STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2023AP2319-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MICHAEL JOSEPH GASPER,

Defendant-Respondent-Petitioner.

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

Michael Joseph Gasper petitions this Court for review after the court of appeals reversed the circuit court's order granting his motion to suppress. *See State v. Gasper*, No. 2023AP2319-CR, 2024 WL 4615609 (Wis. Ct. App. Oct. 30, 2024) (recommended for publication). (Pet-App. 4–18).[1] Although the court of appeals issued a decision regarding an issue of first impression, this Court's review is not warranted. The decision is carefully limited to its facts, Gasper relies on meritless arguments that would not promote law development, and multiple, alternative avenues to affirm the court of appeals exist. This Court should therefore deny his petition for review.

BACKGROUND

The circuit court suppressed a video depicting child sexual abuse material (CSAM) that Snapchat[2] found in Gasper's Snapchat account and other CSAM files found on his phone following a search of his home pursuant to a warrant. *Gasper*, 2024 WL 4615609, ¶ 7.

Snapchat detected the CSAM video in Gasper's Snapchat account after scanning the account with Microsoft's PhotoDNA program. *Id.* ¶ 2. Snapchat reported the video to the National Center for Missing and Exploited Children (NCMEC) as required by federal law. *Id.* ¶ 2 & n.2. NCMEC, in turn, traced the IP address of Gasper's account to Wisconsin, generated a CyberTip report regarding the flagged video, and sent the CyberTip and the video to the Wisconsin

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[1] The State cites to the electronically stamped page numbers of Gasper's Appendix.

[2] Snapchat is a social media platform where users can "share text, photographs, and video recordings, collectively known as 'snaps.'" *Commonwealth v. Carrasquillo*, 179 N.E.3d 1104, 1109 (Mass. 2022).

Department of Justice. *Id.* ¶¶ 2–3. No one with Snapchat or NCMEC opened the flagged video. *Id.* ¶ 2.

Detective David Schroeder reviewed the CyberTip and opened the attached video. *Id.* ¶ 4. After confirming that the video constituted child pornography under state law, he prepared and executed a search warrant for Gasper's home and electronic devices. *Id.* Police found additional CSAM files on Gasper's personal devices. *Id.* The State subsequently charged Gasper with 10 counts of possessing child pornography and 9 counts of sexual exploitation of a child. *Id.* ¶ 5 & n.5.

Gasper moved to suppress all recovered child pornography files. *Id.* ¶ 5. He argued that Detective Schroeder unlawfully opened the flagged Snapchat video attached to the CyberTip without a warrant or exception and that the other child pornography evidence should be suppressed as fruit of the poisonous tree. *Id.*

The circuit court held a suppression hearing in which Detective Schroeder was the lone witness to testify. *Id.* ¶ 6. "The State submitted into evidence Snapchat policies and guidelines that govern a user's use of Snapchat and that all users, including Gasper, must agree to upon creating a Snapchat account." *Id.* "These policies banned child pornography and informed users that Snapchat was actively scanning for child pornography and that Snapchat will report discovery of the same to NCMEC and law enforcement." *Id.*

The circuit court granted Gasper's suppression motion. It ruled, in relevant part, that Gasper had a reasonable expectation of privacy in the Snapchat video because he used a cell phone to access Snapchat, citing *Riley v. California*, 573 U.S. 373 (2014) and *Carpenter v. United States*, 585 U.S. 296 (2018). *Gasper*, 2024 WL 4615609, ¶ 7.

The State appealed, and the court of appeals reversed. It held that Gasper did not have a reasonable expectation of privacy in the CSAM video. *Gasper*, 2024 WL 4615609, ¶¶ 1, 8. It rejected the circuit court's reliance on *Riley* and *Carpenter* because Snapchat did not search Gasper's phone or any of his other electronic devices. *Id.* ¶ 15. Rather, consistent with *State v. Bowers*, 2023 WI App 4, 405 Wis. 2d 716, 985 N.W.2d 123 (2022), the relevant "area" to evaluate was Gasper's Snapchat account. *Gasper*, 2024 WL 4615609, ¶ 12.

