STATE OF WISCONSIN
IN SUPREME COURT

Case No. 2019AP001404-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

GEORGE STEVEN BURCH,
Defendant-Appellant.

ON CERTIFICATION FROM THE WISCONSIN COURT OF APPEALS FROM A JUDGMENT OF CONVICTION ENTERED IN BROWN COUNTY CIRCUIT COURT, THE HONORABLE JOHN P. ZAKOWSKI, PRESIDING

AMICUS CURIAE BRIEF of LEGAL ACTION OF WISCONSIN, INC., CRIME VICTIMS' RIGHTS PROJECT

IN SUPPORT OF DEFENDANT-APPELLANT GEORGE STEVEN BURCH

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INTRODUCTION

The Fourth Amendment secures the papers of "the people." Ordinarily, the law considers the contours of this right for criminal suspects and defendants. Less visibly, but critically, the Fourth Amendment also protects those not suspected of a crime – including crime victims.

People expect privacy over their cell phones, from suspects like George Burch to crime victims like our clients. Like Burch, crime victims who consent to cell phone searches often understand the scope to pertain only to the portions or purpose they discuss with law enforcement. Victims often guard their private records because they do not want so much of their personal information in the hands of their assailant. They also, like so many others, often do not want so much personal information in the hands of *the state*.

This Brief begins with anecdotes from the Crime Victims' Rights Project. Through these cases and concerns, victims' understanding of their scope of consent to search their cell phones sheds light on the privacy a typical reasonable person expects over their cell phone data in the context they discuss with law enforcement, similar to the terms discussed by Burch and Officer Bourdelais. Though anecdotal, case law relies on anecdotes. These examples flag the potential impact such scope of consent issues could have on victims' cell phone privacy under the Fourth Amendment.

These crime victims' perspectives support Burch's position that his consent to search his "text messages" entailed no more consent than that. A reasonable person would not understand such a narrow expression of consent, even with subsequent general discussions or standardized consent forms, to instead permit a full extraction, indefinite retention, and subsequent inspection of all their phone data. Such a search and seizure, absent unambiguous consent, is not lawful under the Fourth Amendment.

ARGUMENT

This Brief concurs with the Defendant-Appellant: Under the Fourth Amendment, the full extraction, indefinite retention, and subsequent inspection of George Burch's cell phone data is not lawful.

A reasonable person would consider the scope of consent to search a cell phone to be limited to the scope discussed with law enforcement. A reasonable person would not expect standard consent forms, or other imprecise communications, to remove the bounds of that consent.

We know this not only from the facts in George Burch's case, but also given the experiences and concerns that crime victims endure in the face of similar requests.

I. Victims have understood their scope of consent to search their cell phone as limited to the context they discuss with law enforcement.

A. K.'s Dilemma[1]

K.'s ex-partner, G., broke into K.'s residence and assaulted her. The evidence in her case included video footage, 9-1-1 calls, and the suspect's cell phone. One agency filed charges; another weighed filing others. Prosecutors from the latter said they first needed to review the text messages on K.'s cell phone[2] to make sure G. came to K.'s place uninvited. K. gave her word: She and G. had not texted in the months leading up to the assault. Prosecutors insisted. They needed to see her texts before they would issue the charges.

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[1] This Brief incorporates the facts from the appellate parties' briefs. Facts introduced here use pseudonym initials to protect anonymity.

[2] The terms "cell phone" or "phone" refer throughout to smartphones.

Besides, they assured, K. had already consented to a full download of her phone data. An officer had handed her a standard consent form in the hazy hours following her assault, before the rape kit, so they could search her phone for this investigation. K. had signed it. Didn't she remember? They just needed the physical phone now to extract all the data.

K. remembered signing something but did not remember the wording. She asked whether the investigators could extract just the text messages between her and G., without downloading the rest of her phone. No, unfortunately, the team said. They could only extract phone data in its entirety. They gave their word: they would only look at the text messages between K. and G. They would not go where they were not invited.

K. wracked her brain about everything sacred on her phone. The text messages with her lawyer in an unrelated case: Would she lose attorney-client privilege? Photos of her kids: Could the state store and use the images elsewhere? Photos of friends and family: What if they would not consent to this? What if the state got the wrong idea about something, or someone, and used these records against them?

