether law enforcement's extended custody of the phone transformed its seizure into an unlawful one.

The jury trial.

Zimmerman's jury trial lasted four days. (*See* 248; 249; 254; 255). The State called Bailey, Kari, Kari's mom (with whom Bailey was living at the time), Dustin, Detectives Henning and Nocchi, and a child forensic interviewer. (248:30, 37, 57, 78, 118; 249:122, 162). The defense called Rory and Joshua. (254:4, 16). The evidence was mixed.

Testimony from Bailey.

Bailey testified that Zimmerman was her father figure, explained their family tree, and described the layout of their former family home. (249:165-66). She then discussed an array of assaults. (249:167-85). She told the jury Zimmerman mostly assaulted her in his shop, but she also described an incident in a makeshift teepee in her yard and one in her paternal grandma's side of the family home. (249:173, 217-18). She testi-

fied that Zimmerman took photos of her during a game of strip poker, with Dustin present. (249:224-25).

The State asked Bailey about letters she'd sent Zimmerman while he was in prison for the Jana incident. (249:186-90, 251). The letters reflected a happy parent-child relationship. (249:186). The State and Bailey then had the following exchange:

> Q Were there ever any letters you wrote to [Zimmerman] during this time but did not send?
>
> A Yes.
>
> Q How do you know that?
>
> A Because I found one in a notebook while I was looking through notebooks for school.
>
> Q And when did you find that unfinished letter?
>
> A I don't remember.
>
> ….
>
> Q ... [S]itting up there beside you should be ... State's Exhibit 5. Do you see that?
>
> A Yes.
>
> ….
>
> Q Is that a true and accurate copy of the unfinished letter ... ?
>
> A Yes, it is.

(249:186-88).

An excerpt from the letter Bailey said she began drafting but never sent is reproduced on the left-hand side of the next page. (*See* 249:187-88). Beside it is an excerpt from one of several letters Bailey undisputedly sent at that time. (*See* 249:233).

Dear Dad,

I know your not the happiest person with me. I know that once I started school everything got stressful with me. I'm really putting all of my effort into school. I know I make you mad when I give you an attitude, it's just really hard for me to talk to you about [redacted] certain things.

[redacted]

I understand that your mad at me for things that I have done, but I'm also mad for what we have done. Sometimes I want to tell someone so I don't have to be with you or have someone who might do it to me again. But then I think twice and remember that I wouldn't have the greatest step dad ever.

6/1/16

HI Daddy,

How are you doing? I'm doing well. I got a 90/100 for my end of the year science project. I'm doing ok in school, just a couple of papers to turn in then I'll have all good grades.

Yesterday mom took me to the doctors and I weigh 93.4 lbs, and I'm 5.4, and I got to do a lot of shopping with mom for the pool.

If it's ok with you and mom, can I get my ears pierced again? I just want to get it in the

On cross, trial counsel highlighted the difference between Bailey's handwriting and tone in the unmailed letter and those she actually sent. (249:245-46). Bailey had no explanation for the discrepancies. Counsel asked Bailey if she'd in fact just recently drafted the unmailed letter—for use at trial. (249:246). Bailey said "no." (249:246).

After reading sections of her unmailed letter to the jury, Bailey read a portion of a different letter—one she'd sent to her maternal grandma before she accused Zimmerman of assault. (249:190). She told her grandma she wanted to move in with her because her parents yelled at her more than her brothers. (249:190). She also said it bothered her when people went through her belongings. (249:190).

The State used the latter comment to segue into questions about a tally sheet Bailey said she'd kept until it was taken from her room. (249:190-91). She testified: "I kept a sheet in a notebook that I kept under my bed with tally marks, and I had 105 on the paper." (249:190). Bailey said she made a tally mark "[a]fter each time [she and Zimmerman] had sex." (249:191). She did not have the tally sheet anymore, she said, because someone ripped it out of her notebook. (249:191). She believed that person was Zimmerman. (249:191).

Bailey acknowledged that she first accused Zimmerman of assault in January 2019. (249:192). When the State asked Bailey why she decided to speak out on that particular night, Bailey said it was because, earlier in the evening, Zimmerman had said they should "talk about what happened." (249:191). But trial counsel suggested a different explanation. On cross, he showed that Bailey was going through a tumultuous period in January 2019, and that she wanted a way out of her problems. (249:201-07). Bailey acknowledged that she faced significant stressors at the time, including:

- She was doing poorly in school, misbehaving there, and getting punished for it. (249:204).