The court of appeals concluded that Gasper failed to establish either a subjective or objective expectation of privacy in the CSAM video in his Snapchat account. As for the subjective expectation of privacy, Gasper failed to offer any admissible evidence to show that he believed the video in his account was private. *Id.* ¶ 20. But even if he had, that subjective expectation of privacy would have been objectively unreasonable in light of Snapchat's policies. *Id.* ¶¶ 21–22.

Snapchat's Terms of Service barred users from violating the law or Snapchat's content guidelines as set forth in Snapchat's Community Guidelines. *Id.* ¶ 17. Snapchat users authorized Snapchat to "access, review, screen, and delete [their] content at any time and for any reason." *Id.* (alteration in original). Users further acknowledged that Snapchat "reserve[s] the right to remove any offending content" and to "notify third parties—including law enforcement—and provide those third parties with information relating to your account." *Id.* (alteration in original). The Terms of Service contained multiple hyperlinks to the Community Guidelines. *Id.*

The Community Guidelines specifically prohibited "any activity that involves sexual exploitation or abuse of a minor." *Id.* ¶ 18. The Guidelines advised users that Snapchat would "report all instances of child sexual exploitation." *Id.* The Community Guidelines referred users to the Sexual Content

Explainer for more information about this particular content prohibition. *Id.*

"The Sexual Content Explainer restates Snapchat's prohibition on any content or activity related to the sexual exploitation of a child." *Id.* ¶ 19. An ensuing paragraph notifies users that Snapchat scans accounts for CSAM and reports it to NCMEC, just as it did with Gasper:

> Preventing, detecting, and eradicating Child Sexual Abuse Material (CSAM) on our platform is a top priority for us, and we continuously evolve our capabilities to address CSAM and other types of child sexually exploitative content. We report violations of these policies to [NCMEC], as required by law. NCMEC then, in turn, coordinates with domestic or international law enforcement, as required.

Gasper, 2024 WL 4615609, ¶ 19 (alteration in original).

These policies "regarding sexual content in general and sexually explicit content involving children in particular" precluded Gasper from demonstrating an objectively reasonable expectation of privacy in the CSAM video in his account. *Id.* ¶ 22. While this issue was novel in Wisconsin, the court of appeals observed that its decision was consistent with four decisions from federal district courts. *Id.* ¶¶ 25–27.

Because the court of appeals determined that Gasper lacked a reasonable expectation of privacy, it did not reach the State's two other reasons for reversing: (1) the application of the private party search doctrine; and (2) the application of the good faith exception to the exclusionary rule. *Id.* ¶ 29 & n.8.

Gasper now petitions for review.

ARGUMENT

Gasper argues primarily that the novelty of the issue addressed by the court of appeals presents this Court a real and significant question of constitutional law and an opportunity to develop, clarify, and harmonize the law on a statewide level. (Gasper's Pet. 13); *see* Wis. Stat. § (Rule) 809.62(1r)(a), (c)2.–3. In addition, he argues that his petition raises a question regarding policy pursuant to Wis. Stat. § (Rule) 809.62(1r)(b), and that the court of appeals' decision runs contrary to two decisions from the U.S. Supreme Court and one decision from the Second Circuit pursuant to Wis. Stat. § (Rule) 809.62(1r)(d). (Gasper's Pet. 13, 18, 26.) These justifications are unavailing.

While the court of appeals issued a novel decision, Gasper overlooks the fact-intensive nature of that decision. The court of appeals' decision is narrowly tailored to its specific facts, limiting the case's law-developing potential. For the same reason, Gasper overstates the degree to which his petition presents a real and significant question of constitutional law.

