STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2012AP1818-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RAMON GONZALEZ,

Defendant-Appellant-Petitioner.

On Petition for Review of a Court of Appeals Decision Affirming a Judgment of Conviction Entered in the Milwaukee County Circuit Court, the Honorable William W. Brash III, Presiding, and an Order Denying Postconviction Relief, the Honorable David A. Hansher, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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ISSUE PRESENTED

Whether Ordering a Defendant to Open His Mouth and Reveal His Platinum Teeth to the Jury, Despite the Assertion of His Right Not to Testify, Violates the Constitutional Right Against Self-Incrimination?

The postconviction court denied relief, and the court of appeals affirmed.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court's decision to grant review indicates that this case presents an issue of statewide concern, meriting both oral argument and publication.

STATEMENT OF THE CASE AND FACTS

In September 2006, a fight broke out among several inmates on a "pod," or housing unit, in the Milwaukee County Jail.[1] Frederick Brown was attacked in his cell, resulting in a fight that spilled out into a common area. Ramon Gonzalez was alleged to have participated in the fight, and the State charged him, along with Emmanuel Martinez, with one count of battery by a prisoner as a party to a crime, contrary to Wis. Stat. §§940.20 and 939.05. (2:2).

Gonzalez and Martinez were jointly tried in June 2008 before a jury, the Honorable William W. Brash III presiding. The central issue at trial was who participated in the attack on Brown. (57:94-101). The State called several witnesses, including Brown and Detective Kenneth Mohr, who spoke with Brown in the infirmary several hours after the fight.

[1] The Milwaukee County Jail is also known as the Criminal Justice Facility, or C.J.F. (58:27).

(58:69-103; 60:13-34; App. 118-139). A surveillance tape showing portions of the fight was also played. (59:45-58).

Brown, a reluctant witness, testified he had no specific recollection of Ramon Gonzalez being involved in the attack, although he identified Gonzalez in court as a fellow inmate who he knew as "Platinum" because of his platinum teeth. (58:91-92, 97). During Detective Mohr's testimony regarding statements that Brown made to him identifying his attackers, the trial court ordered Mr. Gonzalez to open his mouth and display his platinum teeth to the jury, at the State's request and over defense objection. (60:32-33; App. 137-138).

Ramon Gonzalez invoked his Fifth Amendment right against self-incrimination and did not testify, and the defense presented no witnesses. (59:90-95).

The jury returned guilty verdicts for both Gonzalez and Martinez, and the court sentenced Mr. Gonzalez to a five-year prison term. (61:55-58; 62:26; App. 116-117).

Mr. Gonzalez filed a postconviction motion seeking a new trial on several grounds, including that the trial court's order to display his teeth to the jury violated his right against self-incrimination under the Fifth Amendment of the United States Constitution and Article I, Section 8 of the Wisconsin Constitution, and that requiring him to reveal his "fierce-looking" teeth to the jury was unfairly prejudicial. (44). The postconviction court, the Honorable David A. Hansher, denied the motion, and Gonzalez appealed. The court of appeals affirmed in an unpublished decision. ***State v. Gonzalez***, No. 2012AP1818-CR, slip op. (WI App July 23, 2013); (App. 101-114). Regarding the challenge to the trial court's order that Mr. Gonzalez reveal his teeth to the jury, the court of appeals held that this was not testimonial, but rather a showing of physical evidence that did not implicate the Fifth Amendment. ***Id.,*** ¶20; (App. 107). The court of appeals also rejected Mr. Gonzalez's argument that the forced display of his dental work unfairly prejudiced him because platinum teeth are commonly associated with drug dealing

and gang affiliation, finding any such association harmless "in view of Gonzalez's obvious status as a convicted person." ***Id.,*** ¶21; (App. 107).

Mr. Gonzalez's petition for review asked this Court to address whether ordering a non-testifying defendant to open his mouth and reveal his platinum teeth to the jury violates his Fifth Amendment right against self-incrimination.

Additional facts as relevant are referenced below.

ARGUMENT

I. The Trial Court's Order Requring Mr. Gonzalez to Open His Mouth and Reveal His Platinum Teeth to the Jury, Despite the Assertion of His Constitutional Right Not to Testify, Violated His Fifth Amendment Right Against Self-Incrimination.

A. Introduction.

The right against self-incrimination is a constitutional protection of the Fifth Amendment to the United States Constitution and Article I, Section 8 of the Wisconsin Constitution. This right "'protects an accused … from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature.'" ***State v. LaPlante***, 186 Wis. 2d 427, 437, 521 N.W.2d 448 (Ct. App. 1994) (quoting ***Pennsylvania v. Muniz***, 496 U.S. 582, 589 (1990) (citations omitted). Testimonial conduct can be both verbal and nonverbal conduct. *See* ***Schmerber v. California***, 384 U.S. 757, 761 n.5 (1966) ("A nod or head-shake is as much a 'testimonial' or 'communicative' act in this sense as are spoken words."). An accused's act is considered testimonial when it explicitly or implicitly relates a factual assertion or discloses information. ***Muniz***, 496 U.S. at 594 (quoting ***Doe v. United States***, 487 U.S. 201, 210 (1988)).

