STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2012AP1818-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RAMON G. 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.

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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SUPPLEMENTAL STATEMENT OF FACTS

As in the Court of Appeals, the State once again unnecessarily remarks in a footnote in its Statement of the Case that the "inordinate delay of four years from entry of the judgment of conviction to the denial of direct postconviction relief appears to have been caused almost entirely by the defense." (State's brief at 3). And, once again, petitioner is compelled to respond by pointing out that the "inordinate delay" is completely irrelevant to the issue presented in this case, and that the delay was through no fault of Mr. Gonzalez.

Following Mr. Gonzalez's sentencing, defense counsel timely filed, on July 28, 2008, the notice of intent to pursue postconviction relief under Wis. Stat. §809.30(2)(b). (25). The State Public Defender (SPD) appointed Attorney Donald Dudley as postconviction counsel, who undertook no court action and closed his file on May 27, 2009, without having any personal contact with Mr. Gonzalez. (35:2).

On April 17, 2011, Mr. Gonzalez wrote to the SPD office inquiring why no action had been taken on his case. After an investigation, the SPD appointed Asst. State Public Defender Michael Gould, who filed a ***Knight***[1] petition in the Court of Appeals seeking reinstatement of Mr. Gonzalez's direct appeal deadlines. (35:1-2; Appeal No. 2011AP1466-W). On July 29, 2011, the State filed a written response indicating it did not oppose the petition, and the Court of Appeals reinstated Gonzalez's direct appeal rights on August 3, 2011. (35:2-3). Undersigned counsel were then appointed as successor counsel due to Attorney Gould's impending military leave, and the Court of Appeals subsequently

[1] ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992).

granted, for good cause, several extension requests of the postconviction and briefing deadlines. (37;39;41;43).

ARGUMENT

I. The Trial Court's Order Requiring 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. Compelling Mr. Gonzalez to open his mouth to reveal his platinum teeth to the jury violated his constitutional right against self-incrimination because it was not for identification or evidentiary purposes.

Mr. Gonzalez does not advocate, as the State claims, that this Court make any radical change in the law or ignore controlling precedent. (State's brief at 6). Instead, Mr. Gonzalez's position is simply that the circumstances present here are distinguishable from cases concluding that the compelled production of a suspect's body as evidence does not violate the Fifth Amendment right against self-incrimination.

Mr. Gonzalez asserts that the court's order requiring him to open his mouth and reveal his platinum teeth to the jury was not for identification or evidentiary purposes. While the issue of who attacked Fredrick Brown was an issue at trial, it was undisputed that Mr. Gonzalez - identified in court by Mr. Brown as "Platinum" because of his platinum teeth - in fact had platinum teeth. (58:83,91-92,97). Consequently, there was simply no reason for Mr. Gonzalez to be forced to

open his mouth in front of the jury so that they could observe his platinum grill.

Further, Detective Mohr, the State's testifying witness when the court ordered Mr. Gonzalez to display his teeth for the jury, had never even seen Mr. Gonzalez's teeth, nor had he witnessed the jail fight. (60:14-16,31-32). And, at no point did the jury hear any testimony that described the appearance of Mr. Gonzalez's platinum teeth, e.g., the number of, or a particular distinctive appearance to, the platinum teeth. (60:22-23,29,31-33; Pet. App. 127-128,134,136-138). Consequently, requiring Mr. Gonzalez to open his mouth and display his platinum teeth for the jury was not done for identification or comparison purposes.

Because the forced display of Mr. Gonzalez's teeth was not for identification or evidentiary purposes, this case is distinguishable from the line of cases that holds that it is permissible under the Fifth Amendment for a suspect to be compelled to display some bodily characteristic or feature as physical evidence. *See* ***Schmerber v. California***, 384 U.S. 757 (1966), ***United States v. Wade***, 388 U.S. 218 (1967), ***Gilbert v. California***, 388 U.S. 263 (1967), and ***State v. Hubanks***, 173 Wis. 2d 1, 496 N.W.2d 96 (Ct. App. 1992). In each of those cases, the court found that compelling a suspect to display his body as physical evidence for identification or evidentiary purposes was not a violation of the right against self-incrimination. (*See* Petitioner's brief. at 7-9).

The State's citation of ***State v. Schmidt***, 2012 WI App 137, 345 Wis. 2d 326, 825 N.W.2d 521, is inapposite. In ***Schmidt***, the defendant, charged with operating while intoxicated, asserted that his Fifth Amendment right against self-incrimination was violated by the trial court's order requiring him to submit to a horizontal gaze nystagmus

(HGN) test outside the presence of the jury and the subsequent admission of testimony regarding the result during rebuttal. ***Schmidt,*** ¶1. The trial court's order occurred after defense counsel cross-examined the arresting officer regarding possible alternative causes of HGN, including diabetes, and the defendant testified. ***Id.,*** ¶¶3-4. On appeal, the court held that the time-of-trial HGN test was "classic physical evidence" and "[b]y performing the test, [the defendant] was not compelled to disclose his perceptions or thoughts or convey any statement." ***Id.,*** ¶9. The court also noted, in denying his claim of an unfair trial, that Schmidt put his performance of the HGN test at issue by suggesting that his diabetes could affect the result, and then chose to testify, providing the necessary foundation for admission of the test results. ***Id.,*** ¶10. In contrast, here Mr. Gonzalez did not testify, and made no claim denying that he was not known as "Platinum" for his platinum teeth, as testified by Fredrick Brown.

