Appeal No. 2025AP1028-CR **Cir. Ct. No. 2023CF382**

WISCONSIN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOR S. LANCIAL,

DEFENDANT-APPELLANT.

FILED

NOV 17, 2026

Samuel A. Christensen
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Stark, P.J., Hruz, and Gill, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2023-24),[1] this appeal is certified to the Wisconsin Supreme Court for its review and determination.

ISSUES AND SUMMARY

Thor S. Lancial was charged and convicted, following a jury trial, of ten counts of possession of child pornography. ***State v. Lancial***, No. 2022AP146-CR, unpublished slip op., ¶1 (WI App Jan. 5, 2023). On appeal, we determined that law enforcement violated Lancial's Fourth Amendment rights

[1] All references to the Wisconsin Statutes are to the 2023-24 version.

by conducting a warrantless search of his cell phone, and, as a result, we ordered the cell phone evidence suppressed and overturned his convictions.[2] ***Id.***, ¶3.

Lancial is now before us again, albeit with a new case number, as a result of a second search of the same cell phone, which revealed the same evidence that we had previously ordered suppressed, although the State charged different images. We certify this appeal to the Wisconsin Supreme Court because it presents several intertwined, novel legal questions involving different judicial doctrines and constitutional requirements.

In this case, Lancial moved to suppress the evidence uncovered during the second search of the cell phone, this time arguing before us that the evidence was "fruit of the poisonous tree," *see* ***Wong Sun v. United States***, 371 U.S. 471, 478-88 (1963), such that the law of the case prohibits any of the evidence being used to prosecute him. And even if the law of the case doctrine does not apply, Lancial contends, the search warrant affidavit was insufficient and the circuit court's order authorizing the search was impermissibly overbroad.

The State responds that the second search was authorized under the independent source doctrine based upon a second affidavit containing the same facts as the prior affidavit in the first case and a modified search warrant. Essentially, the State's argument regarding the independent source doctrine is seeking a judicial do-over of the search to rescue evidence that it failed to lawfully acquire the first time. In the event that the independent source doctrine does not apply, and regardless of any issues with the affidavit or the court's order, the State

[2] Neither party filed a petition for review by the Wisconsin Supreme Court in that case.

requests application of the good-faith exception to the exclusionary rule to ultimately save the previously suppressed evidence, which may fundamentally eviscerate Fourth Amendment protections in this state.

The State's reliance on the independent source doctrine here is unique for the following reasons: (1) the source of the evidence is a cell phone that was continuously in law enforcement's possession; (2) police sought a second search of the exact same phone searched the first time, for the exact same evidence that was uncovered during the first search, using the exact same probable cause; (3) the search came after the defendant had already been tried and convicted of the crime of possession of child pornography; and (4) the evidence giving rise to that conviction was ordered suppressed by an appellate court. Accordingly, we question whether the evidence obtained was truly from an independent source or whether the State's actions reveal an untenable constitutional loophole to the exclusionary rule. This is a question of statewide importance because if the independent source doctrine applies under these circumstances, it is likely that the State will utilize this procedure in future cases. Therefore, litigants, attorneys, and lower courts throughout the state would benefit greatly from a definitive decision on the issue by the state's highest court.

In order to answer the above question regarding the independent source doctrine, however, we believe it is important to first consider whether, as Lancial claims, law enforcement's affidavit for the second search failed to include sufficient facts to support a finding of probable cause to believe that his cell phone contained evidence of the crime of possession of child pornography or whether, given the significant privacy interest that the case law recognizes in modern cell phones, police had no legal basis—separate from the residence where the phone was found—to search his cell phone. And, relatedly, we must also consider

whether the circuit court's order authorizing the search was erroneous because it failed to specifically identify the device being searched and allowed a broad search of the device without identifying the nature of the evidence sought and its nexus to the crime of possession of child pornography.

The State, in contrast, asserts that the search warrant affidavit contained enough information for the circuit court to make separate and independent inferences in support of probable cause, that a reasonable officer conducting the search would be able to discern the crime at issue and the evidence sought, and that the affidavit and the order can be considered together to create the necessary basis for a probable cause finding and nexus to the crime. Accordingly, the State argues, the court did not err by denying Lancial's motion to suppress the evidence obtained through the second search. Thus, this case presents an important, novel, and active legal question regarding the sufficiency of a search warrant affidavit and the scope of an order authorizing the seizure of the contents of a cell phone and the search of those contents, particularly where the crime being investigated might necessitate an extensive search of the digital device.[3]

If it is determined that the search warrant affidavit lacked sufficient evidence to demonstrate probable cause to seize and search the contents of Lancial's phone, and that the circuit court's resulting order to search the cell phone failed the particularity requirement, then those facts weigh on whether the independent source doctrine was correctly applied. Lancial contends that absent

[3] After briefing occurred in this case, the Wisconsin Supreme Court granted the petition for review in ***State v. Melssen***, 2025 WI App 76, 419 Wis. 2d 288, 30 N.W.3d 468, *review granted*, 2026 WI 33, which involved a challenge to a warrant to search a smartphone because it was overbroad and not carefully tailored to its justifications.

the first unlawful search and the evidence it uncovered, the State would not have sought a second search of his cell phone. Relatedly, and given the deficiencies in the supporting affidavit and the court's order, he contends that the court would not have authorized the second search but for its knowledge of the first search and its results. Thus, the second search did not genuinely result from an independent source, but was instead a search tainted by the results of the first search.

And, finally, in the alternative, we question whether *all of the above* considerations are eclipsed by application of the good-faith exception to the exclusionary rule. In other words, regardless of whether the independent source doctrine was properly applied, the affidavit was insufficient, and the order was impermissibly overbroad, or whether the law of the case should control to suppress the evidence, would the good-faith exception apply? And if it did, would its application effectively swallow the exclusionary rule? Accordingly, we certify this appeal to the Wisconsin Supreme Court.

BACKGROUND

We outlined the facts of Lancial's first case, Dunn County Circuit Court Case No. 2019CF264, in detail in our prior decision. ***Lancial***, No. 2022AP146-CR, ¶¶4-15. For our purposes, we note that law enforcement received cyber tip line reports from the National Center for Missing and Exploited Children (NCMEC) that an IP address had been used to access several images of suspected child pornography.[4] ***Id.***, ¶¶3-4. That IP address was registered to the residence of Lancial's father—Richard Lancial—and Officer Maloree Zassenhaus

[4] "An IP address is a 'unique address that identifies a device on the Internet.'" ***State v. Baric***, 2018 WI App 63, ¶4, 384 Wis. 2d 359, 919 N.W.2d 221 (citation omitted).

of the Menomonie Police Department obtained and executed a search warrant for the residence. ***Id.***

Lancial's cell phone was seized during that search, and its contents were "later downloaded and examined," revealing numerous images of suspected child pornography. ***Id.*** Lancial moved to suppress the evidence, arguing that "Zassenhaus had not obtained a warrant to search the phone before downloading and examining its contents" because "the language of the warrant did not authorize a search of the electronic devices" and was "limited to searching the residence and seizing any electronic devices therein." ***Id.***, ¶¶5-6. The circuit court denied Lancial's motion, and the case proceeded to a jury trial. ***Id.***, ¶¶6, 14.

Thereafter, Lancial appealed his convictions to this court. ***Id.***, ¶15. As relevant here, Lancial challenged the circuit court's denial of his motion to suppress the cell phone evidence, renewing his argument that the search of his cell phone exceeded the scope of the warrant. ***Id.*** We reversed and remanded Lancial's case after concluding that law enforcement had illegally searched Lancial's phone "because the warrant did not specifically authorize a search of the seized electronic devices, nor did it authorize law enforcement to seize the digital data stored on those devices." ***Id.***, ¶¶53, 64. We further concluded that "there was sufficiently deliberate and sufficiently culpable police misconduct in [that] case to justify the application of the exclusionary rule." ***Id.***, ¶58. Finally, we rejected the State's argument that the good-faith exception to the exclusionary rule applied because we concluded the State had failed to satisfy Wisconsin's additional requirements for applying the exception. ***Id.***, ¶¶59-63.

On return to the circuit court, the State, which had retained Lancial's cell phone since it was originally seized, sought an order from the court allowing it

to search the phone a second time, based on a new search warrant affidavit and under the independent source doctrine exception to the exclusionary rule. For his part, Lancial argued that based upon our prior decision, the law of the case doctrine precluded the images found on his phone from being used to prosecute him under any circumstances. During the post-remand hearing,[5] Tyler Ingebretson, an investigator with the Menomonie Police Department who was not initially involved with the investigation, testified that he was directed by the assistant district attorney (the ADA) to "prepare an independent analysis of the case" and draft another search warrant affidavit. According to Ingebretson, the ADA told him not to include any information regarding what had been discovered on the phone during the first unconstitutional search. That affidavit was then admitted into evidence at the hearing.

The relevant facts Ingebretson provided are as follows: (1) on April 30, 2019, Zassenhaus received multiple CyberTip reports from NCMEC; (2) one of the tips stated that on March 3, 2019, one image of apparent child pornography was accessed by IP Address 66.188.243.22; (3) NCMEC reported that IP Address 66.188.243.22 was associated with 17 other CyberTips; (4) Zassenhaus reviewed the files provided with the CyberTips and those images showed children of varying ages in sexually suggestive positions; (5) law enforcement obtained a subpoena and learned that the IP Address belonged to Richard at a residence located in Menomonie, Wisconsin; (6) on July 9, 2019,

[5] The Honorable Christina M. Mayer presided over the post-remand hearing and issued the order for the second search of Lancial's cell phone. The Honorable Rod W. Smeltzer presided over all relevant proceedings in Lancial's first case.

Zassenhaus executed a search warrant at Richard's residence, and Lancial was present when the search warrant was executed; (7) Zassenhaus spoke with Richard, who informed her that "they had a password protected internet with Wifi that he paid for," "no [sic] had visited the residence," "they never give out the password for the Wifi," and Lancial "[has] the Wifi password"; (8) Zassenhaus seized multiple electronic items, including a black Samsung Galaxy J7 cell phone that "was sitting on the coffee table" and that Richard identified as belonging to Lancial; and (9) the Samsung Galaxy cell phone has been held in long-term storage since that time.

After hearing arguments from counsel, the circuit court concluded that the independent source doctrine applied and that Ingebretson's search warrant affidavit established probable cause to support a second search of Lancial's cell phone. The court made the following findings:

> First, the Court determines whether, absent the illegal entry, the officer would have sought the search warrant. And I'm finding that if Officer Zassenhaus thought that she did not have authority to search that phone, she would have sought a warrant.
>
> ….
>
> The second test … asks if information illegally acquired influenced the magistrate's decision to authorize the warrant. And so I'd like to put on the record that I have not seen those pictures. I have not read the trial transcripts. I have not had descriptions of those pictures. I don't have any knowledge of what those pictures contain except what's in the affidavit.
>
> Certainly, [***State v. Carroll***, 2010 WI 8, ¶44, 322 Wis. 2d 299, 778 N.W.2d 1,] states that, while the government should not profit from its illegal activities, neither should it be placed in a worse position than it otherwise would have occupied. I think that if I don't authorize the search warrant, the State will be placed in a worse position.
>
> ….

> And so the question is—in my mind—does this affidavit stand on its own to support probable cause of a search warrant. I have signed search warrants on this information for other people's phones. I think this does establish probable cause.

