STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2020AP1399-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEREMY J. DEEN,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION
ENTERED IN EAU CLAIRE COUNTY CIRCUIT COURT,
THE HONORABLE JON M. THEISEN, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page

Page

Constitutional Provisions

Statutes

ISSUE PRESENTED

Based on a cybertip from the National Center for Missing and Exploited Children (NCMEC), officers determined that someone had uploaded child pornography at a house where Jeremy J. Deen lived. With Deen's permission, officers entered his house and spoke to him about the tip. During a frisk, officers located Deen's cellphone, which he admitted using to access the internet. Deen declined consent to a search of his cellphone. Officers seized the cellphone, and a magistrate issued a search warrant the next day.

Did exigent circumstances justify the officers' warrantless seizure of Deen's phone based on their belief that Deen could destroy evidence on the phone if they allowed him to keep it while they applied for a search warrant?

The circuit court answered: Yes.

This Court should answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither publication nor oral argument.

STATEMENT OF THE CASE

The investigation. On November 20, 2017, the National Center for Missing and Exploited Children (NCMEC)[1] received a cybertip that indicated a known photo containing

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[1] This Court has previously described how an Internet Service Provider initiates a cybertip through a referral to NCMEC, which then forwards it to a state or local law enforcement agency for investigation. *See State v. Silverstein*, 2017 WI App 64, ¶¶ 5–6, 378 Wis. 2d 42, 902 N.W.2d 550.

child pornography was uploaded from an IP address traced back to a Sara Street residence in Eau Claire. (R. 1:1.)

The Wisconsin Department of Justice prepared an administrative subpoena that was served on Charter Communications based on the NCMEC tip. (R. 1:2; 61:10.) Charter Communications' response showed that the IP address identified in the NCMEC tip was assigned to M.J. at a Sara Street residence in Eau Claire on November 20, 2017, when the image was uploaded. (R. 1:2.)

Eau Claire County Sheriff's Deputy Gregory received the NCMEC tip on January 16, 2018. (R. 1:1.) According to Gregory, the image was uploaded from a chat site called Chatstep, in a chatroom called "lilslutz." (R. 1:1; 61:11.) The upload was associated with the username "Josh" and a specific internet protocol (IP) address. (R. 1:1; 61:11.) Deputy Gregory reviewed the image sent with the NCMEC tip, describing the person in the image as a posed, naked prepubescent female. (R. 1:2; 61:10.)

The Eau Claire County Sheriff's Department provided the NCMEC complaint to the Eau Claire Police Department. (R. 61:9.) Detective Ryan Prock testified that he and another officer, Sergeant Pieper, went to the Sara Street residence on January 17, 2018. (R. 61:8–11.) The officers had information that two people resided at the house, including a woman named MJ. (R. 61:15–16.) The officers contacted Deen outside the house and asked Deen if they could speak with him inside his house. (R. 61:11.) Deen allowed the officers to enter the house. (R. 61:11.)

Prock testified that he told Deen that officers had received a tip about child pornography and that it came from his IP address. (R. 61:12.) Deen said that he looked at pornography but did not think that he looked at any child pornography. (R. 61:12.) Deen said that he had heard of the Chatstep site but had never been on it. (R. 61:12–13.) Deen

told the officers that he uses his phone for the internet, the internet service is in his ex-girlfriend's, MJ's, name, that he and MJ split the bill for the service, and that the internet is locked or password protected. (R. 61:13.) Prock did not know whether Deen or MJ shared the password with another person. (R. 61:16.) Deen told Prock that he also used a recently purchased computer to access the internet. (R. 5:3.) But before he bought the computer, he would only use his cellphone. (R. 5:3.) Deen also said that there was a possibility that something was downloaded that should not have been, explaining that when he went into a chat room, there were file attachments to other images that he downloaded. (R. 5:3.)

Prock testified that Pieper observed that Deen had a knife on him. (R. 61:12.) Officers removed the knife, and, during a "pat-frisk," they located his cellphone inside his pocket. (R. 61:12.) Officers placed the cellphone on a table where Deen did not have access to it. (R. 61:12, 17.)