Gasper's remaining contentions regarding this Court's review are meritless. As explained below, the court of appeals' decision is squarely consistent with U.S. Supreme Court precedent and not even clearly inconsistent with the Second Circuit decision cited by Gasper. Gasper's petition does not implicate a policy within the "authority" of this Court as Wis. Stat. § (Rule) 809.62(1r)(b).

In short, the novelty of the court of appeals' decision does not justify this Court's review for four reasons. First, the decision is confined to its facts. Second, Gasper relies on a meritless legal argument. Third, even if Gasper could show that he had an objectively reasonable expectation of privacy, he cannot establish a subjective expectation of privacy. Fourth, even if this Court accepted review and determined

that the court of appeals' reasoning is flawed, this Court would still be obligated to address other issues without the benefit of a decision from the court of appeals. For these reasons, this Court should deny review.

A. The court of appeals issued a fact-specific decision, limiting this Court's opportunity for law development.

This Court's "primary function is that of law defining and law development." *Cook v. Cook*, 208 Wis. 2d 166, 188–89, 560 N.W.2d 246 (1997). It does not grant review "merely to correct error or to examine alleged error." *Vollmer v. Luety*, 156 Wis. 2d 1, 14, 456 N.W.2d 797 (1990). Rather, this Court grants review "because the alleged error in issue has some substantial significance in our institutional law-making responsibility as set forth in the statute and constitution and as reflected in our rules for accepting cases on petition for review." *Id.* (footnote omitted). The criteria weigh against review when the question is factual rather than legal in nature. Wis. Stat. § (Rule) 809.62(1r)(c)3.

Gasper's petition presents a fact-intensive issue not suitable for law development. The court of appeals' decision turned specifically on three policies to which Gasper assented upon creating his Snapchat account: the Terms of Service, the Community Guidelines, and the Sexual Content Explainer. *Gasper*, 2024 WL 4615609, ¶¶ 17–19. The court of appeals walked through each document carefully, demonstrating how the documents became more specific and targeted toward Gasper's particular conduct. The Terms of Service informed users that their accounts would be monitored and that they had to comply with the law and Snapchat policies. *Id.* ¶ 17. The Community Guidelines specifically prohibited any activity involving CSAM and alerted users that all discovered CSAM would be reported. *Id.* ¶ 18. The Sexual Content Explainer restated that prohibition and expressly advised

users that Snapchat would be scanning for CSAM and reporting any found CSAM to NCMEC—just as it did with Gasper's account. *Id.* ¶ 19.

These three policies, in tandem, advised Gasper that his particular conduct was prohibited and would be reported to NCMEC. Therefore, as the court of appeals put it, any subjective expectation of privacy was "objectively unreasonable given Snapchat's policies regarding sexual content in general and sexually explicit content involving children in particular." *Gasper*, 2024 WL 4615609, ¶ 22. This holding necessarily turned on Snapchat's three policies as applied to Gasper, limiting its application to other contexts and its capacity to develop the law.

The fact-intensive nature of the decision is illustrated by *United States v. Maher*, 120 F.4th 297 (2d Cir. 2024), issued the same day as the court of appeals' decision. Gasper relies on *Maher* because it determined that the defendant had a reasonable expectation of privacy in the CSAM found in his Google account and that Google's terms and policies did not render that expectation objectively unreasonable. *Id.* at 307–09.

Google's policies in *Maher*, however, are noticeably less specific and more equivocal than those in Gasper's case. Google's Terms of Service stated that Google "'may' report 'illegal content' to 'appropriate authorities.'" *Id.* at 307 (citation omitted). This generic statement about addressing illegal content is a far cry from Snapchat's Sexual Content Explainer, which calls the eradication of CSAM, specifically, a "top priority" and informs users that Snapchat will report CSAM to NCMEC. *Gasper*, 2024 WL 4615609, ¶ 19. Google's policies in *Maher* disclaimed its oversight capabilities, informing users "that it 'does not necessarily . . . review content'" and further instructing, "*please don't assume that we do*." *Maher*, 120 F.4th at 308–09 (alteration in original) (citation omitted). Snapchat's Community Guidelines, on the

other hand, state that it will "report all instances of child sexual exploitation to authorities." *Gasper*, 2024 WL 4615609, ¶ 18. The Sexual Content Explainer adds that Snapchat "continuously evolve[s] [its] capabilities to address CSAM." *Id.* ¶ 19.

