No. 2024AP469-CR

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,
Plaintiff-Respondent,

vs.

ANDREAS W. RAUCH SHARAK,
Defendant-Appellant.

Appeal from the Circuit Court for Jefferson County
The Honorable Judge William F. Hue Presiding
Case No. 2022CF495

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. Contrary to the State's assertion, there is not a conflict between the published Court of Appeals opinions applying *Payano-Roman* and this Court would not have to overrule, modify, or withdraw language from its own published opinions to resolve this appeal.

The State attempts to manufacture a split in authority to preclude this Court from applying *State v. Payano-Roman*, 2006 WI 47, 290 Wis. 2d 380, 714 N.W. 2d 548, arguing that to do so, this Court would need to "overrule, modify, or withdraw language from" its own published opinions contrary to *Cook v. Cook*, 208 Wis. 2d 166, ¶ 53, 560 N.W. 2d 246 (1997). There is no such split. Each of the cases relied on by the State correctly identified and applied *Payano-Roman* and made findings consistent with *Payano-Roman*. Mr. Rauch Sharak's application of *Payano-Roman* is consistent with this line of cases; it is the State's position that would require this Court to overrule, modify, or withdraw language from several of its own published opinions.

In *Payano-Roman*, the Supreme Court of Wisconsin adopted the analytical framework identified in an earlier Court of Appeals decision, *State v. Rogers*, 148 Wis. 2d 243, 246-47: "For a search to be a private action not covered by the fourth amendment: (1) the police may not initiate, encourage, or participate in the private entity's search; (2) the private entity must engage in the activity to further its own ends or purposes; and (3) the private entity must not conduct the search for the purpose of assisting governmental efforts." The *Payano-Roman* court also confirmed *Rogers*' articulation of the burden of proof as requiring the defendant to prove by a preponderance of the evidence that the private party acted as an agent of the government. *Payano-Roman* at ¶ 21. Finally, the *Payano-Roman* court noted that "the question of whether

a search is a private search or a government search is one that must be answered taking into consideration the totality of the circumstances." *Id.* at ¶ 21, citing *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989).

The *Payano-Roman* court articulated a similar and related test used by Nebraska and endorsed by Wayne R. LaFave in 1 *Search and Seizure* § 1.8(b) at 263 (4th ed. 2004): "a search may be deemed a government search when it is a 'joint endeavor' between private and government actors." *Payano-Roman* at ¶ 19. This related test did not supplant *Rogers*, instead providing an additional conceptual framework that implicates the first *Rogers* requirement that "the police may not initiate, encourage or participate in the private entity's search." By definition, a joint endeavor between a private actor and a government actor involves the participation by the government in the private entity's search. A "joint endeavor" will always implicate the first *Rogers* requirement.

The *Payano-Roman* court's articulation and application of the 'joint endeavor' test is further evidence that all three *Rogers* requirements must be met for a search to be deemed a "private search." While a joint endeavor will always implicate the first *Rogers* requirement, it is not necessarily the case that it will implicate the second and third requirements. The private party engaging in the joint endeavor need not engage in the activity to further its own ends or purposes nor must it participate in the search for the purpose of assisting governmental efforts. *Payano-Roman* explicitly held as much: "There can be no question on this record that one purpose of the laxative procedure was medical treatment. However, when we consider all the circumstances of this case, we conclude that the medical purpose of the procedure cannot

insulate the simultaneous evidence-gathering purpose from Fourth Amendment scrutiny."

In other words, the private party was engaged in the search for its own private purposes – providing necessary medical treatment – and was not participating to assist governmental efforts, yet the participation of the police in the joint endeavor made the search a government search. The first *Rogers* requirement was not met because of this joint endeavor, and so the *Payano-Roman* court correctly held that the search could not be considered a private search.

In 2008, two years after *Payano-Roman*, the Court of Appeals decided *State v. Cole*, 2008 WI App 178, 315 Wis. 2d 75, 762 N.W. 2d 711. The State describes *Cole* as interpreting *Payano-Roman* to require a multifactor totality of the circumstances analysis because *Cole* only cited *Payano-Roman* for the proposition that the court must examine the totality of the circumstances. *Id.* at ¶ 13.

