STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2022AP882-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RAYMAND L. VANNIEUWENHOVEN,

Defendant-Appellant.

APPEAL FROM AN ORDER DENYING A MOTION TO SUPPRESS EVIDENCE AND CONVICTION ENTERED IN THE MARINETTE COUNTY CIRCUIT COURT, THE HONORABLE JAMES A. MORRISON, PRESIDING

# BRIEF OF THE PLAINTIFF-RESPONDENT

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Statutes**



**Other Authorities**

## ISSUES PRESENTED

Did law enforcement's use of a ruse to obtain a DNA sample from Vannieuwenhoven, which allowed them to compare his DNA with DNA recovered from semen left at a 42-year-old double-murder scene, violate the Fourth Amendment?

The circuit court denied Vannieuwenhoven's suppression motion, and he was convicted at trial.

This Court should affirm the circuit court.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State disagrees with Vannieuwenhoven that oral argument is necessary. The State agrees that publication is warranted. While this case can be resolved by applying existing Fourth Amendment law to the facts, it will "[a]ppl[y] an established rule of law to a factual situation significantly different from that in published opinions." Wis. Stat. § (Rule) 809.23(1)(a)2.

## STATEMENT OF THE FACTS

This case is about a grisly, unprovoked double murder and sexual assault that went unsolved for almost fifty years until advances in DNA technology finally allowed police to identify the perpetrator. On July 9, 1976, 25-year-old David Schuldes and his 24-year-old fiancée Ellen Matheys drove to McClintock Park in Marinette County, Wisconsin, for a camping trip. (R. 1:1–2.) Once there, they set up their camping items and around 2:00 p.m. prepared to go for a nature walk. (R. 1:2.) Ellen stopped by the outdoor bathroom facilities and David waited for her outside. (R. 1:2.) Suddenly, David was shot through the neck with a .30 caliber firearm and died immediately. (R. 1:2.) The murderer then either ordered Ellen from the bathroom to a wooded

area about 100 yards away or chased her to that location. (R. 1:2.) He sexually assaulted Ellen, and while she was putting her clothes back on, he shot her twice in the chest. (R. 1:2.) Ellen died from her gunshot wounds as well. (R. 1:2.)

At 2:30 p.m., county parks worker Stanley Apanasiewicz was checking on the supply of firewood at the park and saw David lying near the bathrooms. (R. 1:2.) When he saw blood, he asked a man driving through the park to stay with the body while Apanasiewicz called the police. (R. 1:2.) Marinette County Police arrived and began their investigation. (R. 1:2.) Ellen's body was found the next day. (R. 1:2.) The Wisconsin Department of Justice's Division of Criminal Investigation was called in for assistance, and though multiple people were interviewed, no major suspects were ever established. (R. 1:2.) There was physical evidence collected and saved, though, including semen present in Ellen's vaginal area and on her shorts. (R. 1:2–3.) The case went cold, but the Marinette County Sheriff's Office continued to work to find a suspect as the years passed. (R. 1:2–3.)

In the 1990s, when DNA profiling began to emerge, Detective Craig Bates sent the semen samples collected from Ellen to the Wisconsin State Crime Lab for analysis. (R. 1:3.) The lab was able to develop a DNA profile from the semen recovered from Ellen's shorts, and it was run through CODIS, the Combined DNA Index System, but it was never matched to a suspect or to any other crimes. (R. 1:3.) DNA samples from multiple possible suspects were submitted to the crime lab for comparison over the years, but none matched. (R. 1:3.) The case again went cold.

In 2018, investigators contacted Parabon Nanolabs in Virginia and sent them the DNA sample. (R. 1:3.) A genealogist with Parabon was able to narrow down the suspect pool to a specific family with ties to the Green Bay

area, that of Gladys Brunette and Edward Vannieuwenhoven. (R. 1:3.) The genealogist believed the suspect could be one of their four sons—Edward, Francis, Raymand, or Cornelius Vannieuwenhoven—or one of their four grandsons. (R. 1:3.)