- She was getting in trouble at home, in part for how poorly she was doing in school. (249:204-05). As a result, she would lose privileges—like time with her friends or her phone—and would have to do chores around the house. (249:204-05).

- She was frustrated with how she was being treated by her parents, especially compared to her brothers. (249:205).

- Her parents had just denied her request for a birth control prescription. (249:205-06). She was upset about their decision and frustrated that it wasn't up to her. (249:206).

- She had recently met her biological father and his then-wife for the first time. (249:199).

- Her boyfriend had just broken up with her. (249:206-07).

Towards the end of cross, trial counsel asked Bailey whether she'd said during an interview that there were 105 tally marks on her missing tally sheet (she had) and whether she'd told her mom she was assaulted 365 times (she had). (249:239-40). Bailey explained that she was assaulted 260 times after the tally sheet was ripped out of her notebook, which she said happened when she was 13 years old. (249:240-41).

Bailey turned 13 just two days before Zimmerman went to prison. (249:241-42). She could not explain how 260 assaults took place in two days. (249:241-42).

Testimony from Bailey's family.

Three of Bailey's siblings testified, and all three denied seeing anything inappropriate occur. Dustin said he'd never played strip poker with Zimmerman and Bailey, despite his contrary statement to Henning; he said he was scared he'd get in trouble when Henning questioned him and felt coerced into agreeing with Bailey's strip-poker claim. (248:61-72). Rory denied ever seeing Zimmerman assault Bailey, though Bailey had claimed otherwise, and he noted that he "would have heard or seen

something" if what Bailey described was true. (254:6-8). And Joshua, who told the jury he's a light sleeper, denied ever hearing or seeing anything improper in all the years he shared a bunkbed with Bailey. (254:17-18). All three boys also confirmed that Bailey has a reputation within the family for lying and getting in trouble. (248:74-75; 254:8, 18).

Kari and Kari's mom testified as well. (*See* 248:30, 78).

As to the photos found on Zimmerman's phone, Kari testified that she did not appear to be the female in them. (248:85). She didn't know who it was, calling one photo "very unclear." (248:85-86).

Kari also testified that her family had been happy before Bailey's allegations, and that she never observed anything suspicious. (248:93-94). She echoed Bailey's testimony as to the range of stressors Bailey faced in January 2019. (248:95-100). And she agreed with Zimmerman's sons that Bailey had regularly been getting in trouble for things like "[l]ying, stealing, [and] not following direction[s]." (248:96-97).

Finally, Kari's mom confirmed that Bailey—who was living with her at that point—had recently shown her the unfinished letter she allegedly discovered in an old school notebook. Kari's mom had no firsthand knowledge of the letter's provenance.

The State's remaining witnesses.

The State called three other witnesses: Kayla Lauderdale, one of the forensic interviewers who spoke with Bailey at the child advocacy center; Detective Jeff Nocchi, who conducted the second search of Zimmerman's phone; and Detective Henning, who got Zimmerman's consent for that search and led the broader investigation.

Lauderdale testified about her two conversations with Bailey, about the behaviors exhibited by youth victims of sexual assault, and about child forensic interviewing techniques generally. (248:40-48).

Nocchi testified that the photos discovered during the second search of Zimmerman's phone were there the first time around; police just hadn't noticed them. (249:151).

Finally, Henning began by discussing his investigation into Jana's allegations, not Bailey's. Zimmerman had promptly confessed to those allegations, and Henning was permitted to discuss his confession. (248:23-26).

Henning explained the incident as follows. Jana knew Zimmerman just slightly, through an aunt who'd dated him. (248:122). The aunt contacted Zimmerman because Jana wanted to learn about repairing cars. (248:123-24). The aunt arranged to have Zimmerman show Jana "some basics" so she could "see if it's something that she would like to do." (248:124). Jana ultimately visited Zimmerman late in the evening one night in June 2015. (248:124). They had a few drinks and played cards—including, eventually, a round of strip poker. (248:124). Zimmerman admitted that, after they'd taken their clothes off, he put his fingers and tongue inside Jana's vagina. (248:125).

