STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT III

CASE NO. 2023AP1888 – CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RYAN D. ZIMMERMAN,

Defendant-Appellant.

On appeal from a judgment of conviction and order denying postconviction relief, both entered in the Eau Claire County Circuit Court, the Honorable John F. Manydeeds, presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

Megan Sanders
State Bar No. 1097296

WISCONSIN DEFENSE INITIATIVE
411 West Main Street, Suite 204
Madison, WI 53703
megan@widefense.org
(608) 620-4881

Attorney for Defendant-Appellant

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I. Under the Fourth Amendment, law enforcement's retention of a cellphone must be reasonable.

A. A note on publication.

In his opening brief, Zimmerman advised the Court that publication may be warranted due to the important constitutional question this case presents: whether the retention of property by police—not just its initial seizure—must be reasonable under the Fourth Amendment. Appellant's Br. 11. Zimmerman answers that question "yes" and contends that law enforcement's prolonged retention of his cellphone was unreasonable. *Id.* at 33-38. The State answers that question "no"; it says retaining property is different from seizing it, such that the Fourth Amendment does not apply. State's Br. 12-15.

Precedent indicates that the State is wrong, but there is no controlling case directly on point. By relying solely on cases from two federal circuits—amid a circuit split on the issue—the State's brief proves publication is merited. Wisconsin needs a binding resolution to the recurring question of whether the Fourth Amendment governs law enforcement's retention of private property.

B. Overview.

In *United States v. Jacobsen*, 466 U.S. 109, 124 (1984), the United States Supreme Court recognized that the government's seizure of private property may be lawful "at its inception" but become unlawful over time. Thus, under *Jacobsen*, a seizure continues over time, encompassing more than the

initial governmental act of taking a person's property away. *See id.* at 124-25. So long as a seizure continues, the Fourth Amendment's reasonableness requirement applies. *See id.*

The State disagrees. It argues that the Fourth Amendment is inapplicable to law enforcement's retention of private property, citing opinions from the Sixth and Seventh Circuits for that proposition—and ignoring *Jacobsen*.

Different jurisdictions have considered these conflicting interpretations of what constitutes a seizure under the Fourth Amendment, and the cases go both ways. But by far the most thorough analysis appears in a recent decision from the District of Columbia Circuit Court of Appeals: *Asinor v. District of Columbia*, 111 F.4th 1249 (D.C. Cir. 2024).[1] *Asinor* holds that, following a lawful property seizure, the Fourth Amendment requires "any continued possession of the property [to] be reasonable." *Id.* at 5. The *Asinor* court reaches that conclusion by conducting an in-depth analysis of "the Fourth Amendment's text and history, as well as modern Supreme Court precedents"—most notably *Jacobsen*—"regarding the constitutionally permissible duration of seizures." *Id.*

For the many reasons *Asinor* cites, this Court should hold that law enforcement's retention of property is a seizure subject to the Fourth Amendment's reasonableness requirement. Since the State doesn't claim that law enforcement's retention of Zimmerman's cellphone was reasonable, and because the record shows it wasn't, the circuit court's decision denying suppression should be reversed.

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[1] Perhaps because this opinion is so new, the pagination available on LexisNexis does not appear to reflect the federal reporter's pagination; the opinion starts on page 1.

C. *Asinor* demonstrates that the Fourth Amendment applies to property retention.

Asinor tackles just one issue: whether the Fourth Amendment's reasonableness requirement applies to the government's retention of lawfully seized property. It holds that it does. The *Asinor* court's reasoning is thorough, and it includes an analysis of the same binding precedent addressed in Zimmerman's opening brief.

Asinor begins by examining the text of the Fourth Amendment. "Founding-era definitions of the word 'seizure,'" it explains, "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 6. But "[h]istory helps resolve this semantic ambiguity." *Id.* The Supreme Court has repeatedly held that the Fourth Amendment "codified a '*pre-existing* right,'" *id.*, and there was a pre-existing right against the "prolonged, unauthorized possession of [one's] property ... even if the initial taking [was] lawful." *Id.* at 8-9. In sum, "history indicates that the Fourth Amendment governs [law enforcement's] continued retention, as well as its taking possession, of [private] property." *Id.* at 9.