Detective Todd Baldwin of the Marinette County Sheriff's Department then set about finding DNA samples from Gladys's and Edward's sons to compare to the DNA profile recovered from the crime scene. (R. 1:4.) They began by conducting surveillance on Cornelius and collecting a bag of garbage he placed at the curb. (R. 1:4.) The crime lab isolated Cornelius's DNA from an inhaler found in the garbage and it was not a match; however, Cornelius's profile shared the same YSTR DNA with the sample from the crime scene, meaning that the suspect was a male relative of Cornelius's from the paternal line. (R. 1:4.) The next brother, Edward, was neighbors with a retired detective and the two often had coffee. (R. 1:4.) Baldwin asked the retired detective to keep Edward's coffee cup next time he came over, which the detective did and provided to Baldwin for testing. (R. 1:4.) Edward's DNA profile similarly did not match the suspect, but also shared a YSTR DNA profile with him. (R. 1:4.)

Baldwin asked Oconto County Chief Deputy Darren Laskowski for help collecting a DNA sample from the third brother, Raymand. (R. 1:4.) He requested that Laskowski approach Raymand's residence and ask if Raymand would take a brief survey about policing in the townships and seal the completed survey in a provided envelope. (R. 1:4.) Raymand agreed, filled out the survey, licked the envelope to seal it, and returned the sealed envelope to Laskowski. (R. 1:4.) Raymand's DNA profile from the saliva on the envelope was compared to the DNA profile of the suspect, and it was a match. (R. 1:4.)

Police executed a search warrant on Raymand's home and found a 30-30 lever action rifle in a cabinet and four 30-30 shell casings in a tin can above his washer and dryer. (R. 1:5.) They also obtained a search warrant for buccal swabs to obtain a sample of Raymand's DNA, which confirmed that the DNA from the crime scene and the envelope was Raymand's. (R. 21:32–35.)

The State charged Vannieuwenhoven with two counts of first-degree intentional homicide.[1] Vannieuwenhoven filed a motion to suppress the DNA evidence, arguing that the use of a ruse to get his saliva sample rendered his surrender of his saliva involuntary and that running his genetic profile from it was an unconstitutional search and seizure in violation of the Fourth Amendment. (R. 121.) The circuit court held a hearing and denied the motion, determining that Vannieuwenhoven consented to talk to the police, and then voluntarily invited them into his house, completed the survey, placed his DNA on the envelope, and gave it back to the police officer. (R. 137; 156:7–10.) It observed that the purpose of the Fourth Amendment was to prevent unreasonable government invasions into people's private affairs, not to prevent police from gathering evidence with the citizen's voluntary consent, even if the police use a ruse to do so. (R. 156:9–10.) Accordingly, it denied Vannieuwenhoven's motion to suppress the DNA evidence.

After a six-day trial, the jury found Vannieuwenhoven guilty of both counts. (R. 267; 268; 418; 419; 420; 421; 422;

[1] The State also charged Vannieuwenhoven with one count of first-degree sexual assault, but the circuit court dismissed it on statute of limitations grounds. (R. 1:1; 10:2; 14:1.)

423.) The court imposed two consecutive life sentences.[2] (R. 402:40.) Vannieuwenhoven appeals.

## STANDARD OF REVIEW

Review of an order denying a motion to suppress evidence on Fourth Amendment grounds presents a question of constitutional fact. *State v. Randall*, 2019 WI 80, ¶ 7, 387 Wis. 2d 744, 930 N.W.2d 223. In reviewing such questions, this Court upholds a circuit court's findings of historical fact unless they are clearly erroneous. *Id.* It reviews the application of the relevant constitutional principles to those facts de novo. *Id.*

## ARGUMENT

**The circuit court properly denied Vannieuwenhoven's suppression motion because he no longer had any reasonable expectation of privacy in his genetic identity after he voluntarily handed it to police.**

The Fourth Amendment to the United States Constitution protects citizens from unreasonable searches and seizures of their persons and property. *State v. Roberts*, 196 Wis. 2d 445, 452, 538 N.W.2d 825 (Ct. App. 1995). Generally, a warrant is required before a search or seizure of a person or their property can be deemed reasonable under the Fourth Amendment. *Id.* at 452–53. The Fourth Amendment does not, however, require law enforcement to obtain a warrant before every interaction with a citizen or intrusion upon his property. For example, police are not