In *Cole*, the defendant was ordered to have no contact with his wife (the victim of alleged domestic violence) while his case was pending. *Id.* at ¶ 4. While awaiting trial, the defendant sent several letters to family members instructing them to prevent his wife from appearing at his trial. One of those letters was to his daughter, but he wrote the wrong address on the envelope. That letter was delivered to the address on the envelope – the residence of a Milwaukee County Sheriff's Department Detective. She opened the letter and began reading it, recognized that the letter concerned intimidation of a witness, and looked up the name of the sender on CCAP and found that he had a court date scheduled. She then contacted the district attorney prosecuting the case and turned over the letter. She had no further involvement.

The defendant moved to suppress the letter arguing that the search was a government search because the detective, although off-duty, was a police officer. The narrow scope of the issue as understood by the Court of Appeals was "the issue when an off-duty law enforcement officer acts in a private capacity rather than as a government agent for purposes of the Fourth Amendment," which was an issue of first impression in Wisconsin. The unique facts of the case did not fit neatly within the *Payano-Roman* framework, as the *Rogers* factors presume that the private actor was not a government employee or law enforcement officer, and that any government participation in the search or joint endeavor would be through the actions or influence of a second party. Where, as in *Cole*, there was a single party who was both a private actor and government actor depending on the particular capacity the party was acting in at a given time, *Payano-Roman* offered little analytical guidance. Instead, the *Cole* court turned to out-of-state authority specifically addressing this dual-role issue: "There appears to be general agreement in other jurisdictions that have considered the issue that government involvement in a search is not measured by the primary occupation of the actor, but by the capacity in which he acts at the time in question; therefore, an off-duty officer acting in a private capacity in making a search does not implicate the Fourth Amendment."

This analysis was entirely consistent with *Payano-Roman* and, to the extent the court's analysis applied a different test, *Cole* can properly be limited to its unique facts of an off-duty law enforcement officer performing a search.

One year after *Cole*, the Court of Appeals revisited this issue in a less clear-cut fact pattern which requires some exposition. The 2009 case

State v. Berggren, 2009 WI App 82, 320 Wis. 2d 209, 769 N.W. 2d 100 involved the defendant's 12-year-old daughter Brittany discovering images on a memory card for the defendant's digital camera that depicted a young female performing oral sex on an unidentified male. Brittany later identified the unidentified male as the defendant and the young female as her stepsister Cynthia, who was also 12 years old at the time. That same day, Brittany's mother Lisa was contacted by Cyntha's mother who disclosed that Brittany had told Cyntha that she was afraid that the defendant had touched her (Brittany) inappropriately.

At the time of the call, Brittany was home with the defendant. In order to get him out of the house, Lisa called the defendant and told him that her aunt was ill and that Brittany needed to join them at the hospital. Lisa then asked her brother, Michael Bolender, and father to pick Brittany up from the residence. Lisa's brother was a lieutenant with the Oak Creek Police Department at the time, but was off-duty and on vacation due to the Thanksgiving holiday. Before leaving the house, Brittany, on her own initiative, took the memory card and gave it to Lisa, who gave it to Bolender.

Bolender tried unsuccessfully to open the memory card on Lisa's computer and took it instead to his parents' residence to use their computer. He was able to open the memory card and viewed two photographs depicting Cyntha performing sex acts on a male torso visible from the chest down. Cynthia appeared to be asleep or unconscious in the photo. Bolender contacted the Oak Creek Police Department and the defendant was subsequently arrested.

The defendant moved to suppress the contents of the memory card arguing that Bolender was acting in his official investigative capacity as

a law enforcement officer when he viewed the contents of the memory stick. The Court of Appeals disagreed. The *Berggren* court, addressing virtually the same question as the *Cole* court, recited the legal standard as follows:

> We independently determine whether a search is private or governmental in nature by considering the totality of the circumstances. ([*Payano Roman* at ¶ 17]). Before a search will be deemed private, *three requirements must be met*: (1) the police may not initiate, encourage or participate in the private entity's search; (2) the private entity must engage in the activity to further its own ends or purpose; and (3) the private entity must not conduct the search for the purpose of assisting governmental efforts. *Id.* at ¶ 18. The defendant has the burden to prove by a "preponderance of the evidence" that the search was governmental. *Id.* at ¶ 23.

