David W. Maas
[redacted]
Oconomowoc, Wisconsin 53066
[redacted]

April 25, 2024

VIA EMAIL (GOVJudicialAppointments@wisconsin.gov)

Governor Tony Evers
Office of the Governor, State of Wisconsin
P.O. Box 7863
Madison, WI 53707

Re: Application for Waukesha County Circuit Court

Dear Governor Evers:

I respectfully write to submit my application and supporting materials for appointment to the Waukesha County Circuit Court Branch 4. I believe I have the necessary qualifications, experience, legal knowledge, and judgment to serve as the next judge for the Waukesha County community.

My completed application, supplemental answers, references, and several letters of recommendation are being submitted with this letter. I believe some additional letters of recommendation have been submitted directly to you in support of my application.

I look forward to the opportunity to meet with your Judicial Selection Advisory Committee to answer any questions they have about my qualifications to be a judge. I then hope to have a chance to meet with you personally to satisfy you that I am the right candidate for this position.

If you have any questions in the meantime or need any further materials, please let me know.

Very truly yours,

/s/ David W. Maas

Attachments

David W. Maas

[redacted], Oconomowoc, Wisconsin 53066

[redacted]

[redacted]

LinkedIn Profile: https://www.linkedin.com/in/david-maas-134aa72b

---

ABOUT ME:

Creative, persuasive, and confident trial expert with thousands of hours logged in the courtroom. Excels at thinking quickly on feet, developing trial preparation strategies, and influencing jurors with a trained mix of communication techniques. Primary specialties are prosecution of cyber crimes and compliance with federal and state electronic communication privacy laws. Frequently lectures to state and national audiences on trial skills, 4th Amendment law, and leadership.

EXPERIENCE:

Fond du Lac County District Attorneys Office Fond du Lac, Wisconsin

Assistant District Attorney – June 2023 – present. Prosecute a wide variety of criminal misdemeanor and felony cases. Issue charges, litigate motions, negotiate settlements, and first-chair jury trials. Review and approve electronic communication and phone warrants and subpoenas. Train prosecutors and law enforcement on compliance with legal process requirements, privacy interests in electronic records, and developing 4th Amendment and privacy case law.

Wisconsin Department of Justice Madison, Wisconsin

Assistant Attorney General, Criminal Litigation Deputy Unit Director – July 2008 – June 2023. Prosecuted cases of statewide importance as first chair. As lead cyber crime prosecutor, prosecuted Internet crimes against children, high tech crimes, and other serious felony cases. Reviewed and approved electronic communication warrants, subpoenas, and statewide wiretap requests. Trained prosecutors and law enforcement on compliance with legal process requirements, privacy interests in electronic records, and developing 4th Amendment and privacy case law. Updated legal forms and procedures for obtaining third party data.

As Deputy Director, oversaw attorneys, paralegals, and support staff, reviewed work product, approved courses of action for case litigation and unit direction, and kept the team on task. Led office initiatives and provide guidance to state agencies, law enforcement, and prosecutors. Led the Statewide Prosecutor Education and Training program for the Wisconsin DOJ which provided live and online trainings for prosecutors around the state.

Delivered statewide, national, and international presentations to lawyers, prosecutors, and judges on topics including advanced trial techniques, digital evidence, ethics, legal process, rapidly changing privacy law, and leadership skills. Also gave dozens of presentations to state law enforcement agents on topics including child enticement law, legal process for electronic records, and compliance with federal and state electronic privacy laws.

D.C. Bar Association Washington, D.C.

Leadership Instructor, John Payton Leadership Academy – Spring 2020 and 2022. One of three leaders for the D.C. Bar's flagship leadership program. Through webinars and in-person trainings, delivered a series of lectures to emerging leaders in the Washington, D.C. legal community. Topics included Being a Leader Others Want to Follow, Performance Sustainability, Being the Master of Your Career, The Value of Giving Back, Developing an Effective Team, Building High Quality Connections, and Coaching for Success.

Milwaukee County District Attorneys Office Milwaukee, Wisconsin
Assistant District Attorney – October 1999 – July 2008. Prosecuted felony, misdemeanor, domestic violence, gun, drug, violent crime, and civil termination of parental rights cases. Mentored and trained interns. Responsible for thousands of cases, tried dozens of jury and court trials, litigated over one hundred contested motions.

Mount Mary College Milwaukee, Wisconsin
Adjunct Professor – Fall Semesters, 2001 and 2002. Created and taught criminal justice courses for fledgling justice program. Prepared course curricula, selected texts, created assignments, and wrote exams. Conducted lectures and coordinated guest lecturers.

McNally, Maloney & Peterson, S.C. Milwaukee, Wisconsin
Associate Attorney, Civil Litigation Team – July 1998 – July 1999. Drafted civil pleadings, pretrial documents, answers, and motions. Responded to interrogatories and discovery demands. Researched and wrote trial and appellate briefs. Experience in employment, municipal, personal injury, business, and bankruptcy law.

EDUCATION:

- University of Wisconsin Law School, *Juris Doctor*, May 1998
- Rice University, *Bachelor of Arts – Economics*, May 1995

SELECTED TRAININGS AND LECTURES GIVEN:

- Wisconsin Judicial College – Digital Evidence Boot Camp for Judges
    - February 2024, January 2023, February 2022, February 2020.
    - Presentations on Wisconsin Search Warrant Law and group discussions.

- National Cyber Crime Conference - Norwood, MA
    - April 2024, April 2022, April 2021, April 2019.
    - Presentations for prosecutor track on Emerging Issues in 4th Amendment Law, Mock Trial, Legal Hot Topics, Daubert Issues, and Trial Prep for Expert Witnesses

- Wisconsin Statewide Prosecutor Education and Training
    - Multiple presentations each year.
    - Presentations on Emerging 4th Amendment Legal Issues, Warrant Requirements, Compliance with Electronic Communications Privacy Law, Trial Skills.

- National Attorneys General Training and Research Institute
    - Multiple presentations each year.
    - Taught Trial Skills and Advanced Trial Skills at both national conferences and for state Attorneys General.
    - Conducted series of webinars in 2020 and 2021 on leadership and management, including Thriving in a Remote Workplace, Crisis to Balance, Maintaining Equanimity, Building High Quality Connections, and Developing Effective Teams.

- Attorney General Alliance – Africa Programme
    - Summer 2018 and 2019
    - Taught Cyber Crime and Privacy Law to prosecutors, police, and judges in Rwanda and Ghana.

Tony Evers

Office of the Governor | State of Wisconsin

Governor's Judicial Selection Advisory Committee
Questionnaire for Circuit Court or Court of Appeals

Your name	Position you are applying for
David William Maas	Circuit Court Judge - Waukesha County

Governor's Judicial Selection Advisory Committee Members:

Chief Legal Counsel Mel Barnes
Co-Chair
Office of Governor Tony Evers

Attorney Jeanne Armstrong
Fuhrman & Dodge

Attorney Michael Brose
Doar, Drill & Skow

Retired Judge Thomas Flugaur
Portage County Circuit Court

Attorney Rebeca López
Godfrey & Kahn

Attorney John Raihala
Clifford & Raihala

District Attorney John Sacia
Trempealeau County

Professor Miriam Seifter
University of Wisconsin Law School

Benjamin Wagner
Co-Chair
Habush Habush & Rottier

Attorney Christine Bremer Muggli
Bremer & Trollop Law Offices

Deputy Corporation Counsel Scott F. Brown
Milwaukee County

Attorney Kristen Hardy
Northwestern Mutual

Attorney Craig Mastantuono
Mastantuono Coffee & Thomas

Attorney Jon Padgham
Retired Public Defender

Attorney Katelyn Sandfort
Herrling Clark Law Firm

Directions: You must answer each question in the questionnaire. If you need additional space to fully answer a question, attach additional pages to your application. Questions may be directed to the Office of the Governor at (608) 266-1212.

Last revised: April 2024

Section 1: Personal information

1. Provide the following personal information:

Name (First Middle Last)	Date of birth (MM/DD/YR)
David William Maas	02/18/1973
Email address	Home phone
[redacted]	[redacted]
Work phone	Cell phone
[redacted]	[redacted]
Place of birth (City, State)	Gender
West Allis, WI	Male
Wisconsin State Bar Number	Race
1025522	Caucasian

Maiden/alias/former name(s)	Dates used (MM/YR – MM/YR)
N/A	

2. Are you a United States Citizen? ☑ Yes ☐ No

3. List each residential address you have had in the last 10 years:

Street address	City, State, Zip	Dates you lived at the address (MM/YR – MM/YR)
[redacted]	Oconomowoc, WI 53066	09/2008 - Present

Section 2: Familial information

4. What is your current marital status: ☑ Married/domestic partner, ☐ Not married

5. If you are married/have a domestic partner, answer the following:

Spouse's/domestic partner's name (First Middle Last)	Date of birth (MM/DD/YR)
Elizabeth Marie Maas	[redacted]
Date of marriage/domestic partnership	Place of birth (City, State)
[redacted]	[redacted]

Spouse/domestic partner's maiden/alias/former name(s)	Dates used (MM/YR – MM/YR)
Elizabeth Marie Welsch	[redacted]

6. List your spouse's/domestic partner's three most recent occupations, beginning with their current or most recent employer:

Employer	Employer's address	Occupation/job title	Dates of employment (MM/YR – MM/YR)
[redacted]			

7. If you have ever been divorced, answer the following for each former spouse/domestic partner:

Ex-spouse's/ex-domestic partner's name (First Middle Last)	Date of birth (MM/DD/YR)
N/A	
Dates of marriage/domestic partnership (MM/YR – MM/YR)	Ex-spouse's/ex-domestic partner's occupation and employer

Ex-spouse's/ex-domestic partner's (First Middle Last)	Date of birth (MM/DD/YR)
Dates of marriage/domestic partnership (MM/YR – MM/YR)	Ex-spouse's/ex-domestic partner's occupation and employer

Ex-spouse's/ex-domestic partner's name (First Middle Last)	Date of birth (MM/DD/YR)
Dates of marriage/domestic partnership (MM/YR – MM/YR)	Ex-spouse's/ex-domestic partner's occupation and employer

8. If you have children or step-children, provide the following information:

Name of child	Age	State of residence	Occupation and employer
[redacted]			

Section 3: Education background

9. List the name and location of each school you attended, beginning with high school:

Name of school	Location (City, State)	Dates attended (MM/YR – MM/YR)	Degree earned
Marquette University H	Milwaukee, WI	08/1988 - 06/1991	HS Diploma
Rice University	Houston, TX	08/1991 - 06/1995	B.A. Economics
University of Wisconsir	Madison, WI	08/1995 - 05/1998	Juris Doctor

10. List any scholarships, awards, honors, fellowships, or citations you received during college, graduate school, or law school.

Marquette University High School:
- Honor Roll, First Honors – 4 years
- National Honor Society
- Assistant Rector – Kairos Senior Retreat
- Golf letterman – 4 years
- Senior class Secretary

Continued on separate sheet.

11. While attending any secondary school or college, have you ever been expelled, suspended, placed on probation, or withdrawn from enrollment due to an allegation of academic dishonesty or because of conduct that harmed or could have harmed others? ☐ Yes, ☑ No

12. If yes, provide the following information:

Name & location of school	Date conduct occurred (MM/YR)
N/A	
Nature of conduct	Disposition / outcome
Details of incident	

Section 4: Professional background and experience

13. List each court and administrative body in which you have been admitted to practice:

Bar admission	Date of admission (MM/YR)
Wisconsin Supreme Court	06/1998
Western District of Wisconsin	07/1998
Eastern District of Wisconsin	07/1998

14. If any of your admissions listed above have lapsed, state when and why the admission lapsed.

N/A

15. List all your places of employment for the last 20 years since you've turned 18, including periods of unemployment, beginning with your most recent employer.

Employer	Employer's address	Occupation / Job title	Dates of employment (MM/YR – MM/YR)
Fond du Lac District A	160 S. Macy St., Fond	Assistant District Attor	06/2023 - present
Wisconsin Department	17 W. Main St., Madis	Assistant Attorney Gen	07/2008 - 06/2023
Milwaukee District Att	821 W. State St., Milw	Assistant District Attor	10/1999 - 07/2008
D.C. Bar Association	901 4th St. NW, Ste. 7	John Payton Leadershi	Spring 2020 and 2022

16. If you served in the military, provide the particulars of your service, including: the dates of service, the branch of service, rank or rate, and type of discharge received.

N/A

17. Within the past 10 years, has your employment ended for one of the following reasons: you were fired; you resigned after being told you would be fired; you left by mutual agreement following allegations of misconduct or unsatisfactory performance; or you left for other reasons under unfavorable circumstances?
☐ Yes, ☑ No

18. If yes, provide the following information:

Employer	Employer's address
N/A	
Specific reason for separation	Date of separation (MM/YEAR)
Explanation	

19. Provide the following information if, within the past 10 years, an employer investigated you or disciplined you due to actual or alleged misconduct:

Employer	Employer's address
N/A	
Nature of allegation or misconduct	Disposition of investigation
Explanation	

Section 5: Legal practice

20. Describe the general character of your practice. If you are currently a judge, describe your practice before you became a judge.

As an Assistant District Attorney, my practice area is entirely criminal law with some municipal ordinance enforcement. I have been a criminal prosecutor at either the state or county level since October 1999. Approximately 13 months of my employment in the Milwaukee District Attorney's Office consisted of termination of parental rights cases. Those cases have several civil aspects, particularly during pretrial discovery. I also prosecuted dozens of quasi-criminal Chapter 980 civil commitment cases at the Department of Justice.

21. Describe your typical clients and the areas, if any, in which you have specialized.

At the Milwaukee District Attorney's Office, I started in the general misdemeanor unit, trying a jury trial to verdict within my first two weeks. That trial was followed by dozens more as I progressed after nine months to a misdemeanor domestic violence (DV) calendar and, another year later, a felony DV calendar. Continued on separate sheet.

22. How many cases have you tried to verdict? Well over 100

23. Describe up to three significant trials, appeals, or other legal matters in which you participated as a judge or lawyer in the past seven years. Please explain your role in the case, jurisdiction, name of judge and opposing counsel, dates of involvement, a brief description of your involvement, and why it was significant:

State v. Eddie Tipton, State v. Robert Rhodes, Dane County Case Nos. 16CF2604, 16CF2605. Judge: Ellen Berz. Local defense counsel: Hal Harlowe (Rhodes) and John Bradley (Tipton). As lead Cyber Crime prosecutor at the Department of Justice, I represented Wisconsin's interests in the multi-state lottery fraud perpetrated by Eddie Tipton and his best friend Robert Rhodes. Tipton was a programmer and security expert at the Multi-State Lottery Association in Iowa. He was responsible for creating the software for the random number generator computers used to pick lottery numbers. By installing malicious code into the machines, he was able to predict winning lottery numbers on certain days of the year. In December 2007, Rhodes purchased the winning ticket for the December 29, 2007, WI Megabucks Lottery game worth $2,000,000 by using pre-selected numbers provided by Tipton. Tipton and his conspirators, including his brother, were also responsible for fraudulent lottery wins for millions of dollars in Iowa, Colorado, Kansas, and Oklahoma. Coordination among Iowa, Colorado, and Wisconsin was essential to complete the investigation. The machines used in the Wisconsin lottery were recovered and forensically analyzed, and Tipton's code was cracked. As the lone assigned Wisconsin prosecutor, I worked the entire case from investigation to sentencing. I worked closely with the Iowa Attorney General to discover the criminal pattern, flip witnesses, and break up the conspiracy. Rhodes pled guilty in Wisconsin and agreed to provide testimony against Tipton. Tipton then pled guilty in both Wisconsin and Iowa. The case was the subject of a New York Times Magazine article: Reid Forgrave, The Man Who Cracked the Lottery, New York Times Magazine, May 3, 2018. This case was significant because of the scope of the criminal conspiracy, the amount of loss involved, the technical expertise required to understand the scheme, and, most importantly, the fact that our DOJ team, working with the Wisconsin Lottery, was integral in discovering and stopping the criminal enterprise.

Continued on separate sheet.

24. Describe your experience in adversary proceedings before an administrative agency or commission.

For the past 25 years, my practice has been exclusively in state circuit court, with a few cases litigated in the Court of Appeals.

25. Describe your non-litigation legal experience (e.g., arbitration, mediation).

My practice as a state prosecutor has been entirely litigation-related. I have also delivered dozens of continuing legal education presentations, as more fully described in the next answer.

26. Summarize any speeches or presentations you have given in the past five years about the law, including: the date of the speech or presentation and the organization to which you presented.

Over the past five years, I've presented at over 50 legal and professional conferences in Wisconsin, around the country, and even internationally. Those presentations have been on a variety of topics from substantive criminal law, to trial skills, to leadership in the legal profession. I can best summarize those presentations as follows:

Continued on separate sheet.

27. List any articles or publications you have authored about the law. Include a citation or hyperlink to each article or publication.

Ann Batio, et al., Wisconsin Prosecutor's Domestic Abuse Reference Book (Wisconsin Office of Justice Assistance) (1st ed. 2004). Contributing section author and section editor. Hyperlink unavailable.

Section 5: Professional and public service

28. Identify your participation in professional, civic, and charitable organizations.

Name of association	Offices held and committees served on	Awards, honors, or citations	Dates of participation
Sunset Playhouse, Elm	Board Member		Approx. 2004-2007

29. Do you currently belong to, or have you ever belonged to, any organization that discriminates on the basis of gender identity, race, religion, sex, or sexual orientation, through membership requirements or membership policies? If so, identify the organization, the dates in which you belonged to the organization, and what, if anything you did to change such requirements or policies.

N/A

30. Identify all public offices to which you were appointed or elected.

Name of office	Elected or appointed?	Dates of service
N/A		

31. Identify any awards or honors you have received in the past 10 years, which have not been listed elsewhere on this questionnaire.

Entity providing the award or honor	Name of the award or honor	Date received (MM/YR)
N/A		

32. Describe any significant pro bono legal work or volunteer service you have performed.

N/A

Section 6: Business interests

33. If you or your spouse/domestic partner are a director, officer, or otherwise engaged in the management of any business entity, provide the following information:

Name of the business	Nature of the business	Duties you or your spouse/domestic partner perform	You or your spouse's/domestic partner's intended involvement if you are appointed
Hamacher Resource Group	Employee-owned retail marketing and	Spouse - Human Resource Director and	Spouse will continue as co-owner and HR

Section 7: Previous partisan or non-partisan political involvement

34. List any position you've held in a judicial, non-partisan, or partisan, political campaign (e.g. treasurer, campaign manager, volunteer).

