No. 23-

IN THE

Supreme Court of the United States

KRIS V. ZOCCO,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WISCONSIN

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The Fourth Amendment requires that a search warrant describe the things to be searched and seized with sufficient particularity to prevent a "general, exploratory rummaging in a person's belongings." *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971), *different holding overruled in part on other grounds*, *Horton v. California*, 496 U.S. 128 (1990).

Does a warrant to search the entire contents of a cell phone for unspecified "evidence" of enumerated crimes violate the Fourth Amendment's requirement that warrants "particularly describ[e] the place to be searched, and the persons or things to be seized?"

PARTIES IN COURT BELOW

Other than the present Petitioner and Respondent, there were no other parties in the Wisconsin Supreme Court and Wisconsin Court of Appeals.

PRIOR PROCEEDINGS RELEVANT TO ISSUE PRESENTED

1. Pretrial and trial proceedings. Milwaukee County Circuit Court, *State of Wisconsin v. Kris V. Zocco*, Milwaukee County Case No. 2017CF2151. Amended Judgment entered March 27, 2019.

2. Post-conviction proceedings. Milwaukee County Circuit Court, *State of Wisconsin v. Kris V. Zocco*, Milwaukee County Case No. 2017CF2151. Order entered July 28, 2021.

3. Appeal to Wisconsin Court of Appeals, *State of Wisconsin v. Kris V. Zocco*, Appeal No. 2021AP1412-CR. Decision entered October 31, 2023.

4. Petition for Review to Wisconsin Supreme Court, *State of Wisconsin v. Kris V. Zocco*, Appeal No. 2021AP1412-CR. Review Denied April 16, 2024.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Kris V. Zocco respectfully asks that the Court issue a writ of certiorari to review the judgment of the Wisconsin Court of Appeals which affirmed the judgment of conviction and final order denying his post-conviction motion on direct appeal.

OPINIONS BELOW

The unpublished decision of the Wisconsin Court of Appeals, *State of Wisconsin v. Kris V. Zocco*, Appeal No. 2021AP1412-CR (10/31/23) is in Appendix A. (1a-28a).

The unpublished decision and order of the Wisconsin Circuit Court denying Zocco's post-conviction motion in

State of Wisconsin v. Kris V. Zocco, Milwaukee County Case No. 2017CF2151 (7/28/21), is in Appendix B. (29a-66a).

The unpublished Order of the Wisconsin Supreme Court denying discretionary review, *State v. Kris V. Zocco*, Appeal No. 2021AP1412-CR (4/16/24), is in Appendix C. (67a-68a).

JURISDICTION

The Wisconsin Court of Appeals entered judgment on October 31, 2023. The Wisconsin Supreme Court denied Zocco's timely petition for review on April 16, 2024. This Court's jurisdiction is invoked under 28 U.S.C. §1257(a) & 2101(d) and Supreme Court Rule 13.1. As he did below, Mr. Zocco asserts the deprivation of his right to be free from unreasonable searches and seizures secured by the United States Constitution.

CONSTITUTIONAL PROVISION INVOLVED

This petition concerns the construction and application of the Fourth Amendment to the United States Constitution which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

STATEMENT OF THE CASE

Procedural History

Following a 10-day trial, the jury convicted Zocco of one count each of first degree reckless homicide of K.D., hiding her corpse, and an unrelated act of consensual fellatio the state claimed was "suffocation." (*See* 2a).

The state's theory was that K.D. died in Zocco's apartment, although whether from suffocation during consensual fellatio, from strangulation, or from some other means, it could not know. K.D.'s skeletal remains were not located until 19 months later (in a wooded area miles away), and the autopsy could not reveal the means or cause of death. (2a-4a).

Lacking direct evidence to tie K.D.'s death to Zocco's apartment (beyond the fact that she was with Zocco the night before she went missing), the state relied upon the allegation, disproved at trial, that she could not have left Zocco's apartment building without being seen on the surveillance videos (a theory that failed to explain how K.D.'s body could have left the building unseen), and speculative assumptions that alerts by a so-called "human remains dog" in Zocco's apartment building and apartment at various locations where remains shed by living persons naturally are found meant that there had been a dead body there sometime previously. (*See* 6a-10a).

Also needing to convince the jury that Dwyer died due to Zocco's recklessness rather than negligence, accident, or natural means, the state relied upon sexually explicit photos and a video seized from Zocco's cell phone. The

photos were of K.D. and the video, dated a month before K.D.'s disappearance, depicted her performing fellatio on Zocco in a manner that the state claimed reflected "suffocation." The state also relied upon sexually explicit but legal "bondage" videos not involving K.D. discovered along with hundreds of traditional pornography videos during a search of an old external hard drive found in Zocco's apartment, as well as allegations by a disgruntled former girlfriend. (*See* 10a-12a).

The circuit court imposed consecutive sentences totaling 31 years initial confinement and 19 years extended supervision, to run consecutively to a sentence in another case. (30a).

The circuit court denied Zocco's post-conviction motions. (29a-66a).[1] On October 31, 2023, the Wisconsin Court of Appeals affirmed. (1a-28a).

The Wisconsin Supreme Court denied Zocco's petition for discretionary review on April 16, 2024. (67a-68a).

The Search Warrants

After K.D. went missing, the state requested and received a series of warrants to search Zocco's property. After speaking with Zocco, discovering small quantities of marijuana and cocaine in Zocco's apartment, and conducting further investigation, officers arrested him

1. Under Wisconsin law, post-conviction motions are filed in the circuit court as part of the direct appeal process, after sentencing and before filing the notice of appeal. *See* Wis. Stat. §974.02; Wis. Stat. (Rule) 809.30(2)(h).

and obtained the "phone warrant" at issue here. That application sought, and the warrant granted, authorization to conduct an unspecified "forensic examination" of the unspecified "contents" of Zocco's mobile phone for equally unspecified "evidence" of named offenses. The application was based on Zocco's admission to obtaining and using drugs with K.D., the small quantities of marijuana and cocaine found in his apartment, and police suspicion that Zocco might have been involved in K.D.'s disappearance. (69a-82a).

As noted above, the state at trial relied upon sexually explicit photos and a video involving K.D. and Zocco discovered on his phone pursuant to that warrant to suggest that Zocco's actions during a subsequent sexual encounter recklessly resulted in K.D.'s death. (*See* 10a).[2]

Zocco unsuccessfully challenged the warrants prior to trial, and the post-conviction court acknowledged that those challenges preserved Zocco's particularity claim. (33a-35a).[3] Addressing Zocco's post-conviction motion challenging the warrants, that court rejected what it considered a "hyper-technical reading of the Fourth

2. For the same purpose, the state also relied upon certain videos depicting BDSM (bondage, domination, and sado-masochism) discovered among a much larger number of non-BDSM videos and images pursuant to a subsequent warrant to search an old external hard drive based, *inter alia*, on the results of the phone warrant. (*See* 10a).

3. As noted by the Wisconsin Court of Appeals, the circuit court "did not specifically discuss the cell phone warrant [when denying Zocco's pretrial motions], but generally concluded that each search warrant issued was supported by probable cause." (14a-15a).

Amendment's requirements." (35a). It deemed the cell phone search warrant sufficient because it "identified the contents of the defendant's cellphone as the specific place and device to be searched, and it identified evidence of unlawful activity related to drug crimes and the disappearance of the victim as the object of the search." According to that court, "the warrant enabled the searcher to reasonably ascertain and identify that which was authorized to be seized." (35a-36a).

On appeal, the Wisconsin Court of Appeals held simply that it was enough that "the warrant limited the search to evidence of specific crimes—homicide, hiding a corpse, and drug crimes." (16a-17a (*citing United States v. Bishop*, 910 F.3d 335, 337 (7th Cir. 2018))).[4]

On April 16, 2024, the Wisconsin Supreme Court denied Zocco's timely petition for discretionary review raising this and other issues. (67a-68a).

REASONS FOR ALLOWANCE OF THE WRIT

This petition provides the Court the opportunity to clarify the application of Eighteen Century legal principles embodied in the Fourth Amendment to Twenty-First Century technology. *Cf. Riley v. California*, 573 U.S. 373 (2014) ("search incident to arrest" doctrine does not apply to contents of cell phone); *United States v. Jones*, 565 U.S. 400 (2012) (addressing whether attachment of GPS

4. The Seventh Circuit's actual decision in *Bishop* requires that the warrant identify the items to be seized "as precisely as the circumstances and the nature of the alleged crime permit." 910 F.3d at 337-38.

device to car is a Fourth Amendment "search"); *Kyllo v. United States*, 533 U.S. 27 (2001) (addressing application of Fourth Amendment to thermal imaging technology).

Specifically, this petition concerns whether a warrant authorizing search of the entire contents of a cell phone for unspecified "evidence" of a named crime satisfies the Fourth Amendment's requirement that such warrants "particularly describ[e] . . . [the] things to be seized." U.S. Const. amend. IV.

Although generally requiring a warrant for cell phone searches, *Riley*, *supra*, this Court has not yet addressed the difficulties of applying the intertwined requirements of particularity and probable cause to electronic data in general, let alone to the unique situation of cell phone data. As is further discussed *infra*, the lack of guidance from this Court has led to a multitude of conflicting approaches and confusion in the lower courts. As one lower court explained:

> As technology continues to evolve at a rapid pace, applying the Fourth Amendment requirements to search warrants for [Electronically Stored Information] has become increasingly difficult. The absence of guidance from the Supreme Court and lack of agreement among lower courts have resulted in conflicting approaches to these types of warrants around the country.

In re Cellular Telephones, No. L4-MJ-8017-DJW, 2014 WL 7793690, at *3 (D. Kan. Dec. 30, 2014) (footnote omitted). *See also* Adam M. Gershowitz, *The Post-*Riley *Search Warrant: Search Protocols and Particularity in Cell*

Phone Searches, 69 Vand. L. Rev. 585, 608 (2016) ("*The Post*-Riley *Search Warrant*") ("Until appellate courts signal a more robust particularity guarantee for post-*Riley* cell phone search warrants, however, confusion and erroneous rulings are likely to continue in numerous other cases.").

This case is a particularly good vehicle for clarifying these principles. Neither the warrant nor the supporting affidavit identified any particular "evidence" to be sought. Nor did they provide any probable cause to believe any particular evidence would be found on the phone. As such, this lack of particularity allowed for a wide-ranging exploratory search through any and all data on the cell phone in the hopes of finding some unidentified evidence tying Zocco to either the personal use drug crimes to which he had admitted or to the disappearance of K.D.

Even assuming that the state courts correctly concluded that there was probable cause to believe Zocco may have been involved in a crime, the warrant and affidavit here suffered from many of the problems that lower courts have wrestled with. While some courts have allowed the type of "all data" fishing expeditions at issue here, subject only to identification of the suspected offense for which evidence was sought, *see*, *e.g.*, *State v. Johnson*, 576 S.W.3d 205, 222-23 (Mo. Ct. App.) (collecting cases), *cert. denied*, 140 S.Ct. 472 (2019), others hold that cell phone warrants must be limited, where possible, to the specific locations on the phone and types of evidence supported by probable cause, *see*, *e.g.*, *United States v. Russian*, 848 F.3d 1239, 1245 (10th Cir. 2017). By failing to provide any non-conclusory assertions providing probable cause to search the images on Zocco's phone, the warrant

and affidavit here precisely raise the conflict between these two lines of incompatible authority.

CERTIORARI REVIEW IS APPROPRIATE TO CLARIFY WHETHER A WARRANT AUTHORIZING A SEARCH OF A CELL PHONE FOR UNSPECIFIED "EVIDENCE" OF A NAMED CRIME IS AN IMPERMISSIBLE GENERAL WARRANT

The Fourth Amendment[5] requires that a search warrant describe the things to be seized with sufficient particularity to prevent a "general, exploratory rummaging in a person's belongings." *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971).[6] This mandate effectuates the requirement that searches be limited to those supported by probable cause. *See*, *e.g.*, *Groh v. Ramirez*, 540 U.S. 551, 560 (2004) (unless they are listed in the warrant, "there can be no written assurance that the Magistrate actually found probable cause to search for, and to seize, every item" the officers sought to seize). The particularity requirement also "'makes general searches . . . impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.'" *Stanford v. Texas*, 379 U.S. 476, 485 (1965), quoting *Marron v. United States*, 275 U.S. 192, 196 (1927).

Application of the Fourth Amendment's particularity requirement to Twenty-First Century technology like a

5. "The Fourth Amendment [is] applicable through the Fourteenth Amendment to the States." *Bailey v. United States*, 568 U.S. 186, 192 (2013).

6. This Court overruled in part a different holding in *Coolidge* on other grounds in *Horton v. California*, 496 U.S. 128 (1990).

cell phone, creates unique difficulties that this Court has yet to address.

In *Riley v. California*, 573 U.S. at 403, this Court recognized that warrantless searches of cell phones implicate the same type of privacy interest invaded by the "reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity." Noting that "a cell phone search would typically expose to the government far *more* than the most exhaustive search" of any predigital analogue, *id.* at 396 (emphasis in original), the Court held that a lawful arrest no more justifies rummaging through the arrestee's cell phone without a warrant than it does a similar rummaging through his or her home. *Id.* at 393-97. Rather, the Court's directive to police wishing to search a cell phone was "simple—get a warrant." *Id.* at 403.

However, while generally requiring a warrant to search the contents of a cell phone to protect against "the reviled 'general warrants' and 'writs of assistance' of the colonial era," *id.* at 403, the Court left open questions regarding the showing required for a valid warrant to search the contents of a cell phone and the substance of such a warrant. More specifically as relevant here, the Court did not address application of the Fourth Amendment's requirement that the warrant "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.[7]

7. Although Fed. R. Crim. P. 41(e)(2)(B) was amended in 2009 to address some issues regarding the seizure and search of electronic data, the Committee Notes to that amendment concede that "[t]he amended rule does not address the specificity of

A. The Particularity Requirement

This Court has recognized that:

> [t]he manifest purpose of this particularity requirement was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.

Maryland v. Garrison, 480 U.S. 79, 84 (1987) (footnote omitted).

Given that "the scope of a lawful search is 'defined by the object of the search and the places in which there is probable cause to believe that it may be found,'" *id.*, quoting *United States v. Ross*, 456 U.S. 798, 824 (1982), moreover, the particularity requirement is directly related to the requirement that a warrant be supported by probable cause. *Groh*, 540 U.S. at 560. That is, particularity in the warrant is necessary to ensure "that the Magistrate actually found probable cause to search for, and to seize, every item" the officers sought to seize. *Id.*; *Garrison*, 480 U.S. at 84; *see* 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 4.6(a) at 750 (6th ed. 2020) ("The less precise the description of the things

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description that the Fourth Amendment may require in a warrant for electronically stored information, leaving the application of this and other constitutional standards concerning both the seizure and the search to ongoing case law development."

to be seized, the more likely it will be that" probable cause that items are connected with criminal activity or located in the place to be searched will be lacking.).

Probable cause for a search warrant requires the showing of three things: (1) probable cause of a crime; (2) probable cause that the specific evidence sought is evidence of that crime; and (3) probable cause that the specific evidence sought will be found in the particular place to be searched. *E.g.*, *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (probable cause for a search requires "a fair probability that contraband or evidence of a crime will be found in a particular place"); *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978) ("The critical element in a reasonable search is . . . that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought" (footnote omitted)).

At issue here is the application of these particularity/probable cause principles to the unique circumstances of a cell phone. That is not to say that something regularly possessed and used by 90% of the population, *Riley*, 573 U.S. at 395, is "unique." Rather, it is the unique nature of the cell phone as a repository of intimate details of our private lives that counsels "greater vigilance" to comply with the Fourth Amendment's purpose to prevent general searches. *Cf. United States v. Comprehensive Drug Testing, Inc. (CDT III)*, 621 F.3d 1162, 1177 (9th Cir. 2010) (*en banc*) (*per curiam*) (noting need for "greater vigilance" when searching electronic records to prevent officers from searching that for which they have not shown probable cause).[8]

8. This Court effectively overruled a different holding in *CDT III* on other grounds in *Hamer v. Neighborhood Housing Serv. of*

B. The Decision Below Conflicts with the Decisions of this Court

The decision below ignores the intertwined requirements of particularity and probable cause for the specific search authorized by a warrant, instead authorizing the type of general search the Fourth Amendment was intended to prohibit. It also reflects one side of a many-sided conflict amongst lower courts and scholars regarding the proper application of the particularity standard to cell phone searches. *See* Section C, *infra*. Review and clarification by this Court thus are appropriate. *See* Sup. Ct. R. 10(c).