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[2] Vannieuwenhoven died in prison on June 17, 2022. *See* https://www.greenbaypressgazette.com/story/news/local/oconto-county/2022/06/22/wisconsin-campground-killer-raymand-vannieuwenhoven-convicted-dna-dies-prison/7704877001/.

required to obtain a warrant before entering the curtilage of a home to knock on the front door, *Breard v. Alexandria*, 341 U.S. 622, 626 (1951); to approach a citizen and ask them questions during a consensual encounter, *Florida v. Bostick*, 501 U.S. 429, 431 (1991); or to seize and examine abandoned property, *Abel v. United States*, 362 U.S. 217, 241 (1960).

In short, "The touchstone of the Fourth Amendment is reasonableness. The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable." *State v. Tullberg*, 2014 WI 134, ¶ 29, 359 Wis. 2d 421, 857 N.W.2d 120 (citations omitted).

### A. Police did not need a warrant to extract DNA from the envelope or test for a genetic marker comparison after Vannieuwenhoven abandoned the envelope by handing it to them.

As a preliminary matter, it is important to establish what specifically was obtained from the envelope in this case. Here, the test run by the crime lab was solely for a specific sequence of 13 non-coding genetic markers to determine whether those markers from Vannieuwenhoven's sample matched those same markers from the semen left at the crime scene 40 years earlier. (R. 421:149.) Vannieuwenhoven's parade of horribles about police using the totality of someone's genetic profile to learn of someone's irritable bowel syndrome, sleep patterns, or lactose intolerance is a red herring (Vannieuwenhoven's Br. 7–8); that is not what happened here,[3] and therefore according to

[3] An independent lab did indeed run a genetic phenotyping test to determine physical characteristics of the suspect in this case, but that test was run on the indisputably abandoned 40-year-old semen sample that had been left at the crime scene, not

the United States Supreme Court, it is not germane to the analysis. *Maryland v. King*, 569 U.S. 435, 464 (2013) (holding that obtaining buccal swabs from arrestees for DNA analysis are reasonable searches under the Fourth Amendment in part because "the CODIS loci [that comprise a DNA profile] come from noncoding parts of the DNA that do not reveal the genetic traits of the arrestee" beyond simple identification)[4]; *see also Randall*, 387 Wis. 2d 744, ¶ 35 (holding that the court evaluates the person's expectation of privacy in the limited information actually obtained by the test performed, and evaluating a biological sample is not a Fourth Amendment event when the State performs a tightly circumscribed search of a biological sample rather than the type of "generalized rummaging" through a smartphone that was at issue in *Riley v. California*, 573 U.S. 373, 403 (2014)).

The only issue in this case is whether Vannieuwenhoven maintained a reasonable expectation of privacy in the genetic markers in his saliva that could be used to identify him (for ease of reading, the State will refer to this simply as Vannieuwenhoven's "genetic identity") after he licked the envelope and handed it to law enforcement.

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on the sample police obtained from the saliva Vannieuwenhoven placed on the envelope. (R. 1:3.)

[4] A multitude of other courts have reached this conclusion, as well. *See, e.g.*, *Williamson v. State*, 993 A.2d 626, 638–41 (Ct. App. Md. 2010) (use of "13 'junk' loci used for identification" purposes does not warrant heightened Fourth Amendment scrutiny simply because other portions of DNA can reveal other information); *Haskell v. Harris*, 669 F.3d 1049, 1063 (9th Cir. 2012) (use of non-coding regions of DNA is no different than use of fingerprints); *State v. Surge*, 156 P.3d 208, 212 (Wash. Sup. Ct. 2007) (en banc) (DNA testing for genetic identity only is no different than fingerprints and does not implicate any heightened privacy interests).

Established case law from this Court and many others show that once Vannieuwenhoven voluntarily licked and handed the envelope with his saliva on it over to a person he knew full well was law enforcement, he did not maintain any reasonable expectation of privacy in his genetic identity contained on the envelope.