N/A

35. If you have ever run for public office, provide the following information:

Office sought	Date of primary election	Date of general election	Outcome / percentage of vote you obtained
N/A			

36. If you have ever publicly endorsed a judicial or non-partisan candidate in the past ten years, provide the following information:

Name of endorsed candidate	Office sought by candidate	Year of endorsement
N/A		

Section 8: Character and fitness

37. Answer the following questions. If you answer "no" to any of the following questions, you must attach a detailed explanation of why you answered no.

	Yes	No
a. Are you in good standing with each jurisdiction in which you are admitted to practice law?	☑	☐
b. Are you current with your continuing legal education requirements in each state in which you are admitted to practice law?	☑	☐
c. Are you free of any physical or mental impairment that in any way would limit your ability or fitness to properly exercise your duties as a member of the judiciary in a competent and professional manner?	☑	☐
d. Have you met every deadline imposed by a court order or obtained an extension when needed?	☑	☐
e. Were all of your taxes (federal, state, local) current as of the date of your application?	☑	☐

38. Answer the following questions. If you answer "yes" to any of the following questions, you must attach a detailed explanation of why you answered yes.

	Yes	No
a. Has any tribunal ever held you in contempt or otherwise formally reprimanded or sanctioned you?	☐	☑
b. Have you ever been disciplined, reprimanded, or sanctioned by any regulatory or licensing entity?	☐	☑
c. Have you ever been party to a lawsuit either as a plaintiff or a defendant?	☐	☑
d. Have you ever been subject to an investigation by the Wisconsin Judicial Commission, the Wisconsin Supreme Court, the Office of Lawyer Regulation, the Crime Victim Rights Board, or any other equivalent entity in any jurisdiction?	☐	☑
e. If you are a quasi-judicial officer, have you ever been disciplined or reprimanded by a sitting judge?	☐	☑
f. Has a tax lien ever been filed against you?	☐	☑
g. Have you or your spouse/domestic partner ever been subject of any audit, investigation, or inquiry for either federal, state, or local taxes?	☐	☑
h. Have you or your spouse/domestic partner ever filed for bankruptcy?	☐	☑
i. Is there anything in your current or past financial situation that would affect your ability to be a judge or justice?	☐	☑
j. Are there any circumstances in your professional or personal life that create a substantial question as to your qualifications to serve as a judge or justice that might interfere with your ability to serve?	☐	☑

39. Provide five references, three of which must be practicing attorneys or judges.

Name	Occupation
Eric Toney	Fond du Lac District Attorney
Address	Phone Number
160 S. Macy St., Fond du Lac, WI 54935	[redacted]

Name	Occupation
Hon. Douglas Edelstein	Circuit Court Judge - Fond du Lac County
Address	Phone Number
160 S. Macy St., Fond du Lac, WI 54935	[redacted]

Name	Occupation
Eric Wilson	Deputy Attorney General, WI DOJ
Address	Phone Number
17 W. Main St., Madison, WI 53703	[redacted]

Name	Occupation
Hon. Lisa Stark	Presiding Judge, WI Court of Appeals
Address	Phone Number
2100 Stewart Ave., Ste. 310, Wausau, WI 544	[redacted]

Name	Occupation
Cassandra Van Gompel	Asst. Public Defender, Manager Fond du Lac C
Address	Phone Number
[redacted] Fond du Lac, WI 54935	[redacted]

Section 10: Additional information for consideration

40. Attach your answers to the following questions. Each answer must be 500 words or less. Your answers must be attached as a Word document.

    a. Why do you want to serve the people of Wisconsin as a judge or justice?

    b. Decisions by the Wisconsin Supreme Court and U.S. Supreme Court can greatly impact the people of Wisconsin. Describe which case in the past 25 years by the Wisconsin Supreme Court or U.S. Supreme Court you believe had a significant positive or negative impact on the people of Wisconsin.

    c. Identify two or three judges or justices whom you admire and explain why.

    d. Describe the proper role of a judge.

41. Attach two legal writing samples. Your writing samples must be attached as a Word document.

42. Do you wish to request that your application remain confidential to the extent permitted by law? Please note that state law only provides limited protections. A request for confidentiality will not adversely affect your application.

☐ Yes, ☑ No

REMINDER: Do not forget to attach the following documents to your application:

- Your resume;
- Your cover letter;
- Two legal writing samples;
- Your answers to question 40;
- Your waiver, notice of disclosure, and affidavit (see below); and
- Any necessary attachments (e.g., explanations).

SUBMISSION: Email your application and application materials as a PDF to GOVJudicialAppointments@wisconsin.gov. The email address will provide an automatic confirmation if your submission is received. The email address will not accept attachments exceeding 10 mb in size. If your attachments exceed 10 mb in size, send the attachments in two separate emails.

NEXT STEPS: After you submit your application materials, the Governor's Office will review the application for completeness and accuracy. Complete and accurate applications will be forwarded to the Governor's Judicial Selection Advisory Committee for consideration. If you are selected for an interview, the Committee will contact you to setup an interview. The Committee will base its recommendation on your materials, references, interview, and any other information it deems relevant.

LETTERS OF RECOMMENDATION: You may have individuals submit letters of recommendation on your behalf. The letters must be sent to GOVJudicialAppointments@wisconsin.gov. The letters must be received by the application due date. No more than 10 letters may be submitted.

Waiver and Authorization

I hereby authorize the Office of the Governor or his staff to solicit information and records pertaining to me from any or all of the following sources:

1. My present employer.
2. My previous employers.
3. Any school, college, university, or other educational institution that I attended.
4. Any place of business.
5. Any governmental agency or political subdivision.
6. The Wisconsin Department of Revenue.

I further authorize any recipient of a request for information from the Governor or his staff to provide any such information as may be necessary to consider my application.

Signature: _____ Date: 04/25/24

Printed name: David Maas

Notice of Disclosure

I acknowledge and understand that my application and its attachments will become public records once they are submitted to the Office of the Governor. I further acknowledge and understand that, while state law provides limited confidentiality protections, most of my application and its attachments are subject to disclosure to the general public under the Public Records Law.

Signature: _____ Date: 04/25/24

Affidavit

I, David William Maas, do swear that the information provided in this application is, to the best of my knowledge, true and accurate.

Signature: _____ Date: 04/25/24

Sworn and subscribed to before me
this 25 day of April 2024, 201__

Mark McGinnis
Notary Public, State of Wisconsin
My commission: is permanent

David Maas – Judicial Appointment Application – Waukesha Circuit Court

Continuation from main form:

Question #10 continued:

Rice University:
• President's Honor Roll – 1995
• Residential college judge advocate – Senior year
• Residential college class representative – Freshman, Junior years
• Orientation week advisor – Junior year

University of Wisconsin Law School:
• Dean's List – May 1998
• Highest grade in class – Pretrial Advocacy
• Law Revue – performer all 3 years, lead writer/producer/director 2L and 3L years
• Graduation ceremony master of ceremonies, selected by class and administration

Question #21 continued:

In the DV unit, I tried many cases in a fast-paced environment. The courtroom was my classroom, and I learned how to be an effective trial attorney.

From there, I was promoted to a general felony calendar that involved several trials for armed robbery, attempted homicide, car theft, and burglary. Again, aside from charging new cases and litigating preliminary hearings, the rest of my time was spent in court. If I wasn't trying a case, I was negotiating pleas, litigating motions, questioning witnesses at evidentiary hearings, or arguing in favor of sentencing recommendations. I also spent time in the gun unit before moving to the felony drug unit.

One of the more unique experiences I had in the District Attorney's office was on the Termination of Parental Rights team. The subject matter was tough. Adoption day, though, provided me with some of the most rewarding moments of my career, seeing our team's work come together with the adoption of neglected children into homes of caring and loving parents.

As an Assistant Attorney General in the Complex Criminal Litigation Unit, I took what I learned as an Assistant District Attorney and applied it to larger and more complex cases around the state. My cases involved drug delivery, embezzlement, theft by fraud, misconduct in public office, homicide, election fraud, and tax fraud. I have also prosecuted sexually violent persons petitions under Chapter 980.

Halfway through my AAG career, I began specializing in Internet Crimes Against Children (ICAC) and Cyber Crime cases. I worked closely with our ICAC investigators in the Division of Criminal Investigation, and I trained law enforcement affiliates of the ICAC Task Force around the state. I became the statewide expert in this area and served as a resource for prosecutors both at the state and national levels. I also reviewed hundreds of subpoena and warrant requests for

digital communication records. While the subject matter is heartbreaking, I valued my role as an advocate for extremely vulnerable and abused victims.

At the Fond du Lac District Attorney's Office, I am assigned to one of the five branches where I handle all varieties of criminal matters and proceedings. Cases range from OWI 1st offenses to felony drug and serious violent felony cases.

I have always acted with integrity and adhered to the highest ethical standards when advocating on behalf of the State of Wisconsin. I have stricken hard blows, but no foul ones. I am well aware of the great responsibility and discretion I have had as a prosecutor for 25 years and make sure to never abuse that power.

Question #23 continued:

State v. Daniel Steffen, Polk County Case No. 21CF67. Judge: Scott Nordstrand (St. Croix County). Defense counsel: Eric Nelson. Steffen, a former Polk and Burnett County prosecutor, was convicted of three counts of Representations Depicting Nudity on April 27, 2023, after a jury trial. Steffen, while an ADA in Burnett County, had an ongoing sexual relationship with a female defendant who was on a deferred prosecution agreement prosecuted by Steffen and his office. The Division of Criminal Investigation got its initial tip and began investigating Steffen for misconduct in early 2020. I drafted multiple warrants for communications and location records and gave advice to our agents throughout the course of the investigation. Upon execution of the final warrants in Steffen's home, investigators discovered videos of Steffen engaged in sex with the female defendant, made without her knowledge. Investigators also uncovered a similar video with a second victim. I first-chaired the trial with one of our junior AAGs. The case was significant because of the extensive warrant work done during the multi-year investigation, my close involvement with the agents in putting the pieces of the communication and location records together, and the impact on the profession of prosecuting an ADA who was exploiting his office for personal gain in arguably the most abusive way possible.

State v. William Quicker, Clark County Case No. 21CF14. Judge: Richard Radcliffe (Monroe County). Defense counsel: Ryan Moertel. Quicker is accused of six counts of Possession of Child Pornography. His case is set for jury trial in July 2024. I volunteered to assist the District Attorney on a defense motion to suppress. The defendant alleged that the police violated the 4th Amendment by opening images from a CyberTip without a warrant. I wanted to get involved in the case for a few reasons. First, I had trained agents around the state on 4th Amendment issues with this very scenario and wanted to defend my interpretation of the law. Second, prosecutors from multiple counties had been emailing me for help with identical motions they were encountering, and I saw this as an opportunity to not only provide briefs but also get involved in a motion hearing to produce a sound record for the arguments and decision. Third, this was a complicated and unsettled area of the law, and I believed many prosecutors and judges were not familiar with the technology or processes involved. These types of motions can overwhelm ADAs who must also handle a high volume of cases on their dockets. I hoped that this case would provide a good example for prosecutors (and courts) to follow. My involvement in this case ended once the motion to suppress was denied. My briefs and advice have been sent around our statewide email as a guide for

prosecutors. This case was a good example of how my help in one case benefitted prosecutors in dozens more.

Question #26 continued:

The National Association of Attorneys General (NAAG) is a nonpartisan national forum which provides collaboration, insight, and expertise to empower and champion the country's Attorneys General. I have served as NAAG faculty since shortly after attaining my position as an Assistant Attorney General. Over my career as an AAG and beyond, I have presented dozens of basic and advanced trial skills trainings on topics such as case theory, trial presentation skills, rules of evidence, objections, and ethics. I have also presented at NAAG leadership conferences and webinars. NAAG presentations in the past five years have included:

- Basic and Advanced Trial Skills Training:
  - March 19-22, 2024 – Nevada Attorney Generals Office (AGO)
  - January 23-25, 2024 – Nevada AGO
  - September 26-28, 2023 – Maryland AGO
  - June 20-22, 2023 – Maryland AGO
  - February 21-24, 2023 – Florida AGO
  - September 20-24, 2021 – Michigan AGO
  - October 9-11, 2019 – Utah AGO
  - March 5-9, 2018 – California AGO
- NAAG National Webinar Series for Remote Working (Virtual):
  - Core Leadership: Remote Management Practices – May 17, 2021
  - Thriving in a Remote Workplace: Crisis to Balance – February 4, 2021
  - Thriving in a Remote Workplace: Motivating Yourself and Others – June 8, 2020
  - Thriving in a Remote Workplace: Maintaining Engagement – May 12, 2020
  - Thriving in a Remote Workplace: Best Practices for Success – April 14, 2020
- NAAG Leadership and Management:
  - Leadership and Management Training – February 28, 2023 – Maryland AGO (virtual)
  - Building High Quality Connections / Leadership & Management Skills – September 20-22, 2022 – NAAG Antitrust National Conference (Minneapolis, MN)
  - Crisis to Balance: Maintaining Equanimity – July 19, 2022 – Maryland AGO (virtual)

Beginning in 2020, I have been a faculty member for all four of the Wisconsin Judicial College's Digital Evidence Boot Camp for Judges programs. The boot camp delivers an intense 3-day course to 25 Wisconsin judges on issues relating to cutting edge technological and legal concerns surrounding digital evidence. I have taught approximately 100 judges about best practices and warrant requirements using examples of my own warrants and case studies. Those courses have run in late winter 2020, 2022, 2023, and 2024.

Since 2020, I have been on faculty for the District of Columbia Bar Association's John Payton Leadership Academy. As one of three instructors for the course, I helped guide 120+ up and coming practitioners in the D.C. Bar through leadership and strengths-based training. The

curriculum involves three full days of progressive training complemented by webinars, taking the participants through self-identification of strengths, tools for utilizing those strengths, and finding strengths in others. The D.C. Bar ran this course in 2020 and 2022. The courses included the following presentations and themes:

- Being a Leader Others Want to Follow
- Performance Sustainability Using Strengths to Overcome Weaknesses
- Successful Goal Setting for Attorneys
- The Value of Giving Back
- Being the Master of Your Career
- Celebrating and Using Your Strengths
- Building Your Board of Directors
- Using Your Strengths Assessment
- Developing an Effective Team
- Resilience as a Tool
- Building High Quality Connections for Success
- Coaching for Success
- Coaching Workshop

Drawing on my expertise and specialization in Internet Crimes Against Children and Cyber Crimes, I was invited to teach at the National Cyber Crime Conference in Norwood, Massachusetts. The nation's premiere Cyber Crime conference draws over 1,000 law enforcement investigators, analysts, and prosecutors from around the nation (with some international attendees). My presentations have been part of the prosecutor track:

- Digital Forensic Examiner Expert Witness Preparation; Hot Topics in Digital Evidence; Daubert Issues with Admission of Digital Evidence - April 23-25, 2024
- Mock Trial & Techniques; Hot Topics in 4th Amendment Law - April 26-29, 2022
- Mock Trial & Techniques; Hot Topics in 4th Amendment Law - April 26-30, 2021 (virtual)

In addition to overseeing the Wisconsin DOJ's Statewide Prosecutor and Education Training (SPET) Program as Deputy Director of the Criminal Litigation Unit, I was also a frequent lecturer at our statewide prosecutor conferences. The main SPET conferences gathered 150+ DAs, DDAs, and ADAs from around the state, plus dozens more virtual attendees. The trial skills and new prosecutor courses were delivered to audiences of 20-25 ADAs. Those presentations have included:

- October 31 – November 3, 2023 – Fall SPET Conference
    - Search Warrants for Digital Evidence
    - Day-long specialty track for Leadership Training for Prosecutors
- November 15-18, 2022 – SPET Trail Skills Training for New Prosecutors
    - Created and organized entire 4-day training
    - Led lectures and group discussions
- May 10, 2022 – SPET Webinar series (Virtual)
    - Cutting Edge Law for Digital Evidence Search Warrants
- September 17, 2020 – SPET New Prosecutor Course (Virtual)
    - Case Theme and Theory presentations
    - Led lectures and group discussions

- May 7-10, 2019 & December 3-6 – Spring & Fall SPET Conference
    - Geofences and Advertising IDs
    - Tackling a Child Pornography Case – Issues, Best Practices, and Common Defenses
- August 6-9, 2019 – SPET Trial Skills Training for New Prosecutors
    - Case Theory Workshop
    - Cross Examination Techniques
    - Led group discussions and critiques
- June 12-15 and October 30 – November 2, 2018 – Spring & Fall SPET Conference
    - Wiretap Law in Wisconsin

As part of my work with DOJ's ICAC Task Force, I have delivered numerous legal foundation and legal update courses to new and experienced law enforcement agents around the state. These presentations have been both at DOJ's ICAC School to audiences of over 200 agents and also on-site trainings to local and county agencies. I have also delivered law enforcement training on search and seizure issues with cell phones. Some of those trainings have included:

- DOJ ICAC School:
    - Identifying Chargeable Images & Definitions of Child Pornography; Administrative Subpoena Process and Law - October 30, 2023
    - Identifying Chargeable Images & Definitions of Child Pornography; Legal Updates for Digital Evidence Warrants - October 20, 2022
    - Definitions of Child Pornography; Legal Updates for Search Warrants and Other Legal Process - November 8, 2021
    - Best Practices for ICAC Affiliates - October 7, 2021
    - ICAC Legal Updates - November 5, 2020
    - ICAC Legal Updates - February 4, 2020
    - Legal Process and Definitions of Child Pornography - October 1, 2019
- Western WI Metro Drug Enforcement Group Training – Legal Updates & 4th Amendment Law - December 12, 2022
- Wisconsin Narcotics Officers Association (WNOA) Annual Conference – Digital Evidence Search Warrants and Cell Phone Law - August 26, 2022
- U.S. Department of State International Visitor Leadership Program (Virtual) – Cybersecurity and Safe Digitalization: Transferring U.S. Best Practices and Building Collaboration - March 11, 2021
- Wisconsin DOJ Privacy & Policy CLE – Availability of Location and Other Cloud Data (Virtual) - August 19, 2020
- Marathon County Law Enforcement Conference – Cell Phones and Digital Evidence - January 18, 2019
- Wausau Law Enforcement ICAC Training – Cell Phones & Digital Evidence; Legal Process in ICAC Cases - March 1, 2019
- Madison Police Department ICAC Training – Legal Definitions of Child Pornography; Legal Process in ICAC Cases - February 5, 2019

I was invited to speak on my expertise at the 34th Annual San Diego International Conference on Child and Family Maltreatment in San Diego, CA, January 28-30, 2019. I gave two presentations:

Cell Phone Evidence for Prosecutors and Introduction to Peer-to-Peer Investigations for Prosecutors.