Henning got wind of Bailey's allegations three and a half years later. (248:136). After he discussed the interviews and investigation he conducted into Bailey's allegations, the State presented him with the photos from Zimmerman's phone that Bailey said she was in. (248:140-47). Henning said he could tell the female in the photos was Bailey and not Kari because: (1) that's what Bailey said; and (2) there were physical signs, like that Kari's nipples were darker, her breasts were less firm, she generally wore a wedding ring and a particular necklace, and her "collarbone structure is a little different." (248:148).

The verdicts and sentence.

The jury returned three not-guilty verdicts and five guilty verdicts. (255:10-11, 14). Zimmerman was acquitted of repeated sexual assault of the same child, child enticement, and exposing a child to harmful material. (255:10-14). He was convicted of three counts of possession

of child pornography, one count of incest with child by stepparent, and one count of sexual exploitation of a child. (147:1). For these crimes, the circuit court imposed 33 years of imprisonment. (235:58).

Postconviction litigation and appeal.

Postconviction, Zimmerman moved for a new trial, arguing that his trial lawyer was ineffective. (274:19-20). The circuit court held an evidentiary hearing and then denied relief. (*See* 287; 295:5).

Zimmerman then raised an array of claims on appeal, challenging—among other things—the circuit court's postconviction decision and its pretrial order denying suppression. The court of appeals affirmed. *See Zimmerman*, Appeal No. 2023AP1888-CR, ¶¶2, 4 (App. 4). As to the suppression issue, the court of appeals assumed without deciding that the Fourth Amendment's reasonableness requirement applies to property retention, then held it reasonable for police to keep Zimmerman's cellphone—for years—following the end of Jana's case. *Id.*, ¶¶2-3 (App. 4).

This petition follows.

STANDARD OF REVIEW

"The interpretation and application of a constitutional provision are questions of law" this Court will review de novo. *State v. Grady*, 2025 WI 22, ¶17, 416 Wis. 2d 283, 21 N.W.3d 353. In applying the Fourth Amendment and its state analogue to the facts of this case, the Court "will defer to the circuit court's findings of fact unless they are clearly erroneous." *Id.*

ARGUMENT

I. This Court should grant review and decide whether the Fourth Amendment's reasonableness requirement applies to law enforcement's retention of private property—or only to its initial taking.

The Fourth Amendment to the United States Constitution protects individuals against "unreasonable searches and seizures" of "their persons, houses, papers, and effects." Article I, section 11 of the Wisconsin Constitution does the same. These provisions impose a reasonableness requirement on governmental intrusions into an individual's privacy and possessory interests—interests at their zenith as to cellphones, which contain "the privacies of life." *Riley v. California*, 573 U.S. 373, 381-82, 403 (2014). This reasonableness requirement applies with equal force when police conduct a warrantless search or seizure and when they act on the basis of a valid warrant or exception to the warrant requirement. *See State v. Sveum*, 2010 WI 92, ¶¶18-19, 328 Wis. 2d 369, 787 N.W.2d 317. There is thus no dispute that the Fourth Amendment's reasonableness requirement applied to law enforcement's initial seizure of Zimmerman's cellphone, nor is there any dispute that the requirement was met at that time. After that, the parties' agreement ends.

Zimmerman submits that the Fourth Amendment's reasonableness requirement governs the retention of private property, just like its initial taking. The State posits that "the Fourth Amendment was simply not implicated by law enforcement's continued possession of [Zimmerman's] cellphone"; the seizure contemplated by the Fourth Amendment ended when the cellphone changed hands in 2015. Response Br. at 13. The court of appeals declined to pick a side on this critical constitutional question since it deemed law enforcement's retention of Zimmerman's cellphone reasonable. No binding precedent answers it either.

Other courts have, however, addressed this issue. Their analyses are instructive, though they reach different conclusions. Also instructive

are a pair of United States Supreme Court decisions addressing adjacent issues. The Supreme Court hasn't yet weighed into the circuit split.

United States v. Place, 462 U.S. 696 (1983), and *United States v. Jacobsen*, 466 U.S. 109 (1984), provide the starting point.