In this case, over defense counsel's objection and despite the assertion of his constitutional right not to testify, the trial court ordered Mr. Gonzalez to open his mouth and reveal his platinum teeth to the jury. (59:90-95; 60:32-33; App. 137-138). The court's order stemmed from the State's request during the testimony of Detective Mohr, who had never seen Ramon Gonzalez's teeth and had not observed the

jail fight, and had only interviewed Frederick Brown several hours after the attack:

> THE PROSECUTOR: Now, in terms of the one of the details, Mr. Brown recalled that one of the individuals who struck him was or had platinum teeth?
>
> DETECTIVE MOHR: That's correct.
>
> THE PROSECUTOR: Do you know whether or not Mr. Ramon Gonzalez has any feature or specific dental work that is consistent with that?
>
> DETECTIVE MOHR: I believe he does.
>
> THE PROSECUTOR: Have you seen his teeth?
>
> DETECTIVE MOHR: Not personally, no.
>
> THE PROSECUTOR: I would ask that, for the jury's sake, that we show Mr. Gonzalez'[s] dental work at this point and time so the witness can describe whether or not he has particular dental work.
>
> DEFENSE COUNSEL: I would object to that.
>
> THE PROSECUTOR: It's a physical feature. It's an attribute much like height, eye color, hair.
>
> THE COURT: All right. Side bar. Let's go this way.
>
> [Discussion off the record]
>
> THE COURT: All right. At this point in time based on the discussion we had in chambers, I'll overrule counsel's objection and ask Mr. Gonzalez at this point to display his teeth.
>
> DEFENSE COUNSEL: Okay. Show him your teeth.
>
> (Whereupon, Defendant Gonzalez smiles.)
>
> THE COURT: Okay. Thank you.
>
> THE PROSECUTOR: Thank you.

(60:32-33; App. 137-138).

Defense counsel's objection was that forcing Mr. Gonzalez to display his teeth to the jury violated his Fifth Amendment right to remain silent, and that the "fierce look" of his teeth was unduly prejudicial. (60:35-38; App. 140-143).

Here, compelling Mr. Gonzalez, who asserted his right to remain silent, to open his mouth and reveal his platinum teeth to the jury violated his constitutional right against self-incrimination, as it disclosed his "fierce-looking" teeth to the jury, and was not necessary for identification purposes.

Constitutional questions, both state and federal, are reviewed *de novo* on appeal. *See, e.g.*, ***State v. Schaefer***, 2008 WI 25, ¶17, 308 Wis. 2d 279, 746 N.W.2d 457 (citation omitted).

B. Compelling Mr. Gonzalez to open his mouth to reveal his platinum teeth to the jury violated his constitutional right against self-incrimination.

Historically, the right against self-incrimination was "intended to prevent the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him." ***Doe,*** 487 U.S. at 212. "Such was the process of the ecclesiastical courts and the Star Chamber—the inquisitorial method of putting the accused upon his oath and compelling him to answer questions designed to uncover uncharged offenses, without evidence from another source. The major thrust of the policies undergirding the privilege is to prevent such compulsion." ***Id.***

The privilege against self-incrimination thus recognizes "our fierce 'unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt,' that defined the operation of the Star Chamber, wherein suspects were forced to choose between revealing incriminating private thoughts and forsaking their oath by committing perjury." ***Muniz***, 496 U.S. at 596 (quoting ***Doe***, 487 U.S. at 212). The privilege thus reflects "'a judgment … that the prosecution should [not] be free to

build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused.'" ***Doe***, 487 U.S. at 212 (quotations omitted).

The United States Supreme Court first addressed whether compelling a person to produce his "body as evidence" violated the Fifth Amendment right against self-incrimination in ***Holt v. United States***, 218 U.S. 245 (1910). The issue in ***Holt*** was whether a Fifth Amendment violation occurred by requiring a defendant, prior to trial and over his objection, to try on a shirt for evidentiary purposes. ***Holt,*** 218 U.S. at 252. The Court rejected this claim, concluding that, "the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it *may be material*." ***Id.*** at 252-53 (emphasis added).

Since then, the Court has decided several other cases involving the use of the "body as evidence," including ***Schmerber v. California***, 384 U.S. 757 (1966), ***United States v. Wade***, 388 U.S. 218 (1967), and ***United States v. Gilbert***, 388 U.S. 263 (1967). In each case, the Court found that compelling the suspect to produce his own body as physical evidence for identification or evidentiary purposes was not a violation of the right against self-incrimination.