Expanding on my work with the John Payton Leadership Academy, I presented at the annual Professional Development Consortium (PDC) Summer Conferences on leadership techniques. The PDC is an association of individuals responsible for developing and managing training and continuing professional development for lawyers, future lawyers, and other professionals at law firms, law schools, government agencies and corporations. My presentations were:

- July 20-22, 2023 – Charlotte, NC – Handling Vicarious Trauma in the Legal Profession
- July 13-15, 2022 – Denver, CO – Being a Leader Others Want to Follow

Finally, I had the honor of being selected to present at three international conferences as part of the Conference of Western Attorneys General – African Alliance Partnership on Cyber Crime Enforcement. This national, bipartisan group, now called the Attorney General Alliance – Africa Programme, organizes workshops, seminars, and conferences aimed at sharing knowledge, experiences, and training to develop and strengthen both the human and institutional capacity required to combat transnational crimes. The first was in July 2018 in Kigali, Rwanda, for the East African Law Society. The second was in May 2019 in Accra, Ghana, for the Ghana Police Service. The third, in July 2020 for the Malawi Law Society, unfortunately had to be delivered remotely due to the pandemic. Conference attendees were a mix of local investigators, analysts, prosecutors, and judges. Other instructors included local experts and representatives from electronic communication service providers such as Google. My presentations focused on data protection and regulation, investigation of Cyber Crime, emerging legal issues, and case studies.

Question #40.a. Why do you want to serve the people of Wisconsin as a judge or justice:

There are three primary reasons why I seek this appointment as a Waukesha Circuit Court Judge.

First, I think I would be good in this role. I had the benefit of practicing in front of dozens of judges in Milwaukee County and dozens more across the state as an AAG. During those cases, I saw firsthand the judicial demeanor and conduct that worked well, and plenty that did not. A judge should be punctual, prepared, knowledgeable, impartial, respectful, and ethical. A judge, particularly in Waukesha, should not be afraid of a large caseload and a high-pressure environment. My years as a prosecutor have prepared me well for this role by exposing me on an almost daily basis to this environment. I am not afraid of working hard, making tough calls, and always acting ethically. I know how to manage a huge calendar of cases, and I am confident I would run an efficient courtroom. I will also always appreciate taking the bench as a representative of my community.

Second, I have developed a proper perspective after a 25-year prosecution career, and I can bring that experience and perspective to the bench. Even though I spent this time as an advocate for the people of Wisconsin, I have always strived to do what is right because of the immense power I have as a prosecutor. The decisions I make have a profound impact on defendants, victims, and the community. It is a responsibility I never take lightly. While handling thousands of cases, I feel like I have consistently built a proper perspective to best litigate and resolve cases. While giving

up my advocacy role will be the most difficult part in this transition, I know I will retain proper perspective and judgment.

Third, my expertise with digital evidence and adherence to the 4th Amendment is greatly needed on the bench in Wisconsin. What was once the purview of internet crimes and child pornography cases has become important evidence in almost all kinds of criminal prosecutions and many civil cases. I have seen a vast discrepancy in experience among judges when it comes to digital evidence. I embraced my role helping fellow AAGs and ADAs in this area, and I could do the same for my colleagues on the bench. I feel like I would be the best fit for this greatly needed unique role as a trainer, consultant, and colleague.

I have always embraced the responsibilities that I have as a prosecutor, and I would similarly embrace my responsibilities as a judge. I know I would be a fair and impartial umpire, calling balls and strikes as the arbiter of facts and law. My career has prepared me for this next step in service to my community. I would be honored to serve the citizens of Waukesha County as a member of the bench.

Question #40.b. Decisions by the Wisconsin Supreme Court and U.S. Supreme Court can greatly impact the people of Wisconsin. Describe which case in the past 25 years by the Wisconsin Supreme Court or U.S. Supreme Court you believe had a significant positive or negative impact on the people of Wisconsin.:

I am choosing *Carpenter v. U.S.*, 585 U.S. 296 (2018) for this question. *Carpenter* represents a few positives and a few negatives and signals the direction I think the United States Supreme Court will continue to travel when and if it decides another important 4th Amendment digital evidence case.

First, a negative. *Carpenter* was a 2018 decision based upon 2011 fact pattern. By the time the decision was released, the technology involved was almost obsolete. The cell site location information of *Carpenter* had been surpassed by GPS and other location tracking with exponentially better accuracy. The amount of our personal data available commercially and to the government is greater by many factors. This decision shows the inability of the Supreme Court to keep up with changes in technology and puts the onus on the circuit courts to apply 4th Amendment requirements as technology changes and the government's reach extends, without the benefit of legal precedence or legislation.

A positive takeaway from *Carpenter* is that the Supreme Court recognized our right to privacy in our movements and our data, at least to a point. Read with *Riley v. California*, 573 U.S. 373 (2014), the Supreme Court acknowledged that cell phones, and the data contained therein or in the cloud, are just different than other traditional targets of government search and seizure. The decision rightly requires the government to act in accordance with the 4th Amendment by obtaining a search warrant for location data, even though it is turned over to and kept by third parties. The government cannot take shortcuts in accessing this data. The Supreme Court was correct to reason that this cell phone data is qualitatively different such that it deserves a new classification of records, although it remains unclear what the extension of this special treatment will be. *Carpenter* also gives standing to the individual to challenge search and seizure of this data.

Given the ubiquitous nature of cell phones and the expansive availability of consumer data which tracks our location every minute of every day, even when our phones are "off," courts will continue to be confronted with the challenge of weighing police access to third party records for investigative purposes against a citizen's right to be free of not just government surveillance but also commercial surveillance. This decision is important for both privacy rights and the government's access to records. *Carpenter* requires courts to continue balancing the individual's right to privacy in ways not seen before and be aware that "voluntary" commercial surveillance must not equate to government access to private records. A court must also appreciate the vast amounts of data accessible via warrants and ensure that the warrants are only approved if they are limited in scope and particularity.

Question #40.c. Identify two or three judges or justices whom you admire and explain why:

When I was in the Milwaukee District Attorneys Office, I had the opportunity to try cases before Judge John DiMotto. I cite Judge DiMotto here as an example of what it means to be prepared and ready every day on the bench. I admired his preparation before trials and his anticipation of and readiness for legal issues that may arise. Judge DiMotto was an encyclopedia of legal knowledge. But rather than relying on memory or off-the-cuff analysis, Judge DiMotto would already have a memo or legal analysis prepared. When a complex problem comes up in the heat of a trial, some judges reach for bench books or outlines. Chances are, Judge DiMotto wrote those outlines. He would anticipate issues and have statutes or caselaw ready to go when the attorneys argued. I have not practiced in front of many judges as well prepared for all possibilities as Judge DiMotto.

I got to know Judge Derek Mosley, former Chief Judge of the Milwaukee Municipal Court, when we worked together as Assistant District Attorneys in Milwaukee. I admired Judge Mosley as a colleague for his dedication and service to his community and for his trial skills as a prosecutor. As a municipal court judge, Judge Mosley was a prominent example of further service to and involvement in his community. Judge Mosley was fair and respectful of all who appeared in his courtroom, often looking for creative ways to protect the interests of litigants and ensure the court process did not cause undue burdens on community members. But it was his work outside the courtroom that served as a shining example of a judge getting involved in his community. Judge Mosley cared about the community he served, and his involvement and promotion of the community brought added respect to the Milwaukee municipal bench.

During my entire time in Fond du Lac County, I have been assigned to Judge Douglas Edelstein's court. Judge Edelstein is a relatively newer judge, having come from the District Attorneys office as the Deputy District Attorney. What I have admired about Judge Edelstein, having spent nearly every day of ten months in his courtroom, is his demeanor and fairness to litigants and attorneys. Judge Edelstein is an example of a zealous advocate embracing his new role as impartial magistrate. He affords equal opportunity for litigants to be heard, makes appropriate and reasoned rulings, shows no partiality towards either side, and treats all with respect. I also admire his self-awareness when confronted with a new or unfamiliar issue. Judge Edelstein is not afraid to read statutes, consult with the attorneys, take a break to consult caselaw, and admit unfamiliarity with an issue. I think this is a sign of judicial humility and shows a respect for the gravity of his decisions and a desire to get things right.

Question #40.d. Describe the proper role of a judge:

Judges should serve the community in a way that encourages confidence in the legal system. Inherent in this approach is the necessity to afford all who appear respect and due consideration, applying the law and weighing the facts presented in a fair and impartial manner.

I am guided by the Preamble of SCR 60: "Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us." The first part of this sentence, relating to an independent and fair judiciary, is reiterated in the subsequent SCR 60 rules.

First and foremost, I would be a fair and impartial jurist. While I am to ensure the rights of defendants, victims, plaintiffs, and other parties are preserved and respected, I do not advocate on their behalf. I weigh arguments, assess cases, and make rulings unaffected by bias, prejudice, or passion. If parties are to respect the judiciary, this is crucial.

Of equal importance is the second part of the Preamble's opening: "…interpret and apply the laws that govern us." The judiciary must be separate from the executive and legislative branches. As a judge, I do not make laws. I cannot interpret laws to suit my personal beliefs. I must only apply the law as written. If a higher court has already rendered an opinion on a particular law, then that legal precedent must also be respected. I would not serve the people of Waukesha by making my own laws.

Regarding the "competent" adjective in the Preamble, my experience in practicing before many judges across the state has afforded me the opportunity to see what works well and what doesn't when running a courtroom. Three consistent themes emerged from the well-run courts: preparedness, efficiency, and respect.

A judge should be prepared for arguments by being familiar with the issues of a case. That preparedness is necessary to question the litigants and to make informed rulings. If the judge runs an efficient courtroom by being punctual and keeping a well-maintained calendar, the litigants will be better served. Of equal importance, in service to the citizens who rely on the court system, a judge should extend respect to all who appear before him/her.

Litigants look to the legal system for justice and conflict resolution. The judge is the face of that system. Trust or faith in the system is lost if the judge is unable to uphold these high standards of conduct. I will be an honorable representative of the system.

Finally, to the extent that I will preside over criminal cases, I will strive to protect the public while upholding the Constitution. In civil cases, I will ensure that both sides have a forum to be heard equally in a prompt manner. I recognize that there are many ways, depending on the case, that the public can be best served. A judge must understand that the community relies on its judges to ensure protection for all its citizens.

STATE OF WISCONSIN CIRCUIT COURT CLARK COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 21CF14

WILLIAM BRADLEY QUICKER,

Defendant.

STATE'S BRIEF IN RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS

The defendant was caught by his cellular service provider uploading three images of child pornography. Based on a review of those three images, the State obtained subpoenas and search warrants, leading to the discovery of more illegal images possessed by the defendant. When confronted with those images, the defendant confessed. The defendant now seeks suppression of that evidence, arguing that law enforcement violated his Fourth Amendment rights by reviewing the initial three images without a warrant.

The defendant had no reasonable expectation of privacy in the illegal content he uploaded to his account in violation of the provider's terms of service agreement. Even if he did, because the three images were already searched by the defendant's provider, and because the provider was a private actor, the government was able to conduct a warrantless review of the same files. If the court finds that law enforcement violated the Fourth Amendment by conducting a warrantless search, the conduct of law enforcement was reasonable and in line with caselaw at the time, and suppression is not warranted.

For these reasons, the defendant's Motion to Suppress should be denied.

ISSUES PRESENTED

The defendant's service provider prohibited the uploading of images containing child pornography. The provider further gave notice to the defendant of its intent to search for such images and required the defendant's continued consent to its monitoring of his content. Under these circumstances, can the defendant claim an expectation of privacy in his illegal uploads that warrants Fourth Amendment protection?

The court should answer this question "no."

Private actors are not bound by the Fourth Amendment. If a private party conducts a search that invades another's privacy, it is well settled that law enforcement may conduct a similar search within the scope of the private actor's search. In this case, were the three images uploaded by the defendant searched by a private actor? If so, did law enforcement stay within the scope of that search by opening and examining those same images?

This court should answer both questions "yes."

Current federal caselaw addressing similar fact patterns is split on the application of the private party search doctrine, largely due to a recent, non-binding 9th Circuit decision suppressing evidence. That case, though, was not decided at the time of law enforcement's actions in this case. Rather, existing federal caselaw suggested that the government was acting reasonably in these circumstances when it reviewed CyberTip images without a warrant. Given the state of the caselaw then, and even now, was law enforcement acting reasonably such that the extreme remedy of suppression is not required?

The court should answer this question "yes."

RELEVANT FACTS

Synchronoss Technologies (Synchronoss) is the cloud provider for the defendant's Verizon cellular telephone service. (Doc. 64 (Tr. 55:6–9).) Verizon had various terms of service agreements with its subscribers, including an Acceptable Use Policy (Policy), available to subscribers on its website. (*Id.* at 65:24; Doc. 55.) The Policy prohibited subscribers from using the service for the dissemination of child pornography. (Doc. 64:76:5–9; Doc. 55:1.) The Policy also informed subscribers that Verizon may monitor the subscriber's compliance with its agreements. (Doc. 64:76:22–77:1; Doc. 55:1.) Further, the Policy informed subscribers that Verizon had the right to review content on the service, including content that violates the law or its agreements. (Doc. 64:77:1–6; Doc. 55:1.)

The Defendant violated the Policy by uploading images depicting child pornography. Consistent with the Policy, Synchronoss searched the defendant's images and caught them by matching the images' hash values with hash values of known suspected child pornography. (Doc. 64:11:9; 14:22–25.) Synchronoss sent the images in a CyberTip to the National Center for Missing and Exploited Children (NCMEC). (*Id.* at 6:23–7:7; Doc. 58.) Synchronoss also provided the hash values of the flagged images to NCMEC. (*Id.* at 55:21–56:9.) The CyberTip indicated that the hash values matched hash values of known child pornography referred in other CyberTips. (*Id.* at 52:6–11; Doc. 58:1.) The CyberTip also noted that the images were apparent child pornography but were not viewed by anyone at NCMEC. (*Id.* at 14:18–19.) The CyberTip did not say whether anyone at Synchronoss viewed the images associated with the CyberTip report. (*Id.* at 13:3–19; 54:19–24.) This motion assumes no one did.

NCMEC forwarded the CyberTip to the Wisconsin Department of Justice (DOJ), which receives all CyberTips for the State of Wisconsin. (*Id*. at 45:4–6.) DOJ receives on average 500 CyberTips per month from NCMEC. (*Id.* at 64:7–8.) The images associated with the CyberTip

were available to law enforcement through the CyberTip portal. (*Id.* at 9:20–25.) In August of 2020, a Program and Policy Analyst opened and viewed the images in preparation for an administrative subpoena. (*Id.* at 61:20–62:4; 62:18–63:8.) An administrative subpoena under Wis. Stat. § 165.505 was then issued. (*Id.* at 38:25–39:8.) Based on the location of the Internet Protocol address (IP address) and subscriber address, the CyberTip investigation was sent to the Clark County Sheriff's Department. (*Id.* at 40:22–41:5; 45:20–46:1.)

Clark County Sheriff Detective Noah Lobner received the CyberTip on August 25, 2020. (*Id.* at 18:1–3.) He downloaded the three images onto his department computer and opened them to view the images. (*Id.* at 49:12–23.) Detective Lobner specialized in ICAC cases and had worked ICAC cases for three years. (*Id.* at 5:4–5, 19.) He was trained in the handling and investigation of CyberTips. (*Id.* at 6:18–19.) His normal practice was to view the CyberTip images. (*Id.* at 10:17–24.) He did so without a warrant. (*Id.* at 31:20–22.) Once it was determined that the suspect, the defendant, did not live in his jurisdiction, Detective Lobner transferred the case back to DOJ. (*Id.* at 16:13–20.) Detective Lobner provided his reports along with the transfer. (*Id.* at 17:2–8.)

The case was then assigned to DOJ Division of Criminal Investigation (DCI) Special Agent Jeffrey Lenzner who began his investigation in November or December 2020. (*Id.* at 46:7–9.) Special Agent Lenzner had worked with the DOJ ICAC Task Force for almost five years at that point. (*Id.* at 37:17–22.) He was also trained in the handling of CyberTips. (*Id.* at 38:11–13; 39:16–22.) He worked with CyberTips frequently. (*Id.* at 38:14–17.) Special Agent Lenzer opened and viewed the three images without a warrant. (*Id.* at 56:24–57:1.) This was consistent with his training and practice in investigating CyberTips. (*Id.* at 64:1–3; 63:16–25.) He did so to verify the images were contraband. (*Id.* at 65:2–10.) He also did so to use the descriptions as a basis for his affidavit in support of a warrant to Synchronoss. (*Id.* at 57:24–58:8; Doc. 54:7–8.)

In this case, the three illegal images uploaded by the defendant that formed the basis for the CyberTip report were viewed by the Program and Policy Analyst, Detective Lobner, and Special Agent Lenzner, all prior to a warrant being obtained. (Doc. 64:63:16–22.)

DEFINITION OF HASH VALUES

The evidence and legal theories in this case involve the use of hash values. A "hash value" is "a string of characters obtained by processing the contents of a given computer file and assigning a sequence of numbers and letters that correspond to the file's contents." *United States v. Reddick*, 900 F. 3d 636, 637 (5th Cir. 2018). A hash value can be considered a "digital fingerprint." *United States v. Ackerman*, 831 F. 3d 1292, 1294 (10th Cir. 2016), *reh'g denied* (Oct. 4, 2016). "Hash values are regularly used to compare the contents of two files against each other." *Reddick*, 900 F. 3d at 637. "If two nonidentical files are inputted into the hash program, the computer will output different results. If the two identical files are inputted, however, the hash function will generate identical output." *Id.* (quoting Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 Harv. L. Rev. 531, 541 (2005), *see also* 2017 Advisory Committee Note to Fed. R. Evid. 902(14)).