According to Prock, when the officers asked Deen if he consented to a search of his phone, Deen replied that he needed the phone for work and that they could return later to get it. (R. 61:13.) Prock said that officers seized the phone because if they left it with him, Deen would have "ample opportunity to destroy the phone, to erase everything off the phone or just get rid of the phone." (R. 61:13.)

Prock believed that the phone was evidence related to their investigation. (R. 61:13.) Prock explained that Deen's middle name was Joshua and that "Josh" was the username associated with the upload. (R. 61:18.) Deen said "that at times when he's in these types of chat rooms, that sometimes files get downloaded on his phone and he has clicked on them, but he doesn't remember if he did or not." (R. 61:18.) While Deen did not admit downloading child porn, he acknowledged visiting adult pornography sites on his cellphone. (R. 61:18.)

Prock testified that he did not have a warrant for the phone when he seized it. (R. 61:14.) Prock said that officers did not look in the phone until they obtained a search warrant on January 18, 2018. (R. 61:6, 14.)

On January 19, 2018, Detective Chad Stedl searched Deen's cellphone and located four images of child pornography. (R. 5:3–4.)

The charges. The State charged Deen with four counts of possession of child pornography. (R. 5:1–3.)

Deen's motion to suppress. Deen moved to suppress the images seized from his cellphone. (R. 12:1.) He asserted that the phone was unlawfully seized without a warrant, arguing that exigent circumstances did not justify the cellphone's seizure. (R. 12:3.) Deen also argued that probable cause supported neither the seizure of the cellphone nor the subsequent issuance of the search warrant for the cellphone. (R. 12:3.)

Following Detective Prock's testimony at a suppression hearing (R. 61:8–21), the circuit court denied Deen's suppression motion (R. 61:25). With respect to the cellphone's seizure, the circuit court determined that Detective Prock reasonably relied on the tip from NCMEC and information that Deputy Gregory provided, that officers had an IP address that was used to access child pornography, that officers identified a residence related to the IP address, that Deen resided at that residence, that Deen had knowledge of the website or application used to view or download the contraband, that Deen had a cellphone on him, and that Deen admitted using the cellphone for internet access. (R. 61:22–23.)

Based on *State v. Gralinski*, 2007 WI App 233, ¶ 24, 306 Wis. 2d 101, 743 N.W.2d 448, the circuit court determined that delay between the receipt of the tip on November 20, 2017, and the cellphone's seizure in January did not render

the information stale. (R. 61:22.) The circuit court determined that the officers seized the cellphone without a warrant and without consent, but found "exigent circumstances to seize the phone, to preserve evidence, and to prevent the destruction thereof." (R. 61:23–24.) The circuit court also determined that probable cause supported the issuance of the search warrant and that officers acted in good faith executing the warrant. (R. 61:24.)

Deen's plea and sentence. Deen pleaded guilty to a single count of possession of child pornography. (R. 24:1.) The remaining counts were dismissed and read in. (R. 24:2.) The circuit court imposed a 13-year term of imprisonment, consisting of a 3-year term of initial confinement and a 10-year term of extended supervision. (R. 24:1.)

Deen appeals.

ARGUMENT

Based on the totality of the circumstances, the circuit court correctly determined that exigent circumstances justified the warrantless seizure of Deen's cellphone.

A. A warrantless seizure under exigent circumstances is reasonable.

Standard of review. This Court's review of an order granting or denying a suppression motion presents a question of constitutional fact. *State v. Tullberg*, 2014 WI 134, ¶ 27, 359 Wis. 2d 421, 857 N.W.2d 120. This Court applies a two-step standard of review when it reviews a circuit court's determination of a suppression motion, including "whether exigent circumstances justified a warrantless search" and "whether a law enforcement officer had probable cause." *Id.* ¶¶ 27–28. First, under this two-step test, this Court will uphold the circuit court's findings of historical facts unless they are clearly erroneous. *Id.* ¶ 27. Second, it independently applies the constitutional principles to the facts. *Id.*

Warrantless searches generally. The Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect against unreasonable searches and seizures. U.S. Const. amend. IV; Wis. Const. art. I, § 11; *Tullberg*, 359 Wis. 2d 421, ¶ 29. "The touchstone of the Fourth Amendment is reasonableness. The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable." *Id.* (citation omitted).