With its textual and historical analysis complete, the *Asinor* court turns to precedent, stating: "Modern caselaw confirms that the Fourth Amendment governs what happens after the government initially seizes property." *Id.* at 9-10. It then examines *Jacobsen*, in which—as noted above and discussed at length in Zimmerman's opening brief—the Supreme Court recognized that the duration of a seizure may render it unreasonable under the Fourth Amendment. *Id.* at 10; *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, *Asinor* looks to precedent outside the realm of property seizures—to "[t]he modern caselaw on the seizure of individuals." *Asinor*, 111 F.4th 1249, at 12. "When a person is seized," says the court, 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.* at 12. (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.* at 12. It protects against both.

Thus, 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. While "[o]f course" the government may "retain contraband or evidence in an ongoing criminal [case,] ... the Fourth Amendment does require continuing retention of seized property to be reasonable." *Id.* at 21.

D. *Fox* and *Lee* hold that the Fourth Amendment does not require property retention to be reasonable, but they reach that conclusion by ignoring the most relevant precedent.

The State posits the opposite—that the Fourth Amendment has nothing to say about a person's interest in property

after the government takes it away—by relying on *Fox v. Van Oosterum*, 176 F.3d 342 (6th Cir. 1999), and *Lee v. City of Chicago*, 330 F.3d 456 (7th Cir. 2003). A concurring opinion in *Asinor* addresses not just these two cases but every federal circuit court opinion indicating that the Fourth Amendment's reasonableness requirement is inapplicable to property retention. As the *Asinor* concurrence makes clear, the State's reliance on *Fox* and *Lee* is unavailing.

Both *Fox* and *Lee* take pains to distinguish *United States v. Place*, 462 U.S. 696 (1983), which addresses the passage of time during investigatory detentions of property, not full-fledged property seizures. *Place* holds that there's a temporal limit to a reasonable investigatory detention of property (just as there's a temporal limit to a reasonable investigatory detention of a person, i.e., a *Terry*[2] stop). *See id.* at 706-09. Indeed, in that case, "[t]he length of the detention ... alone" rendered the investigatory detention unlawful. *Id.* at 709.

Given that *Place* addresses the equivalent of a *Terry* stop and not the equivalent of an arrest, it may not dictate, on its own, that the duration of a full-fledged property seizure may render it unreasonable under the Fourth Amendment. But the core problem with *Fox*, *Lee*, and the State's analysis is that none of them acknowledge *Jacobsen*'s extension of the *Place* principle to that very context: full-fledged property seizures. *Jacobsen*, unlike *Place*, shows that a property seizure has a duration that may render it unreasonable—and thus that the Fourth Amendment's strictures apply beyond the moment the property changes hands.

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

Recall that in *Jacobsen*, the government lawfully seized and subsequently field tested a powder that a private freight carrier had discovered. 466 U.S. at 111-12. A significant question presented was whether the field test—conducted without a warrant—violated the Fourth Amendment. 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. *Id.* at 125. Since "a seizure lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests," the Court undertook a balancing analysis to determine whether the seizure effected by the field test was reasonable. *Id.* at 125. Like the *Place* Court, 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.* "Applying this test," it deemed the continued seizure reasonable. *Id.*

The duration of the seizure in *Jacobsen*, then, was not unreasonable and didn't violate the Fourth Amendment. But the fact that it *had* a duration is telling. The reasonableness inquiry wasn't limited to the government's initial taking of the property in either *Place* or *Jacobsen*, and it should not be so limited here.

