

# RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0193-22

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ZAK A. MISSAK,

Defendant-Appellant.

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Argued March 15, 2023 – Decided May 25, 2023

Before Judges Accurso, Vernoia and Firko.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Somerset County, Complaint No. W-2021-0485-1808.

Andrew Gimigliano argued the cause for appellant (Mandelbaum Barrett PC, attorneys; Andrew Gimigliano and Damian P. Conforti, of counsel and on the briefs; Stacey E. Zyriek, on the briefs).

Steven A. Yomtov, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney General, attorney; Steven A. Yomtov, of counsel and on the brief; Lila B. Leonard, Deputy Attorney General, on the briefs).

Jennifer Stisa Granick (American Civil Liberties Union Foundation) of the California bar, admitted pro hac vice, argued the cause for amici curiae American Civil Liberties Union Foundation and American Civil Liberties Union of New Jersey Foundation (American Civil Liberties Union of New Jersey Foundation and Jennifer Stisa Granick, attorneys; Alexander Shalom, Jeanne LoCicero and Jennifer Stisa Granick, on the brief).

#### PER CURIAM

In this appeal we consider the proper scope of a search warrant for the contents of a cellular phone seized from defendant Zak A. Missak following his arrest for second-degree luring, N.J.S.A. 2C:13-6(a), and second-degree attempted sexual assault, N.J.S.A. 2C:14-2(c)(4) and N.J.S.A. 2C:5-1(a). The State alleges that prior to his arrest, defendant used two online chatting applications to communicate with an individual he believed was a fourteen-year-old girl, solicited the child's agreement to meet him for a sexual encounter, and traveled to an agreed upon location to perform sex acts with her. The arrest occurred, and his cellular phone was seized, after defendant arrived at the location and discovered his online communications had been with United States Department of Homeland Security Special Agent Laura Hurley (Hurley).

The State obtained a search warrant for the phone's contents and moved for an order compelling defendant to provide the phone's passcode. Defendant

filed a cross-motion to quash the search warrant, arguing it authorized an unconstitutional general search of the phone by allowing access to information for which no probable cause to search was established in Hurley's certification supporting the warrant application.

By leave granted, defendant appeals from an order denying his motion to quash the search warrant. Having considered the motion record, the applicable legal principles, and the arguments presented by the parties and amici curiae, the American Civil Liberties Union and the American Civil Liberties Union of New Jersey, we reverse the court's order denying defendant's motion to quash the search warrant, and remand for further proceedings.

## I.

To provide context for our discussion of the issues and arguments presented, we first summarize the pertinent facts. Because defendant challenges the search warrant's validity, we limit our summary of the facts to those set forth within the four corners of Hurley's certification, which provided the sole support for the State's search warrant application. See State v. Marshall, 199 N.J. 602, 613 (2009) (quoting Maryland v. Garrison, 480 U.S. 79, 85 (1987)) (explaining the validity of a search warrant "must be assessed on the basis of the information

that the officers disclosed, or had a duty to discover and to disclose, to the issuing Magistrate").

### Hurley's Certification

In her supporting certification, Hurley detailed her extensive law enforcement background and experience; noted she is employed as a Special Agent of the United States Department of Homeland Security, Homeland Security Investigations; and explained she is empowered to conduct investigations and make arrests for crimes involving "the use of high-end technology, such as computers, telecommunications equipment, and other advanced technology," and particularly crimes "involving the exploitation of children."

Hurley's certification asserted that based on knowledge she obtained during her participation in an "undercover chat investigation," she had "probable cause to believe" the cellular phone seized from defendant following his arrest "contain[ed] evidence of" two "[s]pecified [c]rimes" — luring and attempted sexual assault — allegedly committed on December 8 and 9, 2021.

According to Hurley, on the afternoon of December 8, 2021, she posed as a fourteen-year-old child on the mobile chat application, Skout.<sup>1</sup> An individual displaying the name M.W., who the State claims is defendant, initiated a conversation with Hurley through Skout, stating, "Hey gorgeous I would love to be your sugar daddy and spoil you."<sup>2</sup>

Hurley provided a cellular phone number to M.W., and later that day received a text message from an unfamiliar phone number stating, "Hey gorgeous." When Hurley asked the sender to identify himself, the sender replied, "[M]."