As noted above, the cell phone warrant here purported to authorize search of the entire "contents" of Zocco's cell phone pursuant to an unspecified "forensic examination" for unidentified "evidence" of miscellaneous drug crimes and crimes related to the disappearance of K.D. (69a-71a). The warrant was based on a police officer's affidavit that first recited what the state courts concluded was probable cause to believe that Zocco may have been involved in a crime. (73a-81a). But it then merely asserted that: (1) Zocco had the phone in his possession when he was arrested; (2) the affiant wanted to search "the contents" of that cell phone; and (3) the affiant "believe[d] that such items as [she was] seeking in the search warrant will constitute evidence of the crimes of " homicide, mutilating a corpse, or various drug offenses. (81a-82a).[9]

Chicago, 583 U.S. 17 (2017). *See Demaree v. Pederson*, 887 F.3d 870, 876 (9th Cir. 2018).

9. Reflecting sloppiness in the preparation and evaluation of the application and warrant, the warrant purportedly authorized

Although overlooked by the courts below, the warrant thus suffers from a number of fatal defects:[10]

- Nothing in the search warrant or supporting affidavit identifies what specific evidence, or even what types of evidence, the officer sought or was authorized to search for and seize.

- Nothing in the supporting affidavit suggests where on the cell phone any specific evidence or type of evidence might be found.

- Nothing in the supporting affidavit suggests what probable cause supports the belief either that any specific evidence or types of evidence exists on the phone or where on the cell phone such evidence might be found.

(*See* 69a-82a).[11]

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use of "a trained narcotics detection canine" to assist in the "forensic examination" of the cell phone. (71a).

10. The phone warrant apparently attached the supporting affidavit (*see* 69a), and "most Courts of Appeals have held that a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant." *Groh*, 540 U.S. at 557-58. However, neither the warrant itself nor the attached affidavit overcome the identified defects. (*See* 69a-82a).

11. "It is elementary that in passing on the validity of a warrant, the reviewing court may consider only information brought to the magistrate's attention." *Aguilar v. Texas*, 378 U.S.

As such, the warrant did not "limit[ ] the authorization to search to the specific areas and things for which there is probable cause to search" and thus could not ensure that the search was "carefully tailored to its justifications." *Garrison*, 480 U.S. at 84; *see Groh*, 540 U.S. at 557 (Warrant based on probable cause under oath and identifying place to search nonetheless was "plainly invalid" because it failed to identify the items sought.).

The warrant thus epitomizes the proverbial "general warrant" authorizing the type of "wide-ranging exploratory searches the Framers intended to prohibit." *Garrison*, 480 U.S. at 84 (footnote omitted); *see Riley*, 573 U.S. at 403. While purporting to authorize the search of the entire contents of Zocco's phone, it failed to identify what the officers were allowed to search for. Rather than identify what evidence, if any, the issuing magistrate found probable cause to search for, the warrant abdicated to the searching officers the determination of what evidence to search for and to seize.

Contrary to the state court's belief (14a-17a), merely delegating to the searching officers the determination of what to search for and what to seize thus does not satisfy the particularity requirement of the Fourth Amendment. Under similar circumstances in which "the warrant did not describe the items to be seized *at all*," this Court recognized that it "was so obviously deficient that we must regard the search as 'warrantless' within the meaning of our case law." *Groh*, 540 U.S. at 558 (emphasis in original; citations omitted).

108, 109, n.1 (1964), *overruled on other grounds*, *Illinois v. Gates*, 462 U.S. 213 (1983).

C. The Lower Courts and Legal Scholars Are in Conflict Regarding Application of the Fourth Amendment Particularity Requirement to Cell Phone Searches

While warrants rarely suffer from the "perfect storm" of defects reflected in the warrant to search Zocco's cell phone here, the lower courts and legal scholars are in conflict regarding how to apply the Fourth Amendment's particularity requirements to such warrants. In many ways, these difficulties follow from the unresolved questions regarding the broader issue of applying the particularity requirement to searches of digital evidence in general. *See*, *e.g.*, *United States v. Zemlyansky*, 945 F. Supp. 2d 438, 453 (S.D.N.Y. 2013) ("there is no settled formula for determining whether a [computer search] warrant lacks particularity"). *See generally* Samantha Trepel, Note, *Digital Searches, General Warrants, and the Case for the Courts*, 10 Yale J.L. & Tech. 120 (2007) (text accompanying footnotes 27-104) (reviewing the development of conflicting computer search doctrines among courts and scholars).

The conflicts are puzzling given the Court's clear instruction that the warrant sufficiently identify the "place to be searched, and the persons or things to be seized" to ensure "that the Magistrate actually found probable cause to search for, and to seize, every item" the officers sought to seize. *Groh*, 540 U.S. at 560; *Garrison*, 480 U.S. at 84. Since the conflicts exist nonetheless, review by this Court is necessary to resolve them and restore coherence in the law.

1. The particularity requirement and personal computer searches

> In today's world, if any place or thing is especially vulnerable to a worrisome exploratory rummaging by the government, it may be our personal computers.

United States v. Christie, 717 F.3d 1156, 1164 (10th Cir. 2013).

The danger of exploratory rummaging is especially high where, as here, the warrant delegates to police the determination of what evidence they may search for (and thus, where to search) on a cell phone.

Although personal computers have existed for more than 40 years, standards for computer searches themselves "remain[ ] an unsettled area of the law:"

> Computer search authorizations are doctrinally and practically difficult because digital evidence of criminal activity could commonly be mislabeled and hidden, making searches more burdensome than a traditional physical search. In light of the fact that "criminals can—and often do—hide, mislabel, or manipulate files to conceal criminal activity, a broad, expansive search of the hard drive may be required." By the same token, "granting the Government a carte blanche to search every file on the hard drive" can lead to an impermissibly general search. Courts have struggled to balance these competing interests.

Andrew D. Huynh, *What Comes After "Get A Warrant": Balancing Particularity and Practicality in Mobile Device Search Warrants Post-Riley*, 101 Cornell L. Rev. 187, 198-99 (2015) (footnotes omitted)(*After "Get a Warrant"*), *citing United States v. Stabile*, 633 F.3d 219, 237 (3rd Cir. 2011). *See generally id.* at 198-203 (discussing conflicting approaches to applying the particularity requirement to computer searches).

Given these conflicting interests, the lower courts have developed a number of conflicting approaches to applying the particularity requirement to searches of more traditional personal computers.

The most common approach simply analogizes searches of digital evidence to the search of a file cabinet for particular documents and allows the officers a free hand to search any file that may contain the identified targets of the warrant. To the extent that the officers go overboard, these courts view that as a matter of "reasonableness" to be addressed afterwards on a case-by-case basis. *E.g.*, *United States v. Schesso*, 730 F.3d 1040, 1049-50 (9th Cir. 2013); *Stabile*, 633 F.3d at 237-40. *See United States v. Richards*, 659 F.3d 527, 539-40 & n.11 (6th Cir. 2011) (collecting cases).

On the other hand, some courts, noting the availability of advanced electronic search tools, have begun to question the file cabinet analogy and underlying assumptions about the need for "all data" searches:

> The digital world however, is entirely different. For example, sophisticated search tools exist, and those search tools allow the government

> to find specific data without having to examine every file on a hard drive or flash drive. When searching electronic devices to seize the data, the potential for abuse has never been greater: it is easy to copy them and store thousands or millions of documents with relative ease. But, by using search tools, there is also the potential for narrowing searches so that they are more likely to find only the material within the scope of the warrant. It is, of course, also in the government's best interest to do so, as it would be a waste of resources to, for example, search file by file looking for data in the scope of the warrant—assuming that, on a 16 or 32 GB flash drive, it is even possible to do so and ever finish the search.

Matter of the Search of Apple iPhone, IMEI 013888003738427, 31 F. Supp. 3d 159, 167 (D.D.C. 2014).

Some therefore have held that, "[b]ecause computers can store a large amount of information, . . . '[o]fficers must be clear as to what it is they are seeking on the computer and conduct the search in a way that avoids searching files of types not identified in the warrant.'" *State v. Castagnola*, 46 N.E.3d 638, 657 (Ohio 2015), *quoting United States v. Walser*, 275 F.3d 981, 986 (10th Cir. 2001); *see id.* at 659 ("the specific evidence sought must be clearly stated," *citing Marron*, 275 U.S. at 196); *Wheeler v. State*, 135 A.3d 282, 285, 304 (Del. 2016) ("warrants, in order to satisfy the particularity requirement, must describe what investigating officers believe will be found on electronic devices with as much specificity as possible under the circumstances;" because warrant failed to do so, it was

unconstitutional "general warrant"). *See also Cassady v. Goering*, 567 F.3d 628, 636 (10th Cir. 2009) ("It is not enough that the warrant makes reference to a particular offense; the warrant must 'ensure[ ] that [the] search is confined in scope to particularly described evidence relating to a specific crime for which there is demonstrated probable cause,'" quoting *Voss v. Bergsgaard*, 774 F.2d 402, 404 (10th Cir. 1985)).

In *United States v. Carey*, 172 F.3d 1268 (10th Cir. 1999), the court noted that reliance "on analogies to closed containers or file cabinets may lead courts to 'oversimplify a complex area of Fourth Amendment doctrines and ignore the realities of massive modern computer storage.'" *Id.* at 1275 (citation omitted). Rather, due to the ubiquity and immense storage capacity of computers, *Carey* held that digital searches require a "special approach" to avoid the dangers of improper rummaging through irrelevant private date. *Id.* at 1275 n.7. Because computers often contain "intermingled" information (i.e., files containing both relevant and irrelevant information), the officers "must engage in the intermediate step of sorting various types of documents and then only search the ones specified in a warrant." *Id.* at 1275. "Where officers come across relevant documents so intermingled with irrelevant documents that they cannot feasibly be sorted at the site, the officers may seal or hold the documents pending approval by a magistrate of the conditions and limitations on a further search through the documents." *Id.*

Yet another approach was proffered by Chief Judge Kozinski, concurring in *United States v. Comprehensive Drug Testing, Inc. (CDT III)*, 621 F.3d at 1178-79 (Kozinski, C.J., concurring). He suggested issuing

magistrates consider a number of guidelines to help prevent police access to information for which probable cause was not shown, including (1) having a search protocol in the warrant application so the magistrate could assess beforehand the adequacy of the intended protection of information not covered by the warrant, and (2) insist that the government forswear reliance on the plain view doctrine when searching for the needle of legitimate evidence in the haystack of private information. *Id.*

See generally Raphael Winick, *Searches and Seizures of Computers and Computer Data*, 8 Harv. J.L. & Tech. 75, 110 (1994) ("An analogy between a computer and a container oversimplifies a complex area of Fourth Amendment doctrine and ignores the realities of massive modern computer storage."); Susan W. Brenner & Barbara A. Frederiksen, *Computer Searches and Seizures: Some Unresolved Issues*, 8 Mich. Telecomm. Tech. L. Rev. 39, 60-63, 81-82 (2002) (setting forth some of the differences between searches of "paper documents and computer-generated evidence" and maintaining that courts should impose restrictions on computer searches such as limiting the search by file types, by requiring a second warrant for intermingled files, and by imposing time frames for conducting the search).

2. The particularity requirement and cell phone searches

The same conflicts regarding how to apply the particularity requirement to electronic data in general exist as well for cell phone data, only more so.

Many lower courts, like the court below (15a-17a), simply apply to cell phone warrants the same basic analysis they apply to warrants for computers, or file cabinets, while assessing "reasonableness" after the fact. *E.g.*, *United States v. Bishop*, 910 F.3d 335 (7th Cir. 2018), *cert. denied*, 139 S. Ct. 1590 (2019). This approach gives rise to the same type of conflict and confusion rampant when addressing warrants to search personal computers. It also ignores unique characteristics of cell phones that often make such an approach unnecessary.

For instance, many of these courts go so far as to uphold "all data" warrants that, like the warrant below, only identify the offense being investigated without further describing, even in general terms, what particular evidence or types of evidence are sought or why probable cause is thought to exist regarding such evidence. *State v. Johnson*, 576 S.W.3d at 222-23 (collecting cases). As previously noted, the primary justification for such "all data" searches of personal computers is that, "given the nature of computer files and the tendency of criminal offenders to mislabel, hide, and attempt to delete evidence of their crimes, it would be impossible to identify *ex ante* the precise files, file types, programs and devices that would house the suspected evidence." *United States v. Karrer*, 460 F. App'x 157, 162 (3rd Cir. 2012).[12]

Other courts, however, recognize that delegating to police officers the determination of what to search for and where undermines the purpose of the warrant requirement

12. Nothing in the warrant or warrant application here suggests any concern that files may have been mislabeled or hidden on Zocco's phone. (*See* 69a-82a).

to place an unbiased judge between law enforcement and the citizen. *Johnson v. United States*, 333 U.S. 10, 14 (1948) ("When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent."). As this Court has explained:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Id. at 13-14 (footnote omitted).

Since *Riley*, therefore, a number of courts have more strictly applied this Court's particularity precedents to cell phones, holding that the scope of cell phone warrants must be limited *where possible* to the locations and evidence supported by probable cause.[13] *E.g.*, *United States v. Russian*, 848 F.3d 1239, 1245 (10th Cir. 2017) ("importance of particularity requirement as it pertains to search of personal computers" also applicable to cell phones, and search warrant here insufficient because it "did not specify what material (e.g., text messages, photos, or call logs)" sought); *United States v. Winn*,

13. *See, e.g.*, *Ross*, 456 U.S. at 824 (scope of a lawful search is "defined by the object of the search and the places in which there is probable cause to believe that it may be found").

79 F. Supp. 3d 904, 919-20 (S.D. Ill. 2015) ("The major, overriding problem with the description of the object of the search—'any or all files'—is that the police did not have probable cause to believe that *everything* on the phone was evidence of the crime of public indecency" (emphasis in original)); *Matter of Black iPhone 4*, 27 F. Supp. 3d 74, 78 (D.D.C. 2014) (Proposed search of "[a]ll records" on a cell phone, without probable cause showing for such a broad request, is "precisely the type of 'general, exploratory rummaging in a person's belongings' that the Fourth Amendment prohibits," *citing Coolidge*, 403 U.S. at 467); *State v. McKee*, 413 P.3d 1049, 1058 (Wash. Ct. App.) (warrant authorizing search of all "electronic data" and "memory" of defendant's cell phone for unspecified evidence of child pornography or sexual exploitation of a child "was not carefully tailored to the justification to search and was not limited to data for which there was probable cause"), *rev'd on other grounds*, 438 P.3d 528 (Wash. 2019); *Commonwealth v. Perkins*, 82 N.E.3d 1024, 1033-34 (Mass. 2017) ("The conclusion that the warrant affidavit established a sufficient nexus to search" a cell phone "does not mean, however, that police had unlimited discretion to search every portion" of the device; here, the warrant established probable cause to search only the call logs and contacts for evidence of Perkins' suspected drug dealing); *Buckham v. State*, 185 A.3d 1, 17-19 (Del. 2018) (where requesting officers provided probable cause only to search for GPS data, warrant authorizing search of all cell phone data was plain error); *People v. Herrera*, 357 P.3d 1227, 1230-31 (Colo. 2015) (warrant authorizing search of cell phone for "indicia of ownership" and for text messages between defendant and named third party did not authorize search of messages involving others); *State v. Henderson*, 854 N.W.2d 616, 633 (Neb. 2014) ("Given the

privacy interests at stake in a search of a cell phone as acknowledged by the Court in *Riley*," "a warrant for the search of the contents of a cell phone must be sufficiently limited in scope to allow a search of only that content that is related to the probable cause that justifies the search"), *cert. denied*, 576 U.S. 1025 (2015). *See also The Post*-Riley *Search Warrant*, 69 Vand. L. Rev. at 629-38 (arguing that, in many "simple" cases, courts can and should avoid unnecessary "all data" searches of cell phones and instead limit searches to those apps or parts of the phone supported by probable cause).

* * *

Although *Riley* generally required that the search of a cell phone be conducted only pursuant to a search warrant, it understandably left to another day the details regarding that process. Given the conflicts among the lower courts and legal scholars, as well as the conflicts between the state court decision below and this Court's authority, this is the appropriate time and this is the appropriate case to resolve the important questions left open in *Riley* regarding how best to harmonize the heightened privacy interests in the vast quantities of personal information stored on one's cell phone, the particularity required by the Fourth Amendment, and the legitimate needs of law enforcement to investigate crimes for which it has probable cause while not resorting to an unconstitutional "general search." Until this Court acts, the conflicts identified in this Petition will continue to cause unnecessary confusion and litigation in the lower courts. *Cf.* Sup. Ct. R. 10(b) & (c).