In *Place*, law enforcement held a suspicious traveler's luggage for over 90 minutes for a "a 'sniff test' by a trained narcotics detection dog," which alerted. 432 U.S. at 699. They then kept the luggage for a couple more days, until they could get a search warrant. *Id.* Their search revealed cocaine, and the traveler was indicted. *Id.*

The key questions on certiorari were: (1) whether, as a general matter, law enforcement's temporary retention of property is subject to *Terry*[2] principles or some other analytical framework; and (2) whether, in the case at hand, law enforcement's temporary retention of the traveler's luggage passed constitutional muster. *Id.* at 702-10. The *Place* Court concluded that *Terry* principles apply, and that it was "clear that the police conduct here exceeded the permissible limits of a *Terry*-type investigative stop." *Id.* at 706, 709. The duration of the temporary detention was dispositive: holding the luggage for 90 minutes was "sufficient to render the seizure unreasonable." *Id.* at 709-10.

Place addressed the passage of time during an investigatory detention of property, not a full-fledged seizure. It made clear that there is a temporal limit to a reasonable investigatory detention, whether the detention is of a person or their property. *See id.* at 706-09.

A year later, the Supreme Court decided *Jacobsen*. There, the government lawfully seized and subsequently field tested a powder that a private freight carrier had discovered. 466 U.S. at 111-12. The Supreme Court held that the field test was not a *search*, as it did not "compromise any legitimate interest in privacy." *Id.* at 123. But it also held that the field test extended the government's *seizure* of the powder: "[T]he field

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[2] *Terry v. Ohio*, 392 U.S. 1 (1968).

test did affect respondents' possessory interests protected by the [Fourth] Amendment, since by destroying a quantity of the powder it converted what had only been a temporary deprivation ... into a permanent one." *Id.* at 125. It then undertook a balancing analysis to determine whether the permanent seizure effected by the field test was reasonable. *Id.* at 125. Following *Place*'s lead, it weighed "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Id.* It deemed the seizure reasonable. *Id.*

Place and *Jacobsen* appear to recognize that a seizure of property has a duration, and that its duration can render it unreasonable. Still, circuits are split on whether the Fourth Amendment's reasonableness requirement applies to the government's continued possession—or merely its initial taking—of private property.

The State has relied on cases from the Sixth and Seventh Circuits for the proposition that the reasonableness requirement expires once the government gains possession of private property, and the First, Second, and Eleventh Circuits are in accord.[3] The Ninth and D.C. Circuits take the opposite view.[4]

The most recent decision from this array of circuits was released by the D.C. Circuit Court of Appeals in in *Asinor v. District of Columbia*, 111 F.4th 1249 (D.C. Cir. 2024). Zimmerman submits that it got it right.

The *Asinor* court began by examining the text of the Fourth Amendment. "Founding-era definitions of the word 'seizure,'" it

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[3] *See Denault v. Ahern*, 857 F.3d 76, 84 (1st Cir. 2017); *Case v. Eslinger*, 555 F.3d 1317, 1330 (11th Cir. 2009); *Shaul v. Cherry Valley-Springfield Cent. Sch. Dist.*, 363 F.3d 177, 187 (2d Cir. 2004); *Lee v. City of Chicago*, 330 F.3d 456, 466 (7th Cir. 2003); *Fox v. Van Oosterum*, 176 F.3d 342, 351 (6th Cir. 1999).

[4] *Asinor v. District of Columbia*, 111 F.4th 1249, 1261 (D.C. Cir. 2024); *Brewster v. Beck*, 859 F.3d 1194, 1197 (9th Cir. 2017).

explained, "are consistent with both readings"—that a seizure is limited to the government's initial taking of property and that it encompasses continued possession. *Id.* at 1252. But "[h]istory helps resolve this semantic ambiguity." *Id.* at 1253. The Supreme Court has repeatedly held that the Fourth Amendment "codified a '*pre-existing* right,'" and there was a pre-existing right against the "prolonged, unauthorized possession of a person's property ... even if the initial taking had been lawful." *Id.* at 1253-54. In sum, "history indicates that the Fourth Amendment governs [the government's] continued retention, as well as its taking possession, of ... property." *Id.*

With its textual and historical analysis complete, the *Asinor* court turned to precedent, stating: "Modern caselaw confirms that the Fourth Amendment governs what happens after the government initially seizes property." *Id.* at 1255. It then examines *Jacobsen*, where, as discussed above, the Supreme Court recognized that the duration of a seizure may render it unreasonable under the Fourth Amendment. *Id.*; *see also Jacobsen*, 466. U.S. at 125. If a seizure has a duration, and if that duration can violate the Fourth Amendment, then a seizure is not confined to the moment property is taken away.