M.W. then texted Hurley he was "tryna get [his] dick sucked wya," and Hurley texted M.W. she was fourteen years old. That afternoon, M.W. continued to send Hurley messages comprised of sexually explicit statements.

On December 9, 2021, in the early evening hours, Hurley received unsolicited messages on another mobile chat application, Kik, from a user

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<sup>1</sup> In her certification, Hurley described Skout as a free social networking mobile application designed to assist people in meeting others from the same geographical location by sharing profiles and allowing the exchange of private messages between its users.

<sup>2</sup> We use the initials "M.W." instead of the false name defendant allegedly utilized to identify himself during the chat to avoid any confusion with any real-life individuals who have the same name.

named "Kazeblack," who was later identified as defendant.<sup>3</sup> Those messages stated, "Hey sexy" and "What's up beautiful its [M.]." "Kazeblack" continued to send messages, including a "photograph of a shirtless male seen from his chest up" and a request for photographs of the juvenile.

As Hurley described in the certification, later in the evening of December 9, 2021, "Kazeblack"/"[M.W.]" arrived at a Franklin Park location in a motor vehicle "in an attempt to meet up with the juvenile with whom he was chatting." The individual, who was identified as defendant, was arrested by members of the New Jersey Internet Crimes Against Children Task Force. During a search incident to defendant's arrest, the officers seized a cellular phone in defendant's possession. The officers secured the phone pending the approval of a search warrant.

Based on those facts, Hurley's certification asserted she had probable cause to believe the phone contained evidence of the crimes of luring and attempted sexual assault. Hurley further represented that based on her training and experience, proving who used, controlled, or accessed an electronic device, and who entered, controlled, or saw data on it, is generally important to an

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<sup>3</sup> Hurley's certification describes Kik as an instant messaging mobile application that allows registered users to chat privately and in groups, and exchange texts, pictures, and gifts.

investigation and "requires examination of data that, on its face, might be innocent, such as registry information and files accessed around that time." Based on that assertion, and the other facts set forth in the certification, Hurley stated a "forensic examiner must be allowed to access and examine ALL of the data on a computer, electronic device, or storage media."

Hurley also stated that computer storage devices, including mobile devices, generally store the equivalent of thousands of pages of information. Hurley averred that "a suspect may try to conceal criminal evidence" and "might store it in random order with deceptive file names." Hurley asserted that, for those reasons, the search may require an examination of "all the stored data to determine which particular files are evidence or instruments of crimes."

Hurley sought the search warrant for the express purpose of "obtain[ing] evidence of the crimes of" luring and attempted sexual assault allegedly committed by defendant on December 8 and 9, 2021. Hurley requested the warrant authorize the State to "access, search, forensically examine, and document all information contained within [the cellular phone], for evidence relating to offenses involving the exploitation of children" specifically involving the crimes of luring and attempted sexual assault defendant allegedly committed

on December 8 and 9, 2021. More particularly, Hurley sought a warrant authorizing a search of the phone's

stored electronic data, encrypted or password protected files/data, the assigned cellular number, cellular billing number, address book/contact(s) information, all recent calls, to include dialed, received, missed, erased calls, duration of said calls, any Internet access information, incoming and outgoing text messages, text message content, any stored pictures, stored video, calendar information, Global Positioning System (GPS) data, memory or Secure Digital Memory cards (SD cards) and any other stored information on said mobile device that will assist in the continuation of this investigation.

The court granted the State's search warrant application. The court found Hurley's certification established probable cause to believe the cellular phone "will yield evidence of the crimes of" luring and attempted sexual assault. The warrant authorized the State to "examine" the cellular phone "with necessary and proper assistance."

The Motion To Compel Defendant To Provide The Phone's Passcode and Defendant's Cross-Motion To Quash The Search Warrant

The State moved for an order compelling defendant to provide the phone's passcode to allow the search of the device authorized by the warrant. Defendant filed a cross-motion to quash the search warrant based on claims: the search warrant constituted an unconstitutional general warrant that was not supported



by probable cause; and the warrant did not set forth the places to be searched with constitutionally required particularity. Defendant also argued the State's motion to compel disclosure of the passcode should be denied because the search warrant was invalid.