CONCLUSION

For the reasons stated, the Court should grant a writ of certiorari to review the decision of the Wisconsin Court of Appeals.

Dated at Milwaukee, Wisconsin, June 26, 2024.

Respectfully submitted,

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APPENDIX

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APPENDIX A — DECISION OF THE COURT OF APPEALS OF THE STATE OF WISCONSIN, DISTRICT I, FILED OCTOBER 31, 2023

STATE OF WISCONSIN,
COURT OF APPEALS, DISTRICT I

Appeal No. 2021AP1412-CR
Cir. Ct. No. 2017CF2151

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KRIS V. ZOCCO,

Defendant-Appellant.

DECISION

DATED AND FILED OCTOBER 31, 2023

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, *Judge*. *Affirmed*.

Before WHITE, *C.J.*, DONALD, *P.J.*, and DUGAN, *J.*

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Appendix A

¶1 PER CURIAM. Kris V. Zocco appeals from an amended judgment of conviction[1] entered following a jury trial for first-degree reckless homicide, hiding a corpse, and strangulation and suffocation, and an order denying his postconviction motion. On appeal, Zocco contends that: (1) the evidence was insufficient to convict him of first-degree reckless homicide; (2) the warrant to search Zocco's cell phone violated the Fourth Amendment's particularity requirement; (3) the cadaver dog evidence admitted during his trial should have been excluded; (4) the admission of pornography evidence during his trial constituted plain error; (5) he was deprived of effective assistance of trial counsel; and (6) he is entitled to a new trial in the interest of justice. For the reasons discussed below, we affirm.

BACKGROUND

¶2 On May 1, 2015, Kelly Dwyer's skeletal remains were found along a rural road in Jefferson County. No clothes or personal items, such as a bag or shoes, were found with Dwyer's remains. According to the Jefferson County Medical Examiner, Dwyer's body was face-down on the ground and her right arm was "underneath her torso," her left arm was "bent backwards and resting on her back," her left leg was "extended with her lower leg kind of off to the side," and her right leg was "bent

1. The judgment of conviction was amended in this case to add restitution. Zocco does not challenge the restitution ordered in this case, so we do not discuss it further. *See Young v. Young*, 124 Wis. 2d 306, 317, 369 N.W.2d 178 (Ct. App. 1985) ("An issue which has not been briefed or argued on appeal is deemed abandoned.").

backwards behind, resting kind of in a bent position as well, upward."

¶3 Dwyer was last seen alive on Friday, October 11, 2013, at 2:37 a.m. in Milwaukee entering Zocco's apartment complex. Zocco and Dwyer were in a "friends with benefits"[2] relationship.

¶4 In 2017, Zocco was charged with first-degree reckless homicide, hiding a corpse, and strangulation and suffocation. In 2018, a ten-day jury trial took place. The State argued that Zocco either manually strangled Dwyer or forced his penis down her esophagus causing her to asphyxiate and die at his apartment. The State further argued that Zocco then transported her body out of his apartment in a travel golf bag and dumped her body in Jefferson County. The defense contended that the State had failed to present sufficient evidence that Zocco caused Dwyer's death. The jury found Zocco guilty as charged, and he was sentenced to a total of thirty-one years of initial confinement and nineteen years of extended supervision.

¶5 Zocco moved for postconviction relief. After briefing, the circuit court denied Zocco's postconviction motion without a hearing. This appeal follows. Additional relevant facts are discussed below.

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2. Zocco told police that he and Dwyer were friends that would get together occasionally to have sex, drink, and do cocaine.

Appendix A

DISCUSSION

¶6 On appeal, Zocco contends that: (1) the evidence was insufficient to convict him of first-degree reckless homicide; (2) the warrant to search Zocco's cell phone violated the Fourth Amendment's particularity requirement; (3) the cadaver dog evidence admitted during his trial should have been excluded; (4) the admission of pornography evidence during his trial constituted plain error; (5) he was deprived of effective assistance of trial counsel; and (6) he is entitled to a new trial in the interest of justice. We address each of Zocco's claims in turn.

I. Sufficiency of the Evidence

¶7 In this case, due to the decomposition of Dwyer's remains, no doctor or medical examiner could definitively determine the cause or manner of Dwyer's death.

¶8 Zocco contends that there was insufficient evidence supporting his first-degree reckless homicide conviction. Zocco asserts that "[a]bsent evidence of the cause or circumstances of [Dwyer's] death, the jury necessarily was left to speculate whether her death was criminal rather than accidental or natural and, if criminal, whether it was reckless rather than negligent."

¶9 When reviewing a sufficiency of the evidence claim, we may not substitute our "judgment for that of the trier of fact unless the evidence, viewed most favorably to the [S]tate and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have

found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). We will uphold a conviction, "[i]f any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt," and we do so even if we do not believe that the trier of fact should have found guilt based on the evidence. *Id.* "It is the function of the trier of fact, and not of an appellate court, to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *State v. Bodoh*, 226 Wis. 2d 718, 727, 595 N.W.2d 330 (1999) (citation omitted). Whether the evidence in a case is sufficient to sustain a guilty verdict is a question of law that we review independently. *State v. Smith*, 2012 WI 91, ¶24, 342 Wis. 2d 710, 817 N.W.2d 410.

¶10 In order to convict Zocco of first-degree reckless homicide, the State bore the burden of proving that: (1) Zocco caused the death of Dwyer; (2) Zocco caused Dwyer's death by criminally reckless conduct; and (3) the circumstances of Dwyer's death showed utter disregard for human life. *See* WIS. STAT. § 940.02(1) (2021-22);[3] WIS JI—CRIMINAL 1022.

¶11 To start, there is no dispute in this case that Dwyer is deceased. Evidence was presented at trial that human remains were found along a rural road in Jefferson County, and Dr. Donald Simley, a forensic dentist, identified Dwyer as the deceased using her dental records.

3. Zocco was convicted in 2018. However, because the relevant statutory language has not changed, all references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

¶12 While no doctor or medical examiner was able to definitively opine as to Dwyer's cause of death, the State presented a variety of other evidence to support that Zocco caused Dwyer's death and to rule out non-homicidal causes. As we discuss in detail below, the evidence at trial included, but was not limited to: surveillance footage, statements from Zocco, testimony from those close to Dwyer, phone records, information relating to Zocco's whereabouts following Dwyer's disappearance, testimony relating to Zocco's apartment, cadaver dog evidence, photos and a video from Zocco's cell phone, testimony from a woman that Zocco had a sexual relationship with, and testimony from a former girlfriend. "It is well established that a finding of guilt may rest upon evidence that is entirely circumstantial and that circumstantial evidence is oftentimes stronger and more satisfactory than direct evidence." *Poellinger*, 153 Wis. 2d at 501.

¶13 During the trial, the State presented surveillance footage from Zocco's apartment complex, which showed Dwyer entering the lobby alone on Thursday, October 10, 2013, at 9:22 p.m., leaving with Zocco approximately twenty minutes later, and returning after 10:00 p.m. Around midnight, on Friday, October 11, 2013, Dwyer and Zocco are seen leaving again and then returning at 2:37 a.m. After returning to Zocco's apartment complex at 2:37 a.m., Dwyer is not seen alive again on the video.

¶14 Zocco admitted to police that he and Dwyer were together on Thursday evening and early Friday morning. According to Zocco, they snorted cocaine and drank at Zocco's apartment, went to a local bar, and then returned to his apartment and had more drinks and cocaine. Dwyer

gave him oral sex, and then they both passed out. They woke up at approximately 9:00 a.m. and Dwyer said she was leaving. He then heard the door click.

¶15 On Friday morning, around 10:00 a.m., Zocco is seen on the surveillance video leaving his garage without Dwyer. Zocco's car returned at 10:22 a.m. and Zocco parked, got out, and went and opened his trunk. A detective testified that there was a gray object in the trunk, which could have been a golf bag, and a toolbox. The car left again at 10:37 a.m. and returned at 10:52 a.m.

¶16 Just after noon, Zocco returned to his car in a white t-shirt and a light hat. In a subsequent video clip at 1:43 p.m., the headlights of Zocco's car are on, he exits the car, and walks back toward the door to his apartment. At that point, Zocco has darker-type clothing. Zocco then shows up again at 3:34 p.m. at the back of his car with a rolling duffle-bag designed to hold bats, which he puts in his trunk. At 5:06 p.m., he approaches his car carrying a smaller, range-type golf bag on his shoulder and places it at the rear-passenger door of the car. Finally, at 6:15 p.m., Zocco's car leaves for the evening.

¶17 Zocco told police that after Dwyer left, he got ready for work and started to drive to his office to get a document, but changed his mind and came home, where he usually worked. After his workday ended, around 6:30 p.m., Zocco said that he took sports equipment, which included golf clubs, to his parents' house in Richfield because his own apartment was getting too crowded.

¶18 The following day, Saturday, October 12, 2013, Dwyer did not show up for work, which her coworkers said was unusual for her. Dwyer's coworkers testified that they could not reach her by phone or at her apartment. Dwyer's boss contacted Zocco. According to Dwyer's boss, Zocco returned her call approximately three or four hours later and said that he was out Christmas shopping that October morning. Zocco initially said that Dwyer left his apartment at "7-ish." Later, he said "9-ish." At another point, he said he was not sure.

¶19 Dwyer's mother, who shared a phone plan with Dwyer, testified that Dwyer's phone call activity ended on Thursday, October 10, 2013, although there was a text sent to her the next day at 7:29 a.m., to which Dwyer did not respond. GPS records suggested that Dwyer's phone remained in the area of Zocco's apartment last syncing with Apple servers at 10:08 a.m. on Friday, October 11th—right as Zocco left his garage.

¶20 The State also presented testimony that from the afternoon of Friday, October 11, 2013, until the late afternoon or evening of Saturday, October 12, 2013, approximately seventeen calls to Zocco's phone went to voicemail. An analysis of Zocco's phone records suggested that Zocco disabled or powered down his phone during that time period.

¶21 With regards to Zocco's whereabouts following Dwyer's disappearance, Erik Villarreal, a retired detective, confirmed that Zocco purchased some cheese at 9:55 a.m. on Saturday, October 12, 2013, in a store in

Windsor, Wisconsin. At 12:11 p.m. the same day, Zocco purchased a pair of shoes and a lemonade at a Delafield, Wisconsin Sports Authority store, which was thirteen miles from where Dwyer's remains were found. Villarreal determined that it was possible for Zocco to have left the shop in Windsor and deposit Dwyer's remains at the discovery site with enough time to arrive at the Sports Authority.

¶22 On October 16, 2013, police executed a search warrant at Zocco's apartment. The jury heard testimony that Zocco's apartment appeared to have been "very recently cleaned," and one of the bathrooms had a "strong odor of bleach[.]" Notably, the bathroom also had a towel hanging from the shower rod, but no shower curtain. It appeared that the shower curtain had been torn off.

¶23 In addition, the jury heard testimony that a cadaver dog was utilized at Zocco's apartment complex. Detective Carren Corcoran testified that her trained police cadaver dog, Molly, alerted multiple times at Zocco's apartment complex. Molly alerted to the odor of human remains on a shovel in the complex's trash room, outside one of the complex's dumpsters, at an empty parking stall, inside of a trash chute on Zocco's floor, and along the vertical seam of the exterior door to Zocco's apartment. Inside Zocco's apartment, Molly alerted on a pile of clothes near a washer and dryer, various locations within the guest bathroom, the master bed, a black t-shirt, and near the bottom of a Swiffer Sweeper mop. In addition, after Zocco's car was impounded, Molly alerted on the exterior driver's side door and at the trunk. Inside the car, she

alerted on a pouch and a garage door opener in the visor and the toolbox in the trunk.

¶24 The State also presented evidence that "a large quantity" of pornographic files were found on an external hard drive located in Zocco's residence. Out of the 1,020 pornographic files, 110 files involved themes of bondage, domination, sadomasochism (BDSM). Detective Sean Lips testified that this "include[d] . . . depictions of apparent nonconsensual conduct or conduct involving any kind of asphyxia[.]" In particular, Detective Lips detailed four files that were "representative of the bondage and domination theme and sexual assault and/or asphyxia-themed pornography found on [the] hard drive."

¶25 The State then presented information about Zocco and Dwyer's sexual relationship. The State played a video downloaded from Zocco's cell phone dated September 22, 2013, showing Zocco inserting his penis into Dwyer's mouth. The State also presented pictures taken within the same half-an-hour time frame. One of the images depicted Dwyer naked, face down on the bed with her ankles and hands restrained by men's neckties. A forensic nurse identified signs of asphyxiation in some of Dwyer's photographs. The nurse also stated that in the video "it's clear from the gagging that [Dwyer] was doing that she was struggling to take a breath."

¶26 In addition, the State presented testimony from other women who had been in a relationship with Zocco. Miss C. testified that she had engaged in a BDSM

relationship with Zocco for a little over a year.[4] Miss C. testified that every time she engaged in oral sex with him it felt like he was impeding her breathing. Miss C. further testified that as their relationship continued, Zocco regularly ignored her requests to stop during oral sex when she needed to breathe. She would get "frantic" and use "every ounce of [her] own strength to get away so that [she] could breathe." Miss C. also stated that Zocco would use neckties to restrain her ankles and wrists and sometimes he would pinch her nose while inserting his penis in her throat.

¶27 The jury also heard from Zocco's girlfriend, Meagan P., who believed their relationship was monogamous.[5] She recalled she had dinner plans with Zocco on Friday, October 11, 2013, but he showed up late. She tried contacting him to no avail, and when he finally arrived, he said that he had brought baseball equipment and his golf clubs to his mother's house. Meagan thought it was odd that he went to his mother's house and that she had not heard from him. Zocco told her that he had been having issues with his phone and needed to get a new SIM card.

¶28 After dinner on Friday, Zocco spent the night at Meagan P.'s condo. She noted that Zocco was "very sweaty" that night, "to the point that he sweat through the sheets[.]" Zocco also stayed over again on Saturday night

4. Miss C.'s real name was not used at trial for confidentiality purposes.

5. Meagan P.'s full name was not used at trial for confidentiality purposes.

and seemed to suffer from "night sweats." The next day, Zocco asked her to help him find a place where he could get his vehicle detailed.

¶29 In regards to Zocco's apartment, Meagan testified that she had helped decorate, including purchasing a shower curtain, bath mats, and a picture. When showed a photo of Zocco's guest bathroom, Meagan testified that the shower curtain and bath mats she had purchased were missing. Meagan also testified that they had the same cleaning person who would come every two weeks and clean her place and his place. She did not ever notice his place smelling like bleach and generally was not aware that he would clean. The cleaning person who Meagan and Zocco hired claimed she did not clean Zocco's apartment for two or three weeks before Dwyer's disappearance.

¶30 Meagan further testified that Zocco had a tall travel golf bag with wheels that was missing from the photos of his apartment. She also never knew Zocco to go Christmas shopping in October.

¶31 Lastly, the State presented testimony from those close to Dwyer indicating that they did not see any evidence that she was suicidal, depressed, or suffered medical conditions that could have resulted in sudden death. In addition, the State presented evidence that Dwyer was "upbeat," "very positive and full of life," and "very social."

¶32 In sum, the evidence the State presented at trial included, but was not limited to, the following: (1) Dwyer was last seen on video entering Zocco's apartment complex

at 2:37 a.m. on Friday, October 11, 2013, and was not seen alive on video again; (2) Dwyer's cell phone last synced with Apple servers Friday at 10:08 a.m. in the area of Zocco's apartment; (3) on Saturday, Zocco left Milwaukee County and made a purchase a mere thirteen miles from where Dwyer's body was ultimately found; (4) Zocco's cell phone was disabled or powered down from Friday until the late afternoon or evening on Saturday; (5) Zocco's bath mat, shower curtain, and a tall travel golf bag all went missing from his apartment; (5) a cadaver dog alerted to the odor of human remains in Zocco's apartment complex, his unit, and his car; (6) Zocco had a video of himself inserting his penis into Dwyer's mouth as she appeared to be struggling to take a breath; (7) one of Zocco's previous sex partners testified that as their relationship continued he would ignore her requests to stop during oral sex when she needed to breathe; and (8) those close to Dwyer did not see any evidence that she was suicidal, depressed, or suffered medical conditions that could have resulted in her sudden death.

¶33 Based on our review of the evidence presented, we conclude that there was sufficient evidence for the jury to convict Zocco of first-degree reckless homicide. We cannot say that the evidence "viewed most favorably to the [S]tate and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *Poellinger*, 153 Wis. 2d at 507.

