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CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
IN SUPREME COURT

No. 2023AP290-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TYLER J. CLARK,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

The State opposes the Petition for Review filed by Tyler J. Clark on March 10, 2024. Clark seeks review of the court of appeals' unpublished, per curiam opinion, affirming his conviction for one count of possession of child pornography and challenging the circuit court's denial of his two suppression motions. *State v. Clark*, No. 2023AP290-CR, 2025 WL 420271, ¶ 1 (Wis. Ct. App. Feb. 6, 2025) (unpublished). On appeal, Clark made two arguments that the court of appeals rejected: (1) the search warrant's "biometric" provision violated his Fifth Amendment rights against self-incrimination and his Fourth Amendment rights because it lacked particularity and was overbroad, and (2) the court erred in failing to suppress his "statement" reciting his passcode to his cellphone in front of an officer, after he invoked his right to counsel. *Id.* ¶ 1. This Court should deny the petition for review because Clark fails to meet the criteria of "special and important reasons" to support review. Wis. Stat. § (Rule) 809.62(1r)(c).

BACKGROUND

Charges, suppression motion and hearing. In 2019, a police investigation, based on information from the National Center for Missing and Exploited Children (NCMEC) that linked Clark to child pornography on a Tumblr account, confirmed that the images were associated with an IP address at Clark's residence, where he lived with his parents. *Clark*, 2025 WL 420271, ¶ 2. Police obtained a search warrant for the residence, Clark's person and vehicles, his parent's vehicles, and access to "biometric information"—finger and thumb prints and facial characteristics—to unlock any device found during execution of the warrant. *Id.* The warrant specifically authorized search and seizure of "[i]mages or visual depictions," and "documents in whatever format" evidencing "possible exploitation, sexual assault and/or enticement of

children,” and anything that “may constitute evidence” of possession of child pornography. *Id.* ¶ 3. Police executed the warrant, detained Clark, seized his cellphone, and turned it over to a digital forensic analyst, who accessed it using the passcode that Clark had provided and found a video file containing multiple child pornography images consistent with the Tumblr images. *Id.* ¶ 4. The State charged Clark with three counts of possession of child pornography. *Id.*

Clark filed two suppression motions. *Id.* ¶ 5. One challenged the warrant itself, contending that it violated his Fifth Amendment right against self-incrimination by allowing police to compel him to provide his biometric information and his Fourth Amendment rights because it “lacked particularity and was overbroad”; the other sought suppression of his “statement that he made after invoking his right to counsel”—reciting his cellphone passcode out loud “in the presence of police”—that he argued was an involuntary statement and the result of coercion *Id.* ¶¶ 5–6.

At the suppression hearing, Detective Mark Hull testified about the investigation of Clark: obtaining and executing the search warrant, taking Clark into custody, placing him first in the back of a squad car and then the detective’s car, reading him his rights, and interviewing him for 15-20 minutes. *Id.* ¶¶ 7–9. After Clark invoked his right to counsel, Hull stopped the interview and moved Clark back to the squad car while police searched his residence. *Id.* ¶¶ 9–10. Fifteen minutes later, Hull recontacted Clark, not to reinitiate the interview but to show him the search warrant and explain that it allowed police to compel him to unlock his cellphone using his fingerprint and facial recognition. *Id.* ¶¶ 10–11. In response to Clark’s question, Hull told him he did not have to provide his passcode. *Id.* ¶ 11. Clark requested his cellphone to contact his boss, and Hull gave it to him, staying close to Clark because the cellphone was “critical evidence.” *Id.* ¶ 11. Hull did not attempt to obtain Clark’s

passcode, thought Clark would use facial recognition to open his phone, and “had no belief” that Clark would “say a passcode.” *Id.* ¶ 11. However, as Clark entered his passcode, he said it “out loud” and when Hull repeated it incorrectly, Clark corrected him by saying the passcode out loud again; when Hull again repeated the passcode, the other officer wrote it down. *Id.* ¶ 12. Because Clark provided his passcode, police did not execute the biometric provision of the search warrant to access his phone. *Id.* ¶ 14. Hull explained that the search warrant authorized search of both Clark’s and his parent’s vehicles and allowed police to obtain biometric information from anyone at the residence where the IP address that was connected to the pornography was located, because police did not know where pornography would be found or who at the residence possessed it. *Id.* ¶ 15.