Id. at ¶ 14 (cleaned up) (emphasis added). The *Berggren* court noted that "In *State v. Cole*, we had the opportunity to address when an off-duty law enforcement officer acts in a private capacity rather than as a government agent for purposes of the Fourth Amendment."

The court ultimately concluded "that the viewing of the photographs did not meet the requirements under *Payano-Roman* for a government search." *Id.* at ¶ 17. The court held that even though Bolender was a lieutenant for the Oak Creek Police Department, his actions were not instigated by the police, his actions were taken in his capacity as Brittany's uncle, he acted in the interest of his family when he viewed the photographs, and that nothing in the record suggests that Bolender acted "for the purpose of assisting governmental efforts." *Id.* (quoting *Payano-Roman* at ¶ 18).

In 2009, the Court of Appeals decided *State v. Butler*, a case in which the defendant was detained by a private security guard working for a Chuck E. Cheese restaurant after the guard saw him driving recklessly

on the property. The security guard detained, handcuffed, and searched Butler, then called the police when he saw that Butler was wearing an empty gun holster. The guard informed the police that Butler was driving recklessly and that he found the empty holster, and that he observed Butler make a motion with his arm from his waist to the passenger side of the vehicle and that he had a dark object in his right hand. Butler was placed under arrest for reckless driving and was searched by the officers. His car was then searched and a handgun was located. Butler sought to suppress the gun arguing that the security guard's detention and search were government action.

The *Butler* court stated that *Payano-Roman* is the leading decision in Wisconsin on whether the government was sufficiently involved with what a private party did to implicate the Fourth Amendment, and recited the three *Rogers* requirements which the court referred to as "the controlling criteria." The *Butler* court also recited *Payano-Roman*'s language that a search may be a government search when it is a joint endeavor. The court rejected Butler's argument that the guard was a government actor, noting "as we see from Butler's submissions that are in the record, none of the elements of state-action identified in *Payano-Roman* is present here. First, the security guard acted entirely on his own —nothing he did in detaining and initially searching Butler was instigated by the police. Second, as a Chuck E. Cheese security guard, it was in his interest and the interest of his employer to keep the restaurant's parking lot safe for other drivers and pedestrians. Third, there is no evidence in the record or in Butler's offer-of-proof that indicates that the security guard's detention and initial search of Butler was "for the purpose of assisting governmental efforts." Finally, what the

security guard did in detaining and initially searching Butler was not part of some "joint endeavor" with law enforcement. Thus, nothing the security guard did violated Bulter's Fourth Amendment rights against unreasonable searches and seizures."

The State describes *Butler* as announcing that a private search could be attributed to the government *either* through the three factors in Paragraph 18 [of *Payano-Roman*] *or* by showing that the search was a "joint endeavor," implying that this was an expansion or aberration of *Payano-Roman*'s holding. That is incorrect. *Butler* recited and applied all three *Rogers* requirements and also determined that the search was not a joint endeavor, consistent with *Payano-Roman*.

Finally, in 2012, the Court of Appeals decided *State v. Cameron*, which challenged the police search of the contents of a duffel bag that was turned over by Cameron's girlfriend after she located child pornography. The Court of Appeals recited the now-familiar language of *Payano-Roman*: "A search is a 'private search' *if three requirements are met*: [listing the *Rogers* requirements]." *State v. Cameron*, 2012 WI App 93, ¶ 24, 344 N.W. 2d 101, 820 N.W. 2d 433 (cleaned up) (emphasis added). The *Cameron* court found that "the 'private search' requirements as set forth in *Payano-Roman* are met."