The court then granted the State's motion and entered an order for a second search of the phone, which we address in more detail below.[6]

Thereafter, the contents of Lancial's cell phone were again seized by law enforcement and searched by the Wisconsin Department of Justice's Division of Criminal Investigation. A flash drive containing the phone's downloaded contents was sent to Ingebretson, who "located [five] images of child pornography which were different than the [ten] images in the original criminal charges." Therefore, while Lancial's convictions in Case No. 2019CF264 were vacated and the case dismissed, based on the second search of the cell phone, the State charged Lancial in Dunn County Circuit Court Case No. 2023CF382 with five counts of possession of child pornography.

Lancial again filed a motion to suppress the cell phone evidence. He argued that the circuit court erred by applying the independent source doctrine because allowing the State to use the evidence from his phone was contrary to the law of the case doctrine and the purpose of the exclusionary rule.

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[6] We pause to note that the Wisconsin Supreme Court has explained previously that

> [a]n order meeting the parameters of a search warrant set out in [WIS. STAT. § 968.12] is a statutorily authorized warrant, even though the document is entitled "order." Therefore, that the order in this case was not entitled, "search warrant," does not affect its validity because, as the statute clearly states, "[a] search warrant is an order."

State v. Sveum, 2010 WI 92, ¶56, 328 Wis. 2d 369, 787 N.W.2d 317 (third alteration in original; quoting § 968.12(1)).

The circuit court held a nonevidentiary hearing on Lancial's motion.[7] In an oral ruling, later memorialized by a written order, the court denied Lancial's motion. Relying on ***Murray v. United States***, 487 U.S. 533 (1988), and ***State v. Van Linn***, 2022 WI 16, 401 Wis. 2d 1, 971 N.W.2d 478, the court concluded that the independent source doctrine was applicable because "this [was] a separate search." According to the court, regardless of what the warrant-issuing judge may be aware of, including a prior illegal search, "you go by what's in the four corners of the warrant. And the four corners of the warrant, in this Court's opinion, does provide probable cause to search Mr. Lancial's phone a second time around."

Lancial filed a petition for leave to appeal the circuit court's nonfinal order denying his motion to suppress. On June 23, 2025, this court granted Lancial's petition and stayed further proceedings in the circuit court pending the disposition of this appeal.

DISCUSSION

I. Law of the case

"The law of the case doctrine is a 'longstanding rule that a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal.'" ***State v. Moeck***, 2005 WI 57, ¶18, 280 Wis. 2d 277, 695 N.W.2d 783 (citation omitted). The doctrine "ensures stability for litigants and reinforces the finality of

[7] The Honorable James M. Peterson presided over the hearing and denied Lancial's motion to suppress.

a court's decisions." ***State v. Jensen***, 2021 WI 27, ¶13, 396 Wis. 2d 196, 957 N.W.2d 244. However, "the law of the case doctrine is not an absolute rule that must be inexorably followed in every case." ***Moeck***, 280 Wis. 2d 277, ¶25. "Courts have the power 'to disregard the rule of law of the case in the interests of justice' and to reconsider prior rulings in a case" where "cogent, substantial, and proper reasons exist." ***Id.*** (citations omitted). "The issue of whether a decision establishes the law of the case raises a question of law" that appellate courts review de novo. ***State v. Stuart***, 2003 WI 73, ¶20, 262 Wis. 2d 620, 664 N.W.2d 82.

A. Lancial's arguments

Lancial argues that the law of the case doctrine prohibits any of the images or other data on his cell phone from being used to prosecute him. We determined in Lancial's prior appeal that law enforcement's act of searching Lancial's cell phone absent a warrant authorizing the search qualified as misconduct, as any belief that "Zassenhaus may have thought she had" regarding "authority to search … was not objectively reasonable because the plain language of the warrant did not permit such a search." ***Lancial***, No. 2022AP146-CR, ¶57. Therefore, because "[l]aw enforcement can and should be deterred from ignoring the scope of a warrant" and because "[t]his concern is especially keen in circumstances … where law enforcement wants to search a cell phone, which is a device known to contain the most private and sensitive information of many individuals," we concluded that "there was sufficiently deliberate and sufficiently culpable police misconduct in this case to justify the application of the exclusionary rule." ***Id.***, ¶¶58, 64 (citing ***Riley v. California***, 573 U.S. 373, 378-97, 402 (2014)).

The application of the law of the case doctrine under these circumstances appears to be an issue of first impression in Wisconsin. Therefore, beyond referencing case citations defining the doctrine generally, Lancial does not present any case law in support of his argument. Instead, Lancial largely advances policy arguments for why the doctrine should apply. First, he contends that "the parties agreed, and the circuit court found, that the proceedings now before [this court] are the same as those [that were] before [us] in 2019, despite the change in case number." He further postulates that "the evidence obtained from the second 'search' … is the same evidence this [c]ourt ordered suppressed," given that "the entirety of the data on the device is typically downloaded" and that "[b]ecause the phone remained in storage in the [S]tate's custody, the data downloaded in 2023 would be the same data that was downloaded in 2019." Thus, he argues, the doctrine should apply because "[t]he evidence obtained from the first search is the same evidence obtained from the second search."

Lancial further asserts that the circuit court's denial of the second motion to suppress is inconsistent with the law of the case doctrine because "it does not advance [the] goal of deterring police misconduct"; therefore, it is inconsistent with our determination that the exclusionary rule applied. *See* ***id.***, ¶58; *see also* ***Fullerton Lumber Co. v. Torborg***, 274 Wis. 478, 483, 80 N.W.2d 461 (1957) ("[W]hen a case is remanded, the [circuit] court must comply with the mandate of the appellate court," and "the [circuit] court has no power to retry the case or go back to the evidence produced upon the first trial, and therefrom make additional findings so as to uphold and cure a judgment which has been held erroneous"), *superseded on other grounds by*, WIS. STAT. § 103.465. According to Lancial, granting law enforcement a do-over under these circumstances nullifies the ability of the exclusionary rule to deter police misconduct.

B. The State's arguments

In contrast, the State argues that the law of the case doctrine does not apply because this court "held only that the fruits of the first search must be suppressed," which "had nothing to do with a hypothetical future lawful search." As the State correctly identifies, our prior decision "did not broadly rule that all evidence from Lancial's phone was forever inadmissible no matter what." In fact, our decision specified that "the evidence obtained from *that search* must be suppressed." ***Lancial***, No. 2022AP146-CR, ¶64 (emphasis added).

In support of its position, the State cites two cases from other jurisdictions. First, in ***Henderson v. State***, 844 S.W.2d 360, 361 (Ark. 1993), the defendant was appealing his second conviction for capital murder after his first conviction was affirmed on appeal but then reversed on a writ of habeas corpus by the United States Court of Appeals for the Eighth Circuit. One of the issues the defendant raised in both appeals was that the circuit court erred by denying his motion to suppress his in-custody statement. ***Id.*** at 362. The State of Arkansas argued that the court should dismiss this argument under the law of the case doctrine. ***Id.*** The Arkansas Supreme Court rejected the government's assertion because the defendant was arguing "for the first time that his statement should be suppressed because of mental illness." ***Id.*** "In other words," the State explains, "the issue decided in the first appeal was not the broad question of whether the statement should be suppressed in general, but the narrow question of whether the statement should be suppressed as involuntary based on the specific arguments raised in the first appeal."

The Oregon Court of Appeals reached a similar result in ***State v. Martin***, 517 P.3d 372 (Or. Ct. App. 2022). In that operating a motor vehicle while

intoxicated (OWI) case, the appellate court initially reversed the defendant's conviction, holding that his blood test results should have been excluded because the evidence was not sufficient to establish a chain of custody. ***Id.*** at 373. On remand, the circuit court granted the defendant's motion to exclude the blood test results based on the law of the case. ***Id.*** The Oregon Court of Appeals reversed, concluding that the law of the case doctrine did not apply. ***Id.*** at 374. According to the court, the previous appeal was "related to the sufficiency of the state's foundation for the [blood alcohol concentration (BAC)] results," but it "did not place any limitation on the state's ability following remand to prove chain of custody." ***Id.***

According to the State, Lancial's case is similar to ***Henderson*** and ***Martin*** because "Lancial's first appeal was not the broad question of whether the evidence from his phone could ever be admissible."[8] Instead, this court "answered the narrow questions of (1) whether Officer Zass[e]nhaus's search exceeded the scope of the search warrant in violation of the Fourth Amendment, triggering the exclusionary rule; and (2) if so, whether the good[-]faith exception to the exclusionary rule prevented suppression." According to the State, our "holding in Lancial's first appeal could not possibly have encompassed the independent source doctrine" given that "the evidence had not yet been obtained from an independent source."

[8] Lancial observes in reply that neither case cited by the State involved the government's attempt to use evidence that an appellate court had ordered suppressed due to a constitutional violation.

C. Our comments

Our own research reveals similar discussions of the law of the case doctrine that we believe are worth addressing. For example, in ***People v. George***, 2017 COA 75, ¶1, 488 P.3d 1159, the question was as follows:

> If a police officer conducts a warrantless search based on consent—but a court suppresses evidence obtained because the consent was invalid—does the law of the case doctrine prevent the officer from lawfully obtaining the same evidence by applying to a different judge for a search warrant, this time based on grounds other than consent, and without using the fruits of the earlier unlawful search in the application?

The case involved allegations of sexual contact with two young girls that the defendant met on the internet. ***Id.***, ¶2. During the investigation, law enforcement conducted a search of the defendant's car and a GPS device—which revealed "movements generally consistent with the victims' testimony about their meetings with" the defendant—based on the consent of a towing company that had possession of the defendant's car. ***Id.***, ¶¶6-7.

The defendant moved to suppress the evidence of both searches, and the circuit court "ruled that the towing company's consent to search the car was valid but that its consent to search the GPS device was not." ***Id.***, ¶8 (footnote omitted). In response, "the prosecution directed the investigator to seek a search warrant for the GPS device—which remained in police custody—from a different magistrate" without "specifically refer[ring] to any data obtained from examination of the GPS device in the warrant application" or "disclos[ing] the earlier suppression ruling." ***Id.***, ¶9. The defendant challenged the second examination of the GPS device on the basis that "the first suppression order was not only law of the case," but it was also "an unchallenged order that applied the exclusionary rule." ***Id.***, ¶30 (citation modified). The Colorado Court of Appeals

declined to apply the law of the case doctrine based on its reasoning that the prosecution was not attempting to relitigate the validity of the previous search. ***Id.***, ¶45. Instead, the "warrant at issue in the second suppression hearing raised a different issue—independent source—that was not and could not have been raised at the first suppression hearing."[9] ***Id.***

Based on the parties' lack of citation to any Wisconsin authority on this topic, it is clear that this case presents a novel issue in Wisconsin. Pursuant to the above persuasive authority, the pertinent question becomes whether, by seeking the second search warrant, the State was attempting to relitigate whether the initial search of Lancial's cell phone was constitutionally valid or whether the exclusionary rule or good-faith exception applied to that first search. If it was a relitigation attempt, then the law of the case doctrine might be applicable. Here, however, a second search is at issue, and the question is whether the independent source doctrine is applicable to that search, which is an entirely different question than was previously before this court.