After hearing argument, the motion court rendered a written decision finding Hurley's certification established probable cause for a search of all the phone's contents and data, and defendant failed to present evidence overcoming the warrant's presumptive validity. The court further determined the warrant was sufficiently particular because it authorized a search of the phone's contents and data, and Hurley's certification supported that broad search.

The court also concluded the State presented sufficient evidence supporting an order compelling defendant to provide the phone's passcode under the foregone conclusion standard set forth by the Supreme Court in State v. Andrews, 243 N.J. 447, 480-81 (2020). Thus, the court granted the State's motion to compel defendant to provide the passcode.

The court entered an order granting the State's motion to compel and denying defendant's cross-motion to quash the search warrant. We subsequently

granted defendant's motion for leave to appeal from that portion of the court's order denying his cross-motion to quash.<sup>4</sup>

On appeal, defendant presents the following arguments for our consideration:

POINT [I]<sup>5</sup>

The Warrant Is Unconstitutional.

A. The Warrant Is Overbroad and Does Not Satisfy the Particularity Requirement Because It Has No Temporal Limitation and Does Not Specify the Things to Be Seized but Instead Seeks to Generally Access, Examine, and Document All Information on the Phone.

i. The Warrant Lacks Particularity Because It Contains No Temporal Limitation.

ii. The Warrant Lacks Particularity Because It Does Not Identify the Things to Seize and Authorizes the State to Search Through and Examine All Information on the Phone.

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<sup>4</sup> Defendant did not seek leave to appeal from that portion of the court's order granting the State's motion to compel defendant to provide the passcode to the cell phone. We therefore do not address the issue, offer any opinion, or render any decision on the validity of that portion of the order.

<sup>5</sup> We renumbered the point headings in defendant's brief because we omitted a point heading addressed to the standard for granting a motion for leave to appeal. As a result of our granting defendant's motion for leave to appeal, defendant's argument addressed to that issue is no longer pertinent to our disposition of the appeal.

B. The Warrant Does Not Satisfy the Probable Cause Requirement to Search the Entire Contents of the Phone Because the Search Through All Information on the Phone Rests on Speculation That Data May Have Been Hidden or Encrypted.

## II.

Prior to addressing defendant's arguments, we consider the State's claim the issues raised on appeal are not ripe for judicial review. The argument is premised in part on the claim our Rules of Court do not permit a challenge to a search warrant's validity prior to its execution. The State also argues a challenge to the validity of a search warrant is not ripe for judicial review until the warrant is executed, evidence is seized, and a defendant is entitled to file a motion to suppress the evidence under Rule 3:5-7.<sup>6</sup>

We reject the State's argument defendant's cross-motion to quash the search warrant should be denied because it is not authorized by the Rules of Court. The State correctly argues Rule 3:5-7 authorizes the filing of a motion to suppress evidence only by "a person claiming to be aggrieved by an unlawful search and seizure," R. 3:5-7(a), but the State ignores that is not the relief sought

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<sup>6</sup> Rule 3:5-7 sets forth the required procedure for the filing and processing of motions to suppress evidence.

in defendant's motion. Defendant does not claim to be a person aggrieved by an unlawful search, and therefore Rule 3:5-7 is inapplicable here.

Contrary to the implicit premise underlying the State's argument, Rule 3:5-7 does not define or limit the scope of relief available under our Rules of Court to a defendant challenging the propriety of a search warrant that has not yet been executed. Rule 1:6-2 authorizes and proscribes the procedure for the filing of "[a]n application to the court for an order." The Rule provides that such applications "shall be by motion." R. 1:6-2(a). Here, defendant proceeded in accordance with the Rule — he filed a motion seeking an order quashing a search warrant. We find nothing in the Rules prohibiting defendant from proceeding in that manner, and the State points to no provision in the Rules barring defendant from doing so.

We are also unpersuaded by the State's claim defendant's challenge to the search warrant's validity is not ripe for judicial review. Whether a case is ripe for judicial review presents a legal issue we review de novo. See Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)) ("[A] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference."). A determination as to whether

an issue is ripe for judicial review is dependent on two factors: "(1) the fitness of issues for judicial review and (2) the hardship to the parties if judicial review is withheld at this time." Comm. to Recall Robert Menendez From the Off. of the U.S. Senator v. Wells, 204 N.J. 79, 99 (2010) (quoting K. Hovnanian Cos. of N. Cent. Jersey, Inc. v. N.J. Dep't of Env't Prot., 379 N.J. Super. 1, 9 (App. Div. 2005)).