The circuit court denied Clark’s suppression motions. *Id.* ¶ 16. First, related to his challenge to the search warrant itself, the court determined that it did not need to address Clark’s challenge to the constitutionality of the biometrics provision, claiming that it violated his Fifth Amendment rights, because police did not execute that provision, no evidence was seized based on the provision, and the provision could be severed from the remainder of the warrant. *Id.* The court also concluded that the warrant did not violate Clark’s Fourth Amendment rights because it did not lack particularity and was not overbroad; rather, it properly allowed police to search all computers and devices at Clark’s residence with the IP address that was connected to the pornography, the language of the warrant “accurately describes child pornography,” and in any event, all the incriminating evidence was found on Clark’s cellphone and not on any computers or other devices, or in any vehicles at Clark’s residence. *Id.* ¶¶ 16–17.

Second, the court rejected Clark’s claim that the police obtained his passcode in violation of his constitutional rights,

concluding that although he was in custody when he said his passcode out loud, police were not interrogating him, “did not engage in the functional equivalent of an interrogation,” and did not coerce his statement. *Id.* ¶ 18. The court based its conclusions on Hull’s testimony that during his second contact with Clark to explain the warrant, including the biometric provision, he explicitly told Clark he did not have to provide his passcode and did not ask him for his passcode. *Id.* Therefore, based on Hull’s testimony, the court held that Clark’s statement saying his passcode out loud was “spontaneous” and “voluntary,” not coerced. *Id.*

Conviction and direct appeal. Clark pled guilty to one count of possession of child pornography, the other two counts were dismissed and read in, he was convicted and sentenced, and then appealed. *Id.* ¶ 19.

In its unpublished, per curiam decision, the court of appeals affirmed Clark’s convictions, rejecting Clark’s multiple arguments that the circuit court erred when it denied his motion to suppress. *Clark*, 2025 WL 420271, ¶ 1.

First, the court of appeals rejected Clark’s Fifth Amendment challenge to the search warrant’s biometric provision, alleging that the provision impermissibly allowed police to compel “testimonial information”: his fingerprints and facial characteristics that unlocked his cellphone. *Id.* ¶ 23. The court concluded that the warrant did not authorize police to compel Clark to provide his passcode and that Clark’s “challenge to the biometrics provision itself fails,” explaining that the circuit court correctly determined that the provision was never executed; moreover, even if it was unconstitutional, it was severable and therefore did not invalidate the remainder of the warrant, and Clark failed to specifically address severability or to develop an argument that the biometrics provision was not severable. *Id.* ¶¶ 23–26. Therefore, the court of appeals held that Clark failed to support his claim that the biometrics provision itself was

unconstitutional, demonstrate that “merely reading or showing him the biometrics provision rendered the provision unconstitutional,” or argue that the finding of fact that Clark recited his passcode voluntarily and spontaneously, without any coercion, was “clearly erroneous, nor does he show that the court’s legal conclusions are in error.” *Id.* ¶¶ 26–27.

Second, the court of appeals rejected Clark’s Fourth Amendment challenge to the warrant alleging that it lacked particularity and was overbroad, because it allowed police to obtain biometric information from individuals at the residence other than Clark, to search Clark’s parents’ vehicles, and to seize items without probable cause. *Id.* ¶ 31. The court determined that even if the provisions authorizing obtaining biometric information from his parents and searching their vehicles were overbroad, neither provision was executed and both were severable from the rest of the warrant. *Id.* ¶¶ 33–34. The court rejected Clark’s arguments that severability did not apply and that there was not a “fair probability” that evidence of child pornography would be found because they were undeveloped. *Id.* ¶¶ 35–36. The court also concluded that Clark failed to show that the warrant lacked particularity because it allowed police to search for and seize evidence without probable cause and that went “far beyond simply child pornography.” *Id.* ¶¶ 37–38.

Third, the court of appeals rejected Clark’s claim that the police violated his Fifth and Sixth Amendment rights by “continuing interrogation after Clarke [in]voked his right to counsel” and “compel[ling] Clark’s statement reciting his passcode,” concluding that he failed to show that when Hull “reinitiated contact” with him, this was “the functional equivalent of interrogation.” *Id.* ¶¶ 39, 44–49. The court again determined that Clark’s arguments were undeveloped and that he failed to show that the circuit court’s factual findings that Clark provided his passcode spontaneously and Hull did not compel him to provide it were “clearly erroneous,”

particularly because Hull testified that he and other law enforcement “did not ask him to do so and explicitly told him more than once that he did not have to.” *Id.* ¶¶ 45–48. Because the circuit court’s findings of fact were not “clearly erroneous” and Clark failed “to make a persuasive argument to the contrary,” the court of appeals held “that police were not interrogating Clark, nor was there the ‘functional equivalent’ of an interrogation, when Clark stated his passcode.” *Id.* ¶ 49.