### 1. The only potential constitutional event that occurred was police's collection of the envelope.

Vannieuwenhoven proclaims that he is not challenging the propriety of law enforcement's obtaining the envelope containing his saliva sample, but rather is challenging the crime lab's extraction of his saliva from the envelope and subsequent development of a profile from it, which he claims are two separate Fourth Amendment searches that each required a warrant. (Vannieuwenhoven's Br. 8.) But he cites no law for this proposition and fails to develop this argument. Instead, he jumps to discussing cases where police already had a particular piece of evidence in their possession and courts determined that the police needed a warrant to perform a subsequent search of it—*Riley*, 573 U.S. 373, which was a smart phone case dealing with the scope of what police can access under the search incident to arrest exception; and *United States v. Davis*, 690 F.3d 226, 241 (4th Cir. 2012), where the Fourth Circuit determined that police needed a warrant to extract the defendant's DNA from clothing they collected from him when he was a victim in a different case and later ran it through a local DNA database.

In both these cases, the separate steps used to extract and develop the evidence were not deemed separate searches. The law holds to the contrary: the crime lab's scientific processing of a piece of lawfully seized evidence, such as the extraction of the saliva and development of a

genetic identity profile from it at issue here, is a single process that is not divided into each individual step for Fourth Amendment purposes. Indeed, even in *Davis* where the court found a Fourth Amendment violation, it did not treat the extraction of the DNA and development of the profile as separate Fourth Amendment events. *Davis*, 690 F.3d at 242. And, importantly, the same case law establishing that the Fourth Amendment is not implicated by extraction and processing of genetic identity from a biological sample also establishes that the collection of the biological sample itself is the Fourth Amendment event in this situation.

The steps of processing a piece of evidence are not individual Fourth Amendment events. For example, in *State v. Petrone*, the Wisconsin Supreme Court rejected an argument that developing rolls of film seized with a warrant was a second search requiring another warrant. *State v. Petrone*, 161 Wis. 2d 530, 544–45, 468 N.W.2d 676 (1991). The warrant allowed the officers to seize the film because it possibly contained nude photos of children. *Id.* at 538–44. Developing the film, the court said, "is simply a method of examining a lawfully seized object" and made the information on it accessible to see if it was evidence of the crime alleged. *Id.* at 545.

This Court relied on *Petrone* in *VanLaarhoven* to conclude that a warrant was not required to test a blood sample taken under the implied-consent law. *State v. VanLaarhoven*, 2001 WI App 275, ¶¶ 12, 14–16, 248 Wis. 2d 881, 637 N.W. 2d 411. Once evidence is lawfully seized, either by a warrant or an exception to the warrant requirement, police do not need a warrant to examine it. *Id.* ¶ 16. Examining the evidence "is an essential part of the seizure and does not require a judicially authorized warrant." *Id.* ¶ 16. *See also State v. Riedel*, 2003 WI App 18, ¶¶ 6, 11–16, 259 Wis. 2d 921, 656 N.W.2d 789 (extending the

reasoning of *VanLaarhoven* to a blood sample seized under the exigent circumstances exception to the warrant requirement). Indeed, this Court in *VanLaarhoven* rejected Vannieuwenhoven's position out of hand, holding that a defendant may not "parse the lawful seizure of a blood sample into multiple components, each to be given independent significance for purposes of the warrant requirement." *VanLaarhoven*, 248 Wis. 2d 881, ¶ 16.

This parsing of the different parts of collection and testing of a biological sample was argued to and again rejected by the Wisconsin Supreme Court in *Randall*, 387 Wis. 2d 744, ¶ 14. A two-justice lead opinion and a concurrence by three other justices agreed that a defendant lacked a reasonable expectation of privacy in her blood alcohol content after police took a blood sample with her consent. *Id.* ¶ 39 n.14 (lead opinion); *id.* ¶¶ 42, 55 (Roggensack, C.J., concurring). The opinions relied on *VanLaarhoven*, *Reidel*, and *Petrone* to reach this conclusion. *Id.* ¶¶ 29–30 (lead opinion, relying on *VanLaarhoven*); *id.* ¶¶ 56–63 (Roggensack, C.J., concurring, relying on all three cases).

There, similar to Vannieuwenhoven's position here, the defendant claimed that a consented-to blood draw and the crime lab's subsequent testing of the blood sample for alcohol content were individual searches that each required an independent constitutional justification. *Id.* The two-justice lead opinion and the three-justice concurrence rejected this argument. *Id.* And though they used slightly different reasoning to reach the conclusion that the defendant lacks a reasonable expectation of privacy in a biological sample that has been lawfully obtained by police, that is immaterial, because Vannieuwenhoven's argument fails under both rationales.