The Fifth Circuit recognized the importance of hash values in combating child pornography in particular:

> Hash values have been used to fight child pornography distribution, by comparing the hash values of suspect files against a list of the hash values of known child pornography images currently in circulation. This process allows potential child pornography images to be identified rapidly, without the need to involve human investigators at every stage.

Reddick, 900 F. 3d at 637.

ARGUMENT

I. The defendant had no objective reasonable expectation of privacy in illegal images he uploaded in violation of the provider's Acceptable Use Policy.

A person seeking to exclude evidence on the grounds that it was obtained through an unreasonable search bears the burden of demonstrating that he or she had a reasonable expectation of privacy. A person possesses a reasonable expectation of privacy if the person: (1) has an actual or subjective expectation in the place searched and the item seized; and (2) the expectation is objectively reasonable, that is one that society is prepared to recognize as reasonable. *State v. Bruski*, 2007 WI 25, ¶¶ 20–23, 299 Wis. 2d 177, 727 N.W.2d 503.

Here, the defendant's internet service provider prohibited the dissemination of child pornography across its platforms and services. The provider also notified the defendant that it would monitor content to make sure usage of the service was not illegal or contrary to its policies. The defendant's choice to upload three illegal images of child pornography, contrary to the policies, extinguishes any expectation of privacy he may claim. Because he has no objectively reasonable expectation of privacy in the illegal images he uploaded, there can be no Fourth Amendment violation.

This is an emerging legal issue in these cases. The following cases cited in this section will be more fully examined regarding the applicability of the private party search doctrine in section II of this brief, below. Before this court reaches the applicability of that doctrine, however, a defendant must demonstrate an objectively reasonable expectation of privacy in his images. While the federal circuits have recognized this issue is one that needs to be addressed, the factual record in existing federal circuit cases has often not been developed at the trial level.

In *United States v. Ackerman*, the Ninth Circuit acknowledged the issue of expectation of privacy but did not rule on that basis. 831 F.3d 1292. The court wondered whether the third-party

doctrine, from *United States v. Miller*, 425 U.S. 435 (1976), and *Smith v. Maryland*, 442 U.S. 735, 742–46 (1979), should be extended to situations in which a subscriber "relies on a commercial ISP to store and deliver" an email. *Ackerman*, 831 F.3d at 1304–05. The court also questioned the district court's assumption that Ackerman had an expectation of privacy considering the terms of service agreement:

> But the district court didn't rely upon third-party doctrine in ruling against Mr. Ackerman. Exactly to the contrary, throughout its decision the court assumed that Mr. Ackerman had a reasonable expectation of privacy in his email. And though we may of course affirm the district court's judgment on any basis the record supports, we think making the attempt here imprudent given that the district court has yet to make any factual findings relevant to Mr. Ackerman's subjective expectations of privacy or the objective reasonableness of those expectations in light of the parties' dealings (e.g., the extent to which AOL regularly accessed emails and the extent to which users were aware of or acquiesced in such access). Facts that could well impact the legal analysis.

Id. at 1305.

On remand, the district court did just that, making findings regarding Ackerman's reasonable expectation of privacy. *United States v. Ackerman*, 296 F. Supp. 3d 1267 (D. Kan. 2017). The district court wrote this about the relevance of AOL's terms of service (TOS):

> Here, Defendant agreed to AOL's TOS by using his email account. The TOS expressly alerted Defendant that he was not to participate or engage in illegal activity. In addition, the TOS provided that a user must not post explicit sexual acts. Furthermore, it informed Defendant that if he did not comply with the applicable TOS, it could take technical, legal or other actions (in its sole discretion) to enforce the TOS.

Id. at 1271–72. The terms of service therefore limited Ackerman's objectively reasonable expectation of privacy. *Id.* at 1272. The district court concluded:

> In sum, even though the Tenth Circuit found that NCMEC is a governmental actor and/or entity and exceeded AOL's private search, this Court finds on remand that Defendant did not have a reasonable expectation of privacy in his email or the four attached images at the time of NCMEC's search. Because he did not have a reasonable expectation of privacy, NCMEC's conduct did not cause a violation of the Fourth Amendment and suppression is not warranted.

Id. at 1273.

The district court also found suppression unwarranted due to the good faith doctrine. *Id.* On appeal, the Tenth Circuit, in an unpublished decision, upheld the district court's denial of Ackerman's suppression motion solely on the good faith grounds. *United States v. Ackerman*, 804 Fed. App'x 900, 905 (10th Cir. 2020) (*cert. denied* 141 S. Ct. 458 (2020) (unpublished and not binding precedent)).[1]

The Fifth Circuit in *Untied States v. Reddick* was also forced to assume there existed an objectively reasonable expectation of privacy when it decided the applicability of the private party search doctrine when law enforcement opened images from a CyberTip. The court narrowed the private party search issue as: "The question presented here, then, is whether, by the time Detective Ilse viewed the suspect image files, Reddick's expectation of privacy in his computer files had already been thwarted by a private third party." *Reddick*, 900 F.3d 636, 638 (5th Cir. 2018). In the footnote ending that sentence, however, the court noted:

> We assume without deciding that Reddick indeed had a legitimate expectation of privacy in the computer files at issue. As the district court correctly noted, "the most useful evidence on which to make the determination" of whether Reddick's expectation of privacy was reasonable—"the end user agreement governing Reddick's use of Microsoft Skydrive"—is not in the record.

Id. at n.1.

In *United States v. Bebris*, the Seventh Circuit acknowledged the district court's finding that Bebris lacked an expectation of privacy because "Facebook's Community Standards and terms of service warned users that Facebook reports child pornography if it becomes aware that it is being sent." 4 F.4th 551, 557 (7th Cir. 2021). However, *Bebris* applied the private party search doctrine without deciding the issue of objectively reasonable expectation of privacy.

[1] The case was not selected for publication in West's Federal Reporter. It is cited for persuasive value consistent with Fed. R. App. P. 32.1 and Wis. Stat. § 809.23(3)(b).

United States v. Miller also spent some time discussing the potential relevance of Google's terms of service agreement. The Sixth Circuit wrote:

> Did Miller have a reasonable expectation of privacy in his Gmail account? Our court has held that individuals generally have reasonable expectations of privacy in the emails that they send through commercial providers like Google. *Id.* at 283–88. (Caselaw on this issue remains "surprisingly sparse" outside our circuit. 2 Wayne R. LaFave et al., Crim. Proc. § 4.4(c) (4th ed.), Westlaw (database updated Dec. 2019).) Yet Google's terms of service also permit it to view its customers' content for illegal items. *Warshak* added "that a subscriber agreement might, in some cases, be sweeping enough to defeat a reasonable expectation of privacy in the contents of an email account" (while suggesting that this outcome would be rare). 631 F.3d at 286. But here we need not consider whether Google's terms are of the "sweeping" sort and will assume that Miller had a reasonable expectation of privacy in his email.

Miller, 982 F.3d 412, 426–27 (6th Cir. 2020). The court then applied the private party search doctrine.

The question here, though, is not whether Quicker had an objectively reasonable expectation of privacy in his email account or his Verizon account. The question is, rather, did Quicker have an objectively reasonable expectation of privacy in the copies of illegal child pornography images he uploaded when Verizon, and by extension Synchronoss, expressly prohibited that content and warned Quicker they could be searching for and reporting such content?

Quicker may have thought his account was completely private and locked down, but the plain language of the Acceptable Use Policy fairly put him on notice. Quicker was not prohibited from using his service for legal purposes. He was not prohibited from storing private, personal photos in his personal account, away from prying eyes of third parties. While any personal non-contraband photos may have been scanned and assigned hash values, the content of those files would not be known because they would not have matched hash values of known contraband images. Only the contraband images would be identified and flagged by Synchronoss because the images had been seen before. Those illegal images did not, and could not, contain any of Quicker's personal thoughts or expressions. It was Quicker's choice to engage in illegal behavior in a way

that subjected him to increased monitoring and invasion of his files. That choice extinguished any potential expectation of privacy in the copies of known child pornography images he uploaded.

Quicker has not met his burden to establish a reasonable expectation of privacy here. Absent an objectively reasonable expectation of privacy in the three illegal images, Quicker cannot claim protection under the Fourth Amendment.

II. The government did not conduct a Fourth Amendment search when agents opened the same files that had previously been searched by a private party and provided to the government.

The Fourth Amendment regulates government conduct, not that of a private actor. When a private actor searches a private space or thing and hands that information over to the government, the government has not violated the Fourth Amendment. If the government views the information provided, the government does not conduct a Fourth Amendment search.

In this case, even if the court assumes Quicker had an objectively reasonable expectation of privacy, because a private party searched the illegal images in the defendant's account and provided those images to the government, the subsequent examination of those files by the government does not implicate the Fourth Amendment.

A. General legal principles related to private party searches.

A "search" occurs when a legitimate expectation of privacy is infringed. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). The U.S. Supreme Court has also "consistently construed this protection as proscribing only governmental action; it is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the government or with the participation or knowledge of any governmental official,'" *id.* (quoting *Walter v. United States*, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting)).

"Private searches are not subject to the Fourth Amendment's protections because the Fourth Amendment applies only to government action." *State v. Payano-Roman*, 2006 WI 47, ¶ 17, 290 Wis. 2d 380, 714 N.W.2d 548. Wisconsin courts apply a three-part test to determine when a search constitutes a private party search:

> (1) the police may not initiate, encourage, or participate in the private entity's search;
> (2) the private entity must engage in the activity to further its own ends or purpose; and
> (3) the private entity must not conduct the search for the purpose of assisting governmental efforts.

Id. ¶ 18 (citation omitted). A private party search may become a government search if it is a "joint endeavor" that involves a private party and a government official. *Id*. ¶ 19. But a government official's mere presence does not "transform a private search into government action." *Id*. ¶ 20. The defendant bears the "burden of proving by a preponderance of the evidence that government involvement in the search or seizure brought it within" the Fourth Amendment's protections. *Id*. ¶ 23.

In *Jacobsen*, the defendant was shipping cocaine through Federal Express. *Jacobsen*, 466 U.S. at 111. During shipping, the package was damaged by a forklift, and Federal Express employees opened the package to examine the contents pursuant to a company policy regarding insurance claims. *Id.* The employees unwrapped the box and found a tube concealed in crumpled newspaper. *Id.* Inside the tube, they found several packages containing white powder that appeared to be cocaine. *Id.* Upon observing the white powder in the innermost package, they called the Drug Enforcement Administration (DEA). *Id.* Before the first DEA agent arrived, the employees "replaced the plastic bags in the tube and put the tube and newspapers back into the box." *Id.*

The agent proceeded to unwrap the tube and plastic bags that contained the white powder. *Id.* He then extracted a trace of the white substance from each of the four plastic bags and conducted a field test which confirmed that the substance was cocaine. *Id.* at 112.

The Supreme Court held that, even though the employees repackaged the cocaine, the DEA agent was justified in searching the package to the same extent as the private individuals. The Court stated, "The agent's viewing of what a private party had freely made available for his inspection did not violate the Fourth Amendment." *Id.* at 119. The Court also held that the field test conducted by the DEA agent at the scene was not an unreasonable extension of the private viewing, even though a small amount of cocaine was consumed in the process. *Id.* at 125.

Another important case relied upon by courts examining fact patterns similar to the case here is *Walter v. United States*, 447 U.S. 649, 657 (1980). In *Walter*, a Georgia business received several misdelivered packages containing boxes of film. The boxes had "suggestive drawings" and "explicit descriptions" on the outside, suggesting that the films were obscene. *Id.* at 652. The private employees did not view the films themselves to discern what the films in fact depicted. *Id.* Eventually, in response to a call from the company, an FBI agent picked up the packages and took them to his office, where, without a warrant, FBI agents viewed the films over a two-month period. *Id.* at 651–52. The Supreme Court held that the FBI's warrantless review of the films violated the defendants' legitimate expectation of privacy. *Id*. at 654.

The Court regarded the FBI's warrantless search as a constitutional violation precisely because the private parties had *not* viewed the films before turning them over to the FBI agent. Consequently, the subsequent warrantless search far exceeded the scope of the private parties' viewing. The Court wrote:

> Prior to the Government screening one could only draw inferences about what was on the films. The projection of the films was a significant expansion of the search that had been conducted previously by a private party and therefore must be characterized as a separate search. That separate search was not supported by any exigency, or by a warrant even though one could have easily been obtained.

Id. at 657 (footnotes omitted).

The *Jacobsen* Court accepted the *Walter* Court's conclusion that "the legality of the governmental search must be tested by the scope of the antecedent private search," *Jacobsen*, 466 U.S. at 116. Consequently, both cases apply the same standard.

B. Synchronoss is a private party and not a government actor.

The defendant does not allege that Synchronoss was a government actor nor that it was acting under the direction of law enforcement. (Doc. 64:113:13.) Still, because the private party search doctrine is central to the analysis in this case, as well as similar cases from the federal circuits, it is worth noting that courts have routinely held that internet service providers such as Synchronoss are private parties not subject to the Fourth Amendment.

In *Bebris*, Facebook flagged images of child pornography in the defendant's cloud storage through hashing and PhotoDNA technology. *Bebris*, 4 F.4th at 553–54. Once flagged, Facebook reported the images to NCMEC in a CyberTip. *Id.* at 554. The defendant argued that Facebook's use of PhotoDNA technology converted Facebook into a government agent. *Id.* at 557.

The Seventh Circuit noted first that the defendant bore the burden of establishing an agency or government actor relationship with the government. *Id.* at 560. The court then acknowledged that other circuits, such as the Eighth Circuit in *United States v. Ringland*, "have recognized that a company which automatically scans electronic communications on its platform does 'not become a government agent merely because it has a mutual interest in eradicating child pornography from its platform.'" *Bebris*, 4 F.4th at 562 (quoting *Ringland*, 966 F.3d 731, 830 (8th Cir. 2020)). The *Bebris* court held that Facebook was not a government actor. *Id.*

In *Ringland*, the Eighth Circuit similarly ruled that Google was not a government agent when it identified hundreds of files of child pornography in the defendant's cloud account. Google discovered the files through its automated hashing technology. *Ringland*, 966 F.3d at 733.

The court noted that the defendant "bears the burden of proving by a preponderance of the evidence that a private party acted as a government agent." *Id.* at 735 (quoting *United States v. Highbull*, 894 F.3d 988, 992 (8th Cir. 2018)). The test, according to *Ringland*, concerns three factors:

> [1] whether the government had knowledge of and acquiesced in the intrusive conduct; [2] whether the citizen intended to assist law enforcement or instead acted to further his own purposes; and [3] whether the citizen acted at the government's request.

Id. (quoting *United States v. Wiest*, 596 F.3d 906, 910 (8th Cir. 2010)).

The defendant in *Ringland* argued that Google was "coerced" by federal statute into reporting child pornography. *Id.* at 736. However, the court found that while 18 U.S.C. § 2258A(a) imposed a "reporting requirement" on electronic service providers (ESPs), 18 U.S.C. § 2258A(f) specifically "does not require ESPs to seek out and discover violations." *Id.* The court also found that Google "scanned its users' emails volitionally and out of its own private business interests," and was not "required to perform any such affirmative searches." *Id.* Further, the government neither knew about nor requested Google's actions. *Id.* For those reasons, the *Ringland* court applied the private search doctrine to the opening of the images by law enforcement.

In *United States v. Miller*, the Sixth Circuit denied a reasonableness challenge to Google's hash matching search because it was a private party action. 982 F.3d 412 (6th Cir. 2020). The court wrote that the defendant's challenge to Google's search as unreasonable under the Fourth Amendment faced "an immediate (and ultimately insurmountable) obstacle: Google is a private entity." In so finding, the court applied a "function" test, "compulsion" test, and "nexus" test. *Id.* at 423.

Google was not performing a "public function," the court held, because Google's interest in investigating crime on its platform was nothing new to private parties like shopkeepers, and Google had not been "endowed with law enforcement powers beyond those enjoyed by' everyone else." *Id.* (quoting *United States v. Ackerman*, 831 F.3d 1292, 1296 (10th Cir. 2016), *reh'g denied*

(Oct. 4, 2016)). In contrasting *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 614 (1989), the court found that Google was not acting under regulatory compulsion to investigate criminal activity and did not fall into that category simply because the government authorized the investigation. *Id.* at 423–24. Finally, while "private action might still be attributed to the government if 'a sufficiently close nexus' exists between a private party and government actors," the court refused to find that Google's reporting to police constituted a sufficiently close nexus to make it a government actor. *Id.* at 425 (quoting *Jackson v. Metro Edison Co.,* 419 U.S. 345, 351 (1974)).

In *United States v. Cameron*, 699 F.3d 621 (1st Cir. 2012), the First Circuit employed its own three-part test, from *United States v. Silva*, 554 F.3d 13 (1st Cir. 2009), in determining that Yahoo! was not a government actor when it searched for, viewed, removed, and reported illegal images to NCMEC. The three factors considered by the court were:

> (1) "the extent of the government's role in instigating or participating in the search"; (2) "[the government's] intent and the degree of control it exercises over the search and the private party"; and (3) "the extent to which the private party aims primarily to help the government or to serve its own interests."

Cameron, 699 F.3d at 637 (quoting *Silva*, 554 F.3d at 18). Because the government neither instigated nor participated in the search, and because the government had no control over Yahoo!'s search, the first two prongs were not met. *Id.* at 638. And while both Yahoo! and the government share an interest in combating child pornography, the shared interest does not mean that Yahoo! was acting in concert with the government. *Id.*

In *United States v. Richardson*, the Fourth Circuit declared AOL to be a private actor after AOL detected child pornography in emails and reported them to NCMEC. 607 F. 3d 357 (4th Cir. 2010). The court wrote, "there must be some evidence of Government participation in or affirmative encouragement of the private search before a court will hold it unconstitutional.

Passive acceptance by the Government is not enough." *Richardson*, 607 F. 3d at 364 (quoting *United States v. Jarrett*, 338 F.3d 339, 346 (4th Cir. 2003)).

Even in *Ackerman*, which will be discussed in more depth below, the Tenth Circuit spent little time in presuming AOL was a private party. *Ackerman*, 831 F.3d at 1295.

It is apparent from these cases that Synchronoss must be considered a private actor in this case. There is nothing to suggest it was acting under the direction, guidance, or initiative of the State. Finding, then, that Synchronoss was a private party not subject to the Fourth Amendment when it searched the defendant's files, we can turn to the application of the private party search doctrine.

C. Law enforcement did not materially expand the search done by Synchronoss, a private party, when it opened and viewed the illegal child pornography images accompanying the CyberTip.