In this light, *Maher* and the court of appeals' decision do not conflict. The two cases dealt with two different electronic service providers and two different sets of policies. In fact, *Maher* expressly declined to "draw any categorical conclusions about how terms of service affect a user's expectation of privacy," limiting its holding to the facts of "Google's particular Terms of Service." *Maher*, 120 F.4th at 308. *Maher*, thus, underscores the fact-specific nature of Gasper's petition that limits its potential for law development.

Accordingly, the novelty of the decision does not provide this Court an opportunity to expound on a real and significant question of constitutional law, Wis. Stat. § (Rule) 809.62(1r)(a), or an opportunity for law development, Wis. Stat. § (Rule) 809.62(1r)(c)3. In addition, the decision is not in conflict with *Maher*. Wis. Stat. § (Rule) 809.62(1r)(d).

B. Gasper relies on a patently meritless legal position that would not serve this Court's law development purpose.

The law-developing potential of Gasper's petition is further limited by Gasper's insistence on making a patently meritless argument.

Gasper continues to argue that he had a categorical reasonable expectation of privacy pursuant to *Riley* and *Carpenter* because he accessed Snapchat on his cell phone. (Gasper's Pet. 17–24.) The court of appeals had little difficulty dispatching this argument because "Snapchat scanned the data held on its own servers and identified the child pornography video in Gasper's account without accessing any

of his devices." *Gasper*, 2024 WL 4615609, ¶ 15. In reaching this conclusion, the court of appeals relied on its prior decision in *State v. Bowers*, 2023 WI App 4, 405 Wis. 2d 716, 985 N.W.2d 123. *See Gasper*, 2024 WL 4615609, ¶¶ 12–14. In *Bowers*, the court of appeals rejected the State's attempt to circumvent the defendant's reasonable expectation of privacy in a digital storage account by arguing that he accessed it with a county government email address. *Bowers*, 405 Wis. 2d 716, ¶¶ 22, 42. As the court of appeals recognized, *Bowers* held that the "relevant 'area'" was the account, not the device used to access it. *Gasper*, 2024 WL 4615609, ¶ 14 (quoting *Bowers*, 405 Wis. 2d 716, ¶¶ 17, 20, 40). The decision in *Bowers* is plainly consistent with *Riley* and *Carpenter*, obviating the need for this Court's review. Wis. Stat. § (Rule) 809.62(1r)(d).

Bowers's holding regarding the relevant "area" is not controversial. The State did not petition for review from it. The defendant in *Maher*—the Second Circuit case that Gasper now cites favorably—did not attempt to make Gasper's convoluted *Riley* and *Carpenter* argument. *See Maher*, 120 F.4th at 307–09. It does not appear that any other defendant has made this argument. Gasper has certainly not provided any examples. (Gasper's Pet. 17–24.) Indeed, in all cases, the parties appear to have agreed that the relevant "area" is the account or files at issue, not the device used to access it. *See, e.g.*, *United States v. Ackerman*, 831 F.3d 1292, 1305 (10th Cir. 2016) (opinion of Gorsuch, J.) (flagging for consideration on remand whether the defendant "had a reasonable expectation of privacy in his email"); *United States v. Reddick*, 900 F.3d 636, 638 n.1 (5th Cir. 2018) (assuming without deciding that the defendant "had a legitimate expectation of privacy in the computer files at issue"); *United States v. Miller*, 982 F.3d 412, 426 (6th Cir. 2020) ("Did Miller have a reasonable expectation of privacy in his Gmail account?"); *United States v. Bebris*, 4 F.4th 551, 562 (7th Cir. 2021) (observing that it did not need to decide "whether

Bebris had a reasonable expectation of privacy in his Facebook messages").

