



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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November 22, 2024

Samuel A. Christensen
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110 East Main Street, Suite 215
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Madison, WI, 53701

Re: *State of Wisconsin v. Andreas W. Rauch Sharak*
Appeal No. 2024AP469-CR

Letter brief regarding impact of *State v. Gasper*, Appeal No.
2023AP2319-CR

Dear Mr. Christensen:

In *State v. Gasper*, 2024 WL 4615609, No. 2023AP2319-CR (Wis. Ct. App. Oct. 30, 2024) (recommended for publication), this Court reversed an order granting suppression based on a detective's warrantless viewing of a file containing child sexual abuse material (CSAM). *Id.* ¶¶ 1–2. Snapchat, Inc. had detected the CSAM file in defendant Gasper's account and reported it to the National Center for Missing and Exploited Children (NCMEC). NCMEC then generated a CyberTip, attaching the CSAM file, and sent the CyberTip to Wisconsin law enforcement. *Id.* ¶ 2. A detective opened the CSAM file and confirmed that it contained CSAM without obtaining a warrant. *Id.* ¶ 4. The circuit court granted the defense's motion to suppress based on its conclusion that the detective's warrantless viewing of the CSAM file was a search under the Fourth Amendment that was not excused by an exception. *Id.* ¶ 7.

This Court reversed, concluding that Gasper did not have a subjective or objectively reasonable expectation of privacy in the CSAM file. *Id.* ¶¶ 8, 28. Therefore, no search under the Fourth Amendment occurred. *Id.* ¶ 29.

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Even if Gasper had presented evidence to show a subjective expectation of privacy (which he did not), this Court determined that his subjective expectation would not have been objectively reasonable given Snapchat's policies that Gasper accepted by creating and using his account. *Id.* ¶¶ 22, 28. The Snapchat "Terms of Service" informed users that they could not use their accounts for unlawful purposes, they authorized Snapchat to access and modify content in their accounts, and Snapchat "reserves[s] the right" to remove content that violates Snapchat's content policies and to report it law enforcement. *Id.* ¶ 17 (alteration in original). The Terms of Service provided a hyperlink to the Snapchat Community Guidelines, which expressly prohibited all content involving nude or sexually explicit content with anyone under the age of 18. *Id.* ¶ 18. The Community Guidelines also informed users that Snapchat reports any instance of the sexual exploitation of a minor to law enforcement. *Id.* ¶ 18. Finally, the Community Guidelines provided a hyperlink to the Sexual Content Explainer. *Id.* ¶ 18. The Sexual Content Explainer reiterated Snapchat's prohibition on CSAM and stated that Snapchat reports all CSAM to NCMEC. *Id.* ¶ 19. In sum, any subjective expectation of privacy would have been "objectively unreasonable given Snapchat's policies regarding sexual content in general and sexually explicit content involving children in particular." *Id.* ¶ 22.

If *Gasper* were to be published as recommended, it will control the outcome of this case and obviate the need for this Court to address any of the other issues raised by the briefing. In any case, *Gasper* was correctly decided, and the facts of the present case are undisputed and virtually identical to the facts in *Gasper*. (See State's Br. 11–12.)

Just as in *Gasper*, the State has argued that Rauch Sharak's inability to establish a reasonable expectation of privacy provides an independent and sufficient basis to affirm the circuit court's denial of his motion to suppress. (State's Br. 14–21.) He suffered a Fourth Amendment violation only if he had a reasonable expectation of privacy in the CSAM in his Google Photos account. See *State v. Tentoni*, 2015 WI App 77, ¶ 7, 365 Wis. 2d 211, 871 N.W.2d 285. For that reason, *Gasper* did not address the State's other arguments that would have been relevant only if a search under the Fourth Amendment occurred. *Gasper*, 2024 WL 4615609, ¶ 29 n.8. Rauch Sharak has not disputed that his reasonable expectation of privacy is a threshold requirement to reversing the circuit court's order. (Rauch Sharak's Reply Br. 10–12.) Thus, if no search under the Fourth Amendment occurred, then the remaining arguments presented in this appeal—whether Google acted as a government agent and whether the good faith exception to the exclusionary rule applies—are immaterial.

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Gasper does, in fact, apply and compel affirming the order denying suppression. Just like the Snapchat policies in *Gasper*, the Google policies in the present case “regarding sexual content in general and sexually explicit content involving children in particular” rendered any subjective expectation of privacy possessed by Rauch Sharak objectively unreasonable. *Id.* ¶ 22. Google’s Terms of Service informed Rauch Sharak that Google retained the right to remove content that violated its terms or the law, including “child pornography,” specifically. (R. 31:59, 67.) Google’s Privacy Policy instructed Rauch Sharak that Google would “analyze [his] content to help [Google] detect abuse such as spam, malware, and illegal content.” (R. 31:81.) Finally, the Google Photos policy entitled “Abuse Program Policies and Enforcement” had a subsection entitled “Child Sexual Abuse and Exploitation.” (R-App. 3.) That subsection provided the following, specific prohibition of CSAM: “Do not create, upload, or distribute content that exploits or abuses children,” including “all child sexual abuse materials.” (R-App. 3.) Moreover, Google stated that it would remove CSAM and “take appropriate action, which may include reporting to [NCMEC.]” (R-App. 4.)

These policies preclude Rauch Sharak from satisfying his burden of proving an objectively reasonable expectation of privacy, just as the similarly worded and structured Snapchat policies did in *Gasper*. Like in *Gasper*, Google’s Terms of Service advised users that they had to comply with the law—including the prohibition of “child pornography”—and that Google would access and remove offending content. *See Gasper*, 2024 WL 4615609, ¶ 17. Google’s Privacy Policy serves the same role that Snapchat’s Community Guidelines did in *Gasper*: it told users that Google scans their content to ensure that illegal content does not infiltrate its platforms. *See id.* ¶ 18. Then, the “Child Sexual Abuse and Exploitation” subsection worked exactly like Snapchat’s “Sexual Content Explainer.” It specifically prohibited users from using or accessing CSAM, and expressly told users that Google would remove CSAM and report it to NCMEC—just as Google did in the present case. *See id.* ¶ 19. Accordingly, just like in *Gasper*, Google’s policies for Google Photos “vitiat[e] any claimed subjective expectation of privacy.” *Id.* ¶ 21.

Rauch Sharak cannot meaningfully contest *Gasper*’s application to his appeal without contesting *Gasper*’s reasoning. But if *Gasper* were to be published as recommended, then Rauch Sharak’s objections to *Gasper*’s reasoning in this forum will be completely beside the point, because only the Wisconsin Supreme Court could rule in his favor. *See Cook v. Cook*, 208 Wis. 2d 166, ¶ 53, 560 N.W.2d 246 (1997).

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In short, if *Gasper* were to be published as recommended, then it will control the present appeal, compel affirmance, and obviate this Court's need to address the other issues.

Electronically signed by:

Michael J. Conway
MICHAEL J. CONWAY
Assistant Attorney General

MJC:cjs

FORM AND LENGTH CERTIFICATION

I hereby certify that this letter brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), and (c) for a letter brief produced with a proportional serif font. The length of this brief is 1091 words.

Dated: November 22, 2024.

Electronically signed by:

Michael J. Conway
MICHAEL J. CONWAY
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated: November 22, 2024

Electronically signed by:

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