STATE OF WISCONSIN

IN SUPREME COURT

No. 2020AP1715-CR

STATE OF WISCONSIN,

Plaintiff -Respondent,

v.

RANDY J. PROMER,

Defendant-Appellant-Petitioner.

RESPONSE OPPOSING PETITION FOR REVIEW

JOSHUA L. KAUL
Attorney General of Wisconsin

MICHAEL C. SANDERS
Assistant Attorney General
State Bar #1030550

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0284
(608) 294-2907 (Fax)
sandersmc@doj.state.wi.us

INTRODUCTION

The circuit court denied Randy J. Promer's motion to suppress evidence gathered in a search of his car, concluding that the stop of Promer's vehicle was justified under the community caretaker doctrine. Promer then pled no contest to operating a motor vehicle with a detectable amount of a restricted controlled substance in his blood, as a seventh offense, and possession of methamphetamine. The court of appeals affirmed Promer's convictions, also recognizing that the stop of Promer's vehicle was justified under the community caretaker doctrine. *State v. Promer*, No. 2020AP1715-CR, slip. op. (Wis. Ct. App. Dec. 21, 2021) (unpublished) (Pet. App. 3–21.) Promer now asks this Court to grant review, and to "decide that in light of the recent United States Supreme Court decision in *Caniglia v. Strom*, 141 S. Ct. 1596 (2021), the community caretaker doctrine is not a standalone exception to the Fourth Amendment warrant requirement for vehicle seizures." (Pet. 4.)

However, in *Caniglia*, the Supreme Court did not hold that the community caretaker doctrine cannot justify a vehicle stop. Instead, as the court of appeals recognized, the Supreme Court "merely held that the community caretaker doctrine cannot be used to justify a warrantless intrusion into a home." *Promer*, slip. op., ¶ 2. The Supreme Court did not eliminate the community caretaker exception for vehicle stops, and this Court should not grant review to decide that it did.

THIS CASE DOES NOT SATISFY THE CRITERIA FOR REVIEW.

A. This case does not present a significant issue of constitutional law.

Promer asserts that review of the court of appeals decision by this Court is warranted under Wis. Stat. § (Rule) 809.62(1r)(a) because this case "presents a significant question of state and federal constitutional law." (Pet. 5.) He claims that under *Caniglia*, "the community caretaker doctrine is not a standalone exception to the Fourth Amendment warrant requirement for vehicle seizures." (Pet. 4.) However, review is unwarranted because, as the court of appeals recognized, *Caniglia* did not eliminate the community caretaker doctrine for vehicle stops.

In *Caniglia*, the Supreme Court considered whether law enforcement officers' "'caretaking' duties" on "public highways" creates "a standalone doctrine that justifies warrantless searches and seizures in the home." *Caniglia*, 141 S. Ct. at 1598 (citation omitted). The Court held that "It does not." *Id.* As the court of appeals recognized in the present case, the Supreme Court distinguished its decision establishing the community caretaker doctrine, *Cady v. Dombrowski*, 413 U.S. 433 (1973), which involved a vehicle, from *Caniglia*, which involved a home. *Promer*, slip. op., ¶ 21. In *Cady*, the Court drew "an 'unmistakable distinction between vehicles and homes' when discussing law enforcement's community caretaking functions." *Id.* ¶ 21 (citing *Caniglia*, 141 S. Ct. at 1599.) In *Caniglia*, the Court noted that "What is reasonable for vehicles is different from what is reasonable for homes. *Cady* acknowledged as much, and this Court has repeatedly 'declined to expand the scope of . . . exceptions to the warrant requirement to permit warrantless entry into the home.'" *Id.* (quoting *Caniglia*, 141 S. Ct. at 1600.)

As the court of appeals recognized, "*Caniglia* did not 'eliminate' the community caretaker doctrine as a justification for warrantless seizures unsupported by probable cause or reasonable suspicion." *Promer*, slip. op., ¶ 22. "Instead, *Caniglia* clarified that the community caretaker doctrine, as originally recognized in *Cady*, is limited to cases involving searches and seizures of automobiles and cannot be used to justify warrantless intrusions into a home." *Id.*

In his petition, Promer insists that in *Caniglia*, the Supreme Court "eliminat[ed] the community caretaker doctrine as a standalone exception to the Fourth Amendment warrant requirement." (Pet. 14.) He does not address the court of appeals' decision that rejected his argument. And he does not point to anything in the majority opinion that supposedly eliminates the community caretaker doctrine except as it relates to searches of a home. Instead, Promer points to one of the concurring opinions, in which Justice Alito wrote: "The Court holds—and I entirely agree—that there is no special Fourth Amendment rule for a broad category of cases involving 'community caretaking.'" (Pet. 14–15) (quoting *Caniglia*, 141 S. Ct. at 1600) (Alito J., concurring). Justice Alito added that in *Cady*, the Court "did not recognize any such 'freestanding' Fourth Amendment category," but "used the phrase 'community caretaking' in passing." *Caniglia*, 141 S. Ct. at 1600 (Alito, J. concurring).