We also recognize that because the State dismissed the prior case against Lancial and filed a new criminal complaint, this is not a subsequent proceeding *in the same case*.[10] *But see* ***Aon Risk Servs., Inc. v. Liebenstein***, 2006 WI App 4, ¶42, 289 Wis. 2d 127, 710 N.W.2d 175 (2005) ("A party may not circumvent a ruling it does not like in one case … by filing a new action, *unless*

[9] In reaching its decision, the Colorado Court of Appeals compared the circumstances in ***State v. Parry***, 390 P.3d 879 (Kan. 2017), and ***United States v. Hanhardt***, 155 F. Supp. 2d 840 (N.D. Ill. 2001), to demonstrate why the law of the case doctrine was inapplicable. ***People v. George***, 2017 COA 75, ¶¶39-44, 488 P.3d 1159.

[10] We note that the parties do not assert that issue preclusion applies in this case. *See* ***State v. Spencer***, No. 2025AP1256-CR, unpublished slip op. (WI App Oct. 20, 2026).

the second action is based on claims that could not have been brought in the first action …."), *abrogated on other grounds by*, ***Burbank Grease Servs., LLC v. Sokolowski***, 2006 WI 103, 294 Wis. 2d 274, 717 N.W.2d 781.

Therefore, a decision from the Wisconsin Supreme Court would be helpful to define the confines of the law of the case doctrine where the State has dismissed and refiled charges after a motion to suppress has been granted, and to clarify how the law of the case doctrine interacts with the independent source doctrine, particularly where the State is seeking the same evidence, from the same source, based upon the same facts.

II. Constitutionality of the second cell phone search: probable cause and overbreadth

Both the Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution guarantee citizens the right to be free from unreasonable searches and seizures and further set forth the manner in which warrants shall issue. U.S. CONST. amend. IV; WIS. CONST. art. I, § 11. A search pursuant to a warrant passes constitutional muster if it satisfies the following three requirements:

> (1) prior authorization by a neutral, detached magistrate; (2) a demonstration upon oath or affirmation that there is probable cause to believe that evidence sought will aid in a particular conviction for a particular offense; and (3) a particularized description of the place to be searched and items to be seized.

State v. Tate, 2014 WI 89, ¶28, 357 Wis. 2d 172, 849 N.W.2d 798 (citation omitted); *see also* WIS. STAT. § 968.12 (discussing search warrants). Evidence obtained through an unlawful search is ordinarily excluded at trial under the exclusionary rule, provided that an exception to the rule does not apply. ***State v. Prado***, 2021 WI 64, ¶¶56, 59, 397 Wis. 2d 719, 960 N.W.2d 869.

Lancial challenges the constitutionality of the second search of his cell phone on several grounds. The first requirement above—a neutral, detached magistrate—is not directly at issue in this appeal, and we will not address it further. On the second requirement, Lancial argues that the affidavit in support of the warrant did not contain sufficient facts establishing probable cause to believe that his phone contained evidence of the crime of possession of child pornography and that, therefore, the circuit court's order was not supported by probable cause. As to the third requirement, Lancial asserts that the court's order authorizing the search was an impermissibly overbroad general warrant that failed the particularity requirement.[11]

A. Lack of probable cause

"The United States Supreme Court has adopted a totality of circumstances standard for determining whether probable cause exists in an application for a search warrant." ***State v. Romero***, 2009 WI 32, ¶17, 317 Wis. 2d 12, 765 N.W.2d 756. That standard "'is a practical, nontechnical conception' requiring a court to deal with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" ***Id.*** (citations omitted). Therefore, when reviewing an application for a search warrant, it is the court's duty "to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before it, there is a

[11] Although we address the issues in the order presented by the parties, we question whether a circuit court addressing a motion to suppress evidence should first consider application of the independent source doctrine because if the doctrine does not authorize a second search, then the search is unlawful regardless of the sufficiency of the affidavit or the overbreadth of the order granting the search. Nevertheless, we also consider these facts relevant when determining whether the independent source doctrine applies, so we address them first in this certification.

fair probability that contraband or evidence of a crime will be found in a particular place." ***State v. Multaler***, 2002 WI 35, ¶8, 252 Wis. 2d 54, 643 N.W.2d 437; ***State v. Lefler***, 2013 WI App 22, ¶8, 346 Wis. 2d 220, 827 N.W.2d 650 ("Probable cause to search exists when sufficient facts 'excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that the objects sought will be found in the place to be searched.'" (citation omitted)).

Nevertheless, "[a] magistrate is entitled to go beyond the averred facts and draw upon common sense in making reasonable inferences from those facts." ***State v. DeSmidt***, 155 Wis. 2d 119, 135, 454 N.W.2d 780 (1990) (citation omitted). The purpose of the Fourth Amendment is not to "den[y] law enforcement the support of the usual inferences which reasonable [people] draw from evidence"; the law merely requires "that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." ***State v. Beal***, 40 Wis. 2d 607, 613, 162 N.W.2d 640 (1968) (citation omitted).

"The person challenging the warrant bears the burden of demonstrating that the evidence before the warrant-issuing judge was clearly insufficient." ***DeSmidt***, 155 Wis. 2d at 132. "We accord great deference to the warrant-issuing judge's determination of probable cause, and that determination will stand unless the defendant establishes that the facts are clearly insufficient to support a finding of probable cause." ***State v. Kerr***, 181 Wis. 2d 372, 380, 511 N.W.2d 586 (1994) (citation omitted).

1. Lancial's arguments

Lancial argues that the circuit court's order authorizing the second search of his cell phone was not supported by sufficient probable cause because Ingebretson's affidavit "seems to be a poorly drafted template into which some specific facts related to this case were entered." What the affidavit required, explains Lancial, was information regarding "the relationship between" Lancial and Richard or Lancial's relationship to Richard's residence, beyond stating that Lancial was present on the day that Zassenhaus came to the house. More importantly, Lancial asserts, "[t]he affidavit … fails to explain whether there was reason to believe that [he] was present in [Richard's] residence three to four months prior when the images underlying the CyberTips were accessed"—i.e., "the affidavit does not connect [Lancial] to the IP Address on the date … the NCMEC tip occurred."

Finally, Lancial contends that the affidavit does not "state that the affiant believes that the phone contains evidence of a crime, why he held such a belief, or even what type of evidence he believed might be present (images, videos, passwords, internet searches, etc.)." Similarly, the State's motion for a second search of Lancial's cell phone "does not list a crime that is being investigated or contain any alleged belief that [Lancial's] phone contains the items sought to be seized or why such a belief existed." Therefore, Lancial asserts that the affidavit did not contain sufficient information for the circuit court to have found that there was a fair probability that *his phone* would contain evidence of the crime of possession of child pornography.

Lancial cites ***Ybarra v. Illinois***, 444 U.S. 85 (1979), in support of his proposition that "[t]he fact that [Lancial] and his phone happened to be present at

[Richard's] residence the day the warrant was executed cannot be enough." In ***Ybarra***, based on a tip from an informant, an Illinois state judge issued a warrant to search a bartender and a tavern for evidence of controlled substances. ***Id.*** at 87-88. When law enforcement executed the warrant, they also frisked the tavern's patrons. ***Id.*** at 88. Officers discovered heroin on Ybarra's person. ***Id.*** at 88-89. The United States Supreme Court ruled that this search violated the Fourth Amendment because "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." ***Id.*** at 91, 96. The Court explained that "[t]here [was] no reason to suppose that … the authorities had probable cause to believe that any person found on the premises of the [tavern], aside from [the bartender], would be violating the law," as evidenced by the fact that "[t]he search warrant complaint did not allege that the bar was frequented by persons illegally purchasing drugs" and "[i]t did not state that the informant had ever seen a patron of the tavern purchase drugs from [the bartender] or from any other person." ***Id.*** at 90 & n.2.

2. The State's arguments

The State, for its part, argues that Lancial has not met his heavy burden to prove that the warrant affidavit was clearly insufficient to establish probable cause. According to the State, the search warrant affidavit "contained more than enough information to create a reasonable inference that evidence of child pornography would be found on Lancial's phone," including that Richard's IP address "was associated with eighteen different cyber tips," which "means child pornography was being repeatedly and persistently accessed from that IP address." The State further asserts that it was clear from the affidavit that Lancial lived in Richard's residence.

For support, the State cites ***State v. Ward***, 2000 WI 3, 231 Wis. 2d 723, 604 N.W.2d 517. In that case, a warrant affidavit contained evidence that Ward was selling drugs out of his home. ***Id.***, ¶2. Specifically, police received a tip that another individual, Darrell Vance, "sells pounds of marijuana." ***Id.***, ¶5. Vance told police that "[Lance Ward] who lives on Royce" was his supplier. ***Id.***, ¶6. Further investigation into the tax rolls revealed that a property on Royce Street was owned by Lance R. Ward. ***Id.*** Ward challenged the warrant on the basis that this information was insufficient to support an inference that illegal drugs would be found at his home "without an explicit statement in the affidavit linking the illegal drugs to the Ward residence." ***Id.***, ¶¶14, 31, 33.

The Wisconsin Supreme Court rejected an "overly technical and formalistic approach" to analyzing the sufficiency of a search warrant affidavit, recognizing that such affidavits "are normally drafted by nonlawyers in the midst and haste of a criminal investigation" and that "[t]echnical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area." ***Id.***, ¶32 (citation omitted). According to the supreme court, the facts alleged were sufficient for the warrant-issuing judge to make the inference that there was probable cause to search Ward's home. ***Id.***, ¶¶33-34.

Just as in ***Ward***, argues the State, Ingebretson's affidavit "does not become insufficient merely because [he] did not painstakingly spell out every possible inference that might be drawn from the facts alleged." The State emphasizes that Ingebretson stated that he believed that evidence of child pornography would be found on Lancial's phone, but he "didn't have to" because "[t]he validity of a warrant does not turn on the affiant's subjective beliefs." *See* ***id.***, ¶21.

The State also relies on ***Commonwealth v. Martinez***, 71 N.E.3d 105 (Mass. 2017), where the issue on appeal was the validity of a search warrant issued "to search [an] apartment for computers and related items connected to the suspected possession and distribution of child pornography" based on the knowledge that the IP address registered to that address was sharing illegal files. ***Id.*** at 108-09. "The central question" in that case was whether the averments "that a particular IP address was used to share child pornography and that this IP address had been assigned at the time in question to an Internet subscriber at the specific physical address to be searched" were "sufficient to establish probable cause for the search, even though the named subscriber was neither listed as, nor confirmed to be, living in the unit, and even though police had no information before the search linking the defendant to the residence." ***Id.*** at 110. In affirming the denial of the defendant's motion to suppress, the Supreme Judicial Court of Massachusetts explained that "[t]hese facts provided a substantial basis from which to conclude that evidence of downloading and sharing child pornography via the Internet would be located at the apartment, even if it turned out that an unauthorized user was 'joyriding' using the targeted IP address." ***Id.*** at 114.

3. Our comments

As we touched on previously, the case law in this area has become more complicated following the Supreme Court's decision in ***Riley***. *See* ***Lancial***, No. 2022AP146-CR, ¶¶44-51; *see also* ***Riley***, 573 U.S. at 395 ("Allowing the police to scrutinize [data contained on cell phones] on a routine basis is quite different from allowing them to search a personal item or two in the occasional case."). Based on our prior decision in Lancial's previous appeal, there is no dispute (1) that law enforcement lawfully seized Lancial's cell phone based on the first premises warrant in the prior case, and (2) that law enforcement exceeded the

scope of the premises warrant by seizing the contents of Lancial's phone and then searching the contents absent a warrant supported by probable cause specifically authorizing that seizure and search. ***Lancial***, No. 2022AP146-CR, ¶¶46, 51.