In rejecting the notion that the blood draw and the subsequent alcohol testing were each separate Fourth

Amendment searches, the two-justice lead opinion reasoned that the United States Supreme Court in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016) and *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602 (1989), consistently recognized "both the acquisition of the sample and the subsequent analysis" as comprising "just one search," which focused on the constitutionality of the acquisition of the sample, not the testing. *Randall*, 387 Wis. 2d 744, ¶ 16. It reasoned that "[i]f the biological specimen testing regimen in *Skinner* involved an invasion of two distinct privacy interests, the Court would have been duty-bound to assess the constitutional fidelity of each search separately. It did not." *Id.* Likewise, in *Birchfield*, "[n]owhere . . . did the Court so much as hint that the ensuing test of the blood sample (or the breath collected for the breath test) might be a search." *Id.* ¶ 17. "[E]ven when *Birchfield* referred to the test, it is apparent from the context that it actually meant the blood draw." *Id.* "Indeed, the Court treated the discovery of the defendant's blood-alcohol level as a constitutional non-event." *Id.* Under this analysis, Vannieuwenhoven's claim fails because he has conceded the constitutionality of the police's acquisition of the envelope—the subsequent extraction and profile development were constitutional non-events after the saliva sample itself was lawfully acquired.

The three-justice concurrence reached the same result, but by a different rationale, concluding that it did not matter if the taking of the blood and the subsequent testing were treated as a single search or two because the defendant had no legitimate expectation of privacy in the alcohol content of her blood after the search for the item containing blood alcohol content (in other words, the blood draw) was lawfully conducted under the consent exception to the warrant requirement, and thus the testing had no Fourth Amendment significance. *Id.* ¶¶ 64–65 (Roggensack, C.J., concurring). As the State will discuss below,

Vannieuwenhoven's claim fails under this rationale as well, because he had no reasonable expectation of privacy in his genetic identity after he voluntarily abandoned it.

To support his claim that the removal of his saliva and development of a genetic identity profile were each separate Fourth Amendment searches, Vannieuwenhoven relies on three cases: *Riley*, *Skinner* and *Davis*.[5] (Vannieuwenhoven's Br. 8–10.) None are persuasive.

*Riley* is easily distinguishable. That was not a DNA profile case, and it involved an open-ended search of a smart phone that had been seized pursuant to the search incident to arrest exception where the defendants were then charged with additional offenses based on evidence found on the phones. *Riley*, 573 U.S. at 378–87. The court held that the rationales of officer safety and destruction of evidence behind the search-incident-to-arrest exception did not support an uncabined search of an item that is capable of containing so much personal information unrelated to those two rationales. *Id.* at 387–88. Nothing of the sort is at issue here—the information gathered was of extremely limited scope and was used for nothing other than to compare Vannieuwenhoven's genetic identity to the contributor of the semen sample. *See King*, 569 U.S. at 464.

In *Skinner*, the Supreme Court held that federally mandated drug and alcohol tests on railway workers' blood, breath, and urine were searches under the Fourth

[5] Vannieuwenhoven has conflated his arguments on whether these were separate searches and whether he had a reasonable expectation of privacy in his genetic identity after he abandoned it, and thus bases both arguments on these same three cases. (Vannieuwenhoven's Br. 7–11.) The two are separate questions, though, and thus the State will address each separately, but the reasons these cases are distinguishable apply to each argument.

