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STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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March 2, 2021

Shelia T. Reiff
Clerk, Supreme Court of Wisconsin
110 East Main Street
Post Office Box 1688
Madison, Wisconsin 53701-1688

Re: *State of Wisconsin v. George Steven Burch*
Case No. 2019AP1404-CR

Dear Ms. Reiff:

Enclosed for filing in the above action please find an original and nine copies of the Response Opposing Motion to Supplement the Record. A copy of this response has been mailed to the attorney for the defendant-appellant.

Sincerely,

Aaron R. O'Neil

Aaron R. O'Neil
Assistant Attorney General

ARO:skr

c: Ana L. Babcock
Counsel for the Defendant-Appellant-Petitioner

FILED
MAR 02 2021
CLERK OF SUPREME COURT
OF WISCONSIN

STATE OF WISCONSIN

IN SUPREME COURT

No. 2019AP1404-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GEORGE STEVEN BURCH,

Defendant-Appellant.

RESPONSE OPPOSING MOTION TO SUPPLEMENT THE RECORD

The State of Wisconsin, Plaintiff-Respondent, opposes Defendant-Appellant George Steven Burch's motion to supplement the record. Burch has not shown that the material that he wants to add to the record was before the circuit court when it issued the decision under review by this Court.

1. Burch and the State have filed their opening briefs in this case. Burch is now in the process of preparing his reply brief. He asks this Court to supplement the record under Wis. Stat. § (Rule) 809.15(3) with a police report that he says supports one of his arguments. Burch argued in his opening brief that law enforcement could not retain data extracted from his cell phone as part of a hit-and-run investigation after police had closed the investigation. In response, the State argued, in part, that Burch had not conclusively shown that the investigation was closed. Burch contends that the police report "establishes . . . beyond question" that the investigation was closed and asks this Court to add it to the record.

2. This Court should deny Burch's request. He has not shown that the police report was ever presented to the circuit court when it considered his motion to suppress the evidence developed from his phone's data. This Court can only consider the record before the circuit court when it made its decision. *Kushman v. State ex rel. Panzer*, 240 Wis. 134, 140, 2 N.W.2d 862 (1942.) Reviewing courts are limited to and

bound by the record. *State v. Aderhold*, 91 Wis. 2d 306, 314, 284 N.W.2d 108 (Ct. App. 1979). "In deciding whether an error warrants a new trial, we are limited to the record of the proceedings in the trial court and the appellate record cannot be enlarged by materials which were not made part of the record in the trial court." *State v. Parker*, 2002 WI App 159, ¶ 12, 256 Wis. 2d 154, 647 N.W.2d 430. "An appellant may not attempt to build a new record on appeal to support his position with evidence that was never admitted in the court below." *United States v. Phillips*, 914 F.2d 835, 840 (7th Cir. 1990). Burch does not explain when and where the police report that he wants to add to the record was presented to the circuit court. He thus has not shown that it is appropriate for this Court to add it to the record.

3. Should Burch be able to show that the report was before the circuit court, or should this Court otherwise grant his motion, the State requests that the Court give it the opportunity to address the report's effect on the parties' argument. Undersigned counsel advises the Court that he was not aware of the police report or its contents until Burch

filed his motion. The State has filed its brief in this matter and will not have any additional opportunity to address the report in writing unless the Court allows it. Given that Burch would be addressing the report for the first time in his reply brief, it is only fair to give the State a chance to respond.

The State respectfully requests that this Court deny Burch's motion to supplement the record.

Dated: March 2, 2021.

Respectfully submitted,

JOSHUA L. KAUL
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