Lancial, in our view, advances a tenable argument that the second search warrant affidavit failed to establish the necessary nexus between himself and the premises or the IP address because, as Lancial argues, the affidavit lacked any information connecting him to Richard or his home. As courts have recognized, an IP address reveals little in the way of identifying information, given that it is "[a] recording of 'the existence of connections between communications devices'" that "shows only that *someone* … was using the internet" but "could not reveal the identity of the user—whether it be [the defendant], his mother, or an unidentified guest." *See, e.g.*, ***United States v. Soybel***, 13 F.4th 584, 592-93 (7th Cir. 2021).

Therefore, because the CyberTip reports from NCMEC established probable cause that someone using the IP address assigned to Richard's home accessed child pornography, it was likely permissible for the warrant to authorize a search of all of the occupants' devices. *See, e.g.*, ***United States v. McLellan***, 792 F.3d 200, 213-14 (1st Cir. 2015) (upholding validity of warrant to search electronic devices of three roommates living in a single-family dwelling where evidence of child pornography was linked to an IP address and "every internet connection established from any of the occupants' computers would trace back to the same IP address").

However, in this case, Lancial argues, the affidavit fails to bridge the gap between Richard's IP address and Lancial by, for example, stating that Lancial was an occupant of Richard's residence or that he was a frequent visitor of

Richard's home or even that Lancial was Richard's son.[12] Even if we could infer that Lancial resided at Richard's home on the day the cell phone was seized, we agree with Lancial's contention that "the affidavit contained no information to suggest that [Lancial] lived there—and used the phone sought to be searched—four months prior, when the images underlying the cybertips were accessed." According to Lancial,

> [a]n officer need not spell out every possible inference [in a search warrant affidavit]. But the officer did need to set forth enough facts to provide a substantial basis for the court to conclude that there was a fair probability that evidence would be found on [Lancial's] phone. This wasn't an affidavit hastily drafted by non-lawyers. It was drafted after this Court's decision, four years after the phone was seized, and it was reviewed by the prosecutor. Under the circumstances, the sloppiness is inexcusable. As is the dearth of information.

Lancial has never been linked to Richard's residence during the time period that the child pornography was accessed. Therefore, the question is whether the affidavit contained enough information to justify the significant invasion of privacy that an unlimited search of a person's cell phone entails.

[12] The State disputes Lancial's assertion on this point, stating that Lancial is "attempt[ing] to treat the probable cause requirement as a semantic trap." According to the State, the first page of the affidavit "states that the phone was seized from 'Thor Lancial's residence.'" Further, the State strings together the facts that "(1) Lancial was present when police arrived; (2) according to Lancial's father, no one visited the residence and they 'never' gave out the Wi-Fi password; and (3) Lancial had the Wi-Fi password" to assert that "[i]f Lancial was at the residence but was not a visitor, then the obvious inference is that he must live there" and "[h]is possession of the Wi-Fi password, which the family 'never' gives out, further supports this already reasonable inference, as does the fact that the home belonged to his father."

Although we know based on Lancial's prior case that he is in fact Richard's son, we agree with Lancial that there is nothing in the affidavit stating as much, and Ingebretson did not testify to that fact at the post-remand hearing. While they clearly share a surname, there are no facts in the affidavit by which to infer their relationship. Lancial does admit that the affidavit's introductory paragraph states that the cell phone was "seized from Thor Lancial's residence," but he alleges "that paragraph was clearly not meant to be in the affidavit and there are no details to support that conclusory assertion."

Additionally, Lancial's knowledge of the Wi-Fi password establishes only that he had the capacity for network access. While the circuit court may make reasonable inferences, it is a significant inferential leap, absent knowledge of other facts, from network access to connection to the crime—one which has broader implications in our digital world and may open the door to cell phone searches based solely on whether an individual connected to a Wi-Fi network. *Cf.* ***Chatrie v. United States***, 609 U.S. 605, 611-12 (2026) (clarifying that individuals have a legitimate expectation of privacy in their cell phones' "Location History"—"a time-stamped record of every place a cell phone has been"—and thus "the police conducted a [Fourth Amendment-protected] search when they gained access to Location History data"). Absent information connecting Lancial to Richard's home, under ***Ybarra***, ***Soybel***, and ***Riley***, there is a significant question of whether capability to access a network and proximity amount to the individualized, particularized probable cause required to breach the digital privacy of a visitor's cell phone.

In terms of the State's arguments, we question the State's reliance on ***Martinez***, given that the Supreme Judicial Court of Massachusetts made clear that "[t]he defendant [did] not challenge the reasonableness or scope of the search of his digital files once police had seized his computers, nor [did] he raise the related issue [of] whether courts should require police to develop minimization techniques to govern the execution of a digital search." ***Martinez***, 71 N.E.3d at 116 n.11. In other words, ***Martinez*** might assist the State if the issue were whether Lancial's phone could be seized during the search of Richard's home based on the CyberTips connected to Richard's IP address, but that question is not at issue here. Instead, ***Martinez*** provides little assistance on the question of whether probable cause to search a residence and seize all electronic devices equals probable cause

to seize the contents of and search every electronic device seized regardless of its connection to the residence.[13] *See* ***id.***; *see also* ***Commonwealth v. Molina***, 71 N.E.3d 117, 127-29 (Mass. App. Ct. 2017) (permitting the seizure of "over a dozen" electronic devices from an apartment shared by five people on the basis that child pornography was shared from a device connected to an IP address registered to the apartment).

The State further argues that "[s]ince there was probable cause to search all the devices, there was undoubtedly probable cause to search the phone, just as probable cause to search an entire house implies probable cause to search a room within that house." Given the recent case law on the subject of cell phone privacy discussed above, we question whether the State's argument accurately reflects the state of the law. Therefore, the issues in this case appear unresolved on several levels, i.e., whether probable cause to search a residence equals probable cause to search every electronic device in the residence, rather than just seize the devices; whether there is a different standard if the electronic device in the home is a cell phone rather than a computer; or whether there is a different standard when the search is for evidence of a crime like possession of child pornography, which may require a broader investigation (as discussed in more detail below).

[13] Lancial suggests that the result of the State's proposed rule would be that law enforcement has "probable cause to search the phone of any individual that happened to be present at the time [a] warrant for [a] residence was executed, regardless of whether that person had ever been to the residence previously."

B. Overbreadth

As noted above, a search warrant must "particularly describ[e] the place to be searched, and the persons or things to be seized." *See* ***State v. Noll***, 116 Wis. 2d 443, 450, 343 N.W.2d 391 (1984) (alteration in original; citation omitted). "This particularity requirement ensures that a search's scope is supported by probable cause: that each area sought to be searched is likely to yield evidence of the crime." ***Socha v. City of Joliet***, 107 F.4th 700, 709 (7th Cir. 2024). "Another limit on the scope of a warrant is the crime under investigation, which 'cabins the things being looked for' to items that could be evidence of that crime." ***Id.*** (quoting ***United States v. Bishop***, 910 F.3d 335, 337 (7th Cir. 2018)). "Particularity is of substantial importance in the context of cell phones (and other, similar electronic devices) because, '[w]ith all they contain and all they may reveal, they hold for many Americans the privacies of life.'" ***Id.*** (alteration in original; quoting ***Riley***, 573 U.S. at 403). The interpretation of a warrant presents an issue of law that appellate courts review de novo. *See* ***State v. Pinder***, 2018 WI 106, ¶24, 384 Wis. 2d 416, 919 N.W.2d 568.

The circuit court's order in this case read as follows:

> Based upon the above motion, file, and records, and for the reasons stated on the record at the motion hearing on 4-17-23 IT IS ORDERED that the [S]tate[']s motion to allow [a] 2nd search of the phone is granted. The State is ordered to turn over records regarding the 1st search of the phone to the defendant's Attorney prior to conducting the 2nd search of the phone. However, images of child pornography will not be turned over, but may be viewed by defense counsel at the Menomonie Police Department. The Court is granting:
>
> A 2nd forensic examination/analysis of the device or the contents of the device, using accepted digital forensic examination tools and techniques. The examination/analysis is for the purpose of locating, documenting, preserving and/or determining the presence

or absence on or in the device. The property sought TO BE SEIZED can be described as follows:

a. Evidence of who used, owned, or controlled the device at the time the things described in the warrant or relevant to the investigation were created, edited, deleted or accessed, such as logs, registry entries, configuration files, saved usernames and passwords, documents, Internet browsing histories, user profiles, email content, email contacts, "chat" and/or instant messaging content, "chat" and/or instant messaging logs, photographs, correspondence and other documents created by or saved on the computer;

b. Evidence of the presence of malicious software that would allow others to control the computer, such as viruses, Trojan horses, and other forms of malicious software, as well as evidence of the presence or absence of security software designed to detect malicious software;

c. Evidence of the attachment to the computer or digital/electronic device of other storage devices or similar containers for electronic evidence;

d. Evidence of the presence of counter-forensic programs (and associated data) that are designed to eliminate data from the computer or device, or the past presence of such software on the computer or device;

e. Evidence of the times the computer or device was used;

f. Passwords, encryption keys, and other access devices that may be necessary to access the computer or device;

g. Contextual information identifiable by the analyst and necessary or helpful to understand the evidence otherwise described in this attachment.

h. Records and things evidencing the use by the device of any of the Internet Protocol (IP) addresses mentioned in the sworn affidavit/complaint supporting issuance of this search warrant in order for the computer or device to have accessed the Internet and or communicated across the Internet at all times relevant to the present investigation, including:

i. Records of IP Addresses used by the computer or device;

ii. Records of Internet activity by or through the computer or device, including firewall logs, caches, browser history and cookies, "bookmarked" or "favorite" web pages, search terms that the computer or device user

> entered into any Internet search engine, and records of user-typed web addresses as well as all data available on or in, or through forensic analysis of, any seized routers, modems, or network equipment used to connect to the Internet and/or other computer networks reflecting Internet or network connection history or activity.
>
> i. Computer or digital programs or files containing, believed to contain or capable of containing images, "still" photographs, and/or digital videos, or any remnants thereof and any evidence or "meta-data" about any such files or file remnants, all regardless of file format or file name.
>
> j. This examination will take place at Division of Criminal Investigation in Eau Claire and the State is granted 120 days to complete the examination.

1. Lancial's arguments

Lancial argues that the circuit court's order was invalid because it was an impermissibly overbroad general warrant. He first claims that the court's order "does not describe the item to be searched—it does not describe the cell phone, but rather states that it is authorizing a second 'examination/analysis of the device or the contents of the device.'" Further, Lancial contends that "while the [S]tate argues that the introductory paragraph of the order mentions it being a second search of the phone, it cites no law suggesting that this vague language is sufficient." Lancial also asserts that "the order does not explain what crime is under investigation" and does not "limit law enforcement's search of the 'device' to evidence of possession of child pornography, or any other crime, for that matter." Instead, the order states, "The examination/analysis is for the purpose of locating, documenting, preserving and/or determining the presence or absence on or in the device," which appears to beg the question, "presence or absence of what?"

Finally, Lancial contends that the items authorized to be seized are not specific or particularized and that the order "in no way limits the scope of law

enforcement's search through the data in [Lancial's] phone." According to Lancial, "this order allowed law enforcement to search *any* device for *any* location data, internet activity, images, videos, passwords, documents, emails, messages, etc., without limitation as to date, that could be evidence of *any* crime."