Lastly, the *Asinor* court looked to precedent outside the realm of property seizures—to "[t]he modern caselaw on the seizure of individuals." *Asinor*, 111 F.4th at 1256. "When a person is seized," it's well-settled that "the Fourth Amendment requires reasonableness not only at the moment of arrest, but also for the seizure's entire duration." *Id*. (Consider, as just one example, the case law governing the extension of traffic stops; an officer may seize a person for the amount of time reasonably necessary to address the issue that led to the stop and—absent grounds for a new seizure—no longer. *See Rodriguez v. United States*, 575 U.S. 348, 354-57 (2015).) No "textual, historical, or other reason" suggests "that the Fourth Amendment protects against the ... prolonged seizure of persons but not ... of effects." *Id.*

Thus, according to the D.C. Circuit Court of Appeals, the Fourth Amendment's text, its history, *Jacobsen*, and the cases governing seizures of individuals all demonstrate that the Fourth Amendment applies to the government's taking and retention of property alike. Zimmerman asks this Court to adopt the D.C. Circuit's persuasive analysis as the law of Wisconsin.

As noted above, the State rooted its contrary position in cases from the Sixth and Seventh Circuits—namely *Lee v. City of Chicago*, 330 F.3d 456 (7th Cir. 2003), and *Fox v. Van Oosterum*, 176 F.3d 342 (6th Cir. 1999). The State's reliance on *Fox* and *Lee* is unavailing.

In *Fox*, law enforcement searched an arrestee's car and found "Fox's wallet and driver's license" within it. 176 F.3d at 345. They later arrested Fox. *Id.* After his release, he "went to the Sheriff's office to collect his wallet and driver's license." *Id.* Law enforcement gave him his wallet but held onto his driver's license on the grounds that he "still had outstanding tickets." *Id.* Fox thereafter sued, alleging that the government's refusal to return his license was an unreasonable seizure. *Id.* The Sixth Circuit rejected his claim, holding that the seizure ended well before Fox sought to retrieve his license: "Once that act of taking the property is complete, the seizure has ended and the Fourth Amendment no longer applies." *Id.* at 351.

Lee followed suit. There, the Chicago police seized a car and "spray painted large, bright-red, six-digit inventory numbers on its hood and its passenger's and driver's side panels." 330 F.3d at 458-59. The car's owner later retrieved it, but "[t]he City didn't pay for th[e] damage"—and in fact made the owner pay to get his car back. *Id.* at 459. The owner sued, and one issue on appeal was whether he had a cognizable Fourth Amendment claim. *Id.* at 460. The owner argued that "the continued possession of [his] property by the government" was a seizure, and an unreasonable one at that. *Id.* The Seventh Circuit disagreed, holding: "Once an individual has been meaningfully dispossessed, the

seizure of the property is complete .... The amendment then cannot be invoked by the dispossessed owner to regain his property." *Id.* at 466.

Both *Fox* and *Lee* take pains to distinguish *Place* on the grounds that it's about *Terry* stops of property (so to speak), not full-fledged property seizures. *See Lee*, 330 F.3d at 464; *Fox*, 176 F.3d at 351 n.6. But neither acknowledge *Jacobsen*'s extension of the *Place* principle to that very context: full-fledged property seizures. *See generally*, *Asinor*, 111 F.4th at 1262-64 (Henderson, C.J., concurring). Recall that in *Jacobsen*, the Supreme Court observed that field testing a sample of the powder meant destroying it; thus, while the rest of the powder was temporarily detained to enable field testing, the destroyed portion was seized permanently. 466 U.S. at 124-25. The Supreme Court grappled with that permanency in considering the seizure's reasonableness. *Id.* at 125.

The reasonableness inquiry wasn't confined to the moment property changed hands in either *Place* or *Jacobsen*, and it should not be so limited here. Instead, this Court should grant review and announce that a seizure of property under the Fourth Amendment—that is, a governmental intrusion subject to the amendment's reasonableness requirement—does not end when the government gains possession of the property. Retention is a seizure too.

II. If this Court grants review and determines that the Fourth Amendment's reasonableness requirement applies in this realm, it should further decide whether law enforcement's years-long retention of Zimmerman's cellphone—which it confessed it had no reason to keep—was constitutionally justified.