This Court's capacity to develop the law by accepting this case would be invariably hamstrung by Gasper's persistence in ignoring the relevant "area" for the purpose of the reasonable expectation of privacy analysis. *Maher* suggests that reasonable minds may disagree with the court of appeals' decision. But because Gasper has consistently failed put forth a reasonable argument to oppose the court of appeals' reasoning, his petition provides a poor vehicle for developing the law.

C. Even if this Court reversed the court of appeals' decision on the objective expectation of privacy issue, Gasper cannot demonstrate his subjective expectation of privacy.

This Court should also deny review because this Court would invariably affirm, even if it disagreed with the court of appeals' conclusion that Gasper lacked an objective expectation of privacy. Gasper cannot prove that he had a subjective expectation of privacy, as he must to prevail.

To trigger the application of the Fourth Amendment, a defendant must show both a subjective and objective expectation of privacy. *State v. Baric,* 2018 WI App 63, ¶ 17, 384 Wis. 2d 359, 919 N.W.2d 221. Failure on either prong dooms the defendant's motion to suppress. *Id.* ¶ 18 n.5.

In the present case, the court of appeals concluded that Gasper failed to establish either a subjective or objective expectation of privacy. *Gasper*, 2024 WL 4615609, ¶¶ 20–21. The court of appeals dispatched Gasper's subjective expectation of privacy in one paragraph, observing that "Gasper did not testify, nor did he submit any admissible evidence to meet his burden to show that he believed the video downloaded on Snapchat was private." *Id.* ¶ 20. In footnote 7,

the court of appeals noted that, "[w]hile Gasper submitted an affidavit, the circuit court ruled that it was inadmissible. Gasper does not challenge that ruling on appeal, and, thus, has abandoned any effort to rely on the affidavit." *Id.* ¶ 20 n.7. All that Gasper arguably offered in support of a subjective expectation of privacy came from the affidavit in support of the search warrant, which noted that Gasper's home Wi-Fi network was password protected. *Id.* ¶ 20.

On this record, Gasper cannot hope to establish a subjective expectation of privacy. The fact that he had a password-protected Wi-Fi network, standing alone, is far too attenuated from his Snapchat account to establish a subjective expectation of privacy. He has no other evidence on which to rely. Thus, if this Court accepted review, it may not even reach the objective expectation of privacy question. Since this Court usually decides cases on the narrowest possible grounds and declines to reach non-dispositive issues, *Maryland Arms Ltd. P'ship v. Connell*, 2010 WI 64, ¶ 48, 326 Wis. 2d 300, 786 N.W.2d 15, this Court could easily opt to affirm based on Gasper's inability to prove his subjective expectation of privacy.

Gasper's argument in support of a subjective expectation of privacy depends entirely on this Court ignoring the court of appeals' opinion. He asserts that his affidavit established his subjective expectation of privacy. (Gasper's Pet. 19.) He does not acknowledge the circuit court's ruling excluding it from evidence or the court of appeals' determination that he abandoned any attempt to challenge that evidentiary ruling. (Gasper's Pet. 19.) He further ignores the portion of his Appendix containing the circuit court's evidentiary ruling. (Pet-App. 180–86.) If Gasper has pinned his hope of establishing a subjective expectation of privacy on a brazen misrepresentation of the record, then he cannot possibly succeed. This Court should decline to give Gasper a forum in which he can rely on an inadmissible affidavit that

the court of appeals deemed abandoned. *See Gasper*, 2024 WL 4615609, ¶ 20 n.7.

Because Gasper cannot prove his subjective expectation of privacy on the existing record, his petition provides a poor vehicle to address whether he had an objective expectation of privacy. On this additional basis, this Court should deny review.