As to whether any alleged lack of specificity in the circuit court's order could be resolved by assuming that Ingebretson's affidavit was incorporated into the order, Lancial disputes that assertion. *See* ***Lancial***, No. 2022AP146-CR, ¶¶40-42. The court's order did not contain language incorporating the State's motion or affidavit, and we are not persuaded that the language in the order suggests that the motion or affidavit was attached to the order. *See* ***Groh v. Ramirez***, 540 U.S. 551, 557-58 (2004) ("[M]ost Courts of Appeals have held that a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant."); ***United States v. Maxwell***, 920 F.2d 1028, 1032 (D.C. Cir. 1990) ("[T]he warrant must … contain 'suitable words of reference' evidencing the magistrate's explicit intention to incorporate the affidavit.").

Lancial relies on ***State v. Melssen***, 2025 WI App 76, 419 Wis. 2d 288, 30 N.W.3d 468, *review granted*, 2026 WI 33, in support of his position. In that case, the defendant appealed his convictions for drug crimes, arguing, as relevant here, that the circuit court erred by denying his motion to suppress evidence obtained in the execution of a warrant to search the contents of his smartphone because the warrant was overly broad and not supported by probable cause. ***Id.***, ¶1. We concluded that "the warrant to search [the defendant's] smartphone—which authorized officers to search virtually all of the messages, images, search terms, passwords, correspondence, credit card bills, telephone bills,

digital artifacts, and incoming and outgoing telephone numbers and call details stored on the smartphone—violated the Fourth Amendment" because, "[a]t most," the warrant application "established probable cause that [the defendant] committed a battery on a specific date, and also established probable cause that evidence related to the battery would be found in a limited search of the call logs and communications on the smartphone over a limited period of time," not probable cause for the broad search authorized by the warrant. ***Id.***, ¶3.

Based on recent case law emphasizing the importance of carefully tailoring warrants to search cell phones, we determined that the warrant in ***Melssen*** permitted an unconstitutional search of the defendant's smartphone, but because "the existing record [did] not allow us to determine the potential applicability of any exception to the exclusionary rule," we remanded the case to the circuit court. ***Id.***, ¶¶4, 36-39. In doing so, we specifically rejected the circuit court's conclusion that "to the extent there is probable cause that evidence of a crime will be found on a smartphone, this necessarily means that there is probable cause for an essentially unrestricted search of the smartphone's contents." ***Id.***, ¶41.

Nevertheless, we recognized that

> [i]n some circumstances, the factual averments in a warrant application might establish a sufficient nexus between the likely contents of a smartphone and the commission of a crime such that a fairly broad search of the smartphone's contents would be justified, but in other cases, the averments will provide probable cause for a much more limited search.

Id., ¶43. On the facts before us, however, we rejected the assertion that the warrant application's averments provided probable cause because "the averments … about 'narcotic activity' were exceptionally vague and exceedingly

slim" because "it would not have been a crime for Melssen to merely communicate with [the other person] about drugs, even if [the other person] was a known drug user." ***Id.***, ¶¶51-52. Therefore, we concluded "that the information about 'narcotic activity' was of insufficient quality and quantity to ring the probable cause bell."[14] ***Id.***, ¶53.

2. The State's arguments

The State argues that we should reject Lancial's argument on this issue because the place to be searched was adequately described as Lancial's cell phone.[15] As support, the State notes that the circuit court's order states that it authorized a "2nd search of the phone," that the order "required the State to turn over its records from the first search to Lancial's counsel prior to conducting the second search," and that "Lancial only had one phone that was subject to a first search and for which the State still had records." Therefore, the State argues, "the warrant on its face states with particularity that Lancial's phone is the thing to be searched." Moreover, the State contends that Lancial's argument fails completely if Ingebretson's affidavit, which identified the thing or place to be searched as a "Samsung Galaxy J7 identified as evidence item number M19-04602-007," was attached to the order, but this fact is unknown to the parties or this court.

[14] The State does not address ***Melssen***.

[15] As an initial matter, the State argues that Lancial did not preserve this argument in the circuit court because he did not mention overbreadth in his motion to suppress. Lancial concedes this point, but he asserts that "given the circumstances, this Court should exercise its discretion and address it" because "[t]his case is on interlocutory appeal" and, therefore, "if the issue is not decided now and the Court doesn't order suppression, [he] could file another motion to suppress on this basis and the case would likely end up before the Court again."

The State cites ***Bishop*** in support of its position. In that case, following "[a] drug deal [that] went wrong," the defendant was convicted of discharging a firearm during a drug transaction. ***Bishop***, 910 F.3d at 336. On appeal, the defendant challenged, on Fourth Amendment particularity grounds, the warrant authorizing a search of his cell phone—a search that turned up incriminating evidence. ***Id.*** The United States Court of Appeals for the Seventh Circuit concluded that the "warrant *d*[*id*] permit the police to look at every file on his phone and decide which files satisf[ied] the description. But [the defendant] is wrong to think that this makes a warrant too general." ***Id.*** According to the court, "specificity is a relative matter"; therefore, "[a] warrant may be thought 'too general' only if some more-specific alternative would have done better at protecting privacy while still permitting legitimate investigation." ***Id.*** at 337. Nevertheless, "a warrant need not be more specific than knowledge allows," and, in ***Bishop***, "the best they could do was the broad language the warrant used." ***Id.*** at 338.[16]

The State concedes that, here, the circuit court's order "allowed police to search every part of Lancial's phone, without narrowing the scope as to which applications, files, etc. they could search," but it argues "that is because every part of Lancial's phone was where evidence of the [crime of possession of child pornography] might have been found." Therefore, like in ***Bishop***, the State

[16] Lancial argues that this case is distinguishable from ***United States v. Bishop***, 910 F.3d 335 (7th Cir. 2018), because the Seventh Circuit determined that there was not a "more-specific alternative [that] would have done better at protecting privacy while still permitting legitimate investigation" and that the warrant limited "the things being looked for by stating what crime [was] under investigation." ***Id.*** at 337. Here, by contrast, Lancial claims that "the circuit court's order does not limit the scope of the search in any manner" and that "[t]he order does not state what crime was under investigation or for what, if any, crime the court had found probable cause to believe the 'device' contained evidence of."

contends that "police had no way of narrowing the scope [of the search of Lancial's cell phone] any further because criminals do not often 'advertise where they keep evidence.'" *See* ***id.*** at 336.

3. Our comments

While we agree that, under certain circumstances, case law supports the idea that the particularity requirement is not violated by a warrant authorizing the search of all data or all files in a cell phone, we question whether those circumstances are present here. The warrant at issue did not authorize a search for specific evidence. Nevertheless, we know from other sources that the evidence at issue relates to the crime of possession of child pornography. Contrary to the State's assertion, however, we suggest that fact does not provide the State with a basis to search the entirety of the phone. Instead, the search can reasonably be limited to all photos on the phone; evidence of downloading, copying, and deleting photos; and evidence showing ownership of the phone.

We also disagree with the State's assertion that "Lancial appears to be confusing requirements two and three under ***Tate***" when he argues "that the warrant itself failed to specify that the crime under investigation was possession of child pornography." The case law on particularity of cell phone searches, even the cases cited by the State, appears to uphold search warrants on particularity grounds so long as the warrant also constrains the broad search *to evidence of a specific crime*. *See, e.g.*, ***Bishop***, 910 F.3d at 337 (noting that case law upholds "the search of every document on the cell phone" provided "the warrant cabins the things being looked for by stating what crime is under investigation"); ***State v. Johnson***, 576 S.W.3d 205, 222-23 (Mo. Ct. App. 2019) (collecting cases and explaining that "[t]he affidavit that was incorporated into the warrant described in

detail the offenses that [the defendant] was suspected of committing and how cell phones could be used in the commission of those offenses"). Here, however, the circuit court's order does not appear to limit the scope of the search in any manner, let alone to evidence of a specific crime.

Further, we recognize that the Wisconsin Supreme Court's ultimate conclusion in ***Melssen*** will likely be extremely relevant to answer the question posed here regarding how detailed a warrant application needs to be to "provide a nexus between the likely contents of the smartphone and a potential" child pornography crime. *See* ***Melssen***, 419 Wis. 2d 288, ¶52. However, ***Melssen*** will not answer the question of whether suspicion of the crime of possession of child pornography, perhaps different from suspicion of a drug crime, would justify an expansive search of a cell phone for hidden files or what that search could or should look like in practice. Given the shifting digital landscape, addressing these questions is critical to enable law enforcement to combat child sexual exploitation while staying within Fourth Amendment parameters. The need for conclusive direction from this state's highest court regarding the scope of a proper search of a cell phone cannot be overstated.

III. Independent source doctrine

For almost as long as the United States Supreme Court has recognized the exclusionary rule,[17] it has also recognized "what has come to be known as the 'independent source' doctrine." ***Murray***, 487 U.S. at 537 (quoting

[17] Because the Wisconsin Supreme Court is well versed in Fourth Amendment jurisprudence, we need not discuss in detail the fact that, as a general matter, the exclusionary rule requires the suppression of evidence obtained in violation of the Fourth Amendment's protections against unreasonable searches and seizures. *See* ***Murray v. United States***, 487 U.S. 533, 536-37 (1988).

Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)). The independent source doctrine "is an exception to the exclusionary rule in that it allows for the admissibility of evidence or information tainted by an illegal evidence-gathering activity when the State otherwise acquires the same information—or 'rediscover[s]' it—by lawful means 'in a fashion untainted' by that illegal activity." ***Van Linn***, 401 Wis. 2d 1, ¶12 (alteration in original; citation omitted); ***Murray***, 487 U.S. at 542 ("So long as a later, lawful seizure is genuinely independent of an earlier, tainted one … there is no reason why the independent source doctrine should not apply.").

Therefore, after the exclusion of evidence on Fourth Amendment grounds, a subsequent subpoena or search warrant is considered "untainted" by police misconduct "when the State can show that the illegal conduct neither 'affected' the circuit court's decision to approve its subpoena [or search warrant] request nor 'prompted' the State's decision to seek a subpoena [or search warrant] in the first place." ***Van Linn***, 401 Wis. 2d 1, ¶12 (citation omitted); ***Carroll***, 322 Wis. 2d 299, ¶45. "The former question turns on 'whether the [… supporting affidavit] contain[s] sufficient evidence of probable cause without the references to the tainted evidence.'" ***Van Linn***, 401 Wis. 2d 1, ¶12 (alterations in original; citation omitted). The burden is on the State to convince the court on each of these prongs. ***Carroll***, 322 Wis. 2d 299, ¶45.

As the Wisconsin Supreme Court has explained previously with regard to the independent source doctrine, "[w]henever the exclusionary rule applies, the scope of the remedy is limited to preventing the State from 'profit[ing] from its illegal activity' without placing the State 'in a worse position than it would otherwise have occupied' absent its illegal conduct." ***Van Linn***, 401 Wis. 2d 1, ¶11 (second alteration in original; quoting ***Murray***, 487 U.S. at 542;

Carroll, 322 Wis. 2d 299, ¶44). "It follows that excluding illegally obtained evidence 'does not mean that the facts thus obtained become sacred and inaccessible,' provided the State's knowledge of them is gained from a source unrelated to the State's illegal conduct." ***Id.*** (quoting ***Silverthorne Lumber***, 251 U.S. at 392). Whether the exclusionary rule applies to the images obtained during the second search of Lancial's cell phone is a mixed standard of review: appellate courts will accept the circuit court's factual findings unless they are clearly erroneous but will determine whether those facts amount to a Fourth Amendment violation as a question of law. *See* ***id.***, ¶10.