II. The circuit court, the State, and trial counsel all made errors at Zimmerman's jury trial that warrant relief.

A. Introduction.

Three collections of errors at Zimmerman's jury trial warrant a do-over. First, the State made an improper golden rule argument during its rebuttal, and trial counsel—though

he objected—did not seek a remedy for the error. Second, and again during its rebuttal, the State offered unlawful burden-shifting commentary on Zimmerman's silence at trial. This time trial counsel objected belatedly, seeking a mistrial (which the circuit court denied) but no lesser remedy (because it was too late for anything else). And finally, everyone overlooked a significant error in the Count 7 guilty-verdict form until after the verdicts were in.

Trial counsel's responses to the State's improper rebuttal arguments were ineffective, as was his failure to identify or correct the verdict-form error before deliberations. In addition, the circuit court erroneously exercised its discretion in denying a mistrial. The State's efforts minimize the significance of these errors—or to claim they weren't errors at all—fail. A new trial is warranted.

B. Trial counsel responded ineffectively to the State's golden rule and "unable to say" remarks, and the circuit court erred in denying a mistrial.

Deficient performance – the golden rule argument. On the deficient-performance prong, the State contends that trial counsel performed adequately by preventing the prosecutor from making a golden rule argument (though it concedes the prosecutor was headed in that direction). Then, after implicitly conceding that trial counsel could have done a better job by seeking a remedy after objecting, it notes that perfection isn't required.

The State is right that the prosecutor was headed towards an *explicit* golden rule argument and that trial counsel could have done more to prevent the jury from putting themselves in the victim's shoes during deliberations. But it overlooks the *implicit* golden rule argument conveyed by the

prosecutor's "Remember when you were 17" comment. She made an improper argument even though she didn't get all the way through it.

What's more, while perfection from trial counsel isn't required, ordinary prudence is a constitutional imperative. *State v. Felton*, 110 Wis. 2d 485, 499-501, 329 N.W.2d 161 (1983). A reasonable attorney exercising ordinary prudence tries to undo damage inflicted on his client during a jury trial—including by seeking a remedy for an improper and prejudicial argument by the State. Of course, remedies can take different forms; that's why, as the State points out, Zimmerman said his trial counsel "could" have made any number of remedy requests. But by declining to seek *any* remedy, trial counsel let an improper argument sit, with no clarification from the circuit court that what the prosecutor invited the jury to do was wrong. That was objectively unreasonable and thus deficient. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

Deficient performance – the "unable to say" remarks. The State contends that trial counsel's tardy objection to the State's second improper "unable to say" rebuttal argument was rooted in a reasonable trial strategy, and that nothing in the record supports the claim that the circuit court would have granted a lesser remedy. The State presents these arguments in its deficient-performance section, though the latter appears to address prejudice.

The State accurately notes that, at the postconviction hearing, trial counsel said he didn't want to make a big deal out of the prosecutor's second round of problematic commentary—a strategic reason for declining to object until deliberations had begun. (287:13). But having *some* strategy is not the same as having an objectively reasonable strategy, which is

what the Sixth Amendment requires. Here, the effects of shifting the burden and inviting the jury to hold Zimmerman's silence against him are too damaging to justify a delayed, partial response. That's true not just because lesser remedies are available in the moment, but also because the circuit court would have been far more likely to accurately recall the prosecutor's comments had they just been made. And, as Zimmerman's opening brief explains, the circuit court erroneously exercised its discretion by denying trial counsel's mistrial request based on its misconception about what the prosecutor said.

The State protests that nothing in the record shows the circuit court might have granted a lesser remedy. It points to the circuit court's misconception about the State's comments and insists that misconception—not the all-or-nothing nature of the requested remedy—was the reason the circuit court denied a mistrial. But the question is whether the circuit court would have granted a remedy given an accurate recollection of the prosecutor's comments and given options less extreme than a mistrial—not what it would have done while misremembering what happened, with only a mistrial request before it. The State's analysis here is thus confused; it's unclear how the circuit court's erroneous reasoning factors into the deficient performance inquiry.

Prejudice – both rebuttal errors. The State's core prejudice argument is that its improper rebuttal arguments had only a "conceivable" effect on the outcome at trial; it isn't reasonably probable that they changed the result. State's Br. 24. The State also stresses that there was photographic evidence for the charges for which Zimmerman was convicted.