Having established that Synchronoss conducted a private party search of the defendant's child pornography, the question is whether law enforcement went beyond the scope of that search when the images were opened and viewed.

The cases regarding the hash match searching of images by internet service providers should be broken down into two categories: those in which the service provider flagged images from hash matching and had an employee review the images before submitting them to NCMEC; and those in which the service provider flagged images from hash matching but did not have an employee review the images before submitting them to NCMEC. The present case falls in the latter category. We will start, though, with the former category.

1. When a service provider flagged images via hash matching and then had an employee view the images before sending them to NCMEC, courts have applied the private party search doctrine.

In *Bebris*, Facebook used PhotoDNA and hash matching developed by Microsoft to identify and flag several images matching known child pornography that were sent by the defendant to another user via Facebook messenger. *Bebris*, 4 F.4th at 554. When Facebook identified the presumptive hit, a Facebook employee reviewed the images. *Id.* The files were then reported to NCMEC pursuant to 18 U.S.C. § 2258A. *Id.* Wisconsin authorities reviewed the files and used them as a basis for subsequent subpoenas and warrants. *Id.*

Bebris challenged Facebook's warrantless search on Fourth Amendment grounds. *Id.* at 555. Bebris alleged that Facebook became a government actor by monitoring for and reporting suspected child pornography. *Id.* The district court "held that Facebook searched Bebris' messages as a private actor and, thus, the search did not implicate the Fourth Amendment." *Id.* at 557. The district court further found that law enforcement did not "exceed the scope of Facebook's private search" when it reviewed those images. *Id.* The Seventh Circuit upheld the district court's findings. *Id.* at 562.

In *Ringland*, Google identified over two thousand images of suspected child pornography, some of which were flagged through its automated hash-comparison technology. *Ringland*, 966 F. 3d at 733. In a series of CyberTips to NCMEC, Google uploaded 1,216 files from a suspect email account and stated it had viewed 502 of the images. *Id.* Law enforcement obtained a warrant to search the content of the email account. *Id.* at 734. In the application, the investigator noted that she had viewed only the 502 images that Google said it had viewed. *Id.* In another batch of nine CyberTips, Google reported finding an additional 1,109 images of child pornography. Google reported that it viewed 773 of those images. *Id.* When it sent those nine CyberTips to law enforcement, NCMEC noted in one of the reports that it had viewed the files and found suspected

child pornography. *Id.* The investigator again sought a warrant based on the additional nine CyberTips containing child pornography. *Id.* According to the court, the investigator noted "Google had not reviewed all the files in the reports and she had not viewed them either." *Id.* It is unclear from this sentence whether the investigator reviewed none of the additional 1,109 images or none of the 336 images out of the 1,109 images that Google did not view. Regardless, the investigator did not view any images that a Google employee did not view.

Because it found Google to be a private actor acting on its own, the Eighth Circuit applied the private party search doctrine. *Id.* at 737. Further, the court held, "because Investigator Alberico searched only the same files that Google searched, the government did not expand the search beyond Google's private party search." *Id.* While it was possible that NCMEC was acting as a government agent and expanded the scope of the search done by Yahoo!, the court did not reach those issues because law enforcement did not rely on any NCMEC searches. *Id.*

Therefore, if a service provider flags images with hash values that match images of known child pornography and then has an employee view those images before sending a CyberTip to NCMEC, the subsequent examination of those images by law enforcement is not a Fourth Amendment search requiring a warrant.

2. When a service provider flagged images via hash matching but did not have an employee review the images before sending them to NCMEC, courts are mixed on whether this constituted a search triggering the private party search doctrine.

Until *United States v. Wilson* was decided in late 2021, there would not have been much distinction between this category of searches and the previous category in which employees viewed images after a hash match. 13 F.4th 961 (9th Cir. 2021). *Ackerman* stood largely alone among the federal circuits in finding that NCMEC was a government actor that exceeded the scope of the private AOL search, but even that case was distinguishable.

United States v. Reddick is most directly on point to the present case. 900 F.3d 636 (5th Cir. 2018). Reddick uploaded child pornography images to his Microsoft SkyDrive service. *Id.* at 637. SkyDrive scanned user images and compared hash values to known images of child pornography. *Id.* at 637–38. Once child pornography was located, the images and the suspect's IP address were uploaded in a CyberTip and sent to NCMEC. *Id.* at 638. The IP address was used to generalize the suspect's location, and the CyberTip was investigated by local authorities in that jurisdiction. *Id.* The investigator "opened each of the suspect files and confirmed that each contained child pornography." *Id.* A warrant to search the defendant's property was subsequently obtained by police. *Id.*

The district court assumed without deciding that the investigator's search "invaded a constitutional expectation of privacy, exceeded the scope of Microsoft's SkyDrive's hash value search, and did not fall into any exception to the warrant requirement." *Id.* However, the district court denied Reddick's motion to suppress on good faith grounds. *Id.*

The Fifth Circuit took a different view and applied the private party search doctrine. The court first looked at "whether, by the time Detective Ilse viewed the suspect image files, Reddick's expectation of privacy in his computer files had already been thwarted by a third party." *Id.* (footnote omitted). To decide this question, the court analogized *Jacobsen* in finding that Reddick's "'package' (that is, his set of computer files) was inspected and deemed suspicious by a private actor." *Id.* At 639. Therefore, "whatever expectation of privacy Reddick might have had in the hash values of his files was frustrated by Microsoft's private search." *Id.*

The government still must operate within the scope of the private party's search for the doctrine to apply. The Fifth Circuit addressed this as well, holding, "when Detective Ilse opened the files, there was no 'significant expansion of the search that had been conducted previously by

a private party' sufficient to constitute 'a separate search.'" *Id.* at 639 (quoting *Walter v. United States*, 447 U.S. 649, 657 (1980)). Rather, the "visual review of the suspect images – a step which merely dispelled any residual doubt about the contents of the files – was akin to the government agents' decision to conduct chemical tests on the white powder in *Jacobsen*." *Id.* The investigator also stayed within the bounds of the private party search by only examining the files with hash values corresponding to suspected child pornography, as determined by Microsoft's search, distinguishing the case from *Ackerman*. *Id.* at 640.

In *United States v. Miller*, 982 F.3d 412 (6th Circ. 2020), the Sixth Circuit applied *Jacobsen* and the private party search doctrine to Google's use of proprietary hash value matching. Google had developed a repository of known child pornography hash values based upon Google employees' previous review of those images. *Id.* at 419. No hash value was added to Google's list without the image being visually confirmed by an employee to be apparent child pornography. *Id.* When the automated program detected two matches in files attached to Miller's email, Google forwarded those images in a CyberTip to NCMEC without having an employee perform a visual inspection of the images. *Id.* at 420. NCMEC did not view the images before it sent the CyberTip to Kentucky State Police based upon the geolocation of the IP addressed used to send the email. *Id.* After the CyberTip was assigned to a local agency, an investigator opened the two images and confirmed they were child pornography. *Id.* Subpoenas and warrants followed. *Id.*

As noted above, the Sixth Circuit applied a three-part test in determining that Google was not a government actor. The court then turned to whether the investigator's opening of the images exceeded the scope of Google's private party search. After examining *Jacobsen* and *Walter*, the court summarized the private party search doctrine as requiring "a private actor's search to create a 'virtual certainty' that a government search will disclose nothing more than what the private

party has already discovered." *Id.* at 428. The court contrasted *Ackerman* and applied *Reddick* because the detective "viewed only files with hash-value matches." *Id.* at 429. However, the court declined to analogize the investigator's search to *Jacobsen's* field test, as *Reddick* had done, because the opening of the files was not a binary test like the drug test (positive or negative). *Id.* Rather, if the files were not child pornography, the investigator would have seen what was in fact depicted in the pictures. *Id.* Thus, the viewing of the files would invade the defendant's privacy, unless that privacy was already frustrated by Google's search. *Id.*

The answer to that issue, the *Miller* court found, hinged on the reliability of Google's hash-value matching. *Id.* at 429–430. But because the defendant never challenged the reliability of Google's proprietary technology in district court, the court found that the defendant could not meet his burden of proof on his motion. *Id.* at 430. However, given *Miller*'s citation to sources indicating the reliability of hash matching was "1 in 9.2 quintillion" that two different files could have the same hash value, it is unlikely that Miller would have prevailed on this point. *Id.* Thus, the reliability of hash value matching "satisfies *Jacobsen*'s virtual-certainty test and triggers its private-search doctrine." *Id.*

United States v. Ackerman, 831 F.3d 1292 (10th Cir. 2016) (*reh'g denied* (Oct. 4, 2016)), is typically the bellwether case for defendants in these types of suppression motions. There, AOL's automated hash value matching filter identified a hash value of an image that matched a known image of child pornography. *Ackerman*, 831 F.3d at 1294. AOL sent a CyberTip to NCMEC that included the email to which the suspect image was attached and three other images that were attached to the email. *Id.* AOL did not open the email to view its contents, nor did AOL view any of the four images. *Id.* at 1306–07. AOL had a hash value match on only the one suspect image, not the other three attachments to the email. *Id.* A NCMEC analyst viewed the email and all four

images sent by AOL in the CyberTip, confirming that each attachment appeared to be child pornography. *Id.* at 1294. The CyberTip was then sent to local law enforcement after NCMEC was able to determine Ackerman was the likely owner of the account. *Id.*

Then-Judge Gorsuch, writing for the Tenth Circuit, first found NCMEC to be a government actor. The court then refused to apply the private party search doctrine to the facts of the case, finding instead that NCMEC conducted a "search" that exceeded the scope of AOL's private party search. *Id.* at 1304, 1308. The court contrasted the facts from *Jacobsen*, finding it important that AOL never opened the email. From a rummaging through the email, NCMEC "could have learned any number of private and protected facts, for (again) no one before us disputes that an email is a virtual container, capable of storing all sorts of private and personal details, from correspondence to other private (and perfectly legal) images, video or audio files, and beyond." *Id.* at 1306. Further, neither AOL nor NCMEC knew anything about the contents of the other three attachments before they were opened and examined by NCMEC. *Id.*

These facts, and the basis for *Ackerman*'s rejection of the private party search doctrine, are distinguishable from our case. Here, Synchronoss had a hash match on all three images included in the CyberTip. The hash matches meant the contents of the files matched images of known suspected child pornography. NCMEC did not perform any additional search, nor did it open and view the images. Law enforcement viewed only the three images examined by Synchronoss and found to contain suspected child pornography, nothing more from Quicker's account.

Ackerman acknowledged that had NCMEC opened only the one image flagged by AOL as a hash match, and had not viewed the email or the other three attachments, it would have presented an "interesting question[], to be sure, but one[] we don't have to resolve in this case." *Id.* That question can be resolved in the present case.

Before turning to *United States v. Wilson*, 13 F. 3d 961 (9th Cir. 2021), we should examine Wilson's state case in California, identical in facts to the federal Ninth Circuit case. *People v. Wilson*, 56 Cal. App. 5th 128 (Cal. Ct. App. 2020) (*cert. denied* 142 S. Ct. 751 (2022)). Wilson was convicted in state court of several sex crimes against children. *Id.* at 140. During his offending, Wilson used a Gmail email account, provided by Google, to communicate with victims. *Id.* at 136. Google's automated hash matching technology, which scanned user emails for illegal content, identified four image files attached to an email from Wilson's account. *Id.* at 137–38. Google generated a CyberTip report including only the four image files and not the email itself. *Id.* at 138. Google classified the images as "'A1,' indicating they depicted prepubescent minors engaged in sex acts." *Id.* Google did not manually review the files before sending them to NCMEC. *Id.* Upon receipt of the images and the report, NCMEC did not open the images but instead forwarded the report to the local ICAC task force in Wilson's area. *Id.* Investigators viewed the images and applied for a search warrant. *Id.* The application was based solely on the investigator's review of the images, without mentioning anything about the technology or process used by Google to flag the images. *Id.*

The trial court first found that Wilson had no reasonable expectation of privacy in using his email account for illegal conduct since Google prohibits illegal content and scans users' content to find such contraband. *Id.* at 140. Further, because "law enforcement simply repeated the private search performed by Google," no Fourth Amendment search occurred. *Id.* Law enforcement did not significantly expand the private search because "Google had previously confirmed that each of the four images in defendant's e-mail was child pornography." *Id.*

The California court of appeals agreed. "Applying the principles set forth in *Jacobsen*, we reject Wilson's claims and conclude the government's actions did not violate the Fourth

Amendment." *Id.* at 143. The court first noted that all of the actions taken by Google were performed by a private party. *Id.* at 144. Then the court looked at whether the government replicated the private search already performed by Google. It held that the government did not. *Id.* at 145. But the court recognized that even under *Jacobsen*, the question was not whether the search was exactly replicated, but whether any additional invasion of privacy exceeded the scope of the private party search. *Id.* If the government did not learn anything that had not previously been learned during the private search, the government's action did not constitute a Fourth Amendment search. *Id.* (quoting *Jacobsen*, 466 U.S. at 120).

The court found that the government's search indeed fell within the scope of the private party search. The court wrote:

> The government was merely reviewing what Google had already found, but in a different format—visually reviewing the photographs with the agent's human eyes versus replicating the computer's generation of a numerical algorithm. Because the assigned numerical values, or "digital fingerprints," are representative of the contents depicted in the photographs themselves, the government gained no new material information by viewing the images. The agent merely confirmed Google's report that Wilson uploaded content constituting apparent child pornography.

Id. at 146. The court further reasoned, "examining an item more closely and learning some additional details is not incompatible with applying the private search doctrine. . . ." *Id.* at 151.[2]

It was noteworthy to the California court of appeals that Google developed its own repository of hash values by having employees manually view images as they were found. *Id.* at 147–48. However, no database of hash values can be compiled without human involvement in the first place. That is, a human must review an image, determine that it contains suspected child

[2] The court did not decide the issue of Wilson's objectively reasonable expectation of privacy in light of Google's terms of service agreement, as the trial court had. Rather, the court assumed without deciding that Wilson did have an expectation of privacy that was nonetheless thwarted by Google's private party search. *Wilson*, 56 Cal. App. 5th at 145, n.10.

pornography, generate a hash value, and record the hash value in the database for future comparison.

On the same underlying facts, the Ninth Circuit disagreed with the California Court of Appeals. Beginning with the assumption that Wilson has a subjective expectation of privacy in his email attachments, the Ninth Circuit focused on whether law enforcement was allowed, under the private party search doctrine, to view Wilson's email attachments. *United States v. Wilson*, 13 F. 3d at 967. The court held that the search was impermissible. The court found that the search exceeded the scope of Google's search, it allowed investigators to learn new information, and no Google employee looked at Wilson's images:

> First, the government search exceeded the scope of the antecedent private search because it allowed the government to learn new, critical information that it used first to obtain a warrant and then to prosecute Wilson. Second, the government search also expanded the scope of the antecedent private search because the government agent viewed Wilson's email attachments even though no Google employee—or other person—had done so, thereby exceeding any earlier privacy intrusion. Moreover, on the limited evidentiary record, the government has not established that what a Google employee previously viewed were exact duplicates of Wilson's images. And, even if they were duplicates, such viewing of others' digital communications would not have violated Wilson's expectation of privacy in *his* images, as Fourth Amendment rights are personal.

Id. at 971–72.

The court found a "gulf between what Agent Thompson knew about Wilson's images from the CyberTip and what he subsequently learned" from viewing the files. *Id.* at 972. The classification of "A1" was not mentioned in the warrant application, but rather the detective used his own detailed description of the images. *Id.* The government, according to the court, was also able to learn two things beyond the information in the CyberTip. "First, Agent Thompson learned exactly what the image showed. Second, Agent Thompson learned the image was in fact child pornography." *Id.* at 973. Prior to the viewing, the agent only knew the images were "suspected" child pornography. *Id.*

The court found the "A1" label more akin to the label on the film box in *Walter* than the chemical test in *Jacobsen*. *Id.* at 973. And like *Walter*, in order to prosecute Wilson, it was necessary for the investigator to view the images that had not been viewed by a Google employee. *Id.* Prior to viewing the images, the agent had "no *image* at hand at all; the entire composition was hidden." *Id.* at 974, (emphasis original). "Reading a label affixed to an image is a different experience entirely from looking at the image itself." *Id.*

Even if the government could show that the attachments were precise duplicates of different files viewed by Google employees, the court continued, the invasion of privacy into others' files had no bearing on the erosion of Wilson's expectation of privacy in *his* images. *Id.* at 975.

D. This court should treat *United States v. Wilson* as the outlier it is and not adopt its flawed reasoning and misapplication of *Jacobsen* and *Walter*.

The Ninth Circuit's reasoning and its application of *Walter* to a hash match search fail to appreciate the technology involved and manufacture a privacy concern when none exists. When Quicker uploads a copy of a known image of child pornography to his cloud account, and that image can be said, with absolute certainty, to be an exact duplicate of a previously viewed image of suspected child pornography, Quicker has no privacy interest in that image once it is searched by Synchronoss. The image file does not, and cannot, contain any private musings or content of the defendant. It is a copy of an illegal image, its content confirmed through a private party search. *United States v. Wilson* is wrong.

Nothing of a personal nature was revealed by Syncronoss' search. The images, far from originating with Quicker, were duplicates of other people's child pornography that other people had previously circulated on the Internet and had already been encountered and viewed. This was known with certainty before law enforcement viewed the images because the hash values matched

those of previously-viewed images. The Ninth Circuit reasoned that "no human had viewed Wilson's images before." *United States v. Wilson*, 13 F.4th at 978. This cannot possibly be correct. A hash value database, whether proprietary like Google's or leased from a third party like Facebook did in *Bebris*, is compiled by human review. A person must view and determine, for each image, whether or not the image contains child pornography. If it does, the hash value is recorded. If another image is scanned by its hash value and found to match the previously-viewed image, we can be absolutely certain that the newly scanned image is the exact duplicate of the previously-viewed image. The content of the new image is, therefore, known. That is the benefit of hash value matching, which, as *Reddick* noted, is a valuable tool in combating child exploitation.

In a similar vein, the Ninth Circuit's reliance on *Walter* is also misplaced. *Walter* was a 1980 case involving 8-mm reels of film. The U.S. Supreme Court rightly concluded that the labels and drawings on the boxes of film, while suggestive of the films' contents, only provided inferences to the exact content of the films. Therefore, the FBI's projection of the films went beyond what could be ascertained from the labels. The present case, though, involves hash values and not arbitrary labels.