A. Lancial's arguments

In this appeal, Lancial challenges the circuit court's order on both independent source doctrine questions. "In other words," he asks, "would law enforcement have sought a warrant to search [Lancial's] phone if [police] had not discovered child pornography on it," and "was [the circuit court's] decision to authorize the second search influenced by knowledge that child pornography had been found?" *See* ***Carroll***, 322 Wis. 2d 299, ¶45. According to Lancial, the State "failed to present convincing evidence to satisfy either prong," and, therefore, "[t]he second search of [Lancial's] phone was unconstitutional."

On the first question, Lancial argues that "although [the circuit court] found that Zassenhaus would have sought a search warrant for [Lancial's] phone even if she hadn't conducted the illegal search and found child pornography, that finding is not supported by the evidence presented, nor does it answer the correct question." Instead, Lancial posits that the correct question is "whether law enforcement's decision to obtain the warrant for a second search of [Lancial's] phone was prompted by the evidence found during the unconstitutional

search, not whether Zassenhaus would have done anything differently in the past." Lancial contends that "[t]he only testimony that the [S]tate provided as to why law enforcement was requesting to search [his] phone again was the officer's testimony that the [ADA] told him to draft an affidavit after [this court's prior decision] suppressed the evidence obtained from the first search." Thus, it was a decision made by the ADA, not law enforcement, and the decision was "made in order to 'rediscover' evidence that [the State] already knew existed in an effort to do an end run around [this court's suppression] decision."

On the second question, Lancial contends that the "record makes clear both that [the circuit court] knew child pornography had been found on [Lancial's] phone, and that [the court's] decision to authorize the second search of the phone was influenced by that knowledge." Lancial reaches this conclusion by observing that the court "repeatedly referenced [this court's prior] decision during the hearing on the [S]tate's motion to authorize a second search of [Lancial's] phone"; "[t]hus," he argues, the court "knew that child pornography was found on [Lancial's] phone, that he was convicted for possession of that child pornography, and that [we] ordered the convictions vacated and the evidence suppressed." Lancial notes that the court "stated that [its] decision to issue the warrant was not influenced by the evidence found during the illegal search because [the court] did not see the images, or read a description of them from the trial," but he contends, without citing any legal authority for his assertion, that "whether [the court] knew details about the exact images does not matter, and [the court's] denial itself cannot be sufficient."[18]

[18] Judge Peterson did not make any specific factual findings regarding whether the first unlawful search affected Judge Mayer's decision to authorize the second search.

In support of his position, Lancial draws a distinction between the circumstances in this case and in ***Van Linn***, where the Wisconsin Supreme Court engaged in a detailed discussion of the independent source doctrine. In that case, the defendant was taken to the hospital, and his blood was drawn both by the hospital, "for diagnostic and treatment purposes," and at the direction of law enforcement, "for investigative purposes." ***Vann Linn***, 401 Wis. 2d 1, ¶1. Both tests revealed a BAC above the legal limit. ***Id.*** The circuit court suppressed the results of law enforcement's warrantless blood draw, and, thereafter, the State subpoenaed the hospital for the defendant's records. ***Id.*** The Wisconsin Supreme Court reached the following conclusions:

> [T]he results of the hospital's blood test are admissible under the independent-source doctrine. The State's decision to subpoena the hospital for [the defendant's] medical records was not prompted by [law enforcement's] unlawful conduct, because the State had reasonable grounds to suspect [the defendant] of OWI prior to the … warrantless blood draw. The fact that the State subpoenaed those records only after the circuit court suppressed the … unlawful blood draw does not change the independent nature of the State's suspicions …. Furthermore, the evidence discovered through the State's subpoena—the hospital's diagnostic blood test—is untainted by [law enforcement's] unlawful conduct thus suppressing it would not serve the exclusionary rule's purpose.

Id., ¶19.

Lancial faults the circuit court judges and the State in this case for "rel[ying] extensively" on the supreme court's holding in ***Van Linn***. First, he argues that this case involves the "exact same evidence obtained from the exact same source," while ***Van Linn*** "involved the results of two different blood tests done on two different blood samples drawn for two different purposes." *See* ***id.***, ¶¶4-5. "Unlike the situation in ***Van Linn***," he asserts, "[t]here were no facts particularized to [Lancial] or his device." *See* ***id.***, ¶¶14-15. Given our conclusion

in Lancial's prior case that "[l]aw enforcement can and should be deterred from ignoring the scope of a warrant," *see* ***Lancial***, No. 2022AP146-CR, ¶58, Lancial observes that "[a]llowing law enforcement a second chance to 'rediscover' evidence it illegally obtained by attempting to do what it should have done in the first place would undermine that objective."

Lancial further argues that the facts in ***State v. Thurston***, 888 S.E.2d 362 (Ga. Ct. App. 2023), "are nearly identical to those in" this case. In ***Thurston***, law enforcement "executed a search warrant for [the defendant's] residence," and while "[t]he warrant authorized the seizure of a number of items, including 'digital devices such as smartphones,'" the warrant "did not authorize a search of the contents of such devices." ***Id.*** at 364. The data on Thurston's phone was nevertheless downloaded and searched in 2020, and he moved to suppress the evidence obtained from that warrantless search of his phone. ***Id.*** While the motion to suppress was pending, the State, in 2022, actually applied for and obtained a warrant authorizing the search of Thurston's cell phone. ***Id.*** The State acknowledged "that the information extracted in 2022 'mirror[ed]' that extracted in 2020." ***Id.*** (alteration in original). Thurston thereafter filed a second motion to suppress the cell phone data. ***Id.*** The circuit court granted Thurston's second motion to suppress, "concluding that the 2022 warrant was obtained solely as an attempt to overcome the [c]onstitutional violation which occurred in 2020, of which the State became concerned after review[ing] Defendant's first Motion to Suppress." ***Id.*** at 365 (alterations in original; citation modified).

The Georgia Court of Appeals affirmed the circuit court's ruling. ***Id.*** at 366-67. As relevant here, the court rejected the state's argument that the evidence obtained from the cell phone pursuant to the 2022 search warrant was admissible under the independent source doctrine. ***Id.*** at 365-66. According to the

court, "[w]hen properly applied, the independent source exception allows the prosecution to use evidence only if it was, in fact, obtained by fully lawful means," which typically includes "a second search conducted by lawful means using information gained independently of the initial search." ***Id.*** at 365 (citations omitted). The court explained that in ***Thurston***, "the State's only evidence of an independent source [was] the 2022 search warrant, and that warrant was not based on any new information or evidence gained independently of that which existed in 2020." ***Id.*** at 365-66. Just as in ***Thurston***, Lancial contends, the State "has failed to offer any separate source or other evidence that did not exist in [2019] to serve as an independent, lawful basis to use a warrant from after-the-fact to justify the earlier search." *See* ***id.*** at 366. The State does not address ***Thurston*** or Lancial's reliance on the case as persuasive authority in its response brief before this court.

B. The State's arguments

The State, for its part, asserts that both requirements of the independent source doctrine have been met. The State treats the first question as a foregone conclusion: "Of course [law enforcement] would have [sought a search warrant]." As the State explains, police "knew from numerous cyber tips that child pornography was being consistently and repeatedly accessed from an IP address associated with Lancial's home," "[t]hey knew Lancial lived there, they knew the phone belonged to Lancial, and they knew that the family never had visitors or gave out their Wi-Fi password."[19] Therefore, argues the State, "at least

[19] In his reply brief, Lancial disputes this claim, noting that "the affidavit doesn't state that Richard said no one ever visited the residence. It states: 'He stated no [sic] had visited the residence.'" Lancial argues that "[w]hat this means isn't clear. Was he saying no one had visited the residence that day? That week? Recently? Was he stating no one other than [Lancial]—who was present that day—had visited?" Lancial asserts, however, that "[i]t seems unlikely that Richard said no one ever visited the residence the entire time he lived there."

one of the seized devices was undoubtedly used to access child pornography multiple times," and "[n]o reasonable person could conclude on these facts that after gathering all this information and seizing the devices, the police might have just inexplicably stopped investigating." The circuit court also specifically found that "if Officer Zassenhaus thought that she did not have authority to search that phone, she would have sought a warrant."

As to the second requirement, the State asserts—and Lancial does not appear to dispute—that no information obtained from the first search of Lancial's phone was used in the warrant affidavit, and, therefore, "[a]ll the information in the affidavit was untainted." *See* ***Van Linn***, 401 Wis. 2d 1, ¶12 ("The … question turns on 'whether the [… supporting affidavit] contain[s] sufficient evidence of probable cause without the references to the tainted evidence.'" (alterations in original; citation omitted)). Further, the circuit court "put on the record" that it had not seen the photographs from the first unlawful search, it had not read the transcripts from Lancial's first trial, and it had not seen any descriptions of the pictures from the cell phone. For these reasons, the State contends, the information illegally acquired from Lancial's cell phone did not influence the court's decision to authorize the second search of the phone.

As a general matter, the State relies on ***Murray*** and ***Van Linn*** in support of its position. It calls ***Murray*** "indistinguishable from this case." There, federal agents had gathered evidence establishing probable cause that the defendants were using a warehouse to distribute large amounts of marijuana. ***Murray***, 487 U.S. at 535. Nevertheless, rather than apply for a warrant with the information they had lawfully collected, law enforcement forced entry into the warehouse without a warrant and "observed in plain view numerous burlap-wrapped bales that were later found to contain marijuana." ***Id.*** The agents

then kept the warehouse under surveillance and applied for a warrant without "mention[ing] the prior entry" and without "rely[ing] on any observations made during that entry." ***Id.*** at 535-36. The warrant was issued, the agents reentered the warehouse, and they seized the bales of marijuana along with notebooks listing customer names. ***Id.*** at 536. The defendants moved to suppress evidence on the basis of the unlawful trespass, which the district court denied and the United States Court of Appeals for the First Circuit affirmed. ***Id.***

The Supreme Court subsequently vacated the judgment and remanded these cases for the district court to determine "whether the warrant-authorized search of the warehouse was an independent source of the challenged evidence" under the standard described by the Court. ***Id.*** at 543-44. The Court made clear that a subsequent search warrant is not independently obtained if law enforcement decided to seek the warrant due to information gathered from the initial, unlawful entry, or if information obtained from the initial, unlawful entry influenced the judge's decision to issue the warrant. ***Id.*** at 542. According to the Court, under the facts in ***Murray***,

> [k]nowledge that the marijuana was in the warehouse was assuredly acquired at the time of the unlawful entry. But it was also acquired at the time of entry pursuant to the warrant, and if that later acquisition was not the result of the earlier entry there is no reason why the independent source doctrine should not apply. Invoking the exclusionary rule would put the police (and society) not in the *same* position they would have occupied if no violation occurred, but in a *worse* one.

Id. at 541.

In terms of ***Van Linn***, the State appears to focus in particular on the rationale behind the independent source doctrine that the Wisconsin Supreme Court discussed in that case. As explained in ***Van Linn***, "the scope of the

[exclusionary rule] remedy is limited to preventing the [s]tate from 'profit[ing] from its illegal activity' without placing the [s]tate 'in a worse position than it would otherwise have occupied' absent its illegal conduct." ***Van Linn***, 401 Wis. 2d 1, ¶11 (alteration in original; citation omitted). Accordingly, the supreme court determined that suppression was not justified in ***Van Linn*** because "the [s]tate did not exploit the deputy's illegal conduct because … the [s]tate had reasonable grounds to suspect [the defendant] of OWI prior to *anyone* drawing his blood." ***Id.***, ¶17 (formatting altered); *see also* ***Wong Sun***, 371 U.S. at 487-88 (stating that "[w]e need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police" and that "the more apt question" is whether the evidence was acquired "by exploitation of that illegality" (citation omitted)); ***State v. Dasen***, 2007 MT 87, ¶21, 155 P.3d 1282 (holding that "while the first search was a factor in obtaining the second search warrant, in that the invalidity of the first search necessitated a second warrant, the State nevertheless possessed sufficient independent information to 'purge the taint' of the first search" (citation omitted)).