II. Cell Phone Search Warrant

¶34 During its investigation, the State sought and secured multiple search warrants. At issue on appeal is the warrant to search Zocco's cell phone, which sought to conduct a "forensic examination" of the entire "contents" of Zocco's cell phone for evidence of the crimes of homicide, hiding a corpse, or various drug offenses. The warrant described the item to be searched as a "black Motorola 4G Verizon brand touch screen cellular phone, placed on Milwaukee Police Department inventory 13035699." In support of the warrant, Detective Tammy Tramel-McClain provided an affidavit detailing the investigation into Zocco's drug use and Dwyer's disappearance. This included describing the surveillance footage showing Dwyer entering Zocco's apartment and Zocco's statements to the police that him and Dwyer used drugs and engaged in oral sex.

¶35 Prior to trial, Zocco moved to suppress the fruits of several of the State's search warrants, including the cell phone warrant. In regards to the cell phone warrant, Zocco contended that it was "overly broad" and "fail[ed] to establish a link between Mr. Zocco's phone and the charges identified." The motion further argued that, "even if the warrant affidavit supported a probable cause determination that authorized a search of all communications on [his] phone, it failed to support expanding that search into the fishing expedition that occurred here into photographs and recordings."

¶36 The circuit court denied Zocco's motion to suppress. The court did not specifically discuss the cell

phone warrant, but generally concluded that each search warrant issued was supported by probable cause.

¶37 Postconviction, Zocco renewed his challenge to the cell phone search warrant. The circuit court rejected Zocco's argument as a "hyper-technical reading of the Fourth Amendment's requirements."

¶38 The Fourth Amendment requires that a search warrant state with particularity "the place to be searched, and the persons or things to be seized." *State v. Noll*, 116 Wis. 2d 443, 450, 343 N.W.2d 391 (1984); U.S. CONST. amend. IV. The purpose of this requirement is to prevent "the government from engaging in general exploratory rummaging through a person's papers and effects in search of anything that might prove to be incriminating." *Noll*, 116 Wis. 2d at 450.

¶39 In reviewing an order granting or denying a motion to suppress, we will uphold the circuit court's findings of fact unless they are clearly erroneous, and we independently review the application of the facts to the constitutional principles. *State v. Hailes*, 2023 WI App 29, ¶12, 408 Wis. 2d 465, 992 N.W.2d 835. The interpretation of a warrant's language is a question of law that we review independently. *State v. Pinder*, 2018 WI 106, ¶24, 384 Wis. 2d 416, 919 N.W.2d 568.

¶40 Here, the warrant for Zocco's cell phone was not overbroad. As the postconviction decision observed, the cell phone warrant "identified the contents of the defendant's cell phone as the specific place and device to

be searched, and it identified evidence of unlawful activity related to drug crimes and the disappearance of the victim as the object of the search."

¶41 Zocco contends that the search warrant and affidavit failed to identify the specific evidence the officers sought, where on the phone the evidence would be found, why the police suspected that evidence would be on his phone, and why police needed to search the entire phone.

¶42 In response, the State points to a Seventh Circuit case—*United States v. Bishop*, 910 F.3d 335 (7th Cir. 2018). We find *Bishop* persuasive. Similar to this case, in *Bishop*, the defendant challenged a search warrant authorizing a general search of his cell phone as violating the Fourth Amendment's particularity requirement. *Id.* at 336. The court acknowledged that the warrant allowed the police to "look at every file on his phone," but stated that the defendant was "wrong to think that this makes a warrant too general." *Id.* The court observed that "[c]riminals don't advertise where they keep evidence. A warrant authorizing a search of a house for drugs permits the police to search everywhere in the house, because 'everywhere' is where the contraband may be hidden." *Id.* at 336-37. The court stated that "[i]t is enough . . . if the warrant cabins the things being looked for by stating what crime is under investigation." *Id.* at 337. The court then concluded that the warrant was "as specific as circumstances allowed" because the police did not know where on the phone the defendant kept the evidence. *Id.* at 337-38.

¶43 Likewise, here, the search warrant permitted the police to search any area of Zocco's phone. However, the warrant limited the search to evidence of specific crimes—homicide, hiding a corpse, and drug crimes. *See id.* at 337. As in *Bishop*, police would not have known where on the phone Zocco kept the evidence. Thus, we reject Zocco's argument that the search warrant was overbroad.[6]

III. Cadaver Dog Evidence

¶44 Prior to trial, Zocco moved for an order to bar the State from presenting "all testimony related to canine cadaver searches performed in the investigation of this case." Zocco argued that the cadaver dog testimony was irrelevant; the probative value of the testimony was outweighed by the danger of unfair prejudice, confusion of issues, and misleading the jury; the evidence was not lay opinion testimony; and the evidence failed to meet the requirements for expert testimony under WIS. STAT. § 907.02.

¶45 The circuit court rejected Zocco's arguments. The court stated that the evidence was relevant because "it arguably shows that there was a cadaver in the defendant's apartment, which the [S]tate contends was Ms. Dwyer."

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6. In the alternative, the State argues that even if the warrant was overbroad, suppression was inappropriate because the police relied on the warrant in good faith. Because we conclude that the warrant was not overbroad, we do not reach the State's good faith argument. *See State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("[C]ases should be decided on the narrowest possible ground[.]").

In addition, the court determined that Detective Corcoran qualified as an expert witness and the evidence was admissible. The court observed that Detective Corcoran and Molly, the cadaver dog, had "deep backgrounds in cadaver searches, [had] completed extensive trainings and achieved multiple certifications, and [were] qualified to testify before," and "that [Detective] Corcoran uses reliable principles and methods and that her testimony will be the result of reliable methods."

¶46 Postconviction, Zocco renewed his arguments that the cadaver dog evidence should not have been admitted. The circuit court again rejected Zocco's arguments, stating that it was standing by its decision to admit the evidence. The court stated that "the cadaver dog evidence in this case more than met the threshold requirements for the admissibility of the expert opinion evidence, and 'any deficiencies in the theory, methodology or application' could be (and indeed were) explored on cross-examination."

¶47 As in his postconviction motion, on appeal, Zocco contends that the cadaver dog evidence was inadmissible. We disagree.

¶48 We generally review a circuit court's ruling on the admissibility of evidence for an erroneous exercise of discretion. *See State v. Miller*, 231 Wis. 2d 447, 467, 605 N.W.2d 567 (Ct. App. 1999). A circuit court properly exercises its discretion if it "examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion." *Martindale v. Ripp*, 2001 WI 113, ¶28, 246 Wis. 2d 67,

629 N.W.2d 698. A circuit court's decision will be upheld "unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion." *State v. Payano*, 2009 WI 86, ¶51, 320 Wis. 2d 348, 768 N.W.2d 832 (citation omitted). If a circuit court "fails to set forth its reasoning, appellate courts independently review the record to determine whether it provides a basis for the circuit court's exercise of discretion." *State v. Hunt*, 2003 WI 81, ¶44, 263 Wis. 2d 1, 666 N.W.2d 771 (citation omitted).

¶49 First, the circuit court properly concluded that the cadaver dog evidence was relevant. Relevant evidence has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01. As the circuit court observed, the cadaver dog evidence "arguably shows that there was a cadaver in the defendant's apartment[.]" If Dwyer died in Zocco's apartment, this made it more probable that Zocco caused her death.

¶50 Zocco argues that Molly could not differentiate between a cadaver's odor and odors that a living person sheds, such as hair, blood, saliva, skin cells, or fingernails. Thus, Zocco suggests that Molly's alerts to locations where one would expect remains shed by living humans to be located did not make any fact of consequence any more likely than without the evidence.

¶51 At trial, however, Detective Corcoran testified that training dogs to find "very small amounts" of blood

"was not useful" because "most everybody's home has some blood" in it. As a result, Detective Corcoran trained Molly using larger sources of human remains to prevent her from alerting to extremely small amounts of biological materials.

¶52 Zocco also contends that Molly was not trained in detecting residual odors and Molly's performance was "spotty" and "uncertain." However, Molly's training logs revealed that she did successfully detect residual cadaver odors on thirteen occasions. Further, while there were occasions that Molly missed odors from a known source, and alerted in some unsolved cases, this does not undermine her positive alerts in other cases. *See generally State v. Bucki*, 2020 WI App 43, ¶69, 393 Wis. 2d 434, 947 N.W.2d 152 (stating that the admissibility of expert opinion testimony is not conditioned on it being "unassailable").

¶53 Second, we are not persuaded that the probative value of the evidence was substantially outweighed by prejudice. Wisconsin Stat. § 904.03 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]" Zocco suggests that the evidence was unfairly prejudicial due to a canine's inability to differentiate between the odors of a decaying cadaver and the shed skin cells or hair of a living person. As noted above, however, the jury was presented with evidence that Molly was intentionally trained to detect larger sources of decaying human remains. Further, the jury heard that there were places Molly did not alert where one would expect to find biological materials, such as one of the bathrooms.

¶54 Finally, we reject Zocco's argument regarding reliability. Zocco argues that the circuit court erroneously exercised its discretion by focusing its analysis on the reliability of the dog or the alerts rather than the reliability of the human interpretation of the alerts. In support, Zocco points to *United States v. Burgos-Montes*, 786 F.3d 92 (1st Cir. 2015). *Burgos-Montes* notes that "[i]t is one thing to use a dog to identify a place in which one might look to see if human remains are present. It is quite another to use a dog to identify dirt that was once exposed to a human cadaver." *Id.* at 116. As the State observes, *Burgos-Montes* did not hold that cadaver dogs are inherently unreliable. Rather, the court stated that the government had failed to present sufficient evidence establishing the canine's ability to distinguish between a human cadaver and other remains or the handler's cues. *Id.*

¶55 In contrast, here, the State presented evidence demonstrating Molly's reliability. As stated above, Molly demonstrated her ability to detect the residual odor of human remains on thirteen occasions. Molly's training logs revealed that over an eight-year span, she was presented with 224 known sources of human remains, located the remains correctly 204 times, missed nineteen times, and only had a false alert one time at the start of her career. Therefore, we conclude that the circuit court properly exercised its discretion when it admitted the cadaver dog evidence. *See Miller*, 231 Wis. 2d at 467.

IV. Hard Drive Evidence

¶56 In 2013, pursuant to a search warrant, police searched an external hard drive found at Zocco's apartment for any files "which appear to contain or have any depictions of child pornography." A forty-four-page report was prepared documenting the child pornography and including BDSM and rape fetish pictures. After the completion of the search, Zocco was convicted of multiple child pornography charges. On appeal, Zocco argued, and this court rejected, that the seizure of the hard drive exceeded the scope of the warrant. *State v. Zocco*, 2019 WI App 54, 388 Wis. 2d 622, 935 N.W.2d 554, unpublished slip op. ¶¶1, 28 (WI App 2019).

¶57 Subsequently, in preparation for the trial in this case, police took another look at the hard drive, resulting in a 333-page report with detailed information regarding 1,525 images and videos depicting pornography. As stated above, 110 files involved themes of bondage, domination, sadomasochism (BDSM). Detective Lips testified that this "include[d] . . . depictions of apparent nonconsensual conduct or conduct involving any kind of asphyxia[.]" Detective Lips also detailed four files that were "representative of the bondage and domination theme and sexual assault and/or asphyxia-themed pornography found on [the] hard drive."

¶58 In his postconviction motion, Zocco argued that the evidence gathered from his hard drive should have been suppressed as an unconstitutional warrantless search. Zocco argued that even if the seizure and search

of the hard drive was proper in his prior case, this search was not. In addition, he argued that the State violated his due process rights by misleading the jury regarding the BDSM pornography on Zocco's hard drive. Because trial counsel did not object to these issues, Zocco asserted he was entitled to a new trial due to plain error.

¶59 In its postconviction decision, the circuit court rejected Zocco's challenge to the search of the hard drive because the law was unsettled. The court also found that the record did not support Zocco's due process claim that the evidence was false or misleading. Accordingly, the court found that there was no plain error. Zocco renews these claims on appeal.

¶60 "The plain error doctrine allows appellate courts to review errors that were otherwise waived by a party's failure to object." *State v. Jorgensen*, 2008 WI 60, ¶21, 310 Wis. 2d 138, 754 N.W.2d 77. A "plain error" is an "error so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time." *Id.* (citation and internal quotation marks omitted). The defendant has the burden of proving that an unobjected to error is an obvious, substantial, and fundamental error. *Id.*, ¶23. An allegation of plain error presents a question of law that this court reviews independently. *State v. Bell*, 2018 WI 28, ¶8, 380 Wis. 2d 616, 909 N.W.2d 750.

¶61 Like the circuit court, we conclude that Zocco has failed to establish plain error when the police accessed his hard drive in preparation for trial.

¶62 In *State v. Betterly*, the defendant was suspected of falsely reporting a ring as stolen in order to collect insurance. *Id.*, 191 Wis. 2d 406, 412, 529 N.W.2d 216 (1995). The defendant was taken into custody on an unrelated matter, and during an inventory search of his person, jail staff found a ring in his pocket and placed it in a jail property box. *Id.* at 414-15. Later that day, the ring was removed from the property box and provided to the officer investigating the fraud. *Id.* at 415. The ring was identified as the stolen ring. *Id.* On appeal, our supreme court examined whether the removal of the ring from the jail property box violated the defendant's Fourth Amendment rights. *See id.* at 415, 417. The court concluded that the police could take a "second look" at the items as long as the "second look" did not exceed the extent of the first search. *Id.* at 418.

¶63 Subsequently, in *State v. Burch*, this court certified several questions of law to our supreme court, including whether an examination of a cell phone download was permissible under the "second look" doctrine. *Id.*, No. 2019AP1404-CR, 2020 Wisc. App. LEXIS 1217 (WI App Oct. 20, 2020). In light of the certification, we conclude that whether the police could take a "second look" at Zocco's hard drive was not well-settled. If it was, this court would not have certified it to our supreme court.[7] Accordingly, we reject Zocco's argument that the search of the hard drive constituted plain error. *See State v. Nelson*, 2021 WI App 2, ¶48, 395 Wis. 2d 585, 954 N.W.2d 11 (stating that

7. We note that the Wisconsin Supreme Court did not ultimately address the merits of this issue. *See State v. Burch*, 2021 WI 68, ¶¶15, 35, 398 Wis. 2d 1, 961 N.W.2d 314.

"[a]kin to the ineffective assistance of counsel requirement that the law must be 'clear' and 'settled' before it can be said that counsel performed deficiently . . . for an error to constitute 'plain error,' the error must be not only fundamental and substantial but also 'obvious' or 'clear'" (citations omitted)); *United States v. Hosseini*, 679 F.3d 544, 552 (7th Cir. 2012) (stating that an error cannot be plain if the law is unsettled).

¶64 Likewise, we reject Zocco's argument that the State violated his right to due process by presenting or relying on evidence that it knew or should have known was false. As the postconviction court found, Zocco's claim is not supported by the record. Contrary to Zocco's suggestion, the State did not mislead the jury into believing that *all* 110 BDSM files featured some form of breath deprivation. Rather, Detective Lips testified that the files "*include[d]* depictions of apparent nonconsensual conduct or conduct involving any kind of asphyxia." (Emphasis added). In addition, even if Detective Lips' testimony can be interpreted to represent that most of the images and videos involved breath deprivation, the record does not establish this as false or that the prosecutor knew it was false. The absence of file names explicitly containing terms consistent with breath deprivation does not mean those files did not include such behavior. Thus, we conclude that Zocco has not established a due process violation that rises to the level of plain error. *See Jorgensen*, 310 Wis. 2d 138, ¶23.

V. Ineffective Assistance of Counsel

¶65 Zocco contends that if trial counsel failed to preserve his challenges to the search of his cell phone, the cadaver dog evidence, the search of Zocco's hard drive, and Detective Lip's analysis, then trial counsel was ineffective.

¶66 To prevail on a claim of ineffective assistance of counsel, a defendant must show that his or her attorney's performance was deficient as well as prejudicial to his or her defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To demonstrate deficient performance, the defendant must show that counsel's actions or omissions "fell below an objective standard of reasonableness." *Id.* at 688. To demonstrate prejudice, a defendant must show that counsel's deficient performance was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. We need not address both prongs of the *Strickland* test if the defendant does not make a sufficient showing on one of the prongs. *Id.* at 697.