Determining with precision the impact of errors at a trial is generally impossible. It's impossible here. Still, Zimmerman's opening brief details the relevance of his attorney's mistakes to the jury's decisionmaking and addresses the evidentiary issues the case presented, which undergird the prejudice analysis. In reviewing this analysis, it's critical to remember that a defendant need not show "counsel's deficient conduct 'more likely than not altered the outcome.'" *Strickland*, 466 U.S. at 696. A reasonable probability is a lesser burden.

With that lesser burden in mind, the key problem with the State's confidence in the verdicts here is that it ignores issues with the photos introduced at Zimmerman's jury trial—photos that serve as the State's talisman in every prejudice discussion in its brief. The male's face isn't pictured, and a limited portion of his body is visible. The visible portions of the female's face and body are blurry. They are, in short, "very unclear." (*See* 248:85-86).

For these reasons and those set forth in Zimmerman's opening brief, trial counsel's deficient performance was prejudicial, and a new trial is warranted.

Mistrial denial. After rejecting Zimmerman's claim that trial counsel was ineffective in responding to the prosecutor's golden rule and "unable to say" remarks, the State turns to the circuit court's denial of trial counsel's mistrial motion, which was rooted solely in the "unable to say" component of the prosecutor's rebuttal. The State claims that these remarks were unobjectionable, and thus that the mistrial denial was proper—reasoning aside.

Surprisingly, the State reaches this conclusion by positing that when the prosecutor said, "they were unable to say, It was not me," she actually meant, "they were unable to say, It was not *him*." *See* State's Br. 31. But in discussing the matter at trial, no one—including the prosecutor herself—said "It was not him" is what she meant. The same goes for the post-conviction hearing. Regardless, it's the prosecutor's words, not her intentions, that matter. The words are all the jury heard.

Beyond its proposed rewriting of the prosecutor's rebuttal, the State returns to its claim that the jury instructions solved any problem with the State's rebuttal and that the evidence was strong. For the reasons set forth in Zimmerman's opening brief, these arguments fail.

C. Trial counsel was ineffective for failing to identify or correct the Count 7 guilty-verdict form error.

Deficient performance. The State's deficient-performance argument on the verdict form error is simple: missing it wasn't good, but since trial counsel did what he could upon learning of the error, his representation was good enough. The State misunderstands effective advocacy. Trying to remedy a failure is a good thing—certainly better than nothing. But a clear-cut mistake, rooted not in any strategy but in an admitted oversight, constitutes deficient performance. *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). The State cites no case suggesting such a deficiency can be excused by after-the-fact efforts at repairing the damage. Common sense says such efforts may preclude prejudice, but they do not erase the deficiency.

Prejudice. The State's prejudice argument here cites the jury instruction for Count 7 (which Zimmerman's opening brief addresses) and leans, again, on the fact that the State

introduced photos in connection with the charges Zimmerman was convicted of. The State still does not acknowledge the limitations of the State's blurry photos, nor does it recognize that photos are often taken by other people, sometimes without the knowledge or consent of the photos' subjects. The photos in this case are not a cure-all sufficient to overcome trial counsel's deficiencies. The State's evidence was a mixed bag, photos included. Its failure to grasp that reality renders its prejudice arguments unpersuasive.

CONCLUSION

Zimmerman asks that this Court reverse the postconviction order and remand with instructions to vacate the judgment of conviction, suppress the phone evidence, and hold a new trial.

Dated this 20th day of September, 2024.

Respectfully submitted,

Electronically signed by
Megan Sanders

Megan Sanders
State Bar No. 1097296

WISCONSIN DEFENSE INITIATIVE
411 West Main Street, Suite 204
Madison, WI 53703
megan@widefense.org
(608) 620-4881

Attorney for Defendant-Appellant

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 3,000 words.

Dated and filed this 20th day of September, 2024.

Signed:

Electronically signed by Megan Sanders

Megan Sanders
State Bar No. 1097296