In ***Schmerber***, the Court held that a forced blood draw for purposes of determining blood alcohol content did not violate the right against self-incrimination. ***Schmerber***, 384 U.S. at 760-61. The Court found that since the blood test evidence was neither testimony nor evidence relating to some communicative act or writing by the suspect, it did not violate the right against self-incrimination. ***Id.*** at 765. Had police asked the suspect directly whether his blood contained a high concentration of alcohol, however, "his affirmative response would have been testimonial even though it would have been used to draw the same inference concerning his physiology." ***Muniz***, 496 U.S. at 593 (citing ***Schmerber***, 384 U.S. at 765).

Similarly, in ***Wade***, the Court held that compelling a bank robbery suspect to provide a voice sample during a lineup in which he spoke the words of the robber did not violate the right against self-incrimination. ***Wade,*** 388 U.S. at 220-21. The Court noted that the suspect was not compelled to utter statements of a "testimonial" nature, but rather that his voice was used as a physical characteristic for purposes of identification. ***Wade***, 388 U.S. at 222-23. *See*, *e.g.*, ***United States v. Dionisio***, 410 U.S. 1, 5-7 (1973) (voice exemplar for identification purposes not a violation of the right against self-incrimination); ***State v. Hubanks***, 173 Wis. 2d 1, 16-18 496 N.W.2d 96 (Ct. App. 1992) (court-ordered voice exemplar for identification purposes did not violate the right against self-incrimination).

And, in ***Gilbert***, 388 U.S. at 266, the Court held that taking a handwriting sample from a suspect for identification purposes did not violate the right against self-incrimination. The Court found that a "mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside [the privilege's] protection." ***Id.*** at 266-67. Had the suspect been asked, however, to compose his own writing sample, "the content of the writing would have reflected his assertion of facts or beliefs and hence would have been testimonial." ***Muniz***, 496 U.S. at 598 (citing ***Gilbert*** at 267).

The common theme in ***Holt, Schmerber, Wade, Gilbert,*** and ***Hubanks*** is that the use of the suspect's "body as evidence" was for the purpose of identification of the suspect or for evidentiary purposes. In contrast, here the trial court's order requiring Mr. Gonzalez to open his mouth and reveal his teeth to the jury was not for identification or evidentiary purposes. For Detective Mohr, the testifying witness during this forced display, had not witnessed the jail fight, nor had he ever seen Mr. Gonzalez's teeth. (60:14-16,31-32; App. 119-121,136-137). Instead, the detective merely spoke with Brown several hours after the incident occurred, at which time, according to the detective, Brown identified Gonzalez,

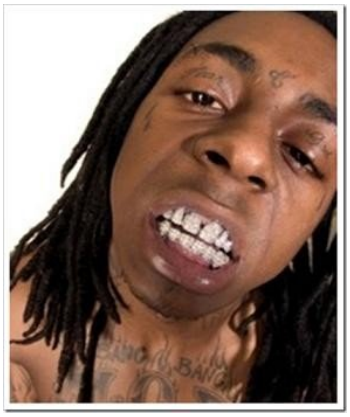
by cell number and his platinum teeth, as one of his attackers. (60:14-16,22-23,31-32; App. 119-121,127-128,136-137). And, while Detective Mohr testified that Brown identified one of his attackers as the inmate in Cell #10 with platinum teeth, there was no description of the platinum teeth, e.g., the number of teeth or a particular distinctive appearance. (60:22-23,29,31-33; App. 127-128,134,136-138).

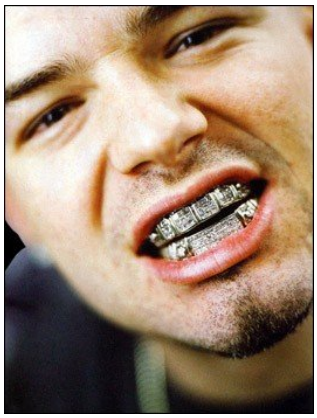
In addition, as Frederick Brown had already identified Gonzalez in court as the inmate he knew called "Platinum" because of his platinum teeth, there was no need for the jury to determine whether Mr. Gonzalez in fact had platinum teeth. (58:73-75,83,92,97). Consequently, because the jury already knew from Brown's testimony that Mr. Gonzalez was known as "Platinum" because of his platinum teeth, there was no basis on which to order Gonzalez to reveal his teeth to the jury in order to identify him as one of the perpetrators in the jail fight. Thus, requiring Mr. Gonzalez to open his mouth and reveal his teeth to the jury was simply not "material" to the case, as it was not for purposes of identification or comparison. *See* ***Holt***, 218 U.S. at 252-53.