While a warrantless search is presumptively unreasonable, a court will uphold the search if it falls within an exception to the warrant requirement. *Tullberg*, 359 Wis. 2d 421, ¶ 30. The State bears the burden by a preponderance of the evidence of establishing that a recognized exception to the warrant requirement applies to a warrantless search or seizure of evidence. *State v. Payano-Roman*, 2006 WI 47, ¶ 42 n.13, 290 Wis. 2d 380, 714 N.W.2d 548.

Exigent circumstances. The exigent circumstances doctrine is a well-recognized exception to the warrant requirement. *State v. Delap*, 2018 WI 64, ¶ 45, 382 Wis. 2d 92, 913 N.W.2d 175. An exigent circumstances search is reasonable under "the Fourth Amendment if the need for the search is urgent and there is insufficient time to obtain a warrant." *Id.* Courts have identified four categories of exigent circumstances, including: (1) hot pursuit; (2) a threat to a suspect or another person's safety; (3) the risk of the destruction of evidence; and (4) the likelihood of a suspect's flight. *Id.* ¶ 46.

When officers "have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant," the officers may seize the property, "pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it." *United States v. Place*, 462 U.S. 696, 701 (1983). Thus, exigent circumstances

justify the warrantless seizure of property to prevent its destruction when "(1) there is probable cause to believe that it contains evidence of a crime, and (2) if exigencies of the circumstances demand it." *State v. Carroll*, 2010 WI 8, ¶ 26, 322 Wis. 2d 299, 778 N.W.2d 1.

Courts apply an objective test to determine whether probable cause exists. *State v. Robinson*, 2010 WI 80, ¶ 26, 327 Wis. 2d 302, 786 N.W.2d 463. Probable cause exists when there is a "'fair probability' that the particular place contains evidence of a crime." *Carroll*, 322 Wis. 2d 299, ¶ 28. Probable cause to search is assessed under the totality of the circumstances. *Tullberg*, 359 Wis. 2d 421, ¶ 33.

Courts apply an objective test to determine whether exigent circumstances justify a warrantless search or seizure to prevent the destruction of evidence. *Tullberg*, 359 Wis. 2d 421, ¶ 41. Under this test, exigent circumstances exist if an "officer, under the facts as they were known at the time, would reasonably believe that delay in procuring a search warrant would . . . risk destruction of evidence." *State v. Hughes*, 2000 WI 24, ¶ 24, 233 Wis. 2d 280, 607 N.W.2d 621, 628. Courts determine whether an exigency exists "case by case based on the totality of the circumstances." *Missouri v. McNeely*, 569 U.S. 141, 145 (2013).

Additional requirements for justifying an exigent circumstances seizure to prevent destruction of evidence. Based on *Illinois v. McArthur*, 531 U.S. 326 (2001), some federal courts have imposed additional requirements beyond the required probable cause and exigency showing to justify an exigent seizure of evidence. In *McArthur*, officers accompanied McArthur's spouse to their home so that she could remove her belongings. *Id*. at 328. The spouse informed the officers, who remained outside, that McArthur "slid some dope" under a couch. *Id*. at 329. McArthur refused the officers' request for a consent search. *Id*. While one officer applied for

a search warrant, another officer prevented McArthur from accessing the trailer unless accompanied by the officer. *Id*.

In upholding the officers' warrantless seizure of McArthur's home pending the issuance of a search warrant, the Supreme Court made four determinations. First, officers had probable cause to believe McArthur's home contained contraband, i.e., drugs. *McArthur*, 531 U.S. at 331–32. Second, officers had "good reason to fear that . . . McArthur would destroy the drugs before they could return with a warrant." *Id*. at 332. Third, officers "made reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy." *Id*. The Supreme Court noted that the officers neither arrested McArthur nor searched his home, imposing a "significantly less restrictive restraint" of preventing his unaccompanied entry into the home. *Id*. Fourth, the period of the restraint "was no longer than reasonably necessary for the police, acting with diligence, to obtain the warrant." *Id*.