Finally, the court of appeals rejected Clark’s claim that his statement providing his passcode was “involuntary” and “procured by coercive police conduct, in violation of his right to due process.” *Id.* ¶ 50. The court held that this claim was unsupported by any legal authority and rejected Clark’s argument that Hull “somehow compelled Clark’s recitation of his passcode.” *Id.* ¶¶ 55–56. Clark’s claim ignored the circuit court’s factual findings about the context of Clark reciting his passcode, did not show or even argue that the factual findings were clearly erroneous, and did not provide any authority to support his coercion argument; therefore, the court concluded that Clark “fail[ed] to provide a basis for us to disturb the [circuit] court’s conclusions” based on its findings of fact, police did not coerce Clark to provide his passcode, and his “recitation of his passcode was voluntary.” *Id.* ¶ 56.

DISCUSSION

In his petition for review, Clark contends that this Court should grant review of the court of appeals’ decision on what he characterizes as “five issues”: (1) whether the search warrant violated the Fourth Amendment because it was “overbroad”; (2) whether the search warrant violated the Fourth Amendment because it contained “unparticular provisions”; (3) whether his Fifth Amendment right against self-incrimination was violated by the search warrant’s “provision compelling biometric information”; (4) whether his Fifth Amendment right to remain silent was violated by the

officer “reinitiating contact with him” and “having Clark provide his passcode”; and (5) whether his “utterance of his passcode” was “a voluntary statement under the Fourth Amendment.” (Pet. 6.) This Court should deny Clark’s petition because he fails to meet the criteria for review in Wis. Stat. § (Rule) 809.62(1r). Clark is not entitled to review of any of these issues stemming from the court of appeals’ decision affirming his conviction for possession of child pornography and rejecting his challenges to the warrant’s biometric provision and the circuit court’s order denying suppression, for several reasons.

First, the court of appeals’ unpublished, per curiam opinion has no precedential value and cannot be cited for persuasive value in the courts of this state. Wis. Stat. § (Rule) 809.23(3).

Second, Clark does not satisfy the requirement of “special and important reasons” for review based on the statutory criteria. Wis. Stat. § (Rule) 809.62(1r).

Third, Clark’s petition does not contain a “concise statement of the criteria” or “a concise statement of other substantial and compelling reasons for review.” Wis. Stat. § (Rule) 809.62(2)(c). In his “Criteria for Review” section, Clark broadly contends that his petition meets the criteria for review “for four main reasons”: the issues are “real and significant questions” of constitutional law; this Court’s decision “will help develop, clarify and harmonize the law” because the issues “are novel” and have “statewide impact”; the issues “are not factual in nature but are questions of law of the type likely to recur unless resolved by this Court”; and the court of appeals decision is “truncated and did not comprehensively analyze the biometric provision of the warrant.” (Pet. 8.) Clark’s recitation of the statutory criteria and blanket assertions that his petition meets the criteria are not concise and fail to demonstrate meaningful reasons that support review by this Court on any of the stated criteria.

Clark's petition fails to meet any of the criteria he contends support review. He claims that review is warranted by a "real and significant" constitutional issue and therefore meets the criteria in Wis. Stat. § (Rule) 809.62(1r)(a), and because the decision is "truncated and did not comprehensively analyze the biometric provision of the warrant." (Pet. 8.) He contends that the court of appeals should have addressed the constitutionality of the biometric provision, arguing that it violated his Fifth Amendment right against self-incrimination by compelling him to provide incriminating information, and that the court's conclusion that the search warrant did not compel him to provide his passcode, but rather his biometric information to unlock the phone, was "a distinction without significance." (Pet. 16.) He argues that the court of appeals' decision should have addressed whether the biometric provision is unconstitutional and that the court erred when it determined that it did not have to reach the issue of the provision's constitutionality because it was not executed and could be severed from the rest of the warrant. (Pet. 16–18.) In support, he disputes the court's factual findings that police did not compel Clark to state his passcode out loud, arguing at length the merits of whether the biometrics provisions compelled "testimonial" information. (Pet. 18–22.) But rather than demonstrating a constitutional issue, Clark argues that the court of appeals erred when it concluded based on the specific facts of this case, it did not need to address the merits of the constitutionality of the biometric provision because the provision was not executed and was severable from the remainder of the warrant that resulted in finding the child pornography in Clark's possession. Clark fails to show that this Court should review the merits of the constitutionality of the biometrics provision, because this was not the basis for the court of appeals' decision affirming the order denying suppression. His contention that the court of appeals erred does not meet the criteria for review by this Court.