Promer reads Justice Alito's concurrence as establishing that the community caretaker doctrine is no longer valid in vehicle stops. But even if Justice Alito's concurrence could somehow be read as him espousing that belief, not a single justice joined his concurring opinion. The majority opinion set forth the holding of the case, which is that the community caretaker doctrine does not "justif[y] warrantless searches and seizures in the home." *Caniglia*, 141

S. Ct. at 1598. And far from eliminating the community caretaker doctrine, the majority opinion distinguished an area of law where it does apply—vehicles—from an area where it does not apply—homes. *Id.* at 600. Notably, Justice Alito joined the majority opinion "in full." *Id.* at 1602 (Alito, J. concurring).

As the court of appeals recognized, the Supreme Court did not eliminate the community caretaker doctrine as it relates to vehicle. *Promer*, slip. op., ¶ 22. Review by this Court to decide that the Supreme Court did so is unwarranted.

B. Review is not warranted to decide whether the community caretaker exception justified the stop of Promer's car.

Promer also argues that, even if the community caretaker doctrine was not eliminated in *Caniglia*, this Court should grant review to determine that the circuit court and the court of appeals erred in concluding that the stop of his vehicle was justified under that doctrine. (Pet. 15–23.)

Review by this Court is unwarranted because Promer is seeking only error correction. And there is no error to correct because the court of appeals correctly concluded that the stop of Promer's car was justified because the police conduct was "a bona fide community caretaker function," and "the public need and interest. . . outweighed the intrusion upon [the individual's] privacy." (*Promer*, slip. op., ¶ 46 (citing *State v. Kramer*, 2009 WI 14, ¶¶ 19–20, 315 Wis. 2d 414, 759 N.W.2d 598).

Officers stopped Promer's car after a report at around 9:30 p.m., that a man was passed out or sleeping in a car in the bar's parking lot. *Id.* ¶ 3. The officers who responded knew that "Promer was on probation and had six prior convictions for operating a motor vehicle while intoxicated (OWI); that he had an outstanding warrant from Florida; and that he was subject to a blood alcohol concentration (BAC) limit of 0.02." *Id.* When an officer arrived at the bar about ten minutes later, he saw Promer's car traveling northbound on the road on which the bar was located, and then slow down and turn back into the parking lot, "traveling kind of at a slower speed through the middle of the parking lot." *Id.* ¶ 4–5. The car "then pulled into a parking spot where it drove onto the curb before backing down again." *Id.* ¶ 5.

The court of appeals "agree[d] with the circuit court that when the deputies stopped Promer's vehicle, they had an objectively reasonable basis to believe, under the totality of the circumstances, that a member of the public was in need of assistance." *Id.* ¶ 25. The court noted that "[t]he deputies knew that a bartender had called law enforcement to report that a man was passed out or sleeping in a car parked in the bar's parking lot." *Id.* And then "When the deputies arrived at the bar about ten minutes later, they saw the same vehicle driving northbound on the road where the bar was located, and the vehicle then turned back into the bar's parking lot and drove through the lot at a slow speed." *Id.* The circuit court and the court of appeals both recognized that "a person being passed out or sleeping in a vehicle in a parking lot," and shortly thereafter "getting onto the road and then coming right back into the parking lot" was "unusual enough to suggest that the police should be able to check out and make sure that this person is okay." *Id.*

The court of appeals also concluded that "the public need and interest supporting the stop of Promer's vehicle outweighed the intrusion upon his privacy." *Id.* ¶ 46. The court recognized that there was a significant public interest because "the officers could reasonably believe that if they did not stop Promer's vehicle, there was a risk that he would proceed back onto the road, where he would pose a danger to himself and to the public." *Id.* ¶ 40. It concluded that "the attendant circumstances surrounding the seizure show that it was not particularly intrusive." *Id.* ¶ 41. The court of appeals noted that the seizure involved the stop of an automobile, and that, "[w]hat is reasonable for vehicles is different from what is reasonable for homes." *Id.* ¶ 43 (quoting *Caniglia*, 141 S. Ct. at 1598, 1600). And the court of appeals recognized that "under the circumstances presented here, the deputies had no reasonable alternative but to stop Promer's vehicle to determine whether he needed assistance." *Id.* ¶ 44.

Promer does not explain how he thinks the court of appeals' analysis was wrong. He does not assert that the circuit court or the court of appeals applied the wrong standard. He claims only that the courts erred in applying that standard. Accordingly, there is no need for this Court to grant review.

CONCLUSION

This Court should deny Promer's petition for review.

Dated: March 1, 2022.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

MICHAEL C. SANDERS
Assistant Attorney General
State Bar #1030550

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0284
(608) 294-2907 (Fax)
sandersmc@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition or response produced with a proportional serif font. The length of this petition or response is 1614 words.

MICHAEL C. SANDERS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULES) 809.19(12) and 809.62(4)(b) (2019-20)

I hereby certify that:

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

I further certify that:

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

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

Dated this 1st day of March 2022.

MICHAEL C. SANDERS
Assistant Attorney General