D. Even if this Court were to reverse the court of appeals, it would still be required to address other issues without the benefit of a court of appeals decision.

Finally, this Court should decline review because reversing the court of appeals would require this Court to resolve two other issues not addressed by the court of appeals.

The State advanced three grounds for reversing the circuit court's suppression order: (1) Gasper lacked a reasonable expectation of privacy; (2) the private party search doctrine applied to the warrantless opening of the video in the Cyber Tip; and (3) the good faith exception to the exclusionary rule applied. By deciding the appeal on the first issue, the court of appeals did not have to reach the other two issues. *Gasper*, 2024 WL 4615609, ¶ 29 n.8.

If this Court were to reverse the court of appeals' decision, the State would argue that this Court should still affirm the court of appeals' result based on one of these two alternative bases. This Court would be better served by declining this opportunity to address either issue.

Admittedly, the private-search doctrine argument presents an issue of first impression that has divided the federal appellate courts when neither the reporting electronic service provider nor NCMEC viewed the CSAM before forwarding it to law enforcement. *Compare Reddick*, 900 F.3d at 639 (applying the doctrine); *Miller*, 982 F.3d at 430 (same); *with United States v. Wilson*, 13 F.4th 961, 974–76 (9th Cir.

2021) (rejecting the doctrine); *Maher*, 120 F.4th at 314 (same). In the same circumstances, published state court decisions have universally followed *Reddick* and *Miller*. *See Walker v. State*, 669 S.W.3d 243, 252–55 & n.8 (Ark. Ct. App. 2023); *People v. Wilson*, 270 Cal. Rptr. 3d 200, 220–25 (Cal. Ct. App. 2020), *cert. denied* 142 S. Ct. 751 (2022); *Morales v. State*, 274 So.3d 1213, 1217–18 (Fla. Dist. Ct. App. 2019). The State maintains that its arguments consistent with *Reddick*, *Miller*, and all other state courts to address the issue are more persuasive than those relied upon in *Wilson* and *Maher*.

In any event, the dispute among the federal appellate courts weighs in favor of denying the petition. This Court would be better served by a petition arising from a court of appeals decision that actually addressed the private-search doctrine. Given the fact-intensive nature of the reasonable expectation of privacy analysis, the court of appeals will eventually address the issue in a different case. Moreover, the United States may very well seek and obtain *certiorari* in *Maher* now that a genuine circuit split exists. This Court would benefit from further percolation of this issue in the Wisconsin Court of Appeals and in other courts before accepting review of it.

Even if this Court addressed the private-search doctrine and ruled in Gasper's favor, this Court would surely affirm the court of appeals' result based on the good faith exception. When Detective Schroeder executed the search warrant at Gasper's home in reliance on the video from the CyberTip, all published authority except for *Wilson* held that his warrantless viewing of the video was lawful. Given the silence of Wisconsin law and the clear weight of authority from other jurisdictions, it was reasonable for Detective Schroeder to apply for a search warrant based on viewing the video and for the issuing authority to grant it. *See State v. Scull*, 2015 WI 22, ¶ 30, 361 Wis. 2d 288, 862 N.W.2d 562 ("Given the precedent, the commissioner's decision to grant

the warrant appears to be a reasonable application of the unsettled law at the time the warrant issued."). Even *Maher* ultimately concluded that the good faith exception applied given the weight of authority at the time that the officer obtained the search warrant. *See Maher*, 120 F.4th at 321–23.

Thus, it would be prudent for this Court to decline Gasper's petition to avoid having to address the other two issues raised by the State in support of reversing the circuit court.

CONCLUSION

This Court should deny Gasper's petition for review.

Dated: December 10, 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 3949 words.

Dated: December 10, 2024

Electronically signed by:

Michael J. Conway
MICHAEL J. CONWAY
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 who are registered users.

Dated: December 10, 2024

Electronically signed by:

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