Measured against those standards, defendant's challenge to the search warrant and appeal of the court's order denying the motion to quash are ripe for judicial review. The singular issue on which disposition of the challenge and appeal turn — the validity of the search warrant — is "'purely legal,' and thus 'appropriate for judicial resolution' without developing additional facts." Ibid. (quoting Abbott Lab'ys v. Gardner, 387 U.S. 136, 149 (1967)). Thus, the issue presented is "fit" for judicial review. Ibid.

We are also persuaded defendant will suffer a hardship — a violation of his constitutional rights against unreasonable searches and seizures and his right to privacy in the personal communications and other information stored on the phone — if his challenge to the search warrant is not addressed and decided. See, e.g., Riley v. California, 573 U.S. 373, 403 (2014) (citation omitted) ("Modern cell[ular] phones are not just another technological convenience.

With all they contain and all they may reveal, they hold for many Americans 'the privacies of life'); Lipsky v. N.J. Ass'n of Health Plans, Inc., 474 N.J. Super. 447, 473 (App. Div. 2023) (noting "the strong privacy interests associated with the contents[] of individuals' personal electronic devices, which often include an extraordinary amount of confidential and even privileged information").

There is no uncertainty about the State's intention to search the contents of defendant's cellular phone. The phone will be searched if we decline to address defendant's challenge to the warrant and await, as the State suggests we should, the search and seizure of evidence before defendant may challenge the warrant's validity in a suppression motion.

For reasons we later explain, we have determined the search warrant is constitutionally invalid. We are therefore "disinclined to allow the [search] to go forward" based on a finding the issue presented is not ripe for resolution, where we would otherwise find the warrant is unconstitutional following the warrant's execution and the seizure of evidence. Wells, 204 N.J. at 100 (citation omitted). We therefore reject the State's claim we should dismiss the appeal because the single issue presented — the validity of the search warrant — is not

ripe for judicial review, and we consider defendant's challenge to the warrant's validity.

In our colonial era, the Crown issued "writs of assistance" which vested the executing officer with unfettered "discretion[] to search suspected places for smuggled goods," Boyd v. United States, 116 U.S. 616, 625 (1886), and "seize any illegally imported goods or merchandise" without limits on the "place" or "duration" of his search, Marcus v. Search Warrants of Prop. at 104 E. Tenth St., Kansas City, Mo., 367 U.S. 717, 729 n.22 (1961). James Otis, Jr., a lawyer of that era, derided these "instrument[s] of arbitrary power" because "they placed 'the liberty of every man in the hands of every petty officer.'" Boyd, 116 U.S. at 625 (quoting Thomas M. Cooley, Constitutional Limitations 301-03 (1868)). The sentiment Otis expressed was popular in his time, ibid., and we still consider the Crown's "indiscriminate searches and seizures" to be "the immediate evils that motivated the framing and adoption of the Fourth Amendment," Payton v. New York, 445 U.S. 573, 583 (1980). That is, the Framers sought to inscribe legal protection for persons, houses, papers, and effects against "a too permeating police surveillance" as the colonies had suffered under Britain. United States v. Di Re, 332 U.S. 581, 595 (1948).

In language that is nearly identical, "the Fourth Amendment of the United States Constitution and Article I, paragraph 7 of the New Jersey Constitution provide . . . that 'no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.'" Marshall, 199 N.J. at 610 (quoting N.J. Const. art. I, ¶ 7). The progress of two-hundred-thirty-two years since the ratification of the Bill of Rights has not tempered these provisions' denunciation of general searches. See, e.g., Riley, 573 U.S. at 381-82 (applying familiar Fourth Amendment tenets to the search of a cellular phone). Moreover, as technological advance introduces "[s]ubtler and more far-reaching means of" privacy invasion, the judiciary is obligated "to ensure that [advance] does not erode Fourth Amendment protections." Carpenter v. United States, 585 U.S. \_\_\_, 138 S. Ct. 2206, 2223 (2018) (first alteration in original) (citing Olmstead v. United States, 277 U.S. 438, 473-74 (1928)).