The first issue presented is the one urgently in need of this Court's review. But assuming the Court accepts this case and concludes that law enforcement's continued possession of Zimmerman's cell phone was a seizure under the Fourth Amendment, two questions emerge: first, was the seizure reasonable? And second, if not, did the seizure's unreasonableness taint Zimmerman's consent to his phone's reexamination?

The State offered no argument on either issue in the court of appeals, relying solely on its claim that the Fourth Amendment doesn't reach property retention. The court of appeals, however—unbothered by the State's implicit concession—deemed law enforcement's retention of Zimmerman's cellphone reasonable, noting that he consented to its initial seizure and never asked to get it back. This Court should take a different approach.

The reasonableness analysis.

To assess whether a seizure became unreasonable over time, a reviewing court will "balance the nature and quality of the [continued] intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify" it. *Jacobsen*, 466 U.S. at 125.

Here, if the Court concludes that the government's retention of private property qualifies as a seizure—i.e., as an intrusion into privacy and possessory interests subject to the Fourth Amendment's reasonableness requirement—then Zimmerman's significant privacy and possessory interests in his cellphone are indisputable. *See Riley*, 573 U.S. at 395. As the United States Supreme Court has explained, even searches of homes—the paradigmatic private space—are unlikely to reveal a fraction of the personal information a phone's examination will turn up. *Id.* at 396-97.

With such weighty interests on one side of the scale, this Court must carefully assess those on the other. But at Zimmerman's suppression hearing, police weren't entirely sure why they held onto his old cellphone for so long. Perhaps the officers conducting annual evidence inventories missed it (repeatedly). (*See* 61:16-18). Perhaps police kept it because the District Attorney's office never followed up to say they could dispose of the phone (as their standard operating procedures contemplate), or because Zimmerman never asked to have it back. (*See* 62:50-51; *see also* 60:2). Perhaps police thought, contrary to departmental

policy, that they should keep the phone until Zimmerman finished his term of supervision in case of an appeal in Jana's case (though Zimmerman never filed a notice of intent to pursue postconviction relief, and all police could possibly have needed were texts they'd long ago extracted). (*See* 61:10-11; *see also* 60:2).

No officer testified that law enforcement kept the phone because they wanted to retain access to the whole of its contents, in perpetuity, in connection with Jana's long-resolved assault claim. Nor did anyone testify that they wanted the phone indefinitely in case any future investigation rendered its contents relevant again—that is, for purposes of "general, exploratory rummaging." *See Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). Such explanations wouldn't have sufficed, as neither variety of seizure is consistent with the Constitution. *See id.*; *Riley*, 573 U.S. at 399. That much is clear.

Instead, a fair assessment of the record shows law enforcement held onto the cellphone because it went unnoticed; no one told them to get rid of it. The surrounding circumstances, meanwhile, show there was no basis for the cellphone's continued retention by the time police sought consent to reexamine it: the phone was seized for its limited relevance in Jana's case, which was long over.

The government's want of a rationale for keeping Zimmerman's cellphone is not the weighty interest needed to outweigh the privacy and possessory interests at stake. Indeed, nothing in the record suggests *any* continuing governmental interest in Zimmerman's cellphone, weighty or not. It remained in law enforcement's possession because they failed to dispose of it, not because they had a reason to keep it. Such negligence does not a lawful seizure make.

The court of appeals' analysis.

In reaching a contrary conclusion—that the continued seizure of Zimmerman's cellphone was reasonable—the court of appeals focused

on the fact Zimmerman consented to law enforcement's seizure of his cellphone in 2015 and never pursued its return. There are two problems with this reasoning: (1) it assumes, incorrectly, that Zimmerman consented to an *indefinite* seizure of his cellphone; and (2) it wrongly considers a statutory process for regaining possession of seized property a prerequisite to Fourth Amendment protection.

Consider, first, the scope of Zimmerman's initial consent to search. The Fourth Amendment "does not bar" a search conducted pursuant to consent, "so long as [the search] does not exceed the scope of the person's consent." *State v. Floyd*, 2017 WI 78, ¶29, 377 Wis. 2d 394, 898 N.W.2d 560. But rarely (if ever) is consent limitless, and it wasn't limitless here. The record demonstrates that Zimmerman consented to a single "complete search" of his cellphone's contents in connection with law enforcement's 2015 investigation into Jana's allegations. (*See* 58:1). He did not, in 2015, consent to a search of his phone four years later in connection with entirely different allegations (hence Henning's second consent request). (*See* 59).