To justify an exigent warrantless seizure to prevent the destruction of evidence, federal courts have interpreted *McArthur* to require a showing that the seizure lasted "no longer than reasonably necessary for the police, acting with diligence, to obtain the warrant." *United States v. Burton*, 756 F. App'x 295, 298–99 (4th Cir. 2018) (quoting *McArthur*, 531 U.S. at 332); *see also United States v. Najar*, 451 F.3d 710, 713 n.2 (10th Cir. 2006). In addition, other circuits also consider whether the government made "reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy." *United States v. Song Ja Cha*, 597 F.3d 995, 1000 (9th Cir. 2010) (quoting *McArthur*, 531 U.S. at 332); *see United States v. Perez-Diaz*, 848 F.3d 33, 41 (1st Cir. 2017).

B. Officers acted reasonably when they seized Deen's cellphone without a warrant.

The officers lawfully seized Deen's cellphone without a warrant based on exigent circumstances. First, the officers had probable cause to believe his cellphone contained evidence of the crime when they seized it. Second, based on the nature of the investigation and Deen's awareness of the investigation, officers reasonably believed that Deen could destroy the evidence if they allowed him to retain his cellphone while they obtained a search warrant. Third, the officers reconciled their law enforcement needs with the demands of Deen's privacy interest, seizing without searching his cellphone before they obtained a search warrant. Fourth, the officers detained Deen's cellphone for less than a day while they obtained a search warrant.

1. Officers had probable cause to believe that the cellphone contained evidence of the crime of child pornography.

Based on the totality of the circumstances, the circuit court reasonably rejected Deen's probable cause challenge to the warrantless seizure of the cellphone and the search pursuant to the search warrant. (R. 61:24.)[2] The circumstances establishing probable cause included:

- Based on a NCMEC cybertip, officers had reason to believe a device associated with a specific IP address uploaded child pornography on November 20, 2017. (R. 61:9.)
- The NCMEC complaint was reliable based partly on the legal obligation imposed on Internet Service Providers

[2] Deen also challenged the magistrate's decision to issue the warrant, alleging that the information in the warrant was stale and, therefore, did not establish probable cause. (R. 12:3–4.) Deen does not pursue this claim on appeal. (Deen's Br. 4 n.1.)

(ISPs) to report suspected child pornography and NCMEC's role in facilitating the transfer of information about suspected child pornography from an ISP to an appropriate law enforcement agency for investigation. *See State v. Silverstein*, 2017 WI App 64, ¶ 19, 378 Wis. 2d 42, 902 N.W.2d 550.

- Through an administrative subpoena,[3] officers associated the IP address in the cybertip to the home on Sara Street. (R. 1:2; 61:10.)
- Deputy Gregory reviewed the image sent with the NCMEC tip, describing the person depicted as a posed, naked prepubescent female. (R. 1:2; 61:10.)
- Based on the cybertip, officers believed that the image was uploaded from a chat site called "Chatstep," by a user named "Josh" in a chatroom known as "Lilslutz." (R. 61:11.)
- Detective Prock knew that Deen's middle name is "Joshua." (R. 61:11.)
- The officers had information that two people resided at the residence, including Deen and a woman named MJ, who was the subscriber for the internet service. (R. 61:15–16.)
- Deen told officers that he used the phone for internet, that he split the bill with MJ, and that internet service was password protected. (R. 61:13.)
- Deen was familiar with the website Chatstep but denied accessing it. (R. 61:12–13.)
- Deen advised officers that he looked at porn but did not "think that he looked at any child pornography." (R. 61:12.)

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[3] Wisconsin Stat. § 165.505(2) authorizes the Attorney General to issue administrative subpoenas for the purpose of obtaining subscriber information associated with an internet protocol address in child pornography investigations.