Even in the context of a cellular phone search, then, a valid warrant requires "probable cause to believe that a crime has been committed, or is being committed, at a specific location or that evidence of a crime is at the place sought to be searched." State v. Sullivan, 169 N.J. 204, 210 (2001); see also State v. Boone, 232 N.J. 417, 426 (2017) (same); State v. Chippero, 201 N.J. 14, 28



(2009) (citation omitted) (explaining there must be "substantial evidence" supporting a court's probable cause determination "the items sought are in fact seizable by virtue of being connected with criminal activity, and . . . the items will be found in the place to be searched"). "Probable cause for the issuance of a search warrant requires 'a fair probability that contraband or evidence of a crime will be found in a particular place.'" Chippero, 201 N.J. at 28 (quoting United States v. Jones, 994 F.2d 1051, 1056 (3d Cir. 1993)). "[T]he probable cause determination must be . . . based on the information contained within the four corners of the supporting affidavit, as supplemented by sworn testimony before the issuing judge that is recorded contemporaneously." Marshall, 199 N.J. at 611 (quoting Schneider v. Simonini, 163 N.J. 336, 363 (2000)).

"[S]ubstantial deference must be paid by a reviewing court to the determination of the judge who has made a finding of probable cause to issue a search warrant." State v. Evers, 175 N.J. 355, 381 (2003). Any "[d]oubt as to the validity of the warrant 'should ordinarily be resolved by sustaining the search.'" State v. Keyes, 184 N.J. 541, 554 (2005) (quoting State v. Jones, 179 N.J. 377, 389 (2004)). "[W]hen the adequacy of the facts offered to show probable cause . . . appears to be marginal, the doubt should ordinarily be

resolved by sustaining the search." State v. Kasabucki, 52 N.J. 110, 116 (1968) (first citing United States v. Ventresca, 380 U.S. 102, 109 (1965); and then citing State v. Mark, 46 N.J. 262, 273 (1966)). However, "[c]ourts [must] consider the 'totality of the circumstances' and should sustain the validity of a search only if the finding of probable cause relies on adequate facts." Boone, 232 N.J. at 427 (quoting Jones, 179 N.J. at 388-89). This is because "the scope of a lawful search is 'defined by the object of the search and the places in which there is probable cause to believe it may be found.'" Marshall, 199 N.J. at 611 (quoting Garrison, 480 U.S. at 84).

A search warrant enjoys a presumption of validity. State v. Bivins, 226 N.J. 1, 11 (2016); Marshall, 199 N.J. at 612. Thus, a defendant challenging the validity of a search warrant bears the burden of proving "there was no probable cause supporting the issuance of the warrant." Jones, 179 N.J. at 388 (quoting State v. Valencia, 93 N.J. 126, 133 (1983)).

Defendant contends the search warrant is invalid because Hurley's certification does not establish probable cause for a search of all the phone's contents, information, and data. Defendant argues Hurley expressly sought the search warrant for evidence of the crimes of luring and attempted sexual assault he allegedly committed on December 8 and 9, 2021, and Hurley presented facts

in her supporting certification establishing only probable cause to search the phone for evidence pertaining to those offenses. Defendant and amici argue the warrant's authorization for the entirety of the phone's contents is not supported by any facts establishing a reason to believe all the various contents, information, and data of the phone may include evidence of the crimes for which the warrant is sought and he is charged.

The State's, defendant's, and amici's briefs on appeal highlight the extensive and voluminous information that is stored on a cellular phone. They also offer various and conflicting contentions concerning the way in which information may be saved, stored, manipulated, and maintained on electronic devices, including cellular phones. Their conflicting contentions concerning issues related to electronic data stored on personal devices raise important and challenging issues for law enforcement, the citizenry, and the courts during criminal investigations and prosecutions, especially in the application of the state and federal constitutional protections against unreasonable searches and seizures. See, e.g., Carpenter, 585 U.S. at \_\_\_\_, 138 S. Ct. at 2223 (noting the judiciary is obligated "to ensure that [technological advance] does not erode Fourth Amendment protections"); United States v. Stabile, 633 F.3d 219, 241 n.16 (3d Cir. 2011) (alteration in original) (quoting United States v.