Of course, the scope of Zimmerman's consent to seize, not search, is the crucial issue here. But his consent to his cellphone's seizure wasn't the subject of any form he signed or any explicit conversation; it was implied, as police could only search the phone upon seizing it. The question is thus whether Zimmerman's implicit consent to his phone's seizure was, presumptively at least, permanent.

As a general matter, "[t]he standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Forida v. Jimeno*, 500 U.S. 248, 251 (1991). The court of appeals apparently concluded that a reasonable person in Zimmerman's position would believe police could keep his cellphone indefinitely if he offered it up for a search. But why? It is undisputed that law enforcement violated their own policies by declining to dispose of Zimmerman's phone well before

they sought consent for its reexamination; wouldn't a reasonable person expect the government to follow its policies? It is also undisputed that Zimmerman's consent to his phone's initial seizure was tied to his consent to a search regarding Jana's 2015 allegations; wouldn't a reasonable person expect such a seizure be tethered to its predicate search? That is, once the search ended and the phone was no longer needed in the case it was seized for, wouldn't a reasonable person expect the seizure to end as well?

It was the State's burden—not Zimmerman's—to prove that the continued seizure of his phone in 2019 was within the scope of his 2015 consent. For the reasons set forth, it did not meet that burden. *See State v. Abbott*, 2020 WI App 25, ¶12, 392 Wis. 2d 232, 944 N.W.2d 8. The court of appeals erred in holding otherwise.

Consider, next, the court of appeals' suggestion that Zimmerman had to ask for his phone back to trigger the Fourth Amendment's protections.

Requesting the return of consensually seized property makes clear that the property's owner no longer consents to its seizure. Some other basis for the seizure—like a warrant—becomes necessary to render it reasonable. Thus, whether a person pursues the statutory process for return of property is undoubtedly relevant to the reasonableness analysis.

But the relevance of such a request doesn't make it a prerequisite—and it's not. The restraints the Fourth Amendment imposes on governmental action aren't contingent on the subject of an intrusion speaking up. An arrest unsupported by probable cause is unlawful regardless of whether the arrestee says, at the time, that he objects to his seizure; evidence derived from an unlawful search of a person's pockets will be suppressed regardless of whether he verbally asserts his right to privacy when officers reach inside. Speaking up *eventually* is necessary

to obtain a remedy for a Fourth Amendment violation; it's not required to enjoy protection in the first place.

In sum, despite Zimmerman's initial consent to his phone's seizure, and despite the existence of a statutory process for seeking return of property, there is no getting around the usual case-by-case Fourth Amendment reasonableness analysis here. *See Missouri v. McNeely*, 569 U.S. 141, 158 (2013).That analysis shows law enforcement's retention of Zimmerman's cellphone was unreasonable.

The consent analysis.

"Consent, even when voluntary, is not valid when obtained through exploitation of an illegal action by police." *State v. Hogan*, 2015 WI 76, ¶57, 364 Wis. 2d 167, 868 N.W.2d 124. Such exploitation is present here: not only did Zimmerman's second round of consent follow law enforcement's unlawful retention of his phone, Henning used his department's continued custody of the phone to help persuade Zimmerman to consent again, saying: "[W]e got into it once clearly we can get into it again." (70:7). The nexus is clear. Zimmerman's consent was tainted.

Thus, should the Court grant review and hold that the Fourth Amendment governs law enforcement's continued possession of private property, it should further hold that law enforcement's continued possession of Zimmerman's cellphone became unlawful by the time they sought to reexamine it, tainting his consent. The fruits of the ensuing reexamination should be suppressed. *See Hogan*, 364 Wis. 2d 167, ¶57.

CONCLUSION

Zimmerman respectfully requests that this Court grant review, determine whether the Fourth Amendment governs the government's retention of private property in addition to its initial taking, and, if it does, decide whether the government's years-long retention of Zimmerman's cellphone was constitutionally reasonable.

Dated this 15th day of December, 2025.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 6,631 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 rulings or decisions showing the circuit court's reasoning regarding those issues.

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

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using 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 and filed this 15th day of December, 2025.

Signed:

Electronically signed by Megan Sanders

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