¶67 When deciding whether a defendant is entitled to an evidentiary hearing based on an ineffective assistance of counsel claim, we first independently determine "whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief." *State v. Ruffin*, 2022 WI 34, ¶27, 401 Wis. 2d 619, 974 N.W.2d 432. "Whether the record conclusively demonstrates that the defendant is entitled to no relief is also a question of law we review independently." *State v. Spencer*, 2022 WI 56, ¶23, 403 Wis. 2d 86, 976 N.W.2d 383 (citations omitted).

"If the record conclusively demonstrates the defendant is not entitled to relief, the circuit court has the discretion to decide whether to hold a hearing, which we review for an erroneous exercise of discretion." *Id.*

¶68 Here, the record conclusively shows that Zocco is not entitled to relief. As discussed above, in regards to the search of Zocco's cell phone, the cadaver dog evidence, and Detective Lips' testimony, Zocco's arguments fail. Trial counsel cannot be ineffective for raising a meritless argument. *See State v. Wheat*, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 647 N.W.2d 441. In regards to the search of the hard drive, as discussed above, the law is unsettled. When the law is unsettled, trial counsel is not ineffective for failing to raise the issue. *See State v. Breitzman*, 2017 WI 100, ¶48, 378 Wis. 2d 431, 904 N.W.2d 93.

¶69 Therefore, the record conclusively shows that Zocco is not entitled to relief and the circuit court properly denied Zocco's postconviction motion without an evidentiary hearing.

VI. New Trial in the Interest of Justice

¶70 Finally, Zocco argues that "the combined effect of the identified errors" entitle him to a new trial in the interest of justice because the "real controversy has not been fully tried." *See* Wis. Stat. § 752.35. "The power to grant a new trial when it appears the real controversy has not been fully tried 'is formidable, and should be exercised sparingly and with great caution.'" *State v. Sugden*, 2010 WI App 166, ¶37, 330 Wis. 2d 628, 795 N.W.2d 456 (citation

omitted). We exercise our power to grant a discretionary reversal only in exceptional cases. *Id.*

¶71 Based on our review of the record, we conclude that this is not an exceptional case warranting a new trial in the interest of justice. As discussed above, we reject Zocco's arguments and he has not presented any other basis that would justify the exercise of our discretionary reversal power. Therefore, for all of the reasons above, we affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

APPENDIX B — DECISION AND ORDER OF THE CIRCUIT COURT OF THE STATE OF WISCONSIN, MILWAUKEE COUNTY, FILED JULY 28, 2021

BY THE COURT:
DATE SIGNED: July 28, 2021

Electronically signed by Judge Jeffrey A. Wagner
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT
Branch 38

MILWAUKEE COUNTY

Case No. 17CF002151

STATE OF WISCONSIN,

Plaintiff,

vs.

KRIS V. ZOCCO,

Defendant.

DECISION AND ORDER
DENYING MOTION FOR POSTCONVICTION RELIEF

On September 21, 2020, the defendant by his attorney filed a Rule 809.30 postconviction motion for a new trial based on claims of error, newly discovered evidence, and ineffective assistance of trial counsel. The court ordered a briefing schedule in this matter, to which the parties have

responded.[1] The court has reviewed the record as well as the parties' extensive postconviction arguments and exhibits. For the reasons set forth herein, the court denies the defendant's motion without a hearing as to all claims.

On October 5, 2018, a jury found the defendant guilty of one count of first-degree reckless homicide, one count of hiding a corpse, and one count of strangulation and suffocation. On December 14, 2018, the court imposed a total sentence consisting of 31 years of initial confinement and 19 years of extended supervision.

The State presented a mountain of circumstantial evidence during the defendant's nine-day jury trial as detailed in pages two to twenty of its postconviction response. To summarize, the victim in this matter, Kelly Dwyer, disappeared the morning of Friday, October 11, 2013. She was last seen alive walking with the defendant into his apartment complex at 2:37 a.m. Numerous witnesses at trial established that she was never seen alive again, and no other indicators, such as phone use, social media posting, or banking activity suggested otherwise. On May 1, 2015, her skeletal remains were found in Jefferson County. Surveillance footage from the defendant's apartment showed him entering with the victim and leaving later in the morning alone. There is no footage of the victim leaving the apartment building.

1. The defendant's postconviction motion was originally assigned to Judge David Borowski as the successor to this court's former homicide calendar; however, after the briefs were filed, the case was transferred back to this court, which presided over the relevant court proceedings, heard all the evidence, and made numerous evidentiary and other rulings.

When police observed the defendant's apartment, they noted that his spare bathroom was missing its mats and shower curtain (which appeared to have been torn off), and testimony from the defendant's cleaners and then-girlfriend (not the victim) established they had recently gone missing. Also missing was a travel golf bag, five feet ten inches in height; however, the golf clubs that were stored in the bag were not. Police also found recently purchased cleaning supplies. A scouring pad and Swiffer pad found in the garbage contained a mixture of the defendant's and the victim's DNA.

The defendant provided investigators with several inconsistent or incredible statements about his activities around the time of Dwyer's disappearance and never mentioned his girlfriend, Megan P. Megan P. described the defendant's odd behavior on the weekend of the victim's disappearance, including his having night sweats. She also stated that she did not hear from him on Saturday, October 12, from 7:30 a.m. to 3:00 p.m. He told her that he was having issues with his cell phone and that he had driven to Madison that day to buy her parents cheese as a Christmas present. On October 13, he expressed a desire to move out of state. He also asked her for assistance in finding a place to get his car detailed.

Based on information that the defendant had traveled to Madison, investigators were able to piece together a timeline of his movements on October 12, despite his phone being powered down. His purchase activity at a cheese store in Windsor and a Sports Authority in Delafield, where he bought shoes, placed him only thirteen miles from where the victim's body was found in Jefferson

County. The timeline indicated the defendant would have had more than sufficient time to drive to the location where the body was found. Entomologists explained that the defendant's activity on that date also fell within the expected time range of when the victim's body was likely to have been deposited.

In addition to cadaver dog evidence and BDSM[2] porn video discussed *infra,* police also located a video on the defendant's phone depicting him inserting his penis into the victim's mouth as she appeared unconscious and "gurgling" for air. A sexual assault nurse examiner (SANE) testified that this showed signs of strangulation and positional asphyxia. Additionally, another acquaintance of the defendant's testified about her own sexual experiences with him. She testified that when they would engage in BDSM sex acts, the defendant would routinely ignore their previously agreed upon safety taps. She testified that she was bound at times and would be unable to breathe because the defendant's penis was down her throat and that he sometimes pinched her nose. She explained that she was sometimes frantic and would have to use all of her strength to try to get away from him. She stated that she would get "spacey" and even blacked out at times. She eventually ended contact with the defendant after he forced anal sex by holding her down after she explained that she could not engage in that activity due to a recent surgery. After nine days of testimony, the jury deliberated for a little more than three hours before returning guilty

2. BDSM is a variety of often erotic practices or roleplaying involving bondage, discipline, dominance and submission, sadomasochism, and other related interpersonal dynamics.

verdicts on all three counts.

The defense first argues that the October 18, 2013 warrant to search the contents of the defendant's cell phone for evidence of crimes violates the Fourth Amendment's particularity requirement, and requires suppression. The defense contends that the third search warrant, dubbed the "cell phone warrant," suffers from the following defects:

- Nothing in the search warrant or supporting affidavit identifies what specific evidence the officer sought or was authorized to search for and seize.

- Nothing in the supporting affidavit suggests where on the cell phone any specific evidence or type of evidence might be found.

- Nothing in the supporting affidavit suggests what probable cause supports the belief either that any specific evidence exists on the phone or where on the cell phone it might be found.

- Nothing in that affidavit suggests probable cause why it might be necessary to search all of the data on the phone rather than specific locations.

(Defendant's motion p. 13).

Appendix B

Pretrial, trial counsel had moved for the suppression of evidence "based upon defective warrants and defective successive warrants." The motion specified that its challenges to the search warrants were based on "A) failure to state probable cause; B) false statements or statements made in reckless disregard for the truth contained in the search warrants; C) authorizing searches beyond the probable cause affidavit contained in the warrants; and D) failing to establish an evidentiary link between the items sought to be searched and the evidence contained in the search warrant affidavits." (10/30/17 warrant suppression motion p. 1).

As relevant here, the suppression motion argued that the October 18th search warrant was "overly broad and fails to establish a link between Mr. Zocco's phone and the charges identified." (Id. p. 7). The motion further argued that, "even if the warrant affidavit supported a probable cause determination that authorized a search of all communications on Mr. Zocco's phone, it failed to support expanding that search into the fishing expedition that occurred here into photographs and recordings. Any connection in the warrant affidavit between photos or recordings on Mr. Zocco's phone and any criminal activity is speculative, conclusory or absent." (Id. p. 8). The State filed a written response to the defendant's suppression motion, *see* 12/4/17 response; subsequently, on December 7, 2017, the defense amended their motion to include the argument that the search of the CDRs and external hard drives exceeded the scope of the search authorized. The parties addressed the search warrant issues, as well as other issues, before the court at several hearings; the

court denied the suppression arguments on January 22, 2018.

Postconviction, the defense acknowledges that the circuit court explained its basis for upholding the search warrants and that the issue is therefore preserved for appellate review, however, it suggests that reconsideration is appropriate. (Defendant's motion pp. 10-11). The court stands by its prior decision regarding the search warrants. Further, the court finds that reversal is not warranted on the basis of plain error, ineffective assistance of counsel, or in the interest of justice.

Probable cause is a '"flexible"' and '"practical commonsense decision,"' *State v. Silverstein,* 2017 WI App 64, 1122, 378 Wis. 2d 42, 902 N.W.2d 550 (citations omitted), and it means a "fair probability" that evidence of a crime will be found, *Illinois v. Gates,* 462 U.S. 213, 238 (1983). "In order to satisfy the particularity requirement, the warrant must enable the searcher to reasonably ascertain and identify the things which are authorized to be seized." *State v. Sveum,* 2010 WI 92, ¶27, 328 Wis. 2d 369, 787 N.W.2d 317 (quoting *State v. Noll,* 116 Wis. 2d 443, 450-51, 343 N.W.2d 391 (1984)).

The court rejects any hyper-technical reading of the Fourth Amendment's requirements. The cell phone search warrant at issue here identified the contents of the defendant's cellphone as the specific place and device to be searched, and it identified evidence of unlawful activity related to drug crimes and the disappearance of the victim as the object of the search. In so identifying,

the warrant enabled the searcher to reasonably ascertain and identify that which was authorized to be seized. In addition, regarding the defendant's argument that there was "no showing of probable cause that any evidence of the alleged offenses would even exist on the phone, let alone that such evidence would exist in the images files on that phone," (Defendant's motion p. 14), this argument fails to account for the fact that the defendant was himself at the last place the victim was ever seen, was a suspect in the suspected homicide and mutilation/hiding of the victim's corpse, was a suspect—from his own admissions—in several drug offenses, and he had access to the phone in question in the hours leading up and following to the victim's disappearance. Trial counsel were not ineffective for failing to litigate the particularity argument, and relief is not warranted through any other framework. *See State v. Jorgensen,* 2008 WI 60, 121, 310 Wis. 2d 138, 754 N.W.2d 77 (plain error doctrine to be used sparingly); *see also State v. Sugden,* 2010 WI App 166, ¶37, 330 Wis. 2d 628, 795 N.W.2d 456 (Discretionary reversal in the interest of justice to be exercised only rarely and only in exceptional circumstances).

Claims two through four of the defendant's motion deal with the cadaver dog evidence that was the subject of a pretrial *Daubert* hearing and was then presented to the jury through the testimony of Officer Caren Corcoran. The detailed factual history of the use of the cadaver dog evidence is set forth at pages four to nine of the State's response:

Appendix B

Defense challenged the admission of cadaver dog evidence under *Daubert* and §§ 904.01 & 904.03. (Def. Expert Mot. 10/3 1/17; Def. Response Expert 3/6/18.) At a pre-trial hearing, Officer Caren Corcoran testified extensively about her experience training and handling human remains detection dogs, including with her own company Canine Search Solutions, LLC. (Tr. Corcoran 12/21/2017 at 7-10, 31-33, 12/4/17 Attach.; 12/4/17 Mot. Ex.)7 She estimated that prior to her involvement in the current case, she had been involved in about 200 missing person's cases, of which about half were under suspicious circumstances. (*Id.* at 26.) She stated that she had testified several times in suppression hearings and in three jury trials, and was declared an expert in Illinois. (*Id.* at 28, 71-73.) Corcoran explained that we all have a unique scent while alive, however we become a generic cadaver odor once dead. (*Id.* at 29.)

She testified that she was familiar with the scientific research concerning human remains detection, and noted one particular forensic anthropologist, Arpad Vass, who's research was sponsored by the FBI and who had identified a number of chemical compounds which the trained dogs detect and was attempting to create a tool which could mimic what the dogs do. (Id. at 11 -12; 33-35.) Corcoran opined that properly trained dogs can detect the odor of human remains where there was no longer

any human remains present, and specifically mentioned one investigation in which she was involved where no remains were located but the dog's detection of the odor of human remains was corroborated by the defendant's inculpatory statement. (Id. at 83.)

Corcoran explained the certification process for cadaver dogs, indicating that she is also a certifying official. (Id. at 17-21.) She explained that "[r]eliability of a detection dog is generally established by training because the field is uncontrolled." (Id. at 20.) Corcoran explained that when performing searches, she needs basic information regarding the case because factors, such as having a very aged case, may mute the sensing. (Id. at 24-25.) She explained "the dog only provides us with information whether the odor of human remains is present or not. And then it's up to everyone else to take that information and work with it." (Id. at 25.) She also explained how her dogs were able to detect residual odor, providing an example of one instance where a dog alerted despite the fact that the human blood had been cleaned up and painted over. (Id. at 74.)

Corcoran explained she obtained k9 Molly, who assisted in the current case, in 2008, and she "trained her, got her certified, and worked her as my primary cadaver dog from 2009 until 2015," also re-certifying Molly yearly. (Id. at

16.) Corcoran testified that Molly was certified at the time of the current investigation by agencies which are considered in the field to be appropriate national certifying agencies. (Id. at 53-58, 61, 63.) Corcoran presented Molly's training logs, testifying that Molly's accuracy in her training problems was 91% based on correctly locating 204 out of 224 sources of human remains, missing only 19 sources and having falsely identified only one time. (Id. at 21-22, 64-66.) She testified that Molly has been trained to respond to human tissue, skin, bone, hair, blood, teeth, and placenta but not fingernails. (Id. at 48-50.) Corcoran explained that her first dog, Cleo, would identify too much data from items such as small drops of blood that were unrelated to the investigation, so Officer Corcoran trained Molly to only identify large sources of human cadaver odor. (Id. at 30, 52, 76-78.) Corcoran explained that dogs accustomed to higher "thresholds" may fail to detect when only small amounts are present. (Id. 75-76.) When defense asked whether Molly would incorrectly identify hair or blood which was shed from a living human as odor of a corpse, Corcoran explained Molly would not because there would have to be a much larger amount of human decomposition odor present for Molly to indicate. (Id. 50-51.) Corcoran did acknowledge, however, that if a large amount of someone's hair was cut off, that could cause a cadaver dog to indicate. (Id. at

73.) However, because she trained Molly with larger amounts of blood, Corcoran indicated that Molly may miss such smaller amounts. (Id.) She also explained she did not have a precise measurement of how much hair or blood would need to be present before Molly would alert that she detected the odor of human remains. (Id. at 84.) She also acknowledged that a handler could unknowingly cue their dog, causing a false result. (Id. at 44.)

Considering all relevant factors and admitting the evidence, the trial court ruled Corcoran and Molly satisfied the *Daubert* standard. (Tr. 3/23/18 at 5-7.) The court also found the evidence relevant because it "arguably shows that there was a cadaver in the defendant's apartment, which the state contends was [the victim]." (Id. at 5.)