Amendment, the Court in a single sentence stated that the "collection and subsequent analysis of the requisite biological samples must be deemed Fourth Amendment searches." *Skinner*, 489 U.S. at 616–18. But it is not at all clear from that sentence if the Supreme Court meant to treat those as two separate Fourth Amendment events or a single one, and, given that the analyses being considered searches was not necessary to the Court's holding, it was dicta. The Supreme Court itself has never subsequently cited to *Skinner* for this proposition or held that the scientific analysis of biological evidence collected was itself a separate Fourth Amendment search from the collection. As our supreme court recognized in *Randall*, *Skinner* treated the collection and subsequent analysis as a single search despite that sentence. *Randall*, 387 Wis. 2d 744, ¶ 16. In any case, in *Skinner*: (1) the collection of the samples from the railway employees and the subsequent testing was compelled by law; (2) the blood and breath tests involved bodily intrusions long held to be searches; (3) there was an objective expectation of privacy while urinating that society was prepared to accept as reasonable; and (4) the type of chemical analysis being used to evaluate the samples *was* capable of revealing a host of other medical information about the employees, unlike the noncoding CODIS loci used to establish genetic identity. *Id. Skinner*, 489 U.S. at 616–18; *King*, 569 U.S. at 464.

*Davis*, while closer to the mark, is not only a non-binding Fourth Circuit case that conflicts with established Wisconsin law about the non-constitutional dimension of police conducting an analysis of evidence they lawfully have in their possession. That case is recognized as an outlier that does not comport with the Supreme Court's own holding in *King* that the Court issued one year later. *United States v. Hicks*, 2:18-cr-20406, 2020 WL 7704556, *3–*6 (W.D. Tenn. May 27, 2020) (slip copy) (discussing the conflict between *Davis* and *King* and collecting cases rejecting *Davis*); *see also*

*Raynor v. State*, 99 A.3d 753, 760–65 (Ct. App. Md. 2014) (same); *Commonwealth v. Arzola*, 26 N.E.3d 185, 192–95 (Mass. 2015) (same); *See, e.g.*, *People v. Moreaux*, 174 N.Y.S.3d 237, 249–50 (N.Y. Sup. Ct. 2022). (same).

Significantly, in *King*, the Court held that using a buccal swab to collect DNA from an arrested defendant as part of the booking process was a search subject to the Fourth Amendment because it involved an intrusion into the person's body to collect the sample, but held that the intrusion was so minimal, the information gathered so limited, and the circumstances under which it was conducted were so regular that no warrant was required; the searches were reasonable on their own. *King*, 569 U.S. at 463–65. It rationally follows that where police simply evaluate a DNA sample that was handed to them and required no governmental bodily intrusion or even governmental bodily contact with the subject to collect, no Fourth Amendment search has been performed. *See Raynor*, 99 A.3d 760–63. An outlier, nonbinding Fourth Circuit case is an inadequate basis for this Court to depart from precedential cases in Wisconsin and from the Supreme Court regarding what constitutes a Fourth Amendment search such as those discussed in *Randall*.[6]

Granted, unlike here, in *Randall* the defendant had been arrested for drunk driving and therefore part of the lead opinion's analysis revolved around the diminished privacy interests of an arrestee. *Randall*, 387 Wis. 2d 744, ¶ 21. But that opinion did not garner a majority of the court. The three-justice concurrence believed that the search-incident-to-arrest discussion in the lead opinion was unnecessary because Randall consented to the blood draw—

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[6] *See State v. Randall*, 2019 WI 80, ¶¶ 14–17, 64–65, 387 Wis. 2d 744, 930 N.W.2d 223.

meaning the only Fourth Amendment search (the piercing of the defendant's skin to obtain the evidence) was conducted pursuant to a well-established exception to the warrant requirement, and the subsequent testing had no constitutional significance because it was simply the evaluation of lawfully-obtained evidence akin to the film obtained in *Petrone*. *Id.* ¶¶ 56–59, 64, 67–72 (Roggensack, C.J., concurring).

Regardless, an arrest is not the only situation in which a person has a diminished—or no—legitimate privacy interest in something lawfully in the police's hands. Here, Vannieuwenhoven not only voluntarily abandoned his saliva, but he voluntarily abandoned it directly to someone he knew was law enforcement. He had no legitimate expectation of privacy in his genetic identity once he voluntarily abandoned the envelope containing his saliva to the police, therefore no warrant was required to develop his genetic identity from it.

### 2. No constitutional provision requires police to inform suspects of their objectives when investigating, and therefore the police's conducting a law enforcement survey to get Vannieuwenhoven to voluntarily lick the envelope and abandon it was lawful.

Contrary to what Vannieuwenhoven sets forth in his brief, albeit summarily, consent to a search is