K. did not trust that the state would only review the text messages they asked to search, now understanding the broad trove of data they asked to seize. In the wake of the greatest violation of trust she had ever experienced, K. doubted that the seemingly trustworthy would not go where they were uninvited, taking advantage of her or her loved ones.

K. emphasized that she "backed the badge." She believed in law and order and fully respected law enforcement. Still, she believed that human nature might get the best of these humans—the good guys

who wanted to do the right thing so badly that they might end up doing the wrong thing.

She had nothing to hide and still felt like she had everything to lose. K. wanted the case to proceed, but not at the cost of entering her life into evidence.

K. did not understand these implications when she signed the standard consent form on the scene. And none of the officers had explained.

Knowing this, K. declined to turn over her phone and rescinded her signed consent form. The agency still managed to convict G. Without K.'s phone data.

B. K. is Not Alone.

K.'s issues are not unique among crime victims. Our project has fielded questions from assault victims across Wisconsin who want to know whether they need to comply with law enforcement's insistence that they turn over their cell phones while reporting what happened to them. Can I say no?, they ask. Law enforcement has not, or could not, offer these individuals narrower, more conservative options.

Other victims have not realized the ramifications of consenting to a search of their devices until it was too late. One minor victim authorized law enforcement to download all the data on her cell phone when she reported. Only when the defendant moved for additional digital data did she realize he had any access in the first place. She had not understood, and no one had explained, that her consent to disclose her cell phone data to law enforcement at the start of the case had implied consent to release this data beyond investigators to her assailant. He now had a copy of the information on her phone in his case file. Another minor victim consented to a download of his phone to

show law enforcement the dating app communications that led to his assault. Little did he realize that law enforcement would go through other parts of his phone and see provocative photos he and had exchanged with his fellow minors. Having approached officers to bring charges, this victim found himself facing them.

Outside of Wisconsin, cases show that victims' cell phone privacy remains an afterthought. *See e.g.*, *State v. Samalia*, 375 P.3d 1082, 1095 (Wash. 2016) (en banc) (Yu, J., dissenting) (critiquing the reasonableness of searching abandoned phone where officer shrugged off victim's privacy); *People v. Valdivia*, 16 Cal.App.5th 1130 (Cal. App. 2017) (Murray, J., concurring) (vacated on other grounds) (criticizing disregard for victim privacy where probation agent had extensive access to defendant's devices). Law enforcement in England and Wales have been dropping rape investigations when victims decline to allow a full search of their cell phone as a prerequisite to their case proceeding.[3]

The above highlights a few relevant, real life examples. State requests for victims' cell phones, and the resulting challenges, have become familiar to our clients and other crime victims. Even so, victims cannot be said to fathom the scope of their consent to search their phones to entail a full extraction, indefinite retention, and subsequent inspection.

II. Victims' experiences suggest that a reasonable person does not understand a search of their cell phone to entail a full extraction, indefinite retention, and subsequent inspection, absent unambiguous consent.

[3] Owen Bowcott, *Police in England and Wales dropping rape inquiries when victims refuse to hand in phones*, THE GUARDIAN (June 17, 2020), https://www.theguardian.com/society/2020/jun/17/police-in-england-and-wales-dropping-inquiries-when-victims-refuse-to-hand-in-phones.

A. The Fourth Amendment precludes the unreasonable search and seizure of cell phone data from "the people," which includes both suspects and crime victims.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures, shall not be violated…
>
> U.S. CONST. amend. IV.

Fourth Amendment jurisprudence generally involves criminal suspects and defendants. But the Fourth Amendment protects all "the people," including crime victims.[4] *See Zurcher v. Stanford Daily*, 436 U.S. 547, 554-57, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978) (internal citations omitted) (Fourth Amendment applies to third parties because warrant does not require suspected culpability of owner or possessor); *State v. Purtell*, 2014 WI 101, ¶ 28, 358 Wis.2d 212, 851 N.W.2d 417 (citing *Riley v. California*, 573 U.S. 373, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014) and *State v. Carroll*, 2010 WI 8, ¶ 27, 322 Wis.2d 299, 778 N.W.2d 1) ("Ordinary citizens, even citizens who are subject to diminished privacy interests because they have been detained, have a legitimate expectation of privacy in the contents of their electronic devices."); *In re G.B.*, 139 A.3d 885 (D.C. 2016) (employing Fourth Amendment to determine lawfulness of crime victim buccal swab).