At trial, Officer Corcoran again testified to her training, experience, and certifications. (Tr. 10/2/18 AM at 50-54.) She again testified about how to train human remains detection dogs in general, as well as with regards to Molly's specific training and certification including Molly's miniscule rate of false positives (which only occurred when Molly was young and inexperienced). (*Id.* at 54-6 1; 64; 66-69; 100.01, 104, 14 I. 142.) She explained again how people have distinct odors while alive, but become a generic human cadaver odor after death which

is distinct from animal remains. (Tr. 10/2/18 AM at 63.) She also explained how a young dog may or may not alert to animal remains in training until they learn they only get rewarded for detecting human remains. (*Id.* at 63.) She testified how in an open air environment, such as outside, odor "can be blown in the wind and carry quite a distance," causing a dog to alert a distance away from the source material. (*Id.* at 65, 68.) She again testified how detecting small amounts of odor from drops of blood and the like was not very useful, so she specifically trained Molly to cue only for larger sources of odor. (*Id.* at 61, 100, 139.) She also explained how Molly primarily was trained with the odor source present, but she also did training exercises involving residual odor. (*Id.* at 66-67.) Corcoran testified Molly would sometimes indicate but sometimes miss the indication of residual odor. (*Id.*) Corcoran did not testify that there was ever a time this caused Molly to provide a false alert. (*Id.*)

Corcoran told the jury Molly detected human remains odor on a dumpster and a shovel inside the garbage room, near the Defendant's parking stall, on the 18th floor trash chute, the vertical seam of the door into unit 1801, inside the entrance to unit 1801, the area near the washer and dryer, in front of the sink and at the tub of the non-master bathroom, and on the master bed (*Id.* at 71-96, 114-131, 135- 138,

144-45.) Molly also detected the odor on a black t-shirt, near the head of a Swiffer Sweeper which were originally located near the washer and dryer. (*Id.* at 96-97.) Additionally, Corcoran testified about how Molly was allowed to sniff around MPDs impounded vehicles, which included the Defendant's vehicle. (Tr. 10/2/18 PM at 4-5, 12-14). Corcoran testified that Molly detected human remains on the exterior of the driver's door and at the trunk of the Defendant's vehicle. (*Id.* at 5-6.) Once the vehicle was opened, Molly also detected human remains on a map pouch and a garage door opener, as well as on a toolbox which was inside the trunk. (*Id.* at 6.)

Corcoran acknowledged that it would not be uncommon for odors of decomposing human remains to be present in a trash room because humans shed biological material that would begin to decompose and produce the odor. (Tr. 10/2/18 AM at 110-13.) She also acknowledged a bed was a common area where "human shed" could occur, and that shed might happen with normal activities like taking a bath. (*Id.* 137, Tr. 10/2/18 PM at 8.) However, she reiterated that she trained Molly on larger pools of scent to avoid alerts on smaller amounts of odor that may occur from small amounts of "shed." (Tr. 10/2/18 PM at 8.)Therefore, Corcoran believed Molly's indications were based upon large source of human remains inside the apartment. (*Id.* at 9-10.) Corcoran also acknowledged cueing by the handler could still occur (*Id.* at

105-06.) She further acknowledged that she did not know "what scent, if any, could be left by a human body deceased for under five hours, six days earlier to a search that was no longer on scene, after the cessation of that five-hour period in terms of residual odor." (*Id.* at 16-17.)

Defense witness Falco Jiminez testified as to various reasons he found Molly's alerts in the case unreliable, including due to the manner of training, lack of details in documented in training logs regarding the size of aids, and possible handler cues. (Tr. 10/2/18 PM at 28-43, 51, 59.) He acknowledged his opinions on appropriate training fell in the minority viewpoint in the relevant professional community. (*Id.* at 37.) He agreed that dogs noses are "incredible." (*Id.* at 44.) He agreed that a dog would only alert for certain amounts of scents if aid size was not varied in training. (*Id.*) He agreed that wind would push and pool scents, stating they pool in a flat areas in environments with no air current and on inclines with strong winds. (*Id.* at 39, 44-45.) He agreed directed searches are appropriate and that a dog's missing an alert wasn't a "failure," just that the dog did not find a scent. (*Id.* at 48-50.)

Following Jiminez's testimony, Utah Officer Wendell Nope explained why Molly was reliable and Jiminez's concerns were invalid. (Tr. 10/2/19 PM at 72-116.) He pointed out Molly's high success rate, the considerable detail of

> Corcoran's reports which validated her as a handler, and that dogs can detect decomposition even from a very early stage. (*Id.* at 74-86; Trial Ex. 229.) He had no concerns with Molly's training in residual odors, opining she was reliable, and had no concern Molly was alerting to "shed" material given she had not alerted in areas such as the master bathroom or kitchen. (Tr. 10/2/19 PM at 87, 92-95.) he also noted that in all her certifications, Corcoran had never received critiques that she was cueing her dog. (*Id.* at 105- 109.)
>
> In rebuttal, Kenneth Furton, another expert in cadaver dogs testified that scientists rely on dog indications as reliable. (Tr. 10/4/18 PM at 89-90; Trial Ex. 274.) He testified dogs can detect residual odors of human remains within minutes of death. (93-94.) He further testified the dogs can distinguish decomposition odors from death from residual biological materials (or "shed") and that *none* of the national organizations do double-blind training due to the complexity. (*Id.* at 94-95, 102.)

The defendant first contends that the court erred in admitting the cadaver dog evidence because the testimony was irrelevant and more prejudicial than probative. The court stands by its decision to allow the State to present the cadaver dog evidence in this case, which is supported by the Court of Appeals' recent decision in *State v. Bucki,* 2020 WI App 43, 393 Wis. 2d 434, 947 N.W.2d 152. *Bucki* involved a homicide in which the defendant was alleged to

have killed and hid the corpse of his estranged wife. Bucki, too, argued that the circuit court erred when it admitted the opinions of the handlers of their cadaver dogs that their dogs had alerted to the scent of human remains at various locations on Bucki's property. Like the present case, the dogs alerted to areas such as the defendant's garage, vehicle, bedroom floor, and shower drain. Also as in the present case, no body was recovered from the property, and experts admitted that it was possible for a cadaver dog to detect human tissue that is not a corpse. Bucki presented essentially the same objection that the defendant does in this case. The defendant argues that this evidence should have been excluded because it was not corroborated by any physical evidence and because it was of low probative value and highly prejudicial. The Court of Appeals rejected these arguments, finding that requiring corroboration as a general rule "improperly shifts the focus of the inquiry not to whether the expert's methodology was sound, but to whether the expert's opinion was *correct*." *Id.* at ¶59. The Court of Appeals went on to state:

> *Daubert* and WIS. STAT. § 907.02 do not condition the admissibility of expert opinion testimony on it being unassailable. Several of the factors that may be considered under the statute–including the known or potential error rate and whether the expert has accounted for obvious alternative explanations—clearly establish that something less than one-hundred percent accuracy is acceptable. Where that line is to be drawn is for the circuit court to decide in the exercise of its discretion after considering

> all the relevant factors. As the court here recognized, once a court has made the threshold reliability finding necessary to admit the expert opinion evidence, any deficiencies in the theory, methodology or application can be explored on cross-examination, and the jury can then give the opinion whatever weight it deems appropriate.

Id. at ¶69.

Just as in *Bucki,* the cadaver dog evidence in this case more than met the threshold requirements for the admissibility of the expert opinion evidence, and "any deficiencies in the theory, methodology or application" could be (and indeed were) explored on cross-examination. Additionally, as the State points out, there was significant circumstantial evidence which corroborated the cadaver dog's alerts in this case, which included the fact that Molly had alerted in the spare bathroom, which was missing the shower curtain and bath mats, but not in the master bathroom (which should have included similar amounts of non-cadaver human shedding). The court finds no error in its prior rulings on this issue. Therefore, for the reasons set forth herein, on the record at the *Daubert* hearing, in the Court of Appeals' decision in *State v. Bucki,* as well as the State's response, which the court incorporates herein by reference, the defendant's claim for a new trial on these grounds is denied.

The defendant next contends that newly discovered evidence exists because Officer Corcoran testified in a

subsequent case that cadaver dogs cannot distinguish remains shed by a living person and from one who is deceased, cannot communicate the intensity of the odor detected, cannot identify the person whose remains it detects, and cannot determine when such materials were deposited. The defendant argues that her testimony establishes that the dog's alerts were "meaningless and therefore irrelevant." He also argues that the fact that "anomalies" can cause an alert in the field qualifies newly discovered evidence.

The court views Officer Corcoran's subsequent testimony to be largely consistent with how she testified in the *Daubert* hearing and at trial, but even in the most charitable reading of the defendant's newly discovered evidence claim, the court finds that the proffered new evidence merely tends to impeach the credibility of one of the *many* witnesses in this case. "Discovery of new evidence which merely impeaches the credibility of a witness is not a basis for a new trial on that ground alone." *Simos v. State,* 53 Wis. 2d 493,499, 192 N.W.2d 877 (1972). Additionally, the court agrees with the State's detailed analysis that the defendant has failed to satisfy any of the first four factors of the newly discovered evidence test as discussed in *State v. McCallum,* 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997).

More critically though, the court finds that the defendant has failed to establish that there is a reasonable probability of different result if additional evidence describing the limitations of cadaver dogs were presented at the trial. *See State v. Plude,* 2008 WI 58, ¶32, 310 Wis.

2d 28, 750 N.W.2d 42 (if a defendant proves the first four criteria, then the trial court must determine "whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt"). First, much of the limitations were already discussed and presented to the jury. Too, there was an overwhelming amount of other circumstantial evidence which was more than enough to establish beyond any reasonable doubt that the defendant killed the victim and dumped her body in Jefferson County, including: 1) the victim was last seen on video entering the defendant's apartment alive and was never seen alive again; 2) the defendant's bath mat, shower curtain, and 5'10" travel golf bag all went missing from his apartment around the time the victim disappeared; 3) the defendant traveled to Madison the next day to buy cheese as a Christmas gift (in October), *with his phone off;* and made a purchase in an adjacent county just 13 miles from where the victim's body was found, 4) the defendant had a video of himself inserting his penis into the victim's mouth as she appeared unconscious and "gurgling" for air; and 5) the other acts testimony from one of the defendant's sexual partners, which established his proclivity to engage in similar acts while ignoring safety taps and to the point of causing her to black out. Given all of the other circumstantial evidence of guilt, there was simply no reasonable probability of a different result even if the additional evidence regarding the limitations of cadaver dog testimony had been presented. For these same reasons, the court rejects the defendant's alternative argument that counsel was ineffective for failing to impeach Officer Corcoran's testimony on the

same basis. *See State v. Moats,* 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990) (a court need not consider whether counsel's performance was deficient if the matter can be resolved on the ground of lack of prejudice).

The defendant also contends that the "intentional or reckless" omissions of facts from the search warrant affidavit, *vis*-à-*vis,* the limitations of the cadaver dog evidence, invalidates the search of his apartment and renders the warrant unconstitutional. The court finds no merit to this claim. *Franks v. Delaware,* 438 U.S. 154, 155-56 (1978) held that if a search warrant affidavit recklessly or intentionally included false information, which if removed from the warrant would vitiate the probable cause, the evidence generated from the warrant should be suppressed. The State makes several points in its response which essentially dispense with this claim: 1) the Court of Appeals already found the warrants stated sufficient probable based on the facts supporting the drug offenses; 2) given that cadaver dog evidence has been held to be reliable enough to be presented to a jury in a criminal trial, it is clearly reliable enough for probable cause; and 3) the other surrounding facts contained in the search warrant affidavit were more than sufficient probable cause support the full scope of the police search to investigate a possible homicide (i.e. evidence showing the defendant was the last person to see Dwyer alive, they are both shown going into his apartment, Dwyer disappeared, the police noted the missing shower curtain (which appeared as if it were ripped off the hooks), and the defendant made false statements about his whereabouts the next day). Consequently, the court rejects the defendant's challenge to the constitutionality of the warrant on these grounds.

Appendix B

Next, the defense argues that Detective Lips's search for adult pornography on the external hard drive was conducted without a warrant, or alternatively was conducted in violation of the limitations of the child pornography warrant, requiring suppression. The defense observes that no warrant authorized the search of the external hard drive for adult pornography, yet, Detective Lips "nonetheless conducted an extensive and detailed search of the contents of that hard drive specifically for adult pornography in preparation for trial in this case, resulting in a 333-page report of the results of that search." (Defendant's motion p. 26). In response, the State points out that attorneys cannot be constitutionally ineffective for failing to raise novel challenges, and that "[a]t best, the law in Wisconsin is unsettled" as to subsequent warrantless searches of items in the continuous possession of law enforcement. (State's response p. 40). The defense disagrees, asserting that the law is fully settled and citing to *Horton v. California,* 496 U.S. 128, 140 (1990) ("If the scope of the search exceeds that permitted by the terms of a validly issued warrant or the character of the relevant exception from the warrant requirement, the subsequent seizure is unconstitutional without more.").

Well after the defendant's conviction, the Wisconsin Court of Appeals, District III, certified an appeal to the Wisconsin Supreme Court regarding three "novel questions regarding the application of Fourth Amendment jurisprudence to the vast array of digital information contained in modern cell phones," including, as relevant here, whether a police department had the authority to conduct a subsequent search of previously-downloaded cell phone data. *See State v. Burch,* No. 2019AP1404-CR,

certification by Wisconsin Court of Appeals (Wis. Ct. App. Oct. 20, 2020). Under this circumstance, the court agrees with the State that the defendant's trial attorneys were not constitutionally deficient for failing to raise a Fourth Amendment challenge to the subsequent search of the external hard drive. *See State v. Hanson,* 2019 WI 63, ¶¶28-29, 387 Wis. 2d 233, 928 N.W.2d 607 ("the law must be settled in the area in which trial counsel was allegedly ineffective"). Likewise, the court finds no plain error.

The defendant next argues that the State failed to establish that he had ever accessed the BDSM videos regarding which Detective Lips testified, and that as a result, the State failed to satisfy the requirements for relevance and admission of the evidence of adult pornography set by this court. On December 21, 2017, the court decided the State's other acts motion. As relevant here, the court explained:

> As to the pornography, that evidence will be allowed, but limited in scope, because it shows the defendant's fixation on the type of sexual conduct that is alleged to have occurred in this crime. The defendant's apparent obsession with the type of sexual conduct is demonstrated by the pornography evidence. The fact that the defendant was in possession of a substantial amount of pornography reflecting his predilection for complete domination over women, breath deprivation and choking, and the depiction of nonconsenting partners establishes how fixated the defendant was with this type of conduct for a period of time. Thus, it is relevant

> to show—relevant to how the state alleges the crime was committed and goes to show the defendant's method of operation, intent, and knowledge, all of which are acceptable purposes for the evidence to be offered.

(Tr. 12/21/17 p. 111). The court acknowledged, "that that type of evidence is, like all evidence, somewhat prejudicial. So I recommend allowing the state to present the evidence in a more summarized version than listing out 15 different pornography titles with descriptions following many of them. The evidence could be presented by giving a summary of how many titles the defendant viewed that were bondage and/or sadomasochistic and asphyxia themed, and then providing the jury with a brief summary of what was involved in those films." (Id. pp. 111-112).

A written decision was filed on August 16, 2018, addressing both parties' motions *in limine* as well as the defendant's motion for reconsideration of the above-described order granting the limited presentation of pornographic evidence. The court denied the motion to reconsider, but clarified the limitations on the State's presentation of the pornographic evidence:

> a. The State may only introduce evidence of pornography that is asphyxia and/or breath deprivation themed or that depicts rape or non-consensual activity.
>
> b. The State may only introduce evidence of pornography that was accessed by the defendant between 2008-2013.

c. The State is limited in its presentation to approximating the number of titles accessed by defendant and a general summary of what is depicted in a particular grouping of materials. For example, the State may provide evidence that there were x-number of titles depicting breath deprivation on defendant's hard drive and that these type of videos generally contained a certain type of content.

d. The State may not introduce any videos or still images of the pornography videos but must rely on Detective Lips' description of the content therein.

(8/16/18 Decision pp. 1-2).

As indicated above, postconviction, the defense argues that Detective Lips's testimony violated the court's admissibility requirements because "Lips admitted he could not say that Zocco had ever accessed or viewed the BDSM videos he testified about." (Defendant's motion p. 29). During the State's direct examination of Detective Lips, the State asked whether he was able to identify any contents on the hard drive containing pornography that "indicated who the owner would be(.)" (Tr. 10/3/18 p.m., p. 22). Detective Lips testified that he "located personal pictures, photographs of the defendant, several resumes of the defendant, certain files that were indicative of the defendant with his name." (Id. pp. 22-23). As pertinent to the defense's instant argument, on cross-examination, trial counsel asked Detective Lips, "And you're not

telling the jury that you know that Mr. Zocco viewed that subset at all, are you?" (Id. p. 40). Detective Lips answered, 'That's correct." (Id.). Nevertheless, on redirect examination, the State asked, "With regard to this hard drive and access of it, during your analysis of the hard drive were you able to locate at least one pathway that had a name associated with an email address that further confirmed your conclusion that this external hard drive belonged to and was actually used by Kris Zocco?" (Id. p. 41). Detective Lips responded, "Well, there were—it was an e-mail address on a resume that belonged to Kris Zocco, but there were other indicators on the hard drive. When you back up information from, let's say, a computer to the hard drive, certain metadata comes with it. And some of it includes a user name. Where, you know, if you have multiple users on a computer, each has their own names. A lot of that data will get transferred with. It's somewhat of a metadata. You don't necessarily see it, but it's there. And there were numerous indicators that it came from a computer belonging to either a computer name with—for Zocco or a user name belonging to Kris Zocco." (Id.).