The State argues that there is a split in authority which precludes this Court from deciding the case. That is simply untrue. Each of the cases discussed above except *Cole* follow *Payano-Roman* and reaffirm that the three *Rogers* requirements must all be met before the court is permitted to find that a search was a "private search" for Fourth Amendment purposes. While the Court of Appeals in *Cole* did not explicitly apply *Payano-Roman* or analyze the *Rogers* requirements, it

relied on out-of-state authority that addressed the narrow fact pattern of an off-duty officer performing a search, and a year later in *Berggren* analyzed that same narrow fact pattern explicitly under the framework of *Payano-Roman*. The joint endeavor analysis endorsed by *Payano-Roman* is not a departure from those requirements because, by definition, it will always implicate the first *Rogers* requirement.

To the extent that *Payano-Roman* describes the analysis as a consideration of the totality of the circumstances, that is an instruction to consider the totality of the facts in determining whether each *Rogers* factor has been met. It is *not* an instruction that the *Rogers* requirements need not be met and that the court should treat the requirements as factors of a multifactor balancing test. Had that been the intent of the Supreme Court of Wisconsin in *Payano-Roman*, it would have said that. Interpreting the *Rogers* requirements as factors of a multifactor balancing test is directly contrary to the Supreme Court's description of the factors as requirements "that must be met for a search to be a private search."

Contrary to the State's argument, this Court can and must apply *Payano-Roman* to the facts of this case and can do so without overruling, modifying, or withdrawing language from any of its prior published opinions by reaffirming *Payano-Roman*'s requirement that all three *Rogers* factors must be met for a search to be considered a "private search." In this case, the trial court correctly held that the government encouraged and participated in the search, and as such the search was a warrantless governmental search.

II. Google's Terms of Service do not defeat Mr. Rauch Sharak's reasonable expectation of privacy.

The trial court held that Mr. Rauch Sharak had a reasonable

expectation of privacy in the contents of his electronic communications and data transmitted through Google's platform. The State argues that Mr. Rauch Sharak's expectation of privacy was not reasonable given Google's terms of service and urges the Court to deny Mr. Rauch Sharak's appeal on this basis to avoid addressing *Payano-Roman*. Mr. Rauch Sharak reiterates the arguments presented in his opening brief. Additionally, the State cites to Google's Terms of Service and argues these terms preclude Mr. Rauch Sharak from having a subjective expectation of privacy in the contents of the content uploaded to Google. The Terms of Service provided by the State were effective as of January 5, 2022. (R31/56).

Mr. Rauch Sharak is alleged to have uploaded the images between July 31, 2021 and August 14, 2021. The State has not shown that the terms of service in effect on the date that Mr. Rauch Sharak opened his Google or uploaded the images that were the basis of the CyberTipline Report frustrated his reasonable expectation of privacy. The January 5, 2022 terms of service cited by the State do not cover Mr. Rauch Sharak's actions between July 31, 2021 and August 14, 2021. As such, they are irrelevant.

Nevertheless, the trial court held that Mr. Rauch Sharak had a reasonable expectation of privacy in the contents of his Google account and that this was not diminished by the Terms of Service cited by the State, relying on *United States v. Warshak (Warshak III)*, 631 F. 3d 266 (6th Cir. 2010); *Bubis v. United States*, 384 F. 2d 643 (8th Cir. 1967) and *Katz v. United States*, 389 U.S. 347 (1967); *United States v. Irving*, 347 F. Supp. 3d 615 (D. Kan. 2018); and *United States v. DiTomasso*, 56 F. Supp. 3d 584 (S.D.N.Y. 2014), aff'd on different grounds, 932 F. 3d 54 (2d

Cir. 2019).