Imagine walking into a video rental store in the 1980s to look for the movie Top Gun. A customer would find rows of shelves with VHS tapes bearing the "Top Gun" label and graphics. Those tapes would likely be positioned behind the distributer's box art displaying the movie's titles. A customer would be fairly certain that a tape sitting behind the Top Gun box contained the Top Gun movie. No one could say with absolute certainty, though, that two Top Gun cassettes contained the exact same content. It would be a reasonable inference but viewing one tape wouldn't necessarily prove with certainty what was on another similarly-labeled tape. As in *Walter*, a visual human review of each tape would be required in order to verify the contents. Even then,

comparison of two video tapes by human eyes could never establish with certainty that the content is identical.

Not so with hash values of digital files. Not only is the technology advanced and different, but the examination of the content of a file goes far beyond the capabilities of human recognition. A hash value can tell you if two files are *identical* down to the pixel or byte. If a digital file bears the same hash value as another digital file, those two files are identical. Period. If those files are each one megabyte in size, then all one million bytes of data in each image are analyzed, compared, and confirmed to be the same. If the content of one file is known, there is no remaining inference as to the content of the matched file. The content is certain.

Walter's reasoning, then, is outdated when applied to hash value matches. When Quicker's files were scanned and hash values calculated, the content of those files was searched. When those hash values were found to match hash values of images of suspected child pornography, the content of the files was known. The search of the files by a private party was comprehensive and complete. When Detective Lobner or Special Agent Lenzner opened and viewed the images, they confirmed that the private company had accurately classified what it had searched.

The *United States v. Wilson* decision also ignores strong public policy reasons for not forcing private employees to repeatedly view images of child sexual abuse material. While not dispositive of the issues, it should be considered. A private company, like Google or Synchronoss, employs private individuals who are neither law enforcement officers nor criminal justice professionals. It makes sense for those companies to have an interest in not forcing their employees to repeatedly view images of child sexual abuse material that have already been viewed before. If the hash value matches a previous file, the company should not force an employee to look at the

image again, nor should it have another employee view it yet again the next time the same hash value is scanned.

Additionally, the repeated viewing of images of child sexual abuse material revictimizes the victim. *See, e.g.*, Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110–358, Tit. I, § 102(3), 122 Stat. 4001 (2008) (congressional finding that a child pornography victim is "revictimize[d] . . . each time the image is viewed"); Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109–248, § 501(2)(D), 120 Stat. 587, 624 (2006) (finding that "[e]very instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse"). We should endeavor to reduce the number of times a child victim is revictimized by repeated viewings of his or her abuse.

The State urges this court to follow *Reddick* and *Miller* and the reasoning of those cases. Quicker lost whatever privacy interest he had in duplicates of child pornography files when the images were scanned and analyzed by a private party and found to match known images of suspected child pornography. Applying the private party search doctrine, the viewing of the images included in the CyberTip by law enforcement did not materially expand the scope of Synchronoss' private party search. Therefore, no Fourth Amendment search occurred.

III. Law enforcement acted in good faith based upon existing caselaw at the time, and investigators' conduct did not rise to the level necessitating exclusion.

The defendant jumps to the conclusion that because law enforcement searched the defendant's illegal images without a warrant, rather than following "proper protocol and obtain[ing] a search warrant," suppression is the proper remedy. (Doc. 40:8.) Exclusion of evidence, though, is not presumed when a Fourth Amendment violation occurs. The defendant fails to show how law enforcement acted with the requisite gross or reckless misconduct necessary

to invoke suppression and ignores that law enforcement was acting reasonably within the guidance of existing federal circuit caselaw at the time.

The Wisconsin Supreme Court examined the application of the exclusionary rule to a warrantless search of digital data most recently in *State v. Burch*, 2021 WI 68, 398 Wis. 2d 1, 961 N.W.2d 314. In *Burch*, a Brown County Sheriff's Office (BCSO) investigator investigating a homicide searched through a forensic download of Burch's cell phone data that had been acquired and stored by the Green Bay Police Department (GBPD) while investigating a separate crime. The GDPB officer obtained consent from Burch to search his cell phone, although the record provided different interpretations of the scope of that consent. When the BCSO investigator searched Burch's phone's data, he did so under the belief that Burch had provided valid consent for his phone data to be seized and searched, albeit in connection with a separate investigation. *Id.* ¶ 22.

The Wisconsin Supreme Court examined the background and purpose of the exclusionary rule. It wrote:

> The exclusionary rule is a judicially-created, prudential doctrine designed to compel respect for the Fourth Amendment's constitutional guaranty. *Davis v. United States*, 564 U.S. 229, 236, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011). In recent years, the United States Supreme Court has significantly clarified the purpose and proper application of the exclusionary rule. *See id.*; *Herring*, 555 U.S. 135, 129 S.Ct. 695, 172 L.Ed.2d 496. In *Davis*, the Supreme Court explained that prior cases suggested that the exclusionary rule "was a self-executing mandate implicit in the Fourth Amendment itself." 564 U.S. at 237, 131 S.Ct. 2419. However, more recent cases have acknowledged that the exclusionary rule is not one of "reflexive" application, but is to be applied only after a "rigorous weighing of its costs and deterrence benefits." *Id*. at 238, 131 S.Ct. 2419. Thus, in both *Herring* and *Davis*, the Court explained that to "trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Herring*, 555 U.S. at 144, 129 S.Ct. 695; *see also Davis*, 564 U.S. at 240, 131 S.Ct. 2419.

Id. ¶ 16. The Court went on:

> The "sole purpose" of the exclusionary rule "is to deter future Fourth Amendment violations." *Davis*, 564 U.S. at 236-37, 131 S.Ct. 2419. Therefore, exclusion is warranted only where there is some present police misconduct, and where suppression will appreciably deter that type of misconduct in the future. *Id*. at 237, 131 S.Ct. 2419. The

> exclusionary rule applies only to police misconduct that can be "most efficaciously" deterred by exclusion. *Id*. (quoting *United States v. Calandra*, 414 U.S. 338, 348, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974)). Specifically, "the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Herring*, 555 U.S. at 144, 129 S.Ct. 695. "But when the police act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence, the deterrence rationale loses much of its force, and exclusion cannot pay its way." *Davis*, 564 U.S. at 238, 131 S.Ct. 2419 (cleaned up).

Id. ¶ 17.

The Wisconsin Supreme Court refused to apply the exclusionary rule in *Burch*, noting that the BCSO acted "by the book." *Id.* ¶ 22. The BCSO reasonably relied on the signed consent form which did not limit Burch's consent in any way. *Id.* The BCSO had "every reason to think" the downloaded data was "legally obtained." *Id.*

While officers in *Burch* could have obtained a warrant to search the already-downloaded data, that alone did not justify application of the exclusionary rule because there was no reason for the BCSO to believe they were engaging in illegal activity. *Id.* ¶ 23. At best, the conduct was "mere negligence" that still would not warrant suppression and exclusion. *Id.* ¶ 24.

In this case, law enforcement's reliance on the private party search doctrine was not only reasonable but also fell in line with federal caselaw at the time, as shown extensively above. There was no present police misconduct such that exclusion would be necessary to prevent future misconduct. This court should not find that law enforcement here acted with the necessary "deliberate, reckless, or grossly negligent conduct" to warrant suppression. *Id.* ¶ 17. Nor should the court find evidence of any "recurring or systemic negligence." *Id.*

Additionally, *United States v. Wilson* was not filed until September 21, 2021, and is not binding on Wisconsin courts in any event. Interestingly, *Wilson*'s companion state case, *People v. Wilson*, which permitted the same conduct as the present case, was filed October 21, 2020, shortly before Detective Lenzner was assigned this investigation. Even presently, with the apparent split

in federal authorities and no Wisconsin decision on point, this court should find that law enforcement acted with objective reasonableness, and the evidence found should not be suppressed.

CONCLUSION

The defendant engaged in intentional behavior that put him in violation of his provider's acceptable use policy. His provider had fairly warned Quicker of the consequences, namely that it would monitor his account for contraband and report any to the government. Despite this, Quicker uploaded child pornography. There was no objectively reasonable privacy expectation with this action.

Even if he maintained some expectation of privacy in the illegal images, Synchronoss' automated examination and analysis of those images was a search done by a private party. When Synchronoss turned those images over to law enforcement, any privacy Quicker may have had was thwarted. Law enforcement's examination confirmed what Synchronoss had found and was not a Fourth Amendment search.

For these reasons, this court should deny the defendant's Motion to Suppress.

Dated this 16th day of December, 2022.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

s/ David W. Maas
DAVID W. MAAS
Assistant Attorney General
State Bar #1025522

Attorneys for State of Wisconsin

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3990
(608) 294-2907 (Fax)
maasdw@doj.state.wi.us

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 8

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 18CF1472

THOMAS DEKEYSER,

Defendant.

STATE'S SUPPLEMENTAL BRIEF IN RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS FRUITS OF INVALID SUBPOENA AND UNREASONABLE SEARCH

The defendant challenges the State's use of an administrative subpoena issued under Wis. Stat. § 165.505. The defendant argues that the subpoena meets neither state nor federal statutory requirements and that a warrant was instead required to obtain the defendant's basic subscriber records held by a third party. The defendant's arguments are selective and contradictory, ignore the federal statute specifically granting administrative authority for basic subscriber records, and misapply *Carpenter v. United States*, 138 S.Ct. 2206 (2018). For these reasons, the defendant's motion should be denied.

Because the power to issue administrative subpoenas rests solely with the Attorney General, and because the Attorney General issues administrative subpoenas for basic subscriber records in investigations concerning internet crimes against children and human trafficking, the Attorney General is hereby submitting this response brief on behalf of the State to supplement the brief already filed by the Waukesha County District Attorney. The undersigned Assistant Attorney General will also be filing a Notice of Appearance for purposes of this motion.

I. The subpoena in this case complied with all requirements of the Wisconsin administrative subpoena statute.

The state administrative subpoena statute grants authority to the Wisconsin Attorney General to issue a subpoena to the provider of an electronic communication service or remote computing service (together, "electronic service provider" or "ESP") compelling production of basic subscriber information of a customer. Wisconsin Stat. § 165.505(2) reads:

> **(am)** The attorney general or his or her designee may issue and cause to be served a subpoena, in substantially the form authorized under s. 885.02, upon a provider of an electronic communication service or a remote computing service to compel the production of any of the items listed in par. (c) if all of the following apply:
>
> **1.** The information likely to be obtained is relevant to an ongoing investigation of a human trafficking crime or an Internet crime against a child.
>
> **2.** The attorney general or his or her designee has reasonable cause to believe that an Internet or electronic service account provided by an electronic communication service or a remote computing service has been used in the crime.
>
> **(bm)** The attorney general or his or her designee issuing a subpoena under par. (am) shall ensure that the subpoena describes each record or other information pertaining to a customer or subscriber of the service to be produced and prescribes a reasonable return date by which the person served with the subpoena must assemble each record or other information and make them available.
>
> **(c)** A person who is duly served a subpoena issued under par. (am) shall, if requested, provide the following information about the customer or subscriber:
>
> **1.** Name.
>
> **2.** Address.
>
> **3.** Duration, including the start date and end date, of the assignment of any Internet protocol address to the customer or subscriber.

The information that may be compelled is limited to name, address, and duration of Internet protocol address (IP address) assignment. Wis. Stat. § 165.505(2)(c). The State may get this information if it is relevant to an ongoing investigation of an internet crime against a child and if the Attorney General has reasonable cause to believe that a service of the ESP was used in the commission of the crime.[1] Wis. Stat. § 165.505(2)(am).

[1] The statute also allows for use of a subpoena for hotel customer information, and in cases of human trafficking, neither of which are relevant in this case.

The defendant argues that the subpoena used was defective because it was not "supported by '*reasonable cause to believe* that an Internet or electronic service account . . . ha[d] been used in the crime.'" (Def.'s Notice of Mot. and Mot. to Suppress Fruits of Invalid Subpoena and Unreasonable Search, Apr. 10, 2019, 2) (alteration in original). The apparent true deficiency, based on the defendant's brief, is that the subpoena did not state facts showing that the suspect engaged in a crime and that the cyber tip was not referenced in the subpoena.

The statute, though, requires no such showing. The subpoena in this case included this language:

> The undersigned Assistant Attorney General has been informed by the undersigned Special Agent in Charge that these records likely contain information relevant to an ongoing investigation of a violation of Wis. Stat. Sections 948.05, 948.075, 948.11, and/or 948.12, and/or a violation of ch. 948 that involved the use of a device that permits the transmission of wire or electronic communications or images through an electronic communications service or a remote computing service. Further, the Special Agent in Charge has informed the undersigned that he/she has reasonable cause to believe that an Internet or electronic service account provided by the above provider has been used in the crime.

(State's Response to the Defense's Mot. to Suppress an Admin. DOJ Subpoena, May 22, 2019, Attach. 1.) An administrative subpoena must comply with its statutory language and requirements. *See v. City of Seattle*, 387 U.S. 541, 544 (1967). The language in this administrative subpoena satisfies the statutory requirements that: "1) [t]he information likely to be obtained is relevant to an ongoing investigation of . . . an Internet crime against a child; and 2) [t]he attorney general or his designee has reasonable cause to believe that an Internet or electronic service account provided by an electronic communication service or a remote computing service has been used in the crime." Wis. Stat. § 165.505(2)(am).

The administrative subpoena, by its nature, is not reviewed by a court, and therefore a court does not have to determine the sufficiency of the request. The statute requires no "showing" to a

court. Wisconsin Stat. § 885.02, after which the form of this administrative subpoena is modeled, requires no such showing.

Contrast the administrative subpoena statute with that of a search warrant under Wis. Stat. § 968.12(1); "A judge shall issue a search warrant if probable cause is shown." There, probable cause may be shown by affidavit, Wis. Stat. § 968.12(2), or oral testimony, Wis. Stat. § 968.12(3). Similarly, contrast the administrative subpoena statute with a subpoena for documents under Wis. Stat. § 968.135: "Upon the request of the attorney general or a district attorney and upon a showing of probable cause under s. 968.12, ..." Other court-issued legal process, such as wiretap intercept orders,[2] pen registers and trap and trace orders,[3] warrants to track communication devices,[4] and warrants for records of communications of customers or an electronic communication service or remote computing service[5] similarly require showings to be made to a court before the court may issue the respective order.

---

[2] "Each application for an order . . . shall be made in writing upon oath or affirmation to the court . . . ." Wis. Stat. § 968.30(1).

[3] "Upon an application made under s. 968.35, the court shall enter an ex parte order authorizing the installation and use of a pen register or a trap and trace device . . . if the court finds that the applicant has certified to the court that the information likely to be obtained by the installation and use is relevant to an ongoing criminal investigation." Wis. Stat. § 968.36(1).

[4] "Application for warrant. Upon the request of a district attorney or the attorney general, an investigative or law enforcement officer may apply to a judge for a warrant to authorize a person to identify or track the location of a communications device. The application shall be under oath or affirmation, may be in writing or oral, and may be based upon personal knowledge or information and belief. In the application, the investigative or law enforcement officer shall do all of the following:
* * *

(d) Provide a statement of the criminal offense to which the information likely to be obtained relates.

(e) Provide a statement that sets forth facts and circumstances that provide probable cause to believe the criminal activity has been, is, or will be in progress and that identifying or tracking the communications device will yield information relevant to an ongoing criminal investigation." Wis. Stat. § 968.373(3).

[5] "Warrant. Upon the request of the attorney general or a district attorney and upon a showing of probable cause, a judge may issue a warrant. . . ." Wis. Stat. § 968.375(3).

The state statute most closely resembling the administrative subpoena statute is the subpoena for records or communications of customers of an electronic communication service or remote computing service provider under Wis. Stat. § 968.375(2). Similar to the warrant under that same section, the subpoena requires a showing of probable cause to a court before the court may issue the subpoena. Wis. Stat. § 968.375(2)(a). However, this subpoena allows the government to obtain much broader information about a customer or subscriber than is allowed under the administrative subpoena statute, including telephone records, telephone numbers, billing information, and bank account information. *Id.* It further specifically requires an affirmative showing of probable cause, whereas the administrative subpoena statute does not.

The language of Wis. Stat. § 165.505 is plainly clear. The defendant asks this Court to read in requirements that were not included by the legislature. Statutory language "is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (citation omitted). If the meaning of the statute is plain, "the statute is applied according to this ascertainment of its [plain] meaning." *Id.* ¶¶ 45–46 (citations omitted).

The administrative subpoena used here complied with state statutory requirements.

II. The subpoena complied with federal statutes permitting the use of administrative subpoenas to obtain third party subscriber records.

The defendant argues that the administrative subpoena used in this case failed to satisfy the "requirements" of 18 U.S.C. § 2703(d). (Def's Br. 1.) This cherry-picked, apples-to-oranges comparison ignores the other methods of obtaining subscriber information allowed under federal law, including, directly on point, the use of an administrative subpoena.

The process by which the government may obtain subscriber or customer records held by a third-party ESP is governed by 18 U.S.C. § 2703(c). The government may issue a warrant under federal or state law. 18 U.S.C. § 2703(c)(1)(A). The government may obtain an order signed by a court pursuant to 18 U.S.C. § 2703(d), commonly referred to as a "2703(d) order." 18 U.S.C. § 2703(c)(1)(B). The government may also obtain subscriber or customer records with consent of the subscriber or customer. 18 U.S.C. § 2703(c)(1)(C).

In the case of basic subscriber records, the government may use "an administrative subpoena authorized by a Federal or State statute." 18 U.S.C. § 2703(c)(2). This basic subscriber information, obtainable with an administrative subpoena, is:

(A) name;
(B) address;
(C) local and long distance telephone connection records, or records of session times and durations;
(D) length of service (including start date) and types of service utilized;
(E) telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and
(F) means and source of payment for such service (including any credit card or bank account number).

Id. This information is considered "basic" when compared to the broader category of "a record or other information pertaining to a subscriber to or customer of such service" obtainable via a warrant, "2703(d) order," or consent. 18 U.S.C. § 2703(c)(1). The government can also use "a Federal or State grand jury or trial subpoena," a warrant, a "2703(d) order," or consent to obtain this same basic information listed in 18 U.S.C. § 2703(c)(2).