- Officers located Deen's cellphone on his person during the frisk conducted after they saw he had a knife. (R. 61:12.)

Based on the totality of this evidence, there was a "fair probability" that Deen's cellphone contained contraband, i.e., child pornography. *Carroll*, 322 Wis. 2d 299, ¶ 28.

Finally, Deen does not pursue before this Court the staleness challenge to probable cause that he raised in the circuit court. (R. 61:22; Deen's Br. 4 n.1.) But even if he had, he would not prevail. This Court has previously rejected staleness challenges based on delays even longer than the delay in Deen's case. *See Gralinski*, 306 Wis. 2d 101, ¶¶ 26–33 (holding two and one-half years between purchase of membership in child pornography website and search warrant's issuance not stale). The almost two-month delay between the upload of the suspected child pornography and the cellphone's seizure did not render probable cause stale.

2. Officers had a reasonable belief that Deen would destroy the evidence before they could obtain a warrant.

As Detective Prock explained, Deen would have "ample opportunity to destroy the phone, to erase everything off the phone or just get rid of the phone" if they left the phone with him. (R. 61:13.) After all, a person who possesses a cellphone can quickly and easily destroy the device itself or the data it contains. *See Riley v. California*, 573 U.S. 373, 388 (2014) (stating that the appellants' concession that the officers could have "seized and secured their cell phones to prevent destruction of evidence while seeking a warrant" was "sensible"). Based on the information known to the officers, Detective Prock reasonably believed that allowing Deen to retain his cellphone while they applied for a search warrant

risked the destruction of evidence. *See Hughes*, 233 Wis. 2d 280, ¶ 24. (R. 61:13.) And based on the record at the suppression hearing, the circuit court correctly determined exigent circumstances existed that supported the cellphone's seizure "to preserve evidence, and to prevent the destruction thereof." (R. 61:23–24.)

Nonetheless, Deen identifies four reasons why exigent circumstances did not justify the seizure of his cellphone. But a careful review of his four claims undermines his argument, reinforcing the reasonableness of the officers' decision to seize only his cellphone and not search it until after they obtained a warrant.

a. The officers reasonably believed that Deen's destruction of the phone was imminent based on his knowledge of their investigation.

Because officers had no evidence that Deen had "done anything in the prior months to indicate he might destroy evidence," Deen contends that officers had no reason to believe that destruction of the phone was imminent if they left it in his possession. (Deen's Br. 7.)

To be sure, as Deen suggests, the officers had no reason to believe that Deen had attempted to destroy his electronic devices or delete data on them after the upload occurred. (Deen's Br. 7.) But those dynamics changed when officers talked to Deen about their investigation and the cybertip. (R. 61:12.) Deen, who admitted using his cellphone to access the internet, knew officers wanted to search it when they requested consent to search it. (R. 61:13.) Under the circumstances, officers reasonably believed that Deen would destroy the cellphone or delete the data on it if they allowed him to retain it while they applied for a warrant. (R. 61:13.) Said another way, officers "had good reason to fear that

[Deen] would destroy" any contraband on the cellphone, based on a reasonable conclusion that Deen, "suspecting an imminent search, would, if given the chance, get rid of the [contraband] fast." *McArthur*, 531 U.S. at 332.

Relying on *McArthur*'s "suspecting an imminent search" language, several courts have upheld the seizure of electronic devices before obtaining a search warrant based on the risk that the suspect will destroy them. In *Burton*, 756 F. App'x at 297, an officer questioned Burton about an allegation that he used his cellphone to take an up-skirt photograph of a woman. The officer disbelieved Burton's explanation for his conduct, seized the cellphones that Burton brought to the stationhouse interview, and obtained a search warrant for the cellphones two days later. *Id*. Noting Burton's awareness of the investigation and the officer's skepticism of his explanation, the First Circuit upheld the warrantless seizure of Burton's phone, explaining that the officer had "good reason to fear" that Burton would destroy the digital evidence if he left the station with his phone. *Id*. at 299 (quoting *McArthur*, 531 U.S. at 332). In its decision, the court observed,

"Given the ease with which Burton could have deleted, transferred, or otherwise removed the digital photos from the phones, [the officer] reasonably assumed that Burton might destroy any evidence contained on the phones, or the devices themselves." *Id*.