Comprehensive Drug Testing, 621 F.3d 1162, 1178 (9th Cir. 2010) (Callahan, J., concurring in part and dissenting in part)) (explaining "[a] measured approach based on the facts of a particular case is especially warranted in the case of computer-related technology, which is constantly and quickly evolving"); Facebook, Inc. v. State, 471 N.J. Super. 430, 464 (App. Div. 2022) (quoting State v. Earls, 214 N.J. 564, 588 (2013)) (noting our law "evolve[s] . . . in response to changes in technology"); People v. Hughes, 958 N.W.2d 98, 111-21 (Mich. 2020) (citation omitted) (discussing the numerous and complex legal issues implicated by a search of electronic data, including the permissible scope of a warrant for electronic data; explaining the propriety of an officer's "search of seized digital data" requires consideration of "whether the forensic steps of the search process were reasonably directed at uncovering the evidence specified in the search warrant"; and detailing factors that should be considered in determining whether the search was reasonably directed at uncovering evidence specified in a warrant).

Discerning where evidence of a crime may be found on a cellular phone is a function of complex technology that changes frequently. Hurley's certification suggests the complexity of a cellular phone's technology — she generally asserts that reaping pertinent evidence from a cellular phone requires

expert foraging at laboratories using complex computer applications and equipment. Similarly, amici submit numerous articles and literature pointing to the complexity of the digital landscape presented by data contained in cellular phones, the manner in which such data may be searched and retrieved, and the constitutional issues presented by law enforcement's efforts to traverse the landscape in search of evidence. See, e.g., Logan Koepke et al., *Mass Extraction: The Widespread Power of U.S. Law Enforcement to Search Mobile Phones* (2020) (discussing the mechanics and prevalence of forensic searches of mobile devices, and the Fourth Amendment rights implicated by such searches).

Although changing technology presents endless challenges for the application of our constitutional principles, the record in this case does not permit a resolution of all the potential constitutional issues that may be presented by the State's effort to search the contents of the cellular phone. We need only consider the four corners of Hurley's certification and apply fundamental tenets of constitutional law to the validity of the warrant to decide the issue presented — whether the search warrant's authorization for the State to search all the phone's contents, information, and data is supported by probable cause. See *Marshall*, 199 N.J. at 611 (quoting *Schneider*, 163 N.J. at 363). We find it is not.

Hurley's certification expressly sought a search warrant for evidence pertaining only to the crimes of luring and attempted sexual assault defendant allegedly committed on December 8 and 9, 2021. The facts Hurley relied on to establish probable cause to believe the phone contained evidence of those crimes are limited to defendant's alleged use of a phone to message Hurley during the commission of the crimes on December 8 and 9, 2021.

Those facts established probable cause to believe the phone found in defendant's possession contained some evidence of the crimes charged. And defendant does not dispute Hurley's certification established probable cause permitting a search of the phone's contents and data limited to the text communications between defendant and Hurley, posing as a juvenile, allegedly exchanged through the Kik and Skout applications on December 8 and 9, 2021, and any alleged phone communications between defendant and Hurley on those two days.

Defendant and amici argue the search warrant is invalid because it authorizes a search of everything else on the phone in the absence of any facts in Hurley's certification supporting probable cause findings defendant committed any crimes prior to December 8, 2021, or the phone's other information and data will contain evidence of any crime, including the charged

crimes. For example, the record lacks facts establishing probable cause the phone's text messages, calls communications, GPS data, or other data created or existing prior to defendant's alleged initial communication with Hurley posing as the juvenile on December 8, 2021, contain evidence of the two crimes for which Hurley expressly sought the search warrant. See, e.g., State v. Smith, 278 A.3d 481, 497 (Conn. 2022) (finding unconstitutional a search warrant for all the data on a cellular phone in part because the warrant "included no time parameters to cabin the scope of the search but, rather, allowed for the entire contents of the phone to be searched for all time").