The fact that Detective Lips was not able to conclusively testify that the defendant viewed the BDSM subset of pornography did not render his testimony irrelevant or inadmissible. Rather, Detective Lips's testimony bore on the weight, not the admissibility, of that evidence. Lips sufficiently satisfied the court's requirements regarding admissibility by testifying to the indicators tying the defendant to the hard drive containing the pornography. Accordingly, trial counsel were not ineffective in this

regard, and the admission of Lips' testimony does not constitute plain error.

The defense also contends that the State violated due process by presenting evidence that it knew, or should have known, was false when Detective Lips testified that all 110 BDSM videos had a breath deprivation theme. The defense argues:

> The state obviously was attempting to suggest that Zocco was obsessed, not just with BDSM, but specifically with asphyxia, and sought to further that perception by claiming that every one of those 110 videos featured asphyxia. However, undersigned counsel have not seen any more detailed summaries of anything but the four videos specifically discussed in Lips' 6/20/18 Report, or the two replacement summaries he testified to at trial. Based on Lips' Report, the titles on only seven of the 110 videos Lips labeled "BDSM" indicate any type of breath deprivation, suggesting either that they do not involve breath deprivation or that any aspect of breath deprivation is merely incidental and not the main theme.

(Defendant's motion p. 31) (Internal citations and footnote omitted).

At trial, Detective Lips testified that he analyzed pornography from the hard drive and from a relevant time frame to determine whether the pornography involved images of bondage, domination, sadomasochism,

or apparent nonconsensual content. (Tr. 10/3/18 p.m., pp. 23-24). He testified that he analyzed 1,020 pornography files, and that 110 of those files contained pornography that met the State's description of "pornography that had a bondage, domination, sadomasochism theme, in particular, involving images of breath deprivation[.]" (Id. pp. 25-26). The State asked Detective Lips whether he had identified "for purposes of summarizing in court today, four files that you believe to be representative of the bondage and domination theme and sexual assault and/or asphyxia-themed pornography found on this hard drive?" (Id. p. 27). Detective Lips answered affirmatively. (Id.). The State published to the jury Exhibit 253, the pie chart Detective Lips created, showing the amount of adult pornography found on the hard drive and the portion containing BDSM, which "includes any depictions of apparent nonconsensual conduct or conduct involving any kind of asphyxia[.]" (Id.). Detective Lips then testified to four summaries of "representative samples" of the 110 BDSM files. (Id. pp. 29-33).

The defendant's postconviction argument is unavailing, as the defendant's claim that the State "suggest[ed] that *all* of the BDSM videos contained breath deprivation" is not supported by the record. Instead, as described above, the State repeatedly described the subset of 110 pornography files in broader terms: "images of bondage, domination, sadomasochism, or apparent nonconsensual content" p.24, "BDSM themed or nonconsent themed" p.24, "pornography that had a bondage, domination, sadomasochism theme, in particular, involving images of breath deprivation" p.25, "bondage and domination

and- as well as any form of asphyxia or breath deprivation or sexual assault based" p.26, "bondage and domination theme and sexual assault and/or asphyxia-themed" p.27, "110 BDSM ... also includes any depictions of apparent nonconsensual conduct or conduct involving any kind of asphyxia" p.27. (*See* Tr. 10/3/18 p.m.)

The court disagrees that Detective Lips's testimony misled the jury into believing that all 110 images featured some form of breath deprivation; rather, the testimony clearly reflected that the 110 files involved bondage, domination, sadomasochism themes *including* breath deprivation *and/or* nonconsensual activity. Further, the defense's conclusion that the vast majority of the 110 files "do not involve breath deprivation or that any aspect of breath deprivation is merely incidental and not the main theme" based on the file titles is tenuous at best. Nevertheless, because the court concludes that the evidence presented by the State was neither false nor misleading, trial counsel were not ineffective for failing to object and the evidence does not constitute a due process violation.

Next, the defendant argues that the court erred in denying his motions for a continuance and for a mistrial. Both decisions are left to the trial court's discretion. *See State v. Leighton,* 2000 WI App 156, ¶[27, 237 Wis. 2d 709, 616 N.W.2d 126; *Haskins v. State,* 97 Wis. 2d 408, 419, 294 N.W.2d 25 (1980). The court has reviewed the record as well as the parties' arguments and supporting attachments and is persuaded that, ultimately, the defendant was not prejudiced by these rulings. First, the defendant

discovered the impeaching evidence before trial and was able to arrange for the production of counterevidence which led to the dismissal of the solicitation charge. Although the State told the jury during its opening statement that it would hear evidence that the defendant confessed to killing the victim, *the jury never actually heard evidence of a confession.* The State's failure to deliver a confession arguably inured to the defendant's benefit. Too, the jury was instructed multiple times that the statements of the attorneys were not evidence and that they were to decide their verdict based upon the evidence received and the court's instructions. (Tr. 9/24/18 p.m., p. 96; Tr. 10/4/18 p.m., pp. 134-35, 139.) The court also read the jury a substantial curative instruction regarding the dismissal of the solicitation charge:

> [O]n September 5, 2018, the state issued a charge of solicitation to commit intimidation of a witness against the defendant, alleging that the defendant solicited a fellow inmate in an attempt to prevent or dissuade a witness from appearing to testify in this trial.
>
> The state also alleged as part of this charge that the defendant confessed in the homicide of Kelly Dwyer during conversations with the inmate. Commented on that alleged confession during openings.
>
> On October 2, 2018, additional information was brought to the attention of police by an inmate witness produced for trial by the

> defense, prompting further investigation into this matter.
>
> On October 4, 2018, the state moved to dismiss the charge. And the Court granted the state's motion.
>
> You may, but are not required to do so, draw an inference that the issuance and/or the dismissal of that charge is relevant or is not relevant to the issue of investigation or prosecution bias against the defendant.
>
> Additionally, you must disregard the state's statement regarding the alleged confession that was made during opening statements. As the Court noted at the beginning of this trial, opening statements are not evidence in the case.

(Tr. 10/05/2018 a.m., pp. 4-5). Jury instructions are not empty rhetoric. The court's words matter. *See State v. Adams,* 221 Wis. 2d 1, 12, 584 N.W.2d 695 (Ct. App. 1998) ("Jurors are presumed to follow the court's instructions.").

The defense argues, "[T]he assumption that jurors will follow an instruction to ignore certain assertions does not hold where, as here, the assertion is so highly inflammatory and prejudicial to the core issue at trial. *State v. Pitsch,* 124 Wis. 2d 628, 369 N.W.2d 711, 720 n.8 (1985); see *Francis v. Franklin,* 47 1 U.S. 307, 323 n.9 (1985). See also *Dunn v. United States,* 307 F.2d 883, 886 (5th Cir. 1962) ("if you throw a skunk into the jury box,

you can't instruct the jury not to smell it")." (Defendant's reply, p.15). These cases are plainly distinguishable.

In *Pitsch,* due to the ineffective assistance of trial counsel, the jury heard evidence of the true number and nature of the defendant's prior crimes, which significantly damaged his credibility. The jury was given an instruction on how to consider the other acts evidence. The *Pitsch* court assumed that the instruction was followed; however, the court recognized "that '[c]ases may arise in which the risk of prejudice inhering in material put before the jury may be so great that even a limiting instruction will not adequately protect a criminal defendant's constitutional rights."' *Id.* at 645 n.8. *Pitsch* was not one of those cases. In contrast, the solicitation/conspiracy allegations were *not* admitted as evidence at the defendant's trial.

Franklin is off point because it involved an unconstitutional jury instruction on the issue of intent and not "an instruction to ignore certain assertions."

In *Dunn,* the prosecutor made improper and prejudicial statements during openings statement and closing arguments, expressing his personal opinions about the case. The court stated, "It is improper for counsel to express his personal opinion or to state facts of his own knowledge, not in evidence, and not part of the evidence to be presented; or to make unwarranted inferences or insinuations calculated to prejudice the defendant." 307 F.2d at 885-86. Although the jury was instructed to "disabuse your minds" of the prosecutor's statements, the court found that the instruction was not sufficient to remove the prejudice. *Id.* at 886.

Appendix B

None of the circumstances in *Dunn* are presented here. The prosecutor's reference to a confession during her opening statement was based on *evidence.* The prosecutor could not have known at that time about the impeaching evidence to follow because the defense did not disclose it. Nor could the court. The court recognizes that confessions can carry great weight with juries, but there is a difference between *evidence* of a confession and a reference to a confession, *which is never admitted as evidence.* The court is not persuaded by the defendant's attempt to equate the prosecutor's opening statement with actual evidence of a confession.

The court finds that it appropriately instructed the jury under these circumstances and that its instructions are entitled to the presumption articulated in *Adams, supra, et al.* The defendant argues, "With more time, defense counsel could have presented these witnesses to the state in time for the state to dismiss the charge before the trial. Had that happened, the charge would not have warped the defense trial strategy and the defense could have adapted to the situation." (Defendant's motion, p. 36). The court is not persuaded by this argument. The defense was still able to present the argument that it wanted to present—i.e. that the investigation and prosecution was biased. The dismissed solicitation charge played well into that argument, and the defense used the dismissal to their advantage. (Id.; Tr. 10/05/2018 a.m., pp. 32-76). Given the defense trial strategy and the court's instructions, the court finds that even if the denial of a continuance was in error, any such error was harmless and that the defendant was not denied his right to due process or the effective assistance of counsel.

Similarly, the court finds that it properly denied the motion for mistrial. Again, the court's instructions, and in particular the curative instruction, were sufficient to curb any potential misuse of the information about a solicitation or a confession. The jury heard no such evidence—a fact the defense highlighted during closing arguments. (Tr. 10/05/2018 a.m., pp. 4-5, 38-49, 73-74; Tr. 10/4/18 p.m., pp. 134-35, 139.) The court rejects the defendant's argument that its decision to exclude the testimony of the impeaching witnesses after the dismissal "seriously damaged the trial strategy." The defendant was able to present argument that police were engaged in an overzealous and biased investigation. Even if the court had allowed the defense witnesses on the intimidation case to testify, the court finds that there is no reasonable probability that it would have affected the outcome of the trial given the substantial circumstantial evidence of guilt in this case. Conversely, had the solicitation charge been dismissed prior to the trial, there is no reasonable probability that the jury would have acquitted on the homicide.

The defendant makes much of the State's timing in bringing the allegations of a confession and the additional solicitation charge; however, the defense sought to strike a tactical advantage by choosing not to disclose its impeaching witnesses to the State ahead of the trial and by attempting to introduce the evidence subsequent to the dismissal of the charge to bolster its theory that the State was biased against the defendant and fully focused on tying him to the homicide. Although the court would not allow the evidence, the defense was nonetheless able to make substantial argument to pursue that theory. (*Id.;* Tr. 10/05/2018 a.m., pp. 32-76.)

The defendant's arguments are a red herring and a distraction from the compelling circumstantial evidence of guilt. There is no reasonable probability these rulings materially affected the outcome of the trial.

The defendant also argues that the prosecutor's closing rebuttal arguments impermissibly shifted the burden of proof. When reviewing a claim of prosecutorial misconduct, the underlying question is whether the prosecutor's conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Neuser,* 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995). The court agrees with the State's analysis at pp. 48-50 and adopts it. The court finds that the prosecutor's comments, when viewed in the context of her entire rebuttal, did not exceed the scope of acceptable argument. The court further agrees that any error was harmless because the jury was informed multiple times that the State had the burden of proof:

> They heard it in voir dire. (Tr. 9/24/18 at 35, 37, 94, 54-55, 72, 75.) They heard this in opening instructions. (Tr. 9/24/18 PM at 96, 98.) They heard it again in closing instructions. (Tr. 10/05/2018 AM at 4-5. 11-15.) They heard it in the State's closing argument. (*Id.* at 25.) They heard it in defense's closing argument. (*Id.* at 71.) They heard it in the State's rebuttal argument. (*Id.* at 90.) Additionally, the Court had instructed the jury that "any statement or anything an attorney says is not evidence." (Tr.

> 9/24/18 PM at 96). Therefore, the record shows that any error was harmless.

(State's response, p. 50).

Throughout his motion, the defendant raises several "catch-all" ineffective assistance of trial counsel claims "[s]hould this or any other court nonetheless conclude that Zocco's right to direct review of any of these claims was somehow forfeited by trial counsels' acts or omissions...." (Defendant's motion, p. 44).

Strickland v. Washington, 466 U.S. 668, 694 (1984) sets forth a two-part test for determining whether an attorney's actions constitute ineffective assistance: deficient performance and prejudice to the defendant. Under the second prong, the defendant is required to show "'that there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* at 694; *see also State v. Johnson,* 153 Wis. 2d 121, 128, 596 N.W.2d 749 (1990). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* As indicated previously, a court need not consider whether counsel's performance was deficient if the matter can be resolved on the ground of lack of prejudice. *Moats,* 156 Wis. 2d 74, 101. "Prejudice occurs where the attorney's error is of such magnitude that there is a reasonable probability that, absent the error, 'the result of the proceeding would have been different.'" *State v. Erickson,* 227 Wis. 2d 758, 769, 596 N.W.2d 749 (1999) (quoting *Strickland,* 466 U.S. at 694). The record shows that trial counsels made most of the arguments the defendant raises in his postconviction motion. To the

extent that counsels failed to raise any of the defendant's postconviction arguments, he was not prejudiced for the reasons that have been set forth in this decision.

The defendant requests a new trial based on plain error and in the interest of justice on the grounds that the real controversy was not fully tried. "'Plain error' means a clear or obvious error, one that likely deprived the defendant of a basic constitutional right." *State v. Lammers,* 2009 WI App 136, 112, 321 Wis. 2d 376, 773 N.W.2d 463. A plain error is an "'error so fundamental that a new trial or other relief must be granted even though the action was not objection to at the time."' *Id.* "The error, however, must be 'obvious and substantial,' and courts should use the plain error doctrine sparingly." *Id.* The court agrees with the State that none of the defendant's claims of error is obvious or so fundamental that it requires a new trial. The defendant's claims have been fairly and fully tested through the ineffective assistance of counsel framework, and the court finds that counsels were not constitutionally ineffective. The plain error doctrine is not an alternative mechanism for asserting failed Sixth Amendment claims.

A court may exercise its discretionary power to order a new trial on the grounds that the real controversy has not been fully tried where the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue in the case or where the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried. *State v. Hicks,* 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996). In *Hicks,* the jury

was not given important DNA evidence that was relevant to the critical issue of identification. In this instance, the defendant asserts, "[T]he primary evidence relied upon by the state was either inadmissible, false or, as with the dog alerts, subject to impeachment as speculative based on evidence the jury never heard even if they were admissible." (Defense motion, p. 52). The finds no support for the defendant's claims. These are more red herrings. As the State asserted in its response at p. 52, "Justice was had in this case and the Defendant was convicted based on overwhelming, compelling, admissible circumstantial evidence and related expert testimony." The court agrees and rejects the defendant's plain error and discretionary reversal arguments for a new trial.

The defendant would have the world believe that he is the victim of an overzealous police investigation, that the mountain of circumstantial evidence of guilt is a mirage based on junk science and rank speculation. The jury was not persuaded by the defendant's attempts to distance himself from the evidence in this case. The court stands by its rulings in this case and denies the defendant's postconviction arguments for a new trial, including his Sixth Amendment claims, for the reasons set forth in the record and herein.