The federal administrative subpoena power referenced in 18 U.S.C. § 2703(c)(2) has its roots in 18 U.S.C. § 3486. That section authorizes the United States Attorney General to issue in writing a subpoena requiring certain production and testimony in cases investigating a federal offense involving sexual exploitation or abuse of children. 18 U.S.C. § 3486(a)(1)(A). That statute

also limits the scope of a subpoena to an ESP when investigating sexual exploitation or abuse of children to disclosure of basic subscriber information as specified in 18 U.S.C. § 2703(c)(2). 18 U.S.C. § 3486(a)(1)(C).

The defendant's comparison of the state administrative subpoena to 18 U.S.C. § 2703(d) ignores all of this. The administrative subpoena issued in this case falls well within the limits imposed by both 18 U.S.C. § 2703(c)(2) and 18 U.S.C. § 3486(a)(1)(A).

III. A person has no reasonable expectation of privacy in basic subscriber information.

The defendant alleges that he has a reasonable expectation of privacy in his subscriber information such that a warrant was required. While the defendant may claim he "sought to preserve as private his subscriber information," that is not the case. (Def.'s Br. 4.) The defendant voluntarily shared this information with his ESP. Also, society does not recognize as reasonable any expectation of privacy in this information. The defendant is unable to cite any case law that specifically says a person maintains a reasonable expectation of privacy in basic subscriber information such that a warrant is required before the government can obtain it.

Courts around the country have held the opposite to be true. In *United States v. Perrine*, 518 F.3d 1196 (10th Cir. 2008), the Tenth Circuit held that a person had no reasonable expectation of privacy in subscriber information he shared with his ESP. *Id.* at 1205. The Tenth Circuit specifically noted that "[e]very federal court to address this issue has held that subscriber information provided to an internet provider is not protected by the Fourth Amendment's privacy expectation." *Id.* at 1204. The court then cited several such cases:

> *See, e.g., Guest v. Leis,* 255 F.3d 325, 336 (6th Cir. 2001) (holding, in a non-criminal context, that "computer users do not have a legitimate expectation of privacy in their subscriber information because they have conveyed it to another person-the system operator"); *United States v. Hambrick,* 225 F.3d 656 (4th Cir. 2000) (unpublished), affirming *United States v. Hambrick,* 55 F.Supp.2d 504, 508–09 (W. D. Va. 1999) (holding that there was no legitimate expectation of privacy in noncontent customer information provided to an internet service provider by one of its customers); *United States v.*

> *D'Andrea,* 497 F.Supp.2d 117, 120 (D. Mass. 2007) ("The *Smith* line of cases has led federal courts to uniformly conclude that internet users have no reasonable expectation of privacy in their subscriber information, the length of their stored files, and other noncontent data to which service providers must have access."); *Freedman v. America Online, Inc.,* 412 F.Supp.2d 174, 181 (D. Conn. 2005) ("In the cases in which the issue has been considered, courts have universally found that, for purposes of the Fourth Amendment, a subscriber does not maintain a reasonable expectation of privacy with respect to his subscriber information."); *United States v. Sherr,* 400 F.Supp.2d 843, 848 (D. Md. 2005) ("The courts that have already addressed this issue ... uniformly have found that individuals have no Fourth Amendment privacy interest in subscriber information given to an ISP."); *United States v. Cox,* 190 F.Supp.2d 330, 332 (N. D. N. Y. 2002) (same); *United States v. Kennedy,* 81 F.Supp.2d 1103, 1110 (D. Kan. 2000) ("Defendant's constitutional rights were not violated when [internet provider] divulged his subscriber information to the government. Defendant has not demonstrated an objectively reasonable legitimate expectation of privacy in his subscriber information.").

Id. at 1204–05. In *Perrine*, the government used the equivalent of a "2703(d) order" to obtain the defendant's subscriber records. *Id.* at 1199. While *Perrine* also involved the defendant's use of peer-to-peer software, which indicated a clear willingness to share personal information with others over the internet, the ruling would have been the same in the absence of such peer-to-peer sharing.

The universal consistency of these holdings stems from the application of the third-party doctrine to the Fourth Amendment analysis surrounding subscriber records, specifically *United States v. Miller*, 425 U.S. 435 (1976) and *Smith v. Maryland*, 442 U.S. 735 (1979). In *Miller*, the United States Supreme Court held that the defendant had no reasonable expectation of privacy in bank records that were voluntarily shared by the defendant with his bank. 425 U.S. at 443. In *Smith*, the United States Supreme Court similarly held that the defendant maintained no reasonable expectation of privacy in the numbers he dialed on his phone. 442 U.S. at 742.

In this present case, the defendant willingly shared his name and address with his ESP in order to obtain internet service at his home. He maintained no expectation of privacy in this information since he willingly disclosed it to a third party in order to obtain service.

The content of the information sought is also important to the analysis. Courts have regularly recognized that basic subscriber information is obtainable via a subpoena. For example:

> [the Electronic Communications Privacy Act] draws a distinction between the content of a communication and the records pertaining to a communication service account. 18 U.S.C. § 2703. To obtain an electronic communication customer's records from a service provider, a governmental entity must follow the procedures outlined in § 2703(c). Absent customer consent, § 2703(c)(1) requires the government to obtain a warrant or court order for the records. The government can bypass these procedures and simply subpoena the records if it seeks only basic subscriber information, such as the name and address of the customer and telephone call logs. 18 U.S.C. § 2703(c)(2).

United States v. Clenney, 631 F.3d 658, 666 (4th Cir. 2011). Also:

> A third option covered by the statute provides for the governmental entity to use "an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena...." *Id.* § 2703(c)(2). The subpoena option covers more limited information—such as a customer's name, address, and certain technical information—as distinguished from that referred to in § 2703(c)(1) which broadly covers "a record or other information pertaining to a subscriber or customer." The Government may seek such information under any of these three options *ex parte,* and no notice is required to a subscriber or customer. *See id.* § 2703(c)(3).

In re Application of U.S. for an Order Directing a Provider of Electronic Communication Service to Disclose Records to Government, 620 F.3d 304, 307 (3rd Cir. 2010) (footnotes omitted).

The defendant contradicts himself with his argument that the administrative subpoena fell short of a "2703(d) order" and his subsequent claim that a warrant is required to obtain basic subscriber information. The State concedes that a "2703(d) order" is sufficient to obtain basic subscriber information. As stated above, this order is one of at least five methods for obtaining this information. But a "2703(d) order" is not issued upon a showing of probable cause. Rather, it is issued upon a showing of "reasonable grounds to believe that the . . . records or other information sought, are relevant and material to an ongoing criminal investigation." *Id.*

As noted by the United States Supreme Court, "that showing falls well short of the probable cause required for a warrant." *Carpenter v. United States*, 138 S.Ct. 2206, 2221 (2018). Thus, if a "2703(d) order" is sufficient to get subscriber records, then a probable cause warrant is not required.

Finally, the defendant's reliance on *Carpenter* is misplaced. The defendant writes, "Because Dekeyser has a reasonable expectation of privacy in his subscriber information, and because law enforcement acquired it without a warrant, the search was presumptively unreasonable. *See Carpenter*, 138 S.Ct. at 2221." (Def.'s Br. 5.) *Carpenter* says no such thing.

Rather, the holding in *Carpenter* is "a narrow one." *Id.* at 2220. The holding pertains only to the collection of more than seven days of cell site location information (CSLI). Collection of long-term CSLI is described by the Supreme Court as "provid[ing] an all-encompassing record of the holder's whereabouts." *Id.* at 2217. This data "provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'" *Id.*, citing *United States v. Jones*, 565 U.S. 415 (2012) (opinion of Sotomayor, J., concurring). This historical chronology offered by CSLI allows the government to "travel back in time to retrace a person's whereabouts, subject only to the retention policies of the wireless carriers. . . ." *Id.* at 2218.

This type of data is not implicated in the present case. "There is a world of difference between the limited types of personal information addressed in *Smith* and *Miller* and the exhaustive chronicle of location information casually collected by wireless carriers today." *Id.* at 2219. And *Carpenter* specifically does "not disturb the application of *Smith* and *Miller*" as that relates to the third-party doctrine's applicability to basic subscriber information. *Id.* at 2220. Instead, "[t]he Government will be able to use subpoenas to acquire records in the overwhelming majority of investigations. We hold only that a warrant is required in the rare case where the suspect has a legitimate privacy interest in records held by a third party." There is no such privacy interest at stake here.

Because the State used a proper administrative subpoena to get basic subscriber information of the defendant, the defendant's challenges must fail.

Dated this 14th day of June, 2019.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

s/ David W. Maas
DAVID W. MAAS
Assistant Attorney General
State Bar #1025522

Attorneys for State of Wisconsin

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3990
(608) 267-2778 (Fax)
maasdw@doj.state.wi.us

Hon. Douglas R. Edelstein
[redacted]
Fond du Lac, WI 54937

April 21, 2024

Re: Letter of Support for Judicial Appointment

To the Governor's Judicial Selection Advisory Committee:

Please accept this letter in support of the appointment of Attorney David Maas for the judicial vacancy in Waukesha County. Attorney Maas presents with the requisite character and qualifications for this role, and I wholly endorse his consideration for this appointment. Of emphasis, Attorney Maas has strengths as an experienced prosecutor and demonstrates a sound demeanor in his approach towards the administration of justice.

During Attorney Maas' assignment to my branch in Fond du Lac County, he has proven to be an experienced prosecutor with extensive knowledge of criminal law, in particular with fourth amendment issues. As is the local practice of Fond du Lac County, prosecutors are routinely required to prepare for multiple cases for trial for any one trial date. Attorney Maas excels in managing a large caseload while also being prepared for trials. Attorney Maas calmly manages a large caseload through all stages of litigation. As a trial attorney, Attorney Maas has a deep understanding of the rules of evidence, which is an important foundation for any circuit court judge.

Attorney Maas is also a member of the Fond du Lac County Drug Court team, to which I am also assigned. Each week Attorney Maas engages with drug court participants and encourages offenders not only to engage in treatment, but also to make better life decisions. Attorney Maas cares about offering rehabilitation services to offenders in need of AODA based treatment. To this end, Attorney Maas appreciates the "big picture" in offering rehabilitation to offenders, as much as he appreciates the need to hold violent offenders accountable for the protection of the community. This even-balanced approach is of immense importance to those serving on the bench.

Attorney David Maas brings experience, as well the proper demeanor to serve others as a circuit court judge. Without question, Waukesha County and the citizens of Wisconsin would benefit through the appointment of David Maas to the bench. I respectfully request his fullest consideration for this important position within the community.

Sincerely,

/e/ signed *Douglas R. Edelstein*
Hon. Douglas R. Edelstein
Circuit Court Br. 5
Fond du Lac County, WI

Outagamie County Est. 1851

JUDGE MARK J MCGINNIS
CIRCUIT COURT BRANCH 1
Phone 920.832.5152
Fax 920.832.5115

Justice Center – 320 S. Walnut St., Appleton, WI 54911

TAYLOR ZEEGERS
COURT REPORTER

DEBBIE LANG
JUDICIAL ASSISTANT

Governor Tony Evers
Wisconsin State Capital
Room 115 E State Capitol
Madison WI 53703

RE: David Maas

Dear Judicial Selection Advisory Committee:

The purpose of this letter is to strongly recommend that Attorney David Maas be appointed to serve as a Waukesha County Circuit Court Judge.

I have had the privilege of knowing David for the past 10 years. He is thoughtful, humble, and hardworking. I am impressed by his common sense, wisdom, and empathy for people. Attorney Maas is nationally recognized for his leadership in the areas of digital data, digital evidence, and technology in the courtroom.

Since February 2020, the Wisconsin judiciary offers a three-day Digital Evidence Bootcamp educational program to selected judges across the State. Attorney Maas is an important part of our faculty and leadership team. He has developed the curriculum and delivered presentations to Wisconsin judges on cutting-edge legal issues and new technology. The Wisconsin judges consistently give Attorney Maas the highest ratings and request more opportunities to learn from him.

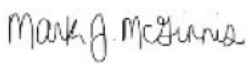
Attorney Maas is extremely hard working, is a great communicator, is passionate about public service, and is committed to excellence in everything he does. He is intelligent, analytical, smart, and is an exception trial lawyer. He has excellent courtroom presence and demeanor. Most impressive is his integrity and his unwavering commitment to excellence and fairness.

In addition, Attorney Maas is a great person that focuses on family and the community. He is an emerging leader in Wisconsin's legal community. He is well-respected and trusted by judges throughout Wisconsin.

Attorney Maas has the personal characteristics and the professional experience to be an outstanding member of Wisconsin's Judiciary. I look forward to having him as a colleague and I expect he will serve many years on the bench with distinction, leadership, and integrity.

Please feel free to contact me if you have any questions or would like more information.

Very truly yours,



Mark J. McGinnis
Outagamie County Circuit Court Judge
Mark.McGinnis@wicourts.gov
[redacted]

District Attorney
Susan L. Opper

Deputy District Attorneys
Lesli S. Boese
Michael D. Thurston
Abbey L. Nickolie

Office Services Coordinator
Julie A. Moelter

Victim/Witness Program
Jennifer S. Dunn, Coord.

Support Staff Supervisor
Rebecca L. Gifford

Assistant District Attorneys
Mary C. Brejcha
Lindsey H. Hirt
Melissa J. Zilavy
Kristina J. Gordon
Jack A. Pitzo
Molly M. Schmidt
Zachary A. Wittchow
Randolph P. Sitzberger
Claudia P. Ayala Tabares
Peter M. Tempelis
Edward M. Bremberger
Andrew M. Nesheim
Chelsea C. Thompson
Alyssa M. Schaller
Alyssa M. Jay
J.J. Crawford
Ted S. Szczupakiewicz
Jack A. Rieder
Nikole M. Kane
Alexis P. Werthmann
Brooke E. Schultz

Waukesha County

Office of the District Attorney

April 22, 2024

Office of the Governor
GOVJudicialAppointments@wisconsin.gov

Dear Governor Evers:

Please accept this letter of recommendation on behalf of David Maas for the position of Circuit Court Judge for Waukesha County.

I have had the pleasure of working with David for many years. My observations are that David is fair, level-headed and respectful of everyone. These traits will serve him well as a Circuit Court Judge.

I was impressed greatly by the leadership and skill he demonstrated while working at the Department of Justice. David acquired knowledge and expertise in prosecuting internet crimes and crimes involving electronic communications. He then shared his knowledge, training police and prosecutors all around the state. He is known as the source to go to when questions and issues arise. He is well-respected and dependable. David also developed several warrants and subpoenas which he distributed for all to use and they continue to be relied on statewide as accurate and thorough templates for accessing electronic communication records.

Also while at DOJ, David instructed on many topics and was always easy to understand and engaging. I have seen him present many times. Most recently, David trained new prosecutors on litigation skills. With his many years in the courtroom and wide variety of cases handled, he was easily able to guide the new prosecutors and provide them with valuable insight and direction. Some of the ADA's working for me attended his training and reported they learned a lot and appreciated his wisdom and approach to trial work.

I know David to have the necessary skills to be a good judge. He has the ability to communicate effectively and exercises sound judgment. I know he will be fair in his approach to cases and apply the law as written.

515 West Moreland Boulevard, Room CG-72
Waukesha, Wisconsin 53188-9877
Phone: (262) 548-7076

I highly recommend David Maas for the position of Circuit Court Judge for Waukesha County. If I can be of any further assistance, please do not hesitate to contact me.

Very truly yours,

Susan L. Opper
Susan L. Opper
District Attorney
Waukesha County

Timothy C. Samuelson
[redacted]
Middleton, Wisconsin 53562

April 24, 2024

Governor's Judicial Selection Advisory Committee

Re: Letter of recommendation in support of David Maas's application for the office of Waukesha County Circuit Court judge.

Dear Committee Members:

I write on behalf of Fond du Lac County Assistant District Attorney David Maas's application for gubernatorial appointment to the office of Waukesha County Circuit Court judge. I have had the pleasure of knowing Attorney Maas for nearly 12 years, since we served together as Assistant Attorneys General at the Wisconsin Department of Justice. I support his judicial application because he possesses the qualities and attributes that would make an exceptional jurist.

Attorney Maas is a skilled practitioner. When I served as Civil Chief Assistant United States Attorney for the Western District of Wisconsin, I observed first-hand his legal work with the Wisconsin Department of Justice's Division of Criminal Investigation, Federal Bureau of Investigation, and U.S. Attorney's Office as part of the Internet Crimes Against Children (ICAC) task force. Among other things, Attorney Maas collaborated in writing highly complex search warrants for digital evidence – based upon legal theories he developed and strategies he recommended – that resulted in disclosure of the facts upon which charges were eventually based. The warrants went largely unchallenged, despite being the cornerstone of several high profile federal prosecutions.

Attorney Mass is an excellent colleague. As a fellow manager at DOJ, my team benefitted from Attorney Maas's experience and willingness to assist and collaborate. When I was the Director of the Medicaid Fraud Unit, for example, my team regularly consulted with Attorney Maas, picking his brain about how to optimally investigate and prosecute complex white collar crimes. Although there were dozens of other AAGs in the department with strong prosecutorial credentials, I sought out Attorney Maas because of his demeanor: approachable, collaborative, and patient.

Attorney Maas is a skilled legal writer. I was appointed to serve as a Dane County Circuit Court Judge in 2017-2018 and remember a brief prepared by Attorney Maas in opposition to a constitutional challenge to the three-year mandatory minimum sentence for possession of child pornography contrary to Wis. Stat. § 939.617. Although the brief was filed by the Dane County Assistant District Attorney assigned to the case, I learned that it was researched, organized, and largely written by Attorney Maas. This was not unusual; prosecutors from across the state frequently rely on his expertise and work product. The brief, which focused on the impact pornography had on the affected children and how this was a rational basis sufficient to pass constitutional muster, gave a voice to victims. Like Attorney Mass, the brief was thoughtful, well-prepared, and

ultimately persuasive. I denied the defendant's motion, heavily relying on the argument and legal reasoning presented in the brief.

Attorney Maas is dedicated to the legal profession. In recent years, I have volunteered on the State Bar of Wisconsin's Leadership Development Committee. Understanding that Attorney Maas was integral with the development and production of the District of Columbia Bar's John Payton Leadership Academy, I invited him to provide input to the State Bar for its G. Lane Ware Leadership Academy. For both the D.C. and Wisconsin Bars, he volunteered his time to benefit the legal profession as a whole by developing younger attorneys, including those from nontraditional and underrepresented backgrounds. Attorney Maas's involvement in these programs is telling: it shows his dedication to public service and the legal profession.