Thus, like in ***Van Linn***, the State argues that "suppression would put the State in a far worse position than it would have been in if the unlawful search had not occurred." *See* ***Van Linn***, 401 Wis. 2d 1, ¶18. Not putting the State in a worse position is important, it argues, "because the exclusionary rule balances the important need to deter future Fourth Amendment violations against the 'substantial societal cost' of suppressing the truth." *See* ***State v. Burch***, 2021 WI 68, ¶18, 398 Wis. 2d 1, 961 N.W.2d 314 (explaining that the "bottom-line effect" of exclusion "is to suppress the truth and set the criminal loose in the community without punishment" and that "[o]ur cases hold that society must swallow this

bitter pill when necessary, but only as a 'last resort'" where "the deterrence benefits of suppression … outweigh its heavy costs" (citation omitted)).

Finally, the State addresses the argument that applying the independent source doctrine would not deter police misconduct. As the State correctly identifies, the Supreme Court acknowledged and rejected this argument in ***Murray***:

> Petitioners' asserted policy basis for excluding evidence which is initially discovered during an illegal search, but is subsequently acquired through an independent and lawful source, is that a contrary rule will remove all deterrence to, and indeed positively encourage, unlawful police searches. As petitioners see the incentives, law enforcement officers will routinely enter without a warrant to make sure that what they expect to be on the premises is in fact there. If it is not, they will have spared themselves the time and trouble of getting a warrant; if it is, they can get the warrant and use the evidence despite the unlawful entry. We see the incentives differently. An officer with probable cause sufficient to obtain a search warrant would be foolish to enter the premises first in an unlawful manner. By doing so, he would risk suppression of all evidence on the premises, both seen and unseen, since his action would add to the normal burden of convincing a magistrate that there is probable cause the much more onerous burden of convincing a trial court that no information gained from the illegal entry affected either the law enforcement officers' decision to seek a warrant or the magistrate's decision to grant it. Nor would the officer *without* sufficient probable cause to obtain a search warrant have any added incentive to conduct an unlawful entry, since whatever he finds cannot be used to establish probable cause before a magistrate.

Murray, 487 U.S. at 539-40 (citations omitted).

C. Our comments

Essentially, Lancial's arguments regarding the independent source doctrine echo the concerns addressed by former Chief Justice Ann Walsh Bradley's dissent in ***Van Linn***. Both surmise that the wrong question was being

answered. *See* ***Van Linn***, 401 Wis. 2d 1, ¶26 (A.W. Bradley, J., dissenting). According to the dissent, the majority erred by resting "its holding on the assertion that 'the State had reasonable grounds to suspect Van Linn of OWI prior to *anyone* drawing his blood'" because "[t]his is not the question that ***Murray*** poses." ***Van Linn***, 401 Wis. 2d 1, ¶¶36, 38 (A.W. Bradley, J., dissenting) (formatting altered). Instead, the dissent explained, "we must ask whether the information learned from the first unconstitutional search 'prompted' the second." ***Id.***, ¶39 (A.W. Bradley, J., dissenting). In other words, the dissent reasoned,

> when law enforcement filed for the subpoena of the hospital's test results, they already knew what they were going to find due to the illegal search. Would officers really have sought the subpoena if the illegally obtained sample had shown that Van Linn's BAC was *below* the legal limit?
>
> Undoubtedly, the subpoena here was also prompted by the suppression of the law enforcement sample. Without that suppression, there would have been no need to subpoena the hospital sample. Accordingly, the independent source doctrine should not apply here to give the State a do-over after it collected evidence in an unconstitutional manner.

Id., ¶¶39-40 (A.W. Bradley, J., dissenting) (formatting altered). The ***Van Linn*** dissent also expressed its concern that the majority's decision would "*encourage*[] police misconduct" by giving law enforcement another kick at the can rather than "creat[ing] a strong incentive for police to do things right the first time." ***Id.***, ¶¶42, 44 (A.W. Bradley, J., dissenting) (formatting altered).

While we recognize that former Chief Justice Bradley's dissent is not the law because it failed to garner sufficient support among the justices, we also recognize that this case essentially embodies the hypothetical she warned us about: "Consider the illegal search of a person's phone in ***Riley*** …, which turned up incriminating photographs. After suppression of a search like that, could the

government simply subpoena Google or Apple for those companies' copies of the same files as an "independent source"? ***Van Linn***, 401 Wis. 2d 1, ¶51 (A.W. Bradley, J., dissenting). Here, even easier than subpoenaing Google or Apple for Lancial's cell phone records, law enforcement is being given a true do-over to access the same evidence, from the same location, in the same manner, and for the same purpose—i.e., law enforcement has the opportunity to do again what it should have done correctly the first time. *See* ***id.***, ¶50 (A.W. Bradley, J., dissenting). In ***Van Linn***, the fact that kept the decision from throwing the exclusionary rule out with the bathwater was that the evidence came from a completely different source—a subpoena of the *hospital's* records—which is not the circumstance here.

Furthermore, we question the State's understanding of the Wisconsin Supreme Court's discussion in ***Van Linn***. In ***Van Linn***, the evidence the state relied upon to prove Van Linn's intoxication was actually created by a separate and independent source. The state would have been placed in a worse position by its inability to access and rely upon that independent evidence than it would have been had it not engaged in an earlier illegal search. Here, the evidence resulting from the second search was not created or obtained by a third party separate and distinct from law enforcement. In fact, it was the same evidence previously created and obtained by law enforcement in violation of Lancial's Fourth Amendment rights. The State merely chose to use five different photos from those obtained during its first cellphone search as the basis for its charges in the second criminal complaint. At certain times, the State is going to be put in a "worse position" as a result of an illegal search than it would have been had that search not occurred, which is as it should be when a court has already determined that the

exclusionary rule is applicable to the evidence obtained due to law enforcement's misconduct.

Nevertheless, while Lancial obviously believes that our prior decision applying the exclusionary rule to the first unlawful search of his phone should mean that under no circumstances will the government ever be allowed to use any evidence from that phone, that is simply not how the Supreme Court and the Wisconsin Supreme Court have developed the law with regard to the independent source doctrine. As the courts have repeatedly stated, "excluding illegally obtained evidence 'does not mean that the facts thus obtained become sacred and inaccessible.'" *See* ***id.***, ¶11 (quoting ***Silverthorne Lumber***, 251 U.S. at 392); ***Murray***, 487 U.S. at 538.

As to Lancial's reliance on ***Thurston***, we note that the manner in which the Georgia Court of Appeals analyzed the independent source doctrine appears slightly different from the way in which the supreme court did so in ***Van Linn***. For example, in ***Thurston***, the court focused on whether there was new evidence or post-2020 information that could supply a lawful basis for the second warrant in addition to the initial information providing probable cause to search in the first instance. ***Thurston***, 888 S.E.2d at 365-66. Absent any new evidence, the court inferred that the second warrant was solely intended to remedy the constitutional violation. ***Id.*** at 366-67.

In ***Van Linn***, however, the Wisconsin Supreme Court did not require any new evidence, reasoning instead that "***Murray*** teaches that the independent-source doctrine applies when the [s]tate has a separate reason to seek the challenged evidence apart from the knowledge it gains from an unlawful search" and focusing on the fact that there were "ample reasons to subpoena Van

Linn's medical records for evidence of OWI" absent any information learned from the unlawful blood draw. ***Van Linn***, 401 Wis. 2d 1, ¶¶14-15. We question whether under the circumstances here—where law enforcement conducts a second search on the same device, that has been in its possession, using the same probable cause, to obtain the exact same evidence—it would be prudent to require more from the State than the supreme court demanded in ***Van Linn***. *See* ***id.***, ¶¶17-19; *see also* ***Murray***, 487 U.S. at 542 (stating that genuine independence "may well be difficult to establish where the seized goods are kept in the police's possession"). Accordingly, we conclude that this case presents a unique sequence of facts that the current independent source doctrine case law in this state seems ill equipped to address.

Because of the first unlawful search, under the independent source doctrine, law enforcement now needs to prove more than just probable cause to search Lancial's phone. The State, first, must prove that, absent the illegal search, the officer would have sought the search warrant. *See* ***Carroll***, 322 Wis. 2d 299, ¶45. Essentially, Ingebretson's affidavit presents exactly the same information that law enforcement knew before the unconstitutional search of Lancial's phone, but it seems perfunctory and an empty formality then for the State to simply claim that law enforcement would have sought the search warrant because they had probable cause before any unlawful search. Sanctioning this procedure would appear to destroy any additional protections provided by the independent source doctrine. As the United States Supreme Court observed in ***Murray***,

> An officer with probable cause sufficient to obtain a search warrant would be foolish to enter the premises first in an unlawful manner. By doing so, he would risk suppression of all evidence on the premises, both seen and unseen, since his action would add to the normal burden of convincing a magistrate that there is probable cause the much more onerous burden of convincing a trial court that no

> information gained from the illegal entry affected either the law enforcement officers' decision to seek a warrant or the magistrate's decision to grant it.

Murray, 487 U.S. at 540.

Ingebretson's affidavit lacks any information regarding his reasons for seeking to search Lancial's phone again, beyond his testimony that the ADA told him to do so. Further, Lancial asserts that the State did not establish why law enforcement believed Lancial's phone *specifically* would contain evidence of possession of child pornography—e.g., because Lancial lives with Richard or because he lived with Richard at the time the images were accessed. Said differently, why did law enforcement specifically ask to search Lancial's phone separate from all the devices at Richard's residence, beyond the knowledge it had already gained from the unconstitutional search? What made law enforcement suspect that evidence of a crime would likely be found on Lancial's phone rather than other devices beyond the fact that police already knew that Lancial's phone contained unlawful images?[20] There was also no additional untainted evidence that law enforcement presented to support the search, unlike in ***Carroll***, 322 Wis. 2d 299, ¶¶42-43, and the evidence did not come from a separate source, unlike in ***Van Linn***, 401 Wis. 2d 1, ¶15. Finally, neither ***Murray***, ***Carroll***, nor ***Van Linn*** involved a search conducted after an appellate court determined a prior search was unconstitutional and ordered suppression.

On the second question, Lancial asserts that because Ingebretson's affidavit lacked any particularized probable cause, the circuit court's "decision to

[20] The State responds to Lancial's argument on this point by noting that Lancial does not have standing to challenge the searches of other devices and that "[t]his case is not about the other devices. It is about Lancial's phone." Respectfully, that is not the point.

authorize the search was affected by [the court's] knowledge of the evidence obtained from the illegal search." Wisconsin case law suggests "that the second part of the ***Murray*** analysis, that the illegal evidence did not affect the magistrate's decision to grant the warrant, is satisfied inasmuch as the untainted evidence provides sufficient probable cause to issue a warrant." *See* ***Carroll***, 322 Wis. 2d 299, ¶52. While the reference to "untainted evidence" clearly would not include the images found during the unlawful search, we question whether simply repeating the same evidence as the basis for the search warrant is sufficient under the doctrine's additional requirements. Not to mention whether, as discussed above, the same evidence that gave law enforcement access to a suspect's home can now provide access to their cell phone, given that Lancial's phone was 1 of 14 electronic devices seized from Richard's residence.