Likewise, in *Perez-Diaz*, 848 F.3d at 36, officers knocked on Perez-Diaz's door during a child pornography investigation. Perez-Diaz allowed the officers inside, and the officers discussed their investigation with Perez-Diaz and whether computers were used to download or watch child pornography. *Id*. Perez-Diaz refused consent to turn on his computer and verify whether peer-to-peer file sharing applications were installed on his computer. *Id* at 37. Officers secured the residence and awaited the issuance of a search

warrant before they searched the apartment and seized computer devices. *Id*. In upholding the officers' seizure of the apartment pending the issuance of a search warrant, the First Circuit observed that officers "had reason to fear that Perez would destroy the evidence unless they secured the premises." *Id*. at 40. Citing *McArthur's* "suspecting an imminent search" language, the court observed that Perez was aware of the nature of their investigation and would destroy the evidence if he had the chance. *Id*. at 41.

And in *United States v. Bradley*, 488 F. App'x 99, 103 (6th Cir. 2012), the Sixth Circuit upheld a warrantless seizure of a computer during a child pornography investigation, determining that the officer "had an objectively reasonable basis for concluding that the evidence of child pornography on the laptop would be destroyed if the computer was not seized immediately, pending application for a search warrant." Relying on *McArthur*, the Sixth Circuit noted, "Courts have doubted the wisdom of leaving the owner of easily-destructible contraband in possession of that contraband once the owner is aware that law-enforcement agents are seeking a search warrant." *Id*.

Following this rationale, West Virginia's supreme court upheld a warrantless seizure of a cellphone under circumstances like those in Deen's case. In *State v. Deem*, 849 S.E.2d 918, 921 (W. Va. 2020), officers determined that a person using an email address and cellphone number associated with Deem had solicited an undercover officer posing as a minor on an online website for explicit photographs and to have sex. Officers went to Deem's residence, and Deem allowed them inside. *Id*. While asking Deem about his phone number and his email address, an officer saw that Deem had a cellphone in his shirt pocket. *Id*. When Deem refused the officer's request to search his cellphone, the officer seized it, but he did not search it until

after obtaining a search warrant two days later. *Id*. at 921–22.

The West Virginia court ruled that, based on the circumstances, an experienced officer could reasonably believe that Deem would delete or destroy the evidence if the officer did not seize the phone. *Deem*, 849 S.E.2d at 926. Noting *McArthur*'s "suspecting an imminent search" language, the court determined that Deem had "every incentive to destroy or damage the evidence." *Id.* at 926–27, 927 n.34. Therefore, West Virginia's supreme court upheld the officer's seizure of Deem's cellphone to prevent its destruction or damage until a search warrant was issued. *Id.* at 927.

Like the defendant in *Burton*, *Perez-Diaz*, *Bradley*, and *Deem*, Deen was aware of the nature of the pending investigation when officers seized his cellphone. Like the officers in those cases, the officers reasonably believed that Deen could destroy the cellphone or the data it contained if they did not seize the phone. And like the courts in those cases, this Court should determine that officers acted reasonably when they seized Deen's cellphone pending a magistrate's approval of their search warrant application.

b. *Kiekhefer* does not aid Deen.

Relying on *State v. Kiekhefer*, 212 Wis. 2d 460, 569 N.W.2d 316 (Ct. App. 1997), Deen contends that the officers lacked evidence to support a reasonable belief that the destruction of evidence was imminent when they entered his residence. (Deen's Br. 8–10.) Deen misplaces his reliance on *Kiekhefer*. In that case, officers smelled the odor of burning marijuana outside Kiekhefer's room and entered it unannounced. *Kiekhefer*, 212 Wis. 2d at 466. Officers immediately handcuffed and frisked Kiekhefer and another person. *Id*. After Kiekhefer admitted that marijuana was in the room, an officer asked Kiekhefer for permission to search,

stating: "We can do this easy, you can allow me to or we can do this hard, and then in which case we'll tear this place apart." *Id*. Kiekhefer then allowed them to search the room. *Id*. at 467.