Finally, Attorney Maas is an exceptional public speaker. Since 2012, I've attended continuing legal education seminars where he has presented, including seminars from the State Prosecutors Education and Training (SPET) program and DOJ's Division of Legal Services Training Committee. In 2022-2023, he also served as DOJ's Deputy Unit Director responsible for planning SPET conferences. Attorney Maas used his position of authority to affect programming by including unconscious bias training and sessions advancing LGBTQ+ interests. As a presenter, Attorney Maas obviously has subject matter expertise. But equally important is his ability to present complex legal concepts in language that is readily understood by those of us without his expertise. His communication style would be particularly beneficial as a judge, increasing the likelihood that litigants would understand the reasons for his decisions.

Attorney Maas's skills and attributes – his legal acumen, collegiality, empathy, leadership, and communication – would make him an exceptional judge, which would benefit the people of the State of Wisconsin. I am honored to recommend Attorney David Maas to the Governor's Judicial Selection Advisory Committee and welcome the opportunity to discuss my experience with him. Thank you for your consideration.

Very truly yours,

/s/ Timothy C. Samuelson

COUNTY OF WAUKESHA

HON. BRAD D. SCHIMEL
Judge

Barb Dassow
Court Reporter
(262) 970-4768

Liz
Deputy Clerk
(262) 548-7564

Michelle
Legal Clerk
(262) 548-7548

CIRCUIT COURT BRANCH 6
515 W. Moreland Boulevard
PO Box 1627
Waukesha, WI 53187-1627

April 25, 2024

To Whom It May Concern:
I write in support of the application of David Maas for appointment to Waukesha County Circuit Court Branch 4 to fill the vacancy that will be created by the retirement of Judge Lloyd Carter. I cannot recall exactly when I first met Mr. Maas, but it was back when we were both assistant district attorneys in neighboring counties, so I have known him as a colleague for at least 20 years.

Mr. Maas has served honorably in public service as a state prosecutor for 25 years. He is an outstanding trial attorney with extensive trial experience, and is extraordinarily qualified to serve as circuit court judge. He is conscientious, thoughtful and ethical and has a strong reputation among his fellow prosecutors, the defense bar and judges. His experience and skills have made him a sought-after instructor at prosecutor and law enforcement training conferences in some of the most challenging types of cases.

During my time at the Department of Justice, Mr. Maas was Deputy Director in the Criminal Litigation Unit. He earned high respect from the legal team he supervised. He is a hard working attorney who puts forth extra effort to strive for the just result in any case with which he is involved. He has a patient and thoughtful demeanor, and invariably treats others with respect. These are among the most important attributes we desire in the judiciary. He has a deep commitment to the constitution and the rule of law.

Mr. Maas has lived in Waukesha County for as long as I can recall and has strong ties to this community. He has earned the respect and support of law enforcement leaders, the judiciary and other public and private sector leaders in Waukesha County. I expect he will win election next spring when Waukesha County will have three open seats for the circuit court on the ballot. I am among many who have committed to support and assist his campaign. If he receives this appointment, Mr. Maas has done tremendous groundwork to organize the support that I am confident will result in his retention.

Thank you for considering my remarks. If you have any questions or concerns or I may be helpful in any other way, please do not hesitate to contact me.

Very truly yours,

Brad Schimel
Circuit Court Judge

WISCONSIN COURT OF APPEALS

2100 STEWART AVENUE, SUITE 310
WAUSAU, WISCONSIN 54401

Chambers of
LISA K. STARK, Presiding Judge

Telephone: (715) 845-6404
TTY: (800) 947-3529
Fax: (715) 845-4523
Email: Lisa.Stark@wicourts.gov

April 24, 2024

Governor's Judicial Selection Advisory Committee

Re: David Maas

Dear Members of the Governor's Judicial Selection Advisory Committee:

Please accept this letter in support of David Maas's application for appointment to the Waukesha County Circuit Court. I have had the honor and privilege of serving as a circuit court judge and judge of the court of appeals for a total of twenty-four years. In my service as Dean of the Wisconsin Judicial College for thirteen years I have developed programming and taught new circuit court judges how to live their lives on the bench. Through this experience I believe that I have developed a keen insight as to the qualities required for a lawyer to serve fairly and effectively as a circuit court judge. Based upon my work with Mr. Maas, I believe that he has the experience, qualities and capacity to be a terrific addition to the Wisconsin circuit court bench.

I endorse David for this position from what I believe is a unique perspective, as I have had the opportunity to work with him to plan and teach Wisconsin circuit court judges at a 4th Amendment Boot Camp for four years. David's background and experience as a prosecutor and with the Department of Justice has been invaluable to us in developing the 4th Amendment program. He possesses a wealth of knowledge regarding Constitutional Law, digital and other evidentiary issues, and criminal process and procedure, all of which will be invaluable in serving as a circuit court judge.

One of the most important things that we teach circuit court judges at the Judicial College is to provide procedural fairness to litigants. This not only means being unbiased and fair in decision-making, but being certain that the people who come before the court know that they have been heard. Having observed David teaching judges for several years, I know that he has the ability to relate to many different types of learners using very effective interpersonal skills. He is able to make the most difficult and technical material easily understandable, and is patient and clear in his delivery. I know that he is fair and open-minded, thoughtful, and that he can be trusted.

While presenting, we often encounter many different opinions from judges as to how a matter should be decided. David addresses the differing viewpoints calmly and facilitates constructive discussion. He has an excellent demeanor for working with all types of persons who will come before the circuit court, and I have no doubt that people who will appear before him will

understand his decisions and feel they have been treated fairly. Based upon my observations, I am sure that David will have the integrity and fortitude to issue decisions required under the law without regard to who appears before him, or influence from outside sources.

Many judges come to the bench from a prior career focused on only one area of the law. While I mentioned David's experience as a litigator and education concerning criminal matters, it is important to note that he has a well-rounded background that will serve him well on the bench. He has significant experience in dealing with issues that confront judges in both civil and criminal matters, and significant litigation experience in and out of the courtroom, all of which will serve him well on the bench.

I am confident that Mr. Maas seeks this position for the right reasons. I know from many discussions with him how deeply he is committed to public service. He has given of his time and talents in his prosecutorial and Department of Justice positions. He has embraced his role as a leader in educating judges, lawyers, and other professionals throughout Wisconsin and nationally. David is confident, but humble, and he does not seek this position for power or fame, but instead to make certain that our citizens are well served by our system of justice.

Mr. Maas possesses the right combination of intellect and experience, as well as great personal integrity, to best serve the citizens of Wisconsin on the Waukesha Circuit Court. I strongly endorse him for that position. Please contact me if you have any questions. I would be pleased to offer further information to the committee in support of Mr. Maas's application. Thank you for your consideration.

Sincerely yours,

/s/ *Lisa K. Stark*

Lisa K. Stark

Laurie Lyte
[redacted]
Middle River, Maryland 21220
[redacted]
[redacted]

April 26, 2024

VIA EMAIL (GOVJudicialAppointments@wisconsin.gov)

Governor Tony Evers
Office of the Governor, State of Wisconsin
P.O. Box 7863
Madison, WI 53707

Re: Application of David Maas, Esq.
Circuit Court for Waukesha County

Dear Governor Evers:

I am writing this letter in support of David Maas, Esq. who has applied to be nominated by the Committee for consideration by the Governor for an appointment to the Circuit Court for Waukesha County.

David has shown himself to be an exceptionally talented attorney, compelling advocate, and supportive colleague. I have witnessed firsthand David's dedication to the legal community, skill as a government attorney, commitment to public service, moral compass, professional ethics, and demonstrated judicial temperament.

I have known David for almost fifteen years. During my tenure with the Maryland Office of the Attorney General, where I served as an Assistant Attorney General and the Director of the Professional Development and Planning Division, I had the pleasure of working with David where he served as a faculty member around litigation skills, leadership, management, and wellbeing. David was one of our outstanding faculty members in service to the office's Professional Development and Planning Division and the broader attorney general community. In my role as Leadership Development Counsel for the District of Columbia Bar Association, I tapped him to serve as faculty for the Bar's flagship leadership program, the John Payton Leadership Academy, where he assisted in developing and providing programming supporting diverse cohorts of attorneys to be strong leaders in the legal profession. Our profession greatly needs this, and David exemplifies and models it.

Having had the privilege of closely observing David's professional journey, I can confirm that he possesses the exceptional qualities, experience, and temperament necessary to excel on the bench. Throughout David's career, he has demonstrated an unwavering commitment to the pursuit of justice and the fair application of the law. As a seasoned litigator, David has exhibited remarkable legal acumen, a deep understanding of legal principles, and an innate ability to navigate complex legal matters with precision, creativity, and integrity. As an educator, David is able to synthesize and share complicated

information to all levels of legal and law enforcement professionals, helping them gain the knowledge and confidence needed to excel.

David has distinguished himself as an outstanding educator in the field of essential management and leadership skills in the legal profession. I have had the privilege of teaching alongside David in leadership and management programs, where his expertise and guidance has been instrumental in helping participants shine and develop into effective leaders. His passion for teaching and mentorship has not only enriched the legal community as a whole, but has also empowered countless lawyers to hone their advocacy skills and cultivate strong leadership practices. David has a unique ability to meet people where they are, encouraging lawyers to be authentic and inclusive while fostering environments where all individuals feel valued, respected, and empowered.

David brings to his teaching and mentoring his considerable trial experience as a prosecutor. David sets himself apart as an expert in his field as he shares his extensive skills as a trial attorney and his expertise in cyber-crime and digital evidence. He is always willing to take on a new challenge and is proactive in his approach to training designing, and delivering programming that is innovative, timely, and meets the needs of a fast paced legal and business environment.

David's talent as an attorney faculty member is evident in every program he participates in. His presentations are engaging, thoughtful, and share a wealth of knowledge with his colleagues around the country. His ability to answer tough questions indicates his clear understanding of whatever topic he is presenting. And his one-on-one coaching with program participants is on point, yet sensitive. He routinely mentors less experienced attorneys and faculty members which facilitates the expansion and flourishing of our attorney general community faculty group.

Through his work with the National Association for Attorneys General Training (NAAG), David has shared his knowledge on a national level. David has deservedly earned a reputation as one of NAAG's outstanding faculty members serving in programs covering a broad range of topics including advocacy, leadership/management, and wellbeing. Through his teaching and speaking engagements, he has addressed critical topics such as resilience, vicarious trauma, engagement, and building high-quality connections. David's commitment to supporting the mental and emotional health of legal professionals has had a durable and profound impact, supporting a positive culture within the legal community.

Without reservation, I strongly support David Maas' application for Wisconsin Circuit Court Judge in Waukesha County. His stellar track record, coupled with his outstanding qualities and unwavering professionalism and commitment to justice and the legal profession, makes him an exemplary candidate for this important role. I am certain that he will make a significant and lasting contribution to the bench.

Please feel free to contact me if you need any further information.

Very truly yours,

Laurie Lyte

Laurie Lyte

Fond du Lac County

OFFICE OF THE DISTRICT ATTORNEY

Eric J. Toney, District Attorney
Barry J. Braatz, Deputy
Kristin R. Menzl, Assistant
Curtis A. Borsheim, Assistant
Catherine A. Block, Assistant
Joan M. Korb, Assistant
Jane Kohlwey, Assistant
Gordon R. Leech, Assistant
Michael E. O'Rourke, Assistant
Amber L. Hahn, Assistant
David W. Maas, Assistant
Michael B. Tobin, Assistant
Victim/Witness Services (920) 929-3048 ext. 1

April 25, 2024

Judicial Appointments Committee
GOVJudicialAppointments@wisconsin.gov

Re: Judicial Appointment Application for ADA David W. Maas

Dear Committee:

I am submitting this letter of recommendation to the committee to respectfully request this committee recommend ADA David Maas for appointment to the bench in Waukesha County, where he resides. For nearly twelve years, as an elected district attorney, I have seen the respect ADA Maas carries amongst prosecutors, private attorneys, public defenders, judges, law enforcement and the judicial system as a whole. I've seen the command of the law ADA Maas possesses, from being in the audience of presentations he has put on for prosecutors and I have seen this firsthand with him as an ADA in my office.

I have also seen the character, integrity, and commitment to the law that ADA Maas carries with him. Additionally, he demonstrates an even temperament to seek justice, while treating everyone with respect and dignity. ADA Maas' commitment to the legal profession goes beyond handling cases in court. He has worked tirelessly to better our profession by organizing, running, and presenting at statewide prosecutor conferences since 2016. His contributions have been invaluable to our profession, especially in the complex areas of digital evidence, search warrants, telecommunication warrants, administrative subpoenas, ICAC issues, expectation of privacy, election security, and the DOJ election fraud prosecution manual.

As an ADA in Fond du Lac County, ADA Maas carries a full caseload ranging from speeding tickets, drug cases, violent crime, domestic violence, property crime, and everything in between. ADA Maas brings a broad level of experience that is necessary to be an effective judge, which would allow him to hit the ground running.

I have seen the good judgment, organizational skills, knowledge of the law, being a good teammate and steady influence in our office, and I have no doubt he will carry all of these traits with him as a judge in Waukesha County.

I wholeheartedly recommend the appointment of ADA Maas to bench as a circuit court Judge in Waukesha County. I know that, if appointed, ADA Maas will represent the community with honor and integrity, with the goal of seeking justice within the law. I would be honored to have him as a judge in Fond du Lac County but I believe the people of Waukesha County would be blessed to have ADA Maas serving them as a judge.

Sincerely,

Eric J. Toney
District Attorney

City-County Government Center, 160 South Macy Street, Fond du Lac, WI 54935
Telephone: (920) 929-3048 Fax: (920) 929-7134

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

Room 114 East, State Capitol
PO Box 7857
Madison WI 53707-7857
(608) 266-1221
TTY 1-800-947-3529

April 17, 2024

SENT VIA EMAIL (GOVJudicialAppointments@wisconsin.gov)

The Honorable Tony Evers
Governor of Wisconsin

Re: Application of David W. Maas for
Waukesha County Circuit Court Vacancy

Dear Governor Evers:

I write in support of the application of David Maas for an appointment to the Waukesha County Circuit Court.

In my capacity as Deputy Attorney General, I worked closely with David from January 2019 when I started in my position until June 2023, when he left the Wisconsin Department of Justice (DOJ) to become a prosecutor in Fond du Lac County. While an Assistant Attorney General at DOJ, David served in a supervisory role as a Deputy Unit Director of the Criminal Litigation Unit and had extensive responsibilities. I witnessed his outstanding performance with respect to many of those responsibilities firsthand.

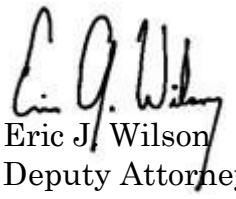
David was the lead coordinator of the Statewide Prosecutors Education and Training (SPET) conference—the twice-yearly conference that is the principal means of continuing legal education for prosecutors throughout Wisconsin. David's leadership of the conference was readily apparent, from its meticulous planning, to his frequent updates to attendees throughout the conference, to his own personal participation as a leader of training sessions. David's aptitude for training was not limited to Wisconsin; while at DOJ, he served for many years as a trainer of attorneys at attorneys general offices nationwide through the National Association of Attorneys General.

Apart from his training role, David also performed important work as a front-line prosecutor at DOJ. He was the head legal advisor at DOJ for the Wisconsin Internet Crimes Against Children (ICAC) Task Force. In that capacity, he was

recognized statewide as a legal expert on warrants and subpoenas for digital evidence, a background that will be invaluable should he be appointed as a circuit court judge. David also coordinated and drafted the annual reports required by state and federal law regarding court-ordered wiretaps. When law enforcement needed assistance with drafting the extensive filings required when applying for a wiretap, David was the lead DOJ prosecutor on those matters. David was also DOJ's designated prosecutor on election security matters, often participating on task forces comprised of state and federal law enforcement officials to protect the integrity of our elections. In sum, when we needed a prosecutor's assistance at DOJ on complex matters, David was often the prosecutor assigned and he performed that work admirably.

If appointed, I am confident that David would serve as a level-headed and fair-minded jurist for the citizens of Waukesha County.

Sincerely,



Eric J. Wilson
Deputy Attorney General

Wisconsin State Public Defender

Protecting Justice for all Since 1977

17 S. Fairchild Street, Suite 500
Madison, WI 53703
Office Number: 608-266-0087 / Fax Number: 608-267-0584
www.wispd.gov

Katie R. York
Acting State Public Defender

Katie R. York
Deputy State Public Defender

April 23, 2024

Office of Tony Evers
Governor's Judicial Selection Advisory Committee
PO Box 7863
Madison, WI 53707

Dear Governor Evers:

I recommend Attorney David Maas for appointment as Waukesha County Circuit Court Judge. For the last two years I have worked with Attorney Maas as faculty for a multi-day judicial training—the Digital Evidence Bootcamp. It is a 3-day intensive program designed for a small number of judges (around 20 participants) where the faculty engages with participants on a number of topics related to digital evidence and the criminal legal system. Attorney Maas and I represent opposing sides of the criminal legal system—prosecutor and defense attorney—but work together as faculty members to provide a comprehensive perspective of the evolving issues related to digital evidence. My experience with Attorney Maas has shown him to be intelligent, thoughtful, and respectful. I believe he will be the same as a judge.

In developing the agenda and preparing for the Bootcamp, all faculty members provide their perspectives on a variety of topics related to digital evidence, with significant focus on the Fourth Amendment. In going through this process, Attorney Maas approaches these quickly evolving legal issues thoughtfully. He does the appropriate research and engages in nuanced discussions about where the law is and where it may go. It is evident from working with Attorney Maas in this capacity that he has respect for the law and would take care to ensure it is applied fairly.

Attorney Maas would also have a respectful judicial demeanor. He works well with opposing counsel and the judiciary. Both in preparing for the Bootcamp and during the course, Attorney Maas and I have not always agreed. Unsurprisingly, we have different perspectives. However, even when we disagree, Attorney Maas has always been respectful. He explains his perspective and listens to my perspective. This is what a good judge does. For these reasons, I believe Attorney Maas would be an excellent choice for appointment as Waukesha County Circuit Court Judge.

I appreciate your consideration of this letter. Please let me know if you have any questions.

Sincerely,

Katie R. York

KATIE R. YORK
Acting State Public Defender