THEREFORE, IT IS HEREBY ORDERED that the defendant's motion for postconviction relief is **DENIED.**

APPENDIX C — ORDER DENYING REVIEW OF THE SUPREME COURT OF WISCONSIN, DATED APRIL 16, 2024

OFFICE OF THE CLERK
SUPREME COURT OF WISCONSIN

110 East Main Street, Suite 215
P.O. Box 1688
Madison, WI 53701-1688

Telephone (608) 266-1880
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

April 16, 2024

To:

Hon. Jeffrey A. Wagner
Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Robert R. Henak
Electronic Notice

John W. Kellis
Electronic Notice

Appendix C

You are hereby notified that the Court has entered the following order:

No. 2021AP1412-CR *State v. Zocco*, L.C.#2017CF2151

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, Kris V. Zocco, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

Samuel A. Christensen
Clerk of Supreme Court

APPENDIX D — CELL PHONE SEARCH WARRANT OF THE CIRCUIT COURT, FIRST JUDICIAL DISTRICT, MILWAUKEE, WISCONSIN, FILED OCTOBER 22, 2013

SEARCH WARRANT	CIRCUIT COURT FIRST JUDICIAL DISTRICT	MILWAUKEE, WISCONSIN

STATE OF WISCONSIN)
) ss. In the Circuit Court of the First Judicial District of Wisconsin
MILWAUKEE COUNTY)

The State of Wisconsin, to any Sheriff, or any Law Enforcement officer of the State of Wisconsin:

WHEREAS, Detective Tammy Tramel-McClain has this day presented (by attached affidavit) to this court upon oath, to the Circuit Court Branch of the First Judicial District, showing probable cause that on October 18, 2013 in the County of Milwaukee, there is now located and concealed in and upon certain premises, located within the city of Milwaukee, in said County, and more particularly described as follows:

DESCRIBE OBJECTS OF SEARCH:

Located at 749 W. State St. in the city and county of Milwaukee, Wisconsin, is a black Motorola 4G Verizon brand touch screen cellular phone, placed on Milwaukee

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Police Department inventory 13035699. The contents of this phone are to be searched via a forensic examination by the Milwaukee Police Department high Tech Crimes Unit which thing(s) (were used in the commission) or (may constitute evidence) of a crime, to-wit:

DESCRIBE CRIME OR CRIMES:

(1) Homicide

(2) Mutilating or hiding a corpse

(3) Possession of a Controlled Substance (cocaine), 961.16(2)(b)(1)

(2) Possession of a Controlled Substance with Intent to Deliver (cocaine), 961.41(3g)(c)

(3) Possession of a Controlled Substance (marijuana), 961.41(3g)(e)

(4) Possession of a Controlled Substance with Intent to Deliver (marijuana), 961.41(1m)(h)

(5) Keeper of a Drug House, 961.42

Possession of Drug Paraphernalia, 961.573(1)

committed in violation of sections 940.01 and 940.11(2), 961.16(2)(b)(1), 961.41(3g)(c), 961.41(1m)(cm) 961.41(3g)(e), 961.41(1m)(h), 961.42, 961.573(1) of the Wisconsin Statutes.

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Now, THEREFORE, in the name of the State of Wisconsin, you are commanded forthwith to search the said premises and/or the said person(s) for said things, and take possession thereof, if found.

You are authorized to bring a trained narcotics detection canine with assist you with conducting said search.

You are further commanded to return this warrant within forty-eight hours before the Assistant Chief Deputy Clerk of the Circuit Court, Crime, Misdemeanor, Traffic Division, or his designee, to be dealt with according to law.

Witness, the Honorable Rosa M. Barillas, Court Commissioner of the First Judicial District of Wisconsin, at Milwaukee, Wisconsin, at 3:24 p.m. on Oct 18, 2013

/s/_____

Branch: _____

Court Reporter: _____

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CIRCUIT COURT)
) ss.
COUNTY OF MILWAUKEE)

Dated at Milwaukee Wis., Oct 21, 2013

I hereby certify that by virtue of the within writ I searched the within named premises and found the following: Milw Police Inventory 13035699. Motorola Droid Razor Phone # 617-335-5829 and have same now in my possession subject to the disposition of the Circuit Court.

/s/_____
Police Officer

APPENDIX E — AFFIDAVIT FOR SEARCH WARRANT OF THE STATE OF WISCONSIN, MILWAUKEE COUNTY, SUBSCRIBED AND SWORN OCTOBER 18, 2013

STATE OF WISCONSIN
MILWAUKEE COUNTY

AFFIDAVIT FOR SEARCH WARRANT
(Form to be Used When Law Enforcement Officer Observed Controlled Substances on Premises)

Affiant, being first duly sworn on oath, states as follows:

1) That affiant is a state certified law enforcement officer currently assigned to the Milwaukee Police Department, Sensitive Crimes Division Section:

2) That affiant has worked full-time as a law enforcement officer for the past 13 years:

3) That affiant knows that Kelly E. Dwyer (w/f 9/27/86) of 1659 N. Humboldt Av, in the city and county of Milwaukee, was reported missing by her mother, Maureen Dwyer, on Saturday, October 12, 2013. Dwyer did not report to work at the Lululemon boutique store on that date and had not been seen by her roommates since Thursday, October 10, 2013 in the evening hours.

4) Affiant knows that further investigation into Dwyer's whereabouts revealed she had been with a male identified as Kris V. Zocco (w/m 1/5/75) on Thursday, October 10, 2013 at approximately 10:00PM. Zocco lives

at 2036 N. Prospect Av #1801, in the city and county of Milwaukee, and Dwyer was observed on video surveillance at that location, entering the building at 9:50PM. Dwyer was seen wearing a blue jean jacket with a gray sweater and black legging type pants, carrying what appears to be a Lululemon handbag with black handles, black sides, and a red front and back with white writing and images on the front and back. Each side of the bag appears to be the Lululemon symbol, which is a stylized "A." Dwyer entered the lobby of the north tower. A short time later, Dwyer and Zocco are observed on the video surveillance exiting the north tower lobby together with Dwyer wearing the same clothing. Dwyer and Zocco are observed re-entering the north tower lobby and going to the parking garage to Zocco's vehicle, a 2011 black Audi S4 Quattro. Zocco drives out of the parking garage with Dwyer seated in the front passenger seat.

5) Affiant knows that Dwyer and Zocco return in the vehicle and park in Zocco's assigned parking space. They both enter into the common hallway which lead to elevators that access each floor.

6) Affiant knows that at approximately 11:40PM, Dwyer and Zocco leave the building again, exiting the north tower lobby with Dwyer wearing the same clothing, At approximately 2:37AM on October 11th, Dwyer and Zocco return to the building entering the north tower lobby again with Dwyer wearing the same clothing. They both enter into the common hallway to elevators that access each floor.

7) Affiant knows that upon further examination of all interior and exterior video surveillance, Dwyer is not seen exiting the building.

8) Affiant knows that a check of Dwyer's cell phone showed no activity after 10:08AM on Friday, October 11, 2013, which is unlike Dwyer, per her close family and friends. Dwyer owned an AT&T Iphone with a phone number of 847-651-3627.

9) Affiant knows that Det. Tammy Tramel-McClain conducted an interview of Zocco at his apartment an Monday, October 14, 2013. Zocco stated he has known Dwyer for about a year and sees her at least two times a week. Zocco described their relationship as "friends with benefits," and stated they usually only get together and "party," He described "party" as using powder cocaine, drinking, and occasional sex. Zocco stated he last saw Dwyer on Thursday, October 10th, and she came to his apartment at about 10:00PM to "party" with him. Zocco stated Dwyer contacts a male she only refers to as "Tone," and they usually purchase an eight ball, which is a street term for over three grams of cocaine, that totals $300, Zocco stated Dwyer contacted "Tone" when she arrived at his apartment and "Tone" told Dwyer that he did have that amount of cocaine for sale, but Dwyer had to go to him to make the purchase. Zocco stated he always pays for the cocaine Dwyer gets from "Tone," and told Dwyer that the two of them had to walk to an ATM nearby to get the money from his account.

10) Affiant knows that Zocco further stated he and Dwyer did walk to a nearby ATM and then returned to his

building to get his vehicle. Zocco stated he drove Dwyer to the area of E. Pleasant Street and N. Water Street to a building where he believes "Tone" lives. Zocco stated he gave Dwyer the $300 and she went inside the building and came out with the cocaine. Zocco stated he and Dwyer returned to his apartment and crushed up the cocaine, each snorting about two "lines" each. A line used in this reference is a street term meaning to make a straight line of cocaine on a hard surface to snort through the nose. Zocco stated he and Dwyer also had some drinks of vodka and seltzer and then stated they "may have" smoked a "bong," Bong is a street term for a pipe commonly used to smoke marijuana. Zocco stated Dwyer changed into a dress at his apartment and the two of them then walked to a club called Allium, which is nearby. Zocco stated the two of them have been frequenting Club Allium for the past couple of months. Zocco stated the two of them had more drinks at the club and then just prior to 3:00AM, they decided to leave the club and return to his apartment, Zocco stated he and Dwyer had more drinks upon their return and also finished using the cocaine they purchased earlier.

11) Affiant knows that Zocco stated Dwyer performed an act of mouth to penis sexual contact on him in his living room, and the two of them "passed out asleep at about 6:00AM on his small living room couch, still fully dressed. Zocco stated at around 9:00AM or a little before that, he and Dwyer both "came to," and awoke. Zocco stated Dwyer told him she was leaving and he heard his apartment door "click" behind Dwyer as she left his apartment.

12) Affiant knows that the building video surveillance did not show Dwyer in any portion of the building or exiting as Zocco indicated.

13) Affiant knows that Zocco stated that later that evening on Friday, October 11th, at approximately 6:30PM, he decided to take his summer sports equipment to his parents' residence at 3626 E. Cliffe Drive, in Richfield, Wisconsin. Zocco stated he returned home to his apartment on the same day of Friday, October 11th at around 8:45PM.

14) Affiant knows that Zocco's statement is not true based on video surveillance from Friday, October 11th at 6:15PM, Zocco is seen standing at the driver side door of his vehicle, and got inside. Zocco's parking spot is number 205. Zocco's vehicle left the parking garage. Zocco vehicle did not return until the following day, Saturday, October 12th at approximately 2:41PM and Zocco is wearing the same clothing, but with a dark long sleeve jacket or pullover sweater. Zocco opened the front passenger door and removed a small, white plastic bag from the front passenger compartment.

15) Affiant knows that Zocco's statement about Dwyer changing into a dress prior to them going to the club is not true as well based on video surveillance at that time which shows Dwyer wearing the same clothing as when she first entered the building.

16) Affiant knows that on October 16, 2013 at 3:03PM, a narcotic search warrant was executed at Zocco's

apartment 2036 N. Prospect Av #1801, and during the search, personal identifiers such as mail was recovered showing Zocco as the sole occupant of the apartment. Officers located a green plant like material, suspected marijuana and a white powder substance, suspected cocaine. Officer Brendan Dolan used NarcII05 Pouch and tested the suspected marijuana and it tested positive for tetrahydracanabinols with a weight of 39.27 grams. Officer Dolan also used NarcII07 tested the suspected cocaine and it tested positive as cocaine salt, with a weight of .04 grams. Also while searching the main bathroom for the apartment, the hooks for the shower curtain was still on the curtain rod, however, the shower curtain was missing, and appeared as if the shower curtain had been ripped off the hooks. The metal ilets from what would have most likely been a hanging shower curtain, were still attached to the hooks.

17) Affiant knows that based on the investigation and the fact that Dwyer is not seen leaving the building and not located inside the building, specifically in apartment 1801, Madison Police Department was contacted for the assistance of their cadaver dog and its handler. Prior consent to search the common areas of the building which include the hallways, parking garage, trash receptacles and stairwells, was given by the building manager, Lisa Puffer (w/f 6/7/85). Puffer signed a Milwaukee Police Department Consent to Search Authorization form.

18) Affiant knows that P.O. Carren Corcoran has been with the City of Madison Police Department since 1990. She has trained, certified and handled 3 Human Remains

Detection (HRD) dogs since 1999. P.O. Corcoran has participated in over 180 searches in Wisconsin, Illinois, Iowa, Michigan, Idaho, Minnesota, Pennsylvania, and Ontario, Canada.

19) Affiant learned that P.O. Corcoran began dog training in 1989 in general obedience, Schutzhund, agility and tracking. P.O. Corcoran has fostered dogs for Wisconsin Academy of Guide Service Dogs. She's provided in-home obedience training. She was a founding member of Central Wisconsin Search and Rescue. She served as the team's training director from 2000 to 2004. She has assisted in the training and certification of approximately 20 dog teams. She has provided outside evaluation for Illinois Search Dogs. Since 2006, she has been deemed an expert witness in courts in Wisconsin (twice) and Illinois (once) and testified in those cases, She has been a member of North American Police Working Dog Association and National Narcotic Detector Dog Association. She is the current owner of Canine Search Solutions, Inc.

20) Affiant learned from P.O. Corcoran that K-9 Molly is a spayed, female German Shepherd that was whelped in June of 2006. K-9 Molly is trained to detect the odor of actively decomposing and decomposed human remains. Upon detection, K-9 Molly provides a formal indication of a "sit." K-9 Molly obtained land and water cadaver certification with National Narcotic Detection Dog Association in September of 2008. K-9 Molly has also obtained a Cadaver Proficiency Certification with K-9 Search Solutions in September 2008, K-9 Molly has participated in approximately 60 searches in Wisconsin,

Illinois, Pennsylvania, Minnesota, Michigan, Colorado, and Ontario, Canada, K-9 Molly has assisted in locating 11 human bodies and K-9 Molly's indications have assisted in obtaining over 6 search warrants in Wisconsin and one search warrant in Colorado.

21) P.O. Carren Corcoran told affiant that a Human Remains Detection Dog (HRD) is trained to detect only human remains and can differentiate from all animal remains.

22) On Monday, October 16, 2013 at 9:00PM, P.O. Corcoran arrived at 2036 N. Prospect Av with K-9 Molly to assist in this investigation. At approximately 9:20PM, K-9 Molly provided an indication that she detected the odor of human remains in the first floor trash room (the trash room is a locked area where trash placed in the trash chutes located on each floor is deposited and collected in green dumpsters). The dumpsters are collected every Friday and Monday. The odor was next to a green, metal dumpster not connected to the trash compactor. A second indication was on a shovel located in the southeast corner of trash room. It should be noted there were no human remains visible. At 9:30PM, K-9 Molly indicated that she detected the odor of human remains near a concrete pillar located next to parking stall 213, which is approximately 25 feet from parking stall 205, of level B3 in the parking garage. It should be noted there were no human remains visible. K-9 Molly was taken up to the 18th floor, removed from her traffic lead, and given her command to sniff for the odor of human remains. K-9 Molly ranged out and moved independently and began sniffing throughout the

18th floor hallway. P.O. Corcoran opened the trash room door and K-9 Molly ranged in ahead. At approximately 9:35PM, K-9 Molly indicated that she detected the odor of human remains at the 18th floor trash chute. The trash chute is located inside the trash room which is approximately 6' by 6' and trash can be deposited into the chute through a square chute door. There is a trash chute on each floor and items deposited into the trash chute go directly into the trash room on the first floor). There were no human remains visible. At approximately 9:40PM, K-9 Molly indicated that she detected the odor of human remains at the exterior of apartment door 1801 on the 18th floor of 2036 N. Prospect Av. It should be noted there were no human remains visible at the door. There are six apartment doorways on the 18th floor and K-9 Molly only indicated on 1801. K-9 Molly was off lead during all sniff efforts. Members of the Milwaukee Police Department were present for all sniff efforts.

23) On Thursday, October 17, 2013 a search warrant was granted and executed at 2:48am on this date. Officer Corcoran entered the apartment of 1801 with K-9 Molly. K-9 Molly did indicate that she detected the odor of human remains in the interior of apartment 1801. K-9 Molly detected the odor of human remains in the main bathroom of 1801, in the laundry by clothing on the floor of 1801 and on the bed in Zocco's bedroom. K-9 Molly was off lead during all sniff efforts. Members of the Milwaukee Police Department were present for all sniff efforts.

24) Affiant knows that on Thursday, October 17, 2013 at 11:07AM, Kris V. Zocco, was located and placed into

custody. Zocco did have in his possession at the time of his arrest, a black Motorola 40 Verizon brand cell phone.

25) Affiant is seeking to search the contents of the black Motorola 4G Verizon brand cell phone, placed on Milwaukee Police Department inventory 13035699.

26) I believe that such items as I am seeking in the search warrant will constitute evidence of the crimes of Homicide, Mutilating or Hiding a Corpse, Possession of Controlled Substance (cocaine), Possession of Controlled Substance with Intent to Deliver (cocaine), Possession of a Controlled Substance (marijuana), Possession of a Controlled Substance with Intent to Deliver (marijuana), Keeper of Drug House, and Possession of Drug Paraphernalia, contrary to Wisconsin Statutes, sec. 940.01 and 940.11(2), 961.16(2)(b)(1), 961.41(3g)(c), 961.41(1m)(cm) 961.41(3g)(e), 961.41(1m)(h), 961.42, 961.573(1).

/s/_____
Signature of Affiant

Subscribed and sworn to before me this 18th day of October, 2013.

/s/_____
Notary Public, State of Wisconsin, Milwaukee County
My commission is permanent.