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[4] Crime victims often assert their statutory and state constitutional rights to privacy over their records. They also enjoy the penumbra of privacy provided by the U.S. constitution. *See* U.S. CONST. amend. I, IV, V, IX, XIV; WIS. CONST. art. I, § 9m; Wis. Stat. § 950; *Griswold v. Connecticut*, 381 U.S. 479, 484-86, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

The Court has been well briefed by both parties and is otherwise well acquainted with the protections provided by the Fourth Amendment when law enforcement searches and seizes a cell phone based on a suspect's consent, or lack thereof. Briefly for our purposes: Warrantless cell phone searches are generally unlawful, and law enforcement needs objectively reasonable consent to perform them. *See Riley*, 573 U.S. at 386; *Florida v. Jimeno*, 500 U.S. 248, 251, 111 S.Ct. 1801, 114 L.Ed.2d. 297 (1991). In the Seventh Circuit, someone can modify their scope of consent to search, but later signing a standard consent form does not suffice to broaden the scope beyond one's initial discussion with law enforcement. *U.S. v. Lemmons*, 282 F.3d 920, 924 (7th Cir. 2002).

When it comes to cell phones, people have a reasonable expectation of privacy over their data, including location data tracked by third parties. *Carpenter v. U.S.*, 138 S.Ct. 2206, 2220, 201 L.Ed.2d 507 (2018) (warrantless search of location data not lawful given "detailed chronicle of a person's physical presence compiled every day, every moment, over several years"). Courts have found it unreasonable for law enforcement to retain phone extractions indefinitely or investigate them subsequently. *See e.g.*, *U.S. v. Morton*, 984 F.3d 421, 425-26 (2021) (5th Cir. 2021) (distinguishing text messages as discrete category of data); *U.S. v. Ganias I*, 755 F.3d 125, 137 (2nd Cir. 2014) (rev'd, vacated, remanded on other grounds, *U.S. v. Ganias II*, 824 F.3d 199 (2nd Cir. 2016) (en banc)) (law enforcement cannot "indefinitely retain every file on [a device] for use in future criminal investigations."); *People v. McCavitt*, 2019 App (3d) 170830, ¶¶ 21, 24-25, 145 N.E.3d 638, 438 Ill.Dec. 102 (warrantless search of download for separate matter was unlawful after initial charges dismissed).

The law often depends on juries to decide objective reasonableness as a fact-based inquiry using jurors' common sense. Unlawful search and seizure issues, however, determine objective reasonableness as a question of law. *See Carroll*, 2010 WI 8, ¶ 17; *State v. Randall*, 2019 WI 80, ¶ 7, 387 Wis.2d 744, 930 N.W.2d 223. Courts ascertain this standard based on what a "typical reasonable person" would understand the scope of their consent to include. *Jimeno*, 500 U.S. at 251. Law relies heavily on records, but that does not mean a "typical reasonable person" contemplates the implications seen in *Burch* or among crime victims in their scope of consent to search their cell phone.

B. Between these cases and victims' experiences, a reasonable person would not understand consent like that given by Burch to extend to so broad a scope of search and seizure, making such a search unlawful.

Burch and Officer Bourdelais discussed searching Burch's "text messages" for a June 2016 matter. *See State v. Burch*, No. 2019AP1404-CR, at 3 (Oct. 20, 2020). Bourdelais asked to download "the information" and had Burch sign a standard consent form. *Id.* at 3-4. The State relies on these follow-up communications to assert that reasonable people "would understand that law enforcement was asking to download all the data," which they could then use in a later, unrelated investigation. (State's Br. 5.)

Crime victims' concerns suggest otherwise.