In addition, the forced display of Mr. Gonzalez's platinum teeth to the jury was not a mere display of physical evidence, but had a "testimonial" aspect, because it revealed *content* – the "fierce-looking" appearance of his teeth – that allowed the jury to make negative inferences regarding Mr. Gonzalez. In objecting to the State's request that Mr. Gonzalez be compelled to reveal his platinum teeth to the jury, trial counsel described Mr. Gonzalez's platinum teeth as having a "fierce look to it" and was concerned about the potential for unfair prejudice. (60:35-37; App. 140-142). Thus, counsel was plainly concerned about the impact that such a display of the appearance of Mr. Gonzalez's teeth – i.e., the "content" of his mouth - would have on the jury.

Trial counsel's concern regarding the prejudicial nature of Mr. Gonzalez's platinum teeth was well-founded. Platinum teeth are more than just a physical characteristic,

like a fingerprint, eye color, height, or voice. Such elective dental work is often a way for people to convey information about themselves. Consider, for example, the following images of platinum "grills":





Tiffany Warner, *Lil Wayne set to remove $100K diamond grill before entering prison*, EXAMINER.COM (February 11, 2010), http://www.examiner.com/article/lil-wayne-set-to-remove-100k-diamond-grill-before-entering-prison; http://www.paulwallworld.com (both last visited March 21, 2014).

The platinum teeth displayed in these photographs are not merely physical characteristics, but convey an image – commonly, one which a jury is likely to view negatively, and may associate with drug-dealing or gang affiliation. [2] *See* http://www.urbandictionary.com/define.php?term=gold+grill; http://www.goldtoothgrill.com (both sites last visited March 21, 2014). Thus, the jury may well have reacted to the forced display of Mr. Gonzalez's "fierce-looking" platinum teeth in a negative manner, and concluded that his "fierce" look rendered him more likely to have participated in the attack on Frederick Brown.

[2] Notably, while the State had previously sought to introduce evidence of the defendants' Latin King gang affiliation as motive for the battery, a previous trial court ruling in the case excluded such testimony at trial, in part because of the potential for undue prejudice. (11; 12; 13; 63:2-10).

In that respect, this case is similar to ***Pennysylvania v. Muniz***, in which the United States Supreme Court considered whether incriminating statements made by the defendant during booking and sobriety testing constituted testimonial evidence for the purposes of the Fifth Amendment. In ***Muniz***, the defendant was arrested for driving while intoxicated, had difficulty responding to routine police booking questions, and failed field sobriety tests. ***Muniz***, 496 U.S. at 585-86. The audiovisual recording of the booking and field sobriety tests were admitted into evidence at trial. ***Id.*** at 587. The Court found that while slurring of the defendant's speech and other evidence of lack of muscular coordination was not testimonial evidence prohibited by the Fifth Amendment, the defendant's response that he was unable to recall the date of his sixth birthday *was* testimonial, as his answer revealed the contents of his mind, which supported an inference of an impaired mental state. ***Id.*** at 590-600.

Similar to Muniz's sixth birthday response, which the United States Supreme Court found improperly supported an inference of an impaired mental state, here the forced display of Mr. Gonzalez's teeth to the jury was a testimonial act because it revealed *content* – the "fierce-looking" appearance of his platinum teeth – that allowed the jury to negatively infer that he was more likely to be the type of person to have been involved in the attack on Brown.

Such an inference unfairly prejudiced Mr. Gonzalez, despite the court of appeals' conclusion that any association with drug dealing or gang affiliation was harmless "in view of Gonzalez's obvious status as a convicted person." Slip op. ¶21 (App. 107). Mr. Gonzalez did not testify in this case, and therefore, the jury never learned whether or not Mr. Gonzalez had been previously convicted of a crime. *See* Wis. Stat. §906.09(1) (evidence of prior convictions admissible for purposes of witness impeachment). And, while Mr. Gonzalez was charged with battery by a prisoner while he was an inmate at the Milwaukee County Jail, this did not necessarily mean that he had been convicted of any crime. For, as one of

the State's witnesses testified, the jail is "a *pretrial* detention facility run by Milwaukee County." (58:27)(emphasis added). Thus, given that the jury had no basis on which to conclude that Mr. Gonzalez had been convicted of a crime, any association the jury made between Mr. Gonzalez's forced display of his platinum teeth and drug dealing or gang affiliation prejudiced him.

In sum, compelling Mr. Gonzalez, who exercised his constitutional right to remain silent, to reveal his platinum teeth to the jury violated his right against self-incrimination. He is entitled to a new trial.

CONCLUSION

For the reasons stated, Mr. Gonzalez respectfully requests this Court reverse the decisions of the circuit court and court of appeals, and grant a new trial.

Dated this 21st day of March, 2014.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3,024 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Rule 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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

Dated this 21st day of March, 2014.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Rule 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under Rule 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 21st, day of March, 2014.

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