This Court ordered the evidence suppressed for several reasons, including that exigent circumstances did not justify the officers' warrantless entry in part because there was "no indication that Kiekhefer was aware of their presence." *Id*. at 477. This Court also found that Kiekhefer's un-*Mirandized* statements and subsequent consent to search were involuntary and that officers had arrested Kiekhefer once they were inside. *Id*. at 474.

This Court later identified two factors critical to its determination that exigent circumstances were not present in *Kiekhefer*. *See State v. Parisi*, 2014 WI App 129, 359 Wis. 2d 255, 857 N.W.2d 472. First, "there was 'no indication that Kiekhefer was aware' of the officers' presence outside his door." *Id*. ¶ 16 (quoting *Kiekhefer*, 212 Wis. 2d at 477). Second, the large quantity of marijuana at issue in *Kiekhefer* "could not be easily or quickly destroyed in Kiekhefer's bedroom." *Id*. ¶ 17 (quoting *Kiekhefer*, 212 Wis. 2d at 478).

Kiekhefer does not aid Deen. Unlike in *Kiekhefer*, Deen was aware of the officers' presence outside his residence and invited them inside. Unlike in *Kiekhefer*, officers lawfully entered Deen's residence with Deen's consent, locating his cellphone during a frisk, which Deen has not challenged. Unlike in *Kiekhefer*, the officers did not handcuff or arrest Deen, nor did they suggest to Deen that they would "do this hard" and "tear this place apart" if he declined consent to allow a search of his cellphone. *Kiekhefer*, 212 Wis. 2d at 466. Unlike the large quantity of marijuana that could not be easily destroyed in *Kiekhefer*, Deen could have easily destroyed his phone if the officers had not seized it. Unlike in *Kiekhefer*, officers did not search Deen's residence for any other evidence until they obtained a search warrant for the

residence a week later. (R. 2:7; 5:4.) Unlike in *Kiekhefer*, the officers did not engage in a "flagrant misuse of authority" during their encounter with Deen. *Kiekhefer*, 212 Wis. 2d at 483. To the contrary, they acted reasonably throughout their interaction with him.

c. The officers' failure to seize Deen's computer does not demonstrate a lack of exigency but the reasonableness of their limited actions.

Based on his statement that he used both his cellphone and computer to access the internet (R. 5:3), Deen argues that the officers' failure to seize his computer demonstrates a lack of exigency. (Deen's Br. 10.) But Deen also told the officers that he had just bought the computer and before this purchase, he only used his cellphone to access the internet. (R. 5:3.) Because the cybertip was almost two months old, the officers might well have reasonably assumed that Deen did not use the computer to access the chat site associated with the uploaded child pornography. Under the circumstances, the officers' decision not to seize Deen's computer demonstrates that they acted reasonably, limiting their seizure to his cellphone, a device found on his person and to which he admitted to accessing the internet, during the relevant time period. In other words, the officers reasonably limited their seizure to the electronic device most likely to contain evidence of the crime they were investigating.

d. Officers did not impermissibly create the exigency.

Finally, citing *Kentucky v. King*, 563 U.S. 452 (2011), Deen asserts that the officers impermissibly created an exigency through unreasonable conduct and, therefore, that their actions do not justify the warrantless seizure of his cellphone. (Deen's Br. 6, 11–12.) In *King*, the Supreme Court

reaffirmed that an exigency, like the need to prevent the destruction of evidence, may make a warrantless search or seizure of evidence objectively reasonable. *King*, 563 U.S. at 460. But it cautioned that officers "may not rely on the need to prevent destruction of evidence" by creating an exigency "by engaging or threatening to engage in conduct that violates the Fourth Amendment." *Id*. at 461–62.