At the outset of an investigation, as in *Burch*, law enforcement may not distinguish between victims and potential suspects.[5] Burch was not a suspect in

[5] Douglass Detrie started as a suspect and later, having lived with the deceased, qualified as a victim. *See* WIS. CONST. art. I, § 9m(1)(a)(1)-(2).

this case when he let Bourdelais search his "text messages," thus situating him at that time in a position similar to many victims when they report. *See Zurcher*, 436 U.S. at 554-57; *Purtell*, 2014 WI 101, ¶ 28 (citation omitted); *In re G.B.*, 139 A.3d at 885. The issues K. and other crime victims face when consenting to cell phone searches thus parallel the issues Burch presents.

For instance, K., like Burch, signed a standard consent form stating law enforcement could search her cell phone. K. signed that form in the aftermath of G. assaulting her. Naturally, she understood the scope of consent to pertain to the that investigation. Even with officers presumably communicating in good faith, K. did not understand her signature on a piece of paper to mean that law enforcement would download all of her cell phone data. K. only came to understand this later with the benefit of time and counsel.

Law enforcement assured both Burch and K. that they would search their phones for certain "text messages." Still, officers planned to download the entire phone. Like crime victims, Burch's consent relied on officers' portrayal of the scope of search. Law enforcement has a tough job. Yet officers are repeat players in these discussions and have greater command of the underlying information: the expertise on how to investigate crimes; knowledge about what technology allows or requires them to download from a digital device; how they can use that data. To this end, the Seventh Circuit advised: "It would sanction deception to hold that, despite [an officer's] assurances, [the defendant] consented to an unlimited search when he signed the consent form." *Lemmons*, 282 F.3d at 924.

Officers also hold the state-sanctioned authority to decide who to help—and who to punish. K. and

other crime victims consent to searches of their cell phones because they want to cooperate. More than that: for their cases to proceed, crime victims need officers to trust them. Officers are gatekeepers. Crime victims, like suspects, often let law enforcement search their cell phones because they do not want to incur a negative inference that they have something to hide.

A typical reasonable person cannot quickly comprehend all of the data they would consent to disclose with a full download of their phone's data when the amount of data on a phone is almost incomprehensible to begin. Victims like K. have worried about the state having this data if for no other reason than the discomfort of exposing personal details to the professionals with whom they must work on their case, especially in smaller towns where victims know these individuals from other parts of life.

Worse, many victims do not understand that a search of their phone by law enforcement can lead to a search of their phone by their assailant. Prosecutors turn over victims' cell phone records to defense attorneys to comply with their *Brady* obligations, sometimes as a matter of course, regardless of apparent exculpatory information. Defendants can access this information in their case files. In the scope of their consent, victims often do not anticipate that a search of their cell phone by law enforcement could lead to a defendant learning the most intimate details of their lives: their complaints to family about the abuser; geolocation data reporting their daily path; apps tracking everything from their mental health appointments to bank accounts to ovulation cycles; photos of her pregnant belly, or other intimate images.

Crime victims and suspects alike expect privacy over the phone data they do not contemplate in the scope of search – which is to say, most of it. Like

suspects in other cases, K. and these crime victims did not understand their consent to include a full extraction, indefinite retention, or subsequent investigation into an unrelated matter. *See Morton*, 984 F.3d at 425-26; *Ganias I*, 755 F.3d at 137; *McCavitt*, 2019 App (3d) 170830, ¶ 21, 24-25.

Even crime victims, communicating in earnest and good faith with law enforcement, have not understood the scope of their consent to entail so broad a search. Crime victims deserve the chance to hold their assailants accountable. This entails limiting warrantless cell phone searches to the scope of consent discussed with law enforcement, for both suspects and victims.

CONCLUSION

For these reasons, the Court should reverse and hold that the Fourth Amendment requires an unambiguous scope of consent to search or seize a person's cell phone data—for all people, suspects and victims alike.

Dated this 4th day of March, 2021.

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CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length is 2,966 words.

Dated this 4th day of March, 2021.

Signed:

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CERTIFICATION OF § 809.19(12) COMPLIANCE

I hereby certify that: I have submitted an electronic copy of this brief, which does not have an appendix. This brief complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that: This electronic brief is identical in content and format to the printed version of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief, filed with the Court, and served on all parties.

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