Further, despite our standard of review, the facts in this case raise serious questions regarding whether we must accept at face value a circuit court's statement that it did not consider the results of the prior search. Here, the court entered the case on remand after the matter was tried and the defendant was convicted; therefore, the court knew that the evidence previously obtained provided a basis for Lancial's conviction for possession of child pornography. Further, the court clearly noted in its order that it was authorizing a *second* search of the phone. Under these circumstances, one could reasonably infer that the court's stated lack of knowledge regarding the exact images previously found on the phone was insufficient to support a finding that results of the previous unlawful search did not influence the court's decision to authorize the second search. *See* ***id.***, ¶45. Thus, within our review of an independent source doctrine claim, we question whether we can consider reasonable inferences in determining the second prong, whether we must accept the court's assertion at face value, or

whether there are other factors or circumstances we should consider to determine if the court's decision to authorize the second search was unaffected by its mere knowledge that some evidence was previously found. Conclusive guidance from the Wisconsin Supreme Court would greatly assist the legal community to properly apply the independent source doctrine under these circumstances.

IV. Good-faith exception

The final question presented in this case is whether the good-faith exception would overcome all of Lancial's above arguments. In other words, if this court concluded that the State's independent source doctrine arguments failed, that there was no probable cause for the second search, and that the circuit court's order to search was impermissibly overbroad, would the good-faith exception to the exclusionary rule nevertheless apply to avoid suppression of the evidence from the second search of Lancial's cell phone? Further, if the State's above arguments failed *and* the Wisconsin Supreme Court concluded that the law of the case doctrine was applicable, would the good-faith exception still allow the evidence to be admitted?

Although "[s]uppression is the usual remedy for a Fourth Amendment violation," ***State v. Ferguson***, 2009 WI 50, ¶21, 317 Wis. 2d 586, 767 N.W.2d 187, the exclusionary rule "is not absolute," and courts have created some exceptions, including the good-faith exception, ***Prado***, 397 Wis. 2d 719, ¶¶56, 59. Exclusion is "warranted only where there is some present police misconduct, and where suppression will appreciably deter that type of misconduct in the future." ***Burch***, 398 Wis. 2d 1, ¶17. Under the good-faith exception, unlawfully obtained evidence may be admitted at trial in two limited circumstances: (1) "when a law enforcement officer has reasonably and

objectively relied on settled law (whether statute or binding judicial precedent) that was subsequently overruled"; or (2) "when law enforcement relies on 'a warrant that was subsequently invalidated or that was based on erroneous information resulting from isolated police negligence attenuated from the arrest.'"[21] ***Prado***, 397 Wis. 2d 719, ¶59 (citation omitted); ***United States v. Leon***, 468 U.S. 897, 922 & n.23 (1984) (holding that "'a warrant issued by a magistrate normally suffices to establish' that a law enforcement officer has 'acted in good faith in conducting the search,'" but "the officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable" (citations omitted)).

Further, in Wisconsin, the supreme court has adopted a good-faith exception that is slightly more exacting than its federal counterpart, holding that article I, section 11 of the Wisconsin Constitution "require[s] additional protection." ***State v. Scull***, 2015 WI 22, ¶35, 361 Wis. 2d 288, 862 N.W.2d 562. Thus, in Wisconsin, the State must also "show that the process used in obtaining the search warrant included a significant investigation and a review by either a police officer trained and knowledgeable in the requirements of probable cause and reasonable suspicion, or a knowledgeable government attorney." ***Id.*** (citation omitted). The burden to establish this additional requirement is on the State. ***State v. Eason***, 2001 WI 98, ¶3, 245 Wis. 2d 206, 629 N.W.2d 625.

[21] The good-faith exception should not apply under the United States Constitution if: (1) the warrant-issuing court "was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth"; (2) the court "wholly abandoned [its] judicial role in the manner condemned" by the United States Supreme Court in ***Lo-Ji Sales, Inc. v. New York***, 442 U.S. 319 (1979); (3) "no reasonably well[-]trained officer should rely on the warrant" because the affidavit is "so lacking in indicia of probable cause"; or (4) the warrant is "so facially deficient" that "the executing officers cannot reasonably presume it to be valid." ***United States v. Leon***, 468 U.S. 897, 923 (1984) (citation omitted).

A. Lancial's arguments

Lancial asserts that the good-faith exception does not apply in this case because the order permitting the second search of his cell phone was objectively invalid. According to Lancial, "[a] reasonably well-trained officer would've known that the search of [Lancial's] phone was illegal despite the court's order allowing it" given that "[a]n officer cannot reasonably rely 'upon a warrant that was based upon a … bare bones affidavit' or 'upon a warrant so facially deficient that she or he could not reasonably presume it to be valid.'" *See* ***id.***, ¶36 (citation omitted).[22] Again, Lancial asserts that Ingebretson's affidavit was "plainly inadequate" and that the circuit court's order was "facially deficient" for the reasons argued above with regard to a lack of a stated connection between Lancial and Richard's home and the failure to specify the item to be searched or the crime for which evidence was sought. Lancial asserts that "[w]hile the [S]tate argues that it's clear the search was for evidence of possession of child pornography based on the affidavit and motion hearing, [the State] cites no law holding that this is sufficient." Lancial emphasizes that the circuit court order did not "incorporate the affidavit" and that "there is no reason to believe the officer conducting the search would know what occurred at the hearing." He further argues that the language regarding turning over the results of the first search does not "imply that the second search was limited to evidence of possession of child pornography."

[22] The only other case that Lancial cites in support of his argument is ***United States v. Glover***, 755 F.3d 811 (7th Cir. 2014), but he cites that case only for its general statement of law without developing an argument with regard to its application to the facts here.

Finally, Lancial argues that the State has failed to prove Wisconsin's additional requirement that a significant investigation was conducted. Lancial contends that the investigation here was lacking because "the affidavit doesn't assert that officers verified the phone belonged to [Lancial] or confirmed that [Lancial] lived at the residence"; "[i]t doesn't appear that officers looked at property records, utility bills, or anything else to determine who the residence belonged to"; and the affidavit does not "assert that officers conducted surveillance or spoke with anyone at the residence about who lived there at the time of the search or when the images were accessed."

B. The State's arguments

The State posits that, "[a]ssuming arguendo that the warrant was unsupported by probable cause and/or was overbroad, suppression is not warranted because police relied in good faith on the judicially granted warrant." (Formatting altered.) The State focuses on the error in this case being a *judicial* error, rather than law enforcement misconduct, and asserts that judicial errors do not authorize suppression. *See* ***Leon***, 468 U.S. at 917. Further, according to the State, "all the requirements of the good[-]faith exception are easily satisfied": there is no suggestion that Ingebretson provided false information in the affidavit or did anything to knowingly or recklessly mislead the circuit court; there is no suggestion that the circuit court "wholly abandoned [its] judicial role" of being a "neutral and detached" magistrate; the warrant affidavit was not "so lacking in indicia of probable cause" that "no reasonably well[-]trained officer should rely on the warrant," given that the court's order was entered after a hearing; and the warrant was not "so facially deficient" that "the executing officers [could not] reasonably presume it to be valid." *See* ***id.*** at 923 (citations omitted).

In support of its position, the State cites ***Massachusetts v. Sheppard***, 468 U.S. 981 (1984). In that case, the search warrant was facially deficient because it authorized a search for controlled substances when law enforcement was actually searching for evidence related to a homicide. ***Id.*** at 985-86. The Supreme Court upheld the search under the good-faith exception, reasoning that "the police conduct in this case clearly was objectively reasonable and largely error-free"; that "it was the judge, not the police officers, who made the critical mistake"; and that "[s]uppressing evidence because the judge failed to make all the necessary clerical corrections despite his assurances that such changes would be made will not serve the deterrent function that the exclusionary rule was designed to achieve." ***Id.*** at 990-91.

According to the State, the order in this case "suffers from no such glaring errors" as occurred in ***Sheppard***. It explains that "[t]he warrant on its face specifically authorize[d] a second search of Lancial's phone," that "the State's motion and the affidavit[] made clear that the search was for evidence of child pornography" and the order "specified that the actual child pornographic images would not be turned over to the defense but could be viewed by defense counsel at the police department," and that "the warrant authorized a broad search of Lancial's phone … because there was no way to know where, specifically, Lancial would have stored child pornography or evidence of him accessing it."

The State also asserts that Wisconsin's two additional requirements were satisfied. It claims, first, that "[t]his was a significant and highly involved investigation that led to the issuance of the warrant" for the reasons that we have already discussed above. Again, though, while the State asserts that law enforcement "confirmed through an administrative subpoena that the IP address was associated with Lancial's residence," that police "confirmed that Lancial

lived" at Richard's address, and that police "confirmed that the family had no visitors and never gave out the Wi-Fi password to anyone else," Lancial disputes these facts. Second, the State points to the fact that the ADA "directed Officer Ingebretson to conduct an independent analysis of the case without using any of the information gathered from the unlawful first search of Lancial's phone," reviewed the affidavit, and then argued for its sufficiency at a contested hearing in support of this requirement. Therefore, the State argues that "[a]ll the requirements of the good[-]faith exception are met," and "[t]here is nothing about this case that justifies a departure from the normal rule."

C. Our comments

We emphasize our concern that allowing the State to assert the good-faith exception following a challenge under the independent source doctrine would fundamentally eviscerate both doctrines. Said differently, by allowing law enforcement to cure an unconstitutional initial search by obtaining a warrant supported by the independent source doctrine using identical evidence, and then excusing any defects of that warrant under the guise of the good-faith exception, the judiciary will have created an unconstitutional do-over loop. Under these circumstances, any incentive that law enforcement has to obtain a warrant in the first instance will be eliminated because officers will know that an unlawful search can always be sanitized by a subsequent, defective warrant shielded by ***Leon*** and ***Eason***. Thus, we question whether the good-faith exception can or should ever be applied where the State asserts the independent source doctrine in response to a motion to suppress evidence.

CONCLUSION

As the above discussion aptly demonstrates, this appeal presents complex, novel questions of first impression regarding cell phone searches, the law of the case, and the independent source doctrine. Resolving these questions is essential to provide guidance to the legal community on likely reoccurring issues, but also to address significant privacy interests and prevent potential overreach by law enforcement. None of the issues on appeal appear to fit cleanly within the parameters of established case law under the circumstances as they have arisen here, and Lancial and the State each provide persuasive arguments in support of their respective positions. We consider it particularly important that the Wisconsin Supreme Court address the application of the independent source doctrine under the facts here and the possibility that its application may grant law enforcement a blanket mechanism to cure prior errors.

Given the importance of the issues raised in this appeal, the unsettled state of the law, and the likelihood that the issues will reoccur, we believe it would be appropriate for the supreme court, rather than the court of appeals, to render a decision. The Wisconsin Supreme Court "has been designated by the constitution and the legislature as a law-declaring court." ***State v. Grawien***, 123 Wis. 2d 428, 432, 367 N.W.2d 816 (Ct. App. 1985). "While the court of appeals also serves a law-declaring function, such pronouncements should not occur in cases of great moment." ***Id.*** A decision by the supreme court on the issues presented by this case "will help develop, clarify or harmonize the law." *See* WIS. STAT. RULE 809.62(1r)(c). Accordingly, we respectfully certify this appeal to the Wisconsin Supreme Court.