But the Supreme Court clarified that officers do not violate or threaten to violate the Fourth Amendment when they effectuate a warrantless knock on a door because they do no more than a private citizen can do by knocking on a door and requesting to speak to an occupant. *King*, 563 U.S. at 469. In reaching this conclusion, the Supreme Court recognized that officers may have a variety of legitimate reasons to decline to apply for a search warrant even if they have probable cause. *Id*. at 466–67.

Similarly, the Wisconsin Supreme Court has noted that officers do not impermissibly create an exigency when they act lawfully by merely knocking on a door and announcing their presence. *Robinson*, 327 Wis. 2d 302, ¶ 32 (finding that defendant's choice to run from the door created the exigent circumstances that justified a warrantless entry to prevent the destruction of evidence). Relying partly on *King*, this Court has also held that officers did not improperly create an exigency by knocking and announcing their presence on an apartment door before entering it to prevent the destruction of evidence. *Parisi*, 359 Wis. 2d 255, ¶ 15.

Officers did not improperly create an exigency in Deen's case because they did not engage or threaten to engage in any conduct that violated the Fourth Amendment. The officers contacted Deen outside his door. (R. 61:11.) They entered Deen's residence only with his permission. (R. 61:11.) Officers located Deen's cellphone during a pat-down frisk, which one of the officers initiated after observing that Deen had a knife. (R. 61:12.) Deen has challenged neither the lawfulness of the

officers' entry into his home with his consent nor the frisk. The officers' contacts with Deen prior to the seizure of his phone did not violate his Fourth Amendment rights; therefore, they did not impermissibly create the kind of exigency that *King* prohibits.

* * * * *

Based on the totality of circumstances, including Deen's awareness of the specific nature of the investigation, the officers reasonably believed that Deen could attempt to delete the data on his cellphone or destroy it if they did not seize it pending the issuance of a search warrant.

3. Officers reconciled their interests with Deen's privacy interests and diligently acted to obtain a warrant.

Deen has not argued that officers failed to make reasonable efforts to reconcile law enforcement's legitimate interests in preserving evidence with Deen's privacy interests or failed to act diligently to obtain a warrant. *McArthur*, 531 U.S. at 332–33. Deen forfeited this argument because he did not raise it in the circuit court. *See State v. Rogers*, 196 Wis. 2d 817, 826–29, 539 N.W.2d 897 (Ct. App. 1995). But even if Deen had, he would not prevail.

Consistent with *McArthur*, officers made reasonable efforts to reconcile law enforcement's legitimate interest in preserving evidence on Deen's phone with his privacy interests. To be sure, the seizure of Deen's cellphone affected his personal liberty interest in the possession of his property. But consistent with *McArthur*, 531 U.S. at 332, officers did not otherwise intrude on Deen's privacy interests by searching his cellphone, generally searching for, or seizing other property at his residence, or by otherwise restricting Deen's freedom of movement. Officers left Deen's cellphone "intact—until a neutral Magistrate finding probable cause, issued a warrant." *McArthur*, 531 U.S. at 332; *see also Burton*,

756 F. App'x at 299 (noting officer's reasonable efforts to balance law-enforcement needs with Burton's rights).

Likewise, the officers' seizure of the phone lasted "no longer than reasonably necessary for the police, acting with diligence, to obtain the warrant." *McArthur*, 531 U.S. at 332. The officers seized the phone on January 17, 2018, and diligently obtained the search warrant the following day, January 18, 2018, at 10:00 a.m. (R. 1:2, 4.) To be sure, the delay to obtain the search warrant in *McArthur* was shorter (two hours), but unlike in *McArthur*, the officers here did not limit Deen's access to his residence while they obtained the warrant. *McArthur*, 531 U.S. at 332. The delay here is less than longer delays, including delays of two days, six days, and 25 days, that federal courts have upheld as reasonable. *See Burton*, 756 F. App'x at 300 (and cases cited therein). The one-day delay to obtain the search warrant for Deen's phone was reasonable.

CONCLUSION

This Court should affirm Deen's judgment of conviction.

Dated this 15th day of January 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5600 words.

Dated this 15th day of January 2021.

Electronically signed by:

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that:

A copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 15th day of January 2021.

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