Additionally, even if Mr. Rauch Sharak lacked a reasonable expectation of privacy, he had a property interest in the contents of his Google account, an independent basis to invoke the protections of the Fourth Amendment where, as here, Google's search on behalf of the government was a "trespass to chattels" under *United States v. Jones*, 565 U.S. 400 (2012). In *Jones*, the United States Supreme Court held that government conduct can constitute a Fourth Amendment violation *either* when it infringes on a reasonable expectation of privacy *or* when it involves a physical intrusion (a trespass) on a constitutionally protected space or thing ("persons, houses, papers, and effects") for the purpose of obtaining information. The fact that Google's conduct as a government agent doesn't trigger *Katz* doesn't mean it doesn't trigger the Fourth Amendment. *Ackerman*, 831 F.3d at 1307. In this case, we are dealing with the warrantless opening and examination of presumptively private electronic data that could have contained much besides potential contraband for all anyone knew. *Id.*

III. NCMEC is a government agency when acting in its statutory capacity as the national clearinghouse for the investigation and identification of child pornography.

The State argues that NCMEC is not an agent of the government for purposes of the search at issue in this case. As outlined in Mr. Rauch-Sharak's opening brief, NCMEC is an agent of the government when it performs its statutory role as the national clearinghouse for the identification and investigation of child pornography. This has become the majority position for those courts which have addressed the question of NCMEC's role on its merits following *United States v. Ackerman*, 831 F. 3d 1292 (10th Cir. 2016). *See, e.g., United States v. Keith*, 980 F. Supp.

2d 33 (D. Mass. 2013); *United States v. Coyne*, 387 F. Supp. 3d 387 (D. Vt. 2018); *State v. Lizette*, 208 Vt. 240 (Vermont 2018); *United States v. Stratton*, 229 F. Supp. 3d 1230 (D. Kan. 2017). The vast majority of cases since *Ackerman* presume without deciding that NCMEC acts as a government agent when operating in this space or decline to reach the issue after resolving the case on narrower grounds. *See, e.g., State v. Ingram*, 662 S.W. 2d 212 (Ct. App. Missouri 2023) (assumed without deciding); *United States v. Ringland*, 966 F. 3d 731 (8th Cir. 2020) (declined to address); *United States v. Miller*, 982 F. 3d 412 (6th Cir. 2020) (same); *United States v. Sykes*, 65 F. 4th 867 (6th Cir. 2023) (same); *United States v. Meals*, 21 F. 4th 903 (5th Cir. 2021) (same).

IV. The trial court's findings of fact were not clearly erroneous.

This Court reviews the trial court's findings of historical fact for clear error. The State attempts to portray certain factual findings made by the trial court as legal holdings subject to de novo review. The trial court's findings of fact include that the federal regulations at issue were (1) developed in response to congressional dissatisfaction with ESPs not being willing sufficiently in the [opinion] of Congress to engage in any form of content moderation and especially not willing to do so through affirmative efforts; (2) were intended to specifically shield ESPs from liability if they choose to engage in moderating activities; (3) specifically defined the type of content that was being targeted – "materials that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable;" (2) specifically shielded ESPs from liability for targeting this type of content "whether or not such material is constitutionally protected;" (5) limited the scope of § 230 immunity for ESPs that published content promoting or facilitating prostitution and sex trafficking creating liability for ESPs

that do not affirmatively search out and remove such content; (6) expanded the definition of human trafficking under the TVPA to more explicitly cover ESPs that "benefit from participation in a venture which has engaged in sex trafficking;" and (7) were introduced explicitly to remove what lawmakers believed to be federal impediments on local law enforcement actions against ESPs.

The trial court's factual findings included that law enforcement both encouraged and participated in Google's search of Mr. Rauch Sharak's electronic data and that Google's search would not be possible without access to NCMEC's hash lists. These findings of fact are not clearly erroneous. The trial court's finding that law enforcement did not actively participate in the specific search of Mr. Rauch Sharak's data does not change the analysis – law enforcement did not actively participate in collecting the biological specimens and carrying out the laboratory tests that determined whether railroad employees had consumed drugs in *Skinner*.

Dated at Waukesha, Wisconsin this 15th day of July, 2024.

KUCHLER & COTTON, S.C.

Electronically signed by
BRADLEY W. NOVRESKE
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm) and (c) for a brief except to the extent a request was made to file an oversized brief. The length of this brief is 3783 words as calculated by Microsoft Word's word count feature.

Dated at Waukesha, Wisconsin this 15th day of July, 2024.

Electronically signed by Bradley W. Novreske
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