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CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

No. 2022AP2051-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JACOB RICHARD BEYER,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

The State of Wisconsin opposes Jacob R. Beyer's Petition for Review of the Wisconsin Court of Appeals' opinion affirming the judgment. *State v. Beyer*, No. 2022AP2051-CR, 2024 WL 119337 (Wis Ct. App. Jan. 11, 2024) (unpublished); (Pet-App. 3–41).

A court found Beyer guilty of possession of child pornography after a bench trial. *Beyer*, 2024 WL 119337, ¶ 1. Beyer raised three claims on appeal, only one of which he petitions this Court for review, i.e., whether he had a due process right to conduct a forensic analysis of the computer that law enforcement used to develop probable cause in support of a search warrant for his home and electronic devices. (Pet. 6.)¹ The agent used investigative software to locate files containing child pornography on peer-to-peer file sharing networks. *Beyer*, 2024 WL 119337, ¶ 7. The agent downloaded a video recording constituting child pornography that was being shared by a device using an IP address associated with Beyer. *Id.* ¶¶ 7–8. Based on the agent's information, officers obtained a search warrant and executed it at Beyer's residence. *Id.* ¶¶ 9–10. Beyer admitted using peer-to-peer software to download child pornography and told the officers the pathname where they could locate the downloaded files. *Id.* ¶ 10. Officers found child pornography on Beyer's computer, but they did not locate the particular video file that the agent had previously downloaded through his peer-to-peer investigation. *Id.* ¶11.

The circuit court denied Beyer's motion to allow his expert to conduct a forensic analysis of the agent's computer. *Beyer*, 2024 WL 119337, ¶ 13. The court of appeals affirmed. *Id.* ¶ 34 It rejected Beyer's "novel argument" that the circuit

¹ The State cites to Beyer's petition by reference to the clerk's electronically assigned page numbers and not Beyer's page designations.

court's denial of his motion violated his due process right to access this evidence and to present a complete defense. *Id.* ¶ 19. The court of appeals noted that while a defendant may have a due process right to exculpatory evidence, a defendant does not have a general constitutional right of discovery of evidence in the State's possession. *Id.* ¶ 22. It also observed that Beyer wanted access to information about the agent's peer-to-peer investigation and that the information obtained through that investigation was "not directly relate[d] to the evidence that the prosecution offered at trial to prove" the child pornography charge. *Id.* ¶ 24. That is, Beyer wanted information material to his challenge to the search warrant but not material to guilt. *Id.* ¶ 25.

Based on its review of U.S. Supreme Court decisions and Wisconsin case law, the court found no authority to support Beyer's argument that he had a due process right to access to evidence for a Fourth Amendment suppression motion. *Beyer*, 2024 WL 119337, ¶¶ 25–26. But even assuming without deciding that Beyer had such a right, the court of appeals determined that the equivocal and speculative nature of his expert's testimony did not support his motion for access to the agent's computer. *Id.* ¶ 33.

CRITERIA FOR REVIEW

Beyer contends that this Court should grant review because his case presents a real and significant question of constitutional law, it will help "reconcile this State's discovery statutes with the defendant's due process rights," and the court of appeals' reasoning is unworkable. (Pet. 9–10.)

Contrary to his assertions, Beyer's petition does not merit review under the criteria in Wis. Stat. § (Rule) 809.62(1r). Beyer's case is not the case to decide whether a defendant has a constitutional right of access to evidence, including inspecting an investigator's computer, for the purpose of finding something useful to challenge a search.

The fact that his argument is novel, as he acknowledges, does not mean that it merits review. *Beyer*, 2024 WL 119337, ¶ 19. Rather, a novel question merits review when it “will help develop, clarify or harmonize the law, and . . . the resolution of which will have a statewide impact.” Wis. Stat. § (Rule) 809.62(1r)(c)2.

Beyer’s case will not develop the law or have a statewide impact. To begin, as the State argued and the court of appeals recognized, criminal defendants have limited discovery rights and do not have a general constitutional right of access to evidence. (Plaintiff-Respondent’s Br. 26–29); *Beyer*, 2024 WL 119337, ¶¶ 21–28. The court of appeals grounded its rejection of Beyer’s novel legal claim in established precedent that limits a criminal defendant’s due process right to discovery. *Beyer*, 2024 WL 119337, ¶¶ 22–28.