Moreover, contrary to the State's claim that requiring display of his platinum teeth was no different than eye color or baldness (State's brief at 5, 9), here, the forced display of Mr. Gonzalez's teeth revealed content – a "fierce-looking" appearance – and thus carried a testimonial aspect beyond the mere display of a physical characteristic. This display of "content" showed the jury something beyond mere eye color or absence of hair, and allowed negative inferences such as drug-dealing or gang affiliation to be made about Mr. Gonzalez. Consequently, as argued in his opening brief, the revelation of Mr. Gonzalez's "fierce-looking" teeth to the jury – the product of the court's order requiring him to open his mouth -- carried a "testimonial" aspect. (Petitioner's brief at 9-12). *See* ***Pennsylvania v. Muniz***, 496 U.S. 582, 590-600 (1990). Notably, the State fails to specifically address this argument in its response brief.

And, while the State suggests that the "compulsion" involved in this Fifth Amendment question turns on whether or not Mr. Gonzalez "voluntarily obtained" his platinum grill (citing ***United States v. Greer***, 631 F.3d 608, 612-13 (2nd Cir. 2011, involving a suspect's tattoo)), undersigned counsel are unaware of any controlling United States Supreme Court or Wisconsin appellate decision holding that the forced display of a suspect's physical characteristic for its content is excluded from Fifth Amendment protection against self-incrimination because the feature was voluntarily acquired.

Lastly, Mr. Gonzalez disputes the State's suggestion that his claims raise a "relevance" challenge under Wis. Stat. §904.01 that was improperly preserved below. (State's brief at 10-11). Mr. Gonzalez does not cite Wis. Stat. §904.01 because he does not directly raise such a statutory challenge to relevance. Rather, the discussion of prejudice in his opening brief is directly linked to Mr. Gonzalez's assertion that requiring him to open his mouth and show his "fierce-looking" teeth revealed "content" that rendered this display testimonial, in violation of his constitutional right against self-incrimination. (Petitioner's brief at 9-12).

In sum, the trial court's order compelled Mr. Gonzalez, who exercised his constitutional right to remain silent, to reveal his platinum teeth to the jury, violating his Fifth Amendment right against self-incrimination.

B. Compelling Mr. Gonzalez to open his mouth and reveal his platinum teeth was not harmless error.

Contrary to the State's assertions, the jail surveillance video did not "confirm" that Mr. Gonzalez attacked Fredrick Brown. (State's brief at 4, 15-16). While a jail surveillance video containing portions of the fight was played for the jury

(59:45-58; 67), it was hardly definitive on the issue of who attacked Fredrick Brown. As defense counsel noted in his closing argument, the surveillance video was "unclear." (61:20-21,25-26). The State agreed, noting that, "the quality of the video, because of the lighting, is not the greatest," with the video snapshots being "grainy." (61:38-39). Thus, contrary to the State's claim, the jail surveillance video did not "confirm" that Mr. Gonzalez attacked Fredrick Brown.

Additionally, the State's assertion that trial counsel's remark that the jury had "plenty of opportunity to observe Mr. Gonzalez here in court" means that Mr. Gonzalez must have "smiled or at least opened his mouth in the jury's presence at other points during the trial," is pure conjecture. (State's brief at 15). Rather than a "concession" that Mr. Gonzalez smiled or opened his mouth at other points during the trial, counsel's remark merely supported his objection to the forced display of teeth on the basis that the jury was able to see Mr. Gonzalez in court and that he was "well-known" to the State, which could have produced booking or other photos of him if identification of his dental work was necessary. (60:36-37; Pet. App. 141-42). Nothing in the record provides any basis to conclude that the jury was able to observe the inside of Mr. Gonzalez's mouth at any other juncture than when he was required, in response to the court's order, to open his mouth and display his teeth to the jury. (60:33; Pet. App. 138).

Finally, contrary to the State's assertion, the jury was not presented with "overwhelming" evidence of Mr. Gonzalez's culpability in the attack on Fredrick Brown. (State's brief at 16). Mr. Brown testified that he had no specific recollection of Mr. Gonzalez being involved in the attack. (58:91-92,97). Unlike other individuals who allegedly participated in the fight, Mr. Gonzalez had no scrapes, bruises or similar injuries indicative of involvement

in a fight. (58:15,17-21). And, Deputy Szymborski, the only other eyewitness who testified, was unable to observe the fight continuously, and the jail surveillance video's poor quality did not plainly show Mr. Gonzalez as one of the inmates attacking Brown. (61:20-21,25-26).

Given the weaknesses in the case, the evidence was far from overwhelming. The court's order requiring Mr. Gonzalez to open his mouth and reveal his teeth to the jury was not harmless beyond a reasonable doubt.

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 22nd day of April, 2014.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of §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 1,791 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 §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 22nd day of April, 2014.

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