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CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
IN SUPREME COURT

No. 2020AP1399-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEREMY J. DEEN,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

The State of Wisconsin opposes Jeremy J. Deen's petition for review of the opinion and order of the Wisconsin Court of Appeals. *State v. Deen*, No. 2020AP1399-CR, 2021 WL 3729054 (Wis. Ct. App. August 24, 2021) (unpublished). (Pet-App. 3–19.) The court of appeals affirmed the judgment of conviction, rejecting Deen's claim that the circuit court erred when it denied his motion to suppress evidence. *Id.* ¶ 1.

Deen challenged an officer's warrantless seizure of his cellphone. *Deen*, 2021 WL 3729054, ¶ 1. The National Center for Missing and Exploited Children (NCMEC) received a tip that child pornography had been uploaded from a particular IP address, which officers later connected to an Eau Claire area residence. *Id.* ¶ 3. Officers contacted Deen outside the residence, and Deen permitted the officers to enter his residence and speak with him. *Id.* ¶ 4. Officers told Deen that they had received a tip about child pornography from his IP address. *Id.* Deen admitted using his cell to access the internet and to look at pornography, but he did not think that he looked at child pornography. *Id.* When an officer observed that Deen had a knife, the officer frisked Deen and located Deen's cellphone. *Id.* ¶ 5. Deen refused the officers' request to search his cellphone. *Id.* Officers seized the cellphone, but they did not search the cellphone until after they obtained a search warrant for it. *Id.*

Deen pleaded guilty to possession of child pornography after the circuit court denied his motion to suppress evidence. *Deen*, 2021 WL 3729054, ¶ 7. Based on its determination that the officers' warrantless seizure of Deen's cellphone was necessary to preserve and prevent the destruction of evidence, the circuit court upheld the search under the exigent circumstances exception to the warrant requirement *Id.*

Deen appealed, contending that the warrantless seizure of his cellphone violated his Fourth Amendment rights. *Deen*,

2021 WL 3729054, ¶ 1. The court of appeals upheld the seizure under the exigent circumstances exception to the warrant requirement based on its determination that when officers seized his cellphone, they “would have reasonably believed that the delay necessary to obtain a search warrant would risk the destruction of evidence.” *Id.* ¶ 29.

CRITERIA FOR GRANTING REVIEW

Deen asks this Court to grant review based on his assertion that the warrantless seizure of his cellphone “presents a real and significant question of federal and state constitutional law, satisfying the criteria for review under Wis. Stat. § (Rule) 809.62(1r)(a).” (Pet. 4.) This Court should decline review because the issue Deen raises involves no more than the application of well-settled legal principles to his case.

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. 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. The test is “whether a police 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.

The court of appeals identified and applied these principles, concluding that the State met its burden of demonstrating that exigent circumstances justified the warrantless seizure of Deen’s cellphone. *Deen*, 2021 WL 3729054, ¶¶ 10–11. Because Deen did not dispute that the officers had probable cause to believe that his cellphone contained evidence of a crime, it focused its analysis on whether exigent circumstances were present. *Id.* ¶ 9. The

court determined that the warrantless seizure of Deen's phone was necessary to prevent the destruction of evidence based on several factors, including: (1) Deen's awareness that officers "were investigating a tip that child pornography had been uploaded from an IP address associated with his residence," (2) the officers' questions about Deen's internet use and pornography viewing habits, (3) Deen's admissions that he used his cellphone to access the internet and view pornography, and (4) his awareness that officers wanted to search his cellphone. *Id.* ¶ 11.

Deen raises four points in support of his petition for review. (Pet. 11–16.) Based on settled law, the court of appeals thoroughly addressed each point, explaining why none of them overcame its determination that exigent circumstances justified the warrantless seizure of Deen's phone to prevent its destruction. *Deen*, 2021 WL 3729054, ¶¶ 17–28.

For example, relying on *State v. Kiekhefer*, 212 Wis. 2d 460, 569 N.W.2d 316 (Ct. App. 1997), Deen asserts that the question of whether the destruction of evidence was imminent should be assessed from the moment of entry. (Pet. 11–14.) The court of appeals rejected this argument, noting that, unlike in *Kiekhefer*, Deen did not challenge the lawfulness of the officers' entry. *Deen*, 2021 WL 3729054, ¶ 22. Rather, "the relevant inquiry is whether an officer would have reasonably believed *at the moment the phone was seized* that evidence on the phone might be destroyed before a warrant could be secured." *Id.*

Likewise, relying on *Kentucky v. King*, 563 U.S. 452 (2011), Deen suggests that the officers improperly created the exigent circumstances used to justify its warrantless seizure. (Pet. 15–16.) *King* held that a warrantless entry to prevent the destruction of evidence under exigent circumstances does not violate the Fourth Amendment "when the conduct of the police preceding the exigency is reasonable" and "the police did not create the exigency by engaging or threatening to

engage in conduct that violates the Fourth Amendment.” *King*, 563 U.S. at 462. Noting that Deen did not challenge the lawfulness of the officers’ entry or the frisk, the court of appeals concluded that the officers did not create the exigency that necessitated the seizure of Deen’s cellphone. *Deen*, 2021 WL 3729054, ¶ 27.

The court of appeals’ application of well-settled legal principles demonstrates that Deen’s case is not one that presents a real or significant question of constitutional law.

CONCLUSION

This Court should not grant Deen’s petition for review.

Dated this 6th day of October 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rule) 809.19(8)(b) and 809.62(4) (2019-20) for a response to petition for review produced with a proportional serif font. The length of this response is 1,031 words.

Dated this 6th October 2021.

DONALD V. LATORRACA
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.62(4)(b)

I hereby certify that:

I have submitted an electronic copy of this response to petition for review, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.62(4)(b) and 809.19(12) (2019-20).

I further certify that:

This electronic response to petition for review is identical in content and format to the printed form of the response to petition for review filed as of this date.

A copy of this certificate has been served with the paper copies of this response to petition for review filed with the court and served on all opposing parties.

Dated this 6th October 2021.

DONALD V. LATORRACA
Assistant Attorney General