Beyer misplaces his reliance on federal cases involving access to evidence, because those cases rely on an interpretation of Fed. R. Crim. P. 16 (Rule 16). (Pet. 35.) As the State argued, Beyer identified no Wisconsin statutory equivalent to Rule 16 providing for discovery when the evidence is in “the government’s possession, custody, or control” and is “material to preparing the defense.” (Plaintiff-Respondent’s Br. 28); Fed. R. Crim. P. 16(a)(1)(E). The Constitution only compels the State to disclose evidence that is both favorable to the accused and material to guilt or punishment—a standard that is indisputably higher than Rule 16’s. *State v. Wayerski*, 2019 WI 11, ¶ 35, 385 Wis. 2d 344, 922 N.W.2d 468.

Beyer has not made even a minimal showing that he has a constitutional right to access evidence for a nontrial purpose, such as challenging a search. *Beyer*, 2024 WL 119337, ¶¶ 24–26. But even if he had, his case is not the case to explore the parameters of such rights. As the court of appeals recognized, even assuming a constitutional right of access exists, Beyer did not make the necessary showing

under his proffered standard that would have justified granting him access to the agent's computer. *Id.* ¶¶ 29–33.

Beyer relied on expert testimony to support his request for access to the agent's computer. As the State argued (Plaintiff-Respondent's Br. 29), his expert's testimony was speculative at best, focused on the "different possibilities" as to how the agent could have downloaded the video file that was not found during the subsequent search of Beyer's computer. (R. 66:39–52.) When pressed on the possibility that malware may have exploited Beyer's computer and manipulated files, the expert provided no evidence for that. (R. 66:47–48, 51.) "[G]iven the equivocal nature of [Beyer's expert]'s testimony regarding mere 'possibilities' regarding what information might be contained on the State's investigative computer, Beyer fail[ed] to establish a reasonable probability of a different outcome for his motion to suppress if he were given access to the computer." *Beyer*, 2024 WL 119337, ¶ 33.

While Beyer referenced the criminal discovery statute, Wis. Stat. § 971.23, in his petition, Beyer never developed an argument in the court of appeals that he was entitled to access the agent's computer under this statute. As the court of appeals observed, "Beyer does not base an argument on his statutory criminal discovery rights under WIS. STAT. § 971.23(1), which enumerates categories of materials that a district attorney must disclose to a defendant." *Beyer*, 2024 WL 119337, ¶ 19. By failing to develop an argument in the lower courts about the need to reconcile the State's statutory discovery obligations under section 971.23 with his rights under the Due Process Clause (Pet. 9), Beyer has forfeited this Court's review of his claim. *See* Wis. Stat. § (Rule) 809.62(2)(a) (requiring petitioner to identify "the method or manner of raising the issues in the court of appeals"); *Darryl T.-H. v. Margaret H.*, 2000 WI 42, ¶ 37 n.5,

234 Wis. 2d 606, 610 N.W.2d 475 (party forfeits review of issue “by failing to raise it before the court of appeals”).

Beyer is wrong when he argues that the lower court’s decision denying access allows the State to avoid scrutiny of the investigation that led to the search warrant’s issuance. (Pet. 9–10.) As the court of appeals observed, the State has a duty to prevent the destruction of apparently exculpatory evidence and may not act in bad faith to preserve potentially exculpatory evidence. *Beyer*, 2024 WL 119337, ¶ 33 n.13 (citing *Arizona v. Youngblood*, 488 U.S. 51 (1988); *State v. Weissinger*, 2014 WI App 73, 355 Wis. 2d 546, 851 N.W.2d 780). Beyer never developed an argument that he had a right of access under these cases. *Id.* A *Youngblood*-type claim is therefore waived, as well. But even if he had, the record would not have supported his claim, as his expert’s speculative testimony “merely demonstrate[d] the existence of various exculpatory possibilities for how the file shared from Beyer’s computer could have gotten there.” *Id.*

Finally, the court of appeals’ opinion does not conflict with controlling opinions of the United States Supreme Court or this Court. Wis. Stat. § (Rule) 809.62(1r)(d). Rather, the court of appeals’ resolution of Beyer’s case involved no more than the “application of well-settled principles” to his case’s facts. Wis. Stat. § (Rule) 809.62(1r)(c)1. As such, granting review will not advance this Court’s “law-declaring and developing function.” *State v. Schumacher*, 144 Wis. 2d 388, 406 & n.13, 424 N.W.2d 672 (1988); Wis. Stat. § (Rule) 809.62(1r).

CONCLUSION

This Court should deny Beyer's Petition for Review.

Dated this 16th day of February 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this petition or 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 1523 words.

Dated this 16th day of February 2024.

Electronically signed by:

Donald V. Latorraca
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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Supreme Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 16th day of February 2024.

Electronically signed by:

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