Hurley sought to justify the request for the search of the phone's entire contents by asserting individuals "may" seek to alter computer files to disguise what they contain and "may" thereby avoid the State's recovery of information and data for which probable cause has otherwise been established.<sup>7</sup> The

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<sup>7</sup> Amici contend it is virtually impossible, absent advanced technological skill and equipment, to modify or alter data files on a cell phone. They also argue law enforcement possesses the forensic tools necessary to conduct precise searches of data such that a court might, and should, precisely and with the requisite constitutional particularity require searches of only the particular data for which probable cause to search has been established. We do not address the claim, and offer no opinion on its validity, other than to note that proper consideration of a conclusory assertion in a certification supporting a search warrant application that a defendant may have altered or modified a cell phone's data files requires some understanding of the pertinent technology of the

justification falls short of the constitutional mark, however, because establishing probable cause for a search requires more than a showing of what "may" have occurred. See State v. Irelan, 375 N.J. Super. 100, 118 (App. Div. 2005) (citing State v. Burnett, 42 N.J. 377, 386-87 (1964)) ("Probable cause requires more than a mere hunch or bare suspicion").

Hurley supported the request for a warrant to search the phone's entire contents, information, and data by claiming that access was necessary to demonstrate defendant possessed and used the phone "around the time" the phone was employed in the commission of the alleged crimes. Based on those assertions, it appears there is data on the phone that may be used to determine whether defendant possessed and used the phone at the time of the December 8 and 9, 2021 messages that in part constituted the alleged commission of the crimes charged. What is missing from Hurley's certification are any facts establishing probable cause for an examination of data and other information, whatever it might be, that either predates defendant's alleged commission of the

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electronic device for which a search warrant is sought and the State's ability to precisely cull through the data. Because the State must establish probable cause supporting a requested search warrant based on facts presented in a supporting certification, the certification should present facts enabling the court to determine the precise data for which probable cause has been established and to authorize a search of that data with the requisite particularity.



crimes or does not constitute evidence of his use of the phone "around the time" the crimes were committed.

Thus, in our view, Hurley's certification does not provide sufficient facts supporting the expansive search warrant for all the data and information on the seized cellular phone. We therefore disagree with the court's conclusion defendant failed to overcome the presumption of validity that attaches to all search warrants. See Bivins, 226 N.J. at 11. The search warrant clearly permits a search for data and information in various forms on the cellular phone for which the State failed to establish probable cause to believe may contain evidence of the crimes for which defendant has been charged and for which the search warrant was sought. For those reasons, we reverse the court's order and quash the search warrant.

We also consider defendant's argument the warrant should be reversed because it violates the federal and state constitutional requirement that warrants must state with particularity the place to be searched. We do not need to reach the argument because the fatal flaw in the warrant is not that it does not define with particularity where the search may be conducted. The warrant is very particular – it allows a search without limitation of all the phone's contents, information, and data. It therefore satisfies the "mandat[e] that [a] warrant

specifically describe the search location so that an officer can reasonably 'ascertain and identify the place intended' to be searched, as authorized by the magistrate's probable cause finding." Ibid. (quoting Marshall, 199 N.J. at 611).

As noted, the warrant's constitutional infirmity is grounded in its authorization of searches of information and data within the phone for which Hurley's certification does not adequately establish probable cause. See Garrison, 480 U.S. at 84 (quoting United States v. Ross, 456 U.S. 798, 824 (1982)) ("[T]he scope of a lawful search is 'defined by the object of the search and the places in which there is probable cause to believe it may be found . . . .'"). It is that failure which require, our determination the search warrant is invalid.

We do not offer an opinion on the scope of an appropriate search warrant in this matter other than our determination Hurley's certification does not establish probable cause for the broad search permitted by the warrant. That is because our analysis has been based solely on the limited facts set forth in Hurley's certification. The State is free to seek a new search warrant based on whatever facts are available to it that establish probable cause to believe the various information and data the State requests to search contain evidence pertaining to the criminal charges pending against defendant.

Given the complexity of the technology concerning a cellular phone's data and information, and law enforcement's ability to cull through the information and data, any future search warrant application should address such issues to allow the court to determine the locations within the data and information on the cellular phone there is probable cause to believe relevant information concerning the crimes charged may be found. That information will assist the court in determining with particularity the locations within the data and information on the cellular phone for which there is probable cause to search. See Bivins, 226 N.J. at 11 (quoting Marshall, 199 N.J. at 611).

Reversed and remanded for further proceedings. We do not retain jurisdiction.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.



CLERK OF THE APPELLATE DIVISION