Clark also fails to show that a decision “will help develop, clarify and harmonize the law” and that the issue is “novel” and has “statewide impact,” or is “not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by [this Court].” Wis. Stat. § (Rule) 809.62(1r)(c). Clark shows no need to resolve a conflict in the law or to clarify the law. Rather, he seeks review of the fact-specific issue of whether the search warrant in this particular case was “overbroad” or “lacked particularity,” based on the provisions authorizing police to obtain biometric information, search all cellphones and computers found at the residence, and search both his vehicle and his parents’ vehicles, because they lived at the same residence where the IP address was located that was connected to the child pornography. (Pet. 22–23.) Clark asks this court to review the court of appeal’s application of the “Severability Doctrine” to uphold the warrant, arguing without support that the doctrine was “not appropriate in this case.” (Pet. 28–30.) He contends that what he characterizes as the “generic and overbroad” description of items to be searched resulted in the warrant being “used to rummage through Clark’s personal belongings,” that the “exclusionary rule” does not apply because the “entire warrant is invalid” for lack of particularity, and that “the good faith exception does not apply” to his claim that the warrant violated the Fourth Amendment for lack of particularity and overbreadth. (Pet. 28–34.) But the court of appeals decision did not rely on either the exclusionary rule or the good faith exception and therefore, review on this basis is unsupported. Moreover, Clark fails to show that this Court should review the court of appeals’ decision that the specific warrant in this case describing the items for police to search and allowing search of his parents’ devices and vehicles was not overbroad and that even if the biometrics provision was unconstitutional, the warrant passed constitutional muster because the provision was not executed and was severable. The court of appeals

affirmed the order denying suppression based on the unique facts and circumstances of this case. Clark's petition asking this Court to review whether this particular warrant was constitutionally overbroad or lacked particularity fails to show that the issues related to this specific warrant demonstrate a need to develop, clarify or harmonize the law, or that the issues are not highly factual in nature and present a question of law that is likely to recur. Wis. Stat. § (Rule) 809.62(1r)(c).

Clark also seeks review of the court of appeals' decision that his constitutional rights were not violated, based on his claim that police continued to interrogate him after he invoked his right to counsel and that his statement reciting his passcode out loud was not voluntary and spontaneous. (Pet. 34–41.) He uses the petition to take issue with the circuit court's findings of fact and credibility determinations based on Hull's testimony, insisting that Hull's testimony was "unreliable," Hull's "intention for reinitiating contact was to have Clark unlock the iPhone," Hull's testimony that he allowed Clark to contact his employer "was not true," his testimony that he did not expect Clark to recite his pass out loud was "unreasonable," and that "from [Clark's] perspective" he was compelled to unlock his phone, "so he did so" by saying his passcode out loud. (Pet. 34–37.) Clark also contends that his "incriminating statement" of saying his passcode out loud was "procured" by Hull "by coercive means" and that Hull "improperly pressured Clark," making his statement providing the passcode "coerced" and "involuntary." (Pet. 38–42.) Clark's contention that he is entitled to review of whether his statement of his passcode was involuntary or the result of coercion is an attempt to challenge the court's findings of fact and credibility determinations based on Hull's testimony, which are not appropriate for review. The court of appeals accepted the circuit court's findings of fact and applied well-settled law

related to the voluntariness of Clark's statement of his cellphone passcode and whether there was "coercion" under this particular set of facts and circumstances, concluding that Clark "fail[ed] to provide a basis for us to disturb the court's conclusions" that police did not interrogate or coerce Clark and that his "recitation of his passcode was voluntary." *Clark*, 2025 WL 420271, ¶¶51–56. Hull's argument that, under the particular facts of this case, his statement was coerced and involuntary, fails to flesh out a significant constitutional issue, a need for this Court to change a policy within its authority, or to develop, clarify or harmonize the law related to a new doctrine, a novel question, or a question that is not factual in nature. Wis. Stat. § (Rule) 809.62(1r)(c).

At bottom, Clark argues that the court of appeals erred when it concluded that the circuit court correctly denied suppression, applying the court's factual findings to well-settled law. This Court should not accept review of whether the court of appeals erred, because this is not an error-correcting court. *See State v. Minued*, 141 Wis. 2d 325, 328, 415 N.W.2d 515 (1987).

In sum, Clark's petition does not satisfy any of the criteria for review in Wis. Stat. § (Rule) 809.62(1r). Moreover, the court of appeals' decision was a correct application of well-established law. This Court should deny the petition for review.

Dated this 20th day of March 2025.

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 3,442 words.

Dated this 20th day of March 2025.

Electronically signed by:

Anne C. Murphy
ANNE C. MURPHY
Assistant Attorney General

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 Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants

Dated this 20th day of March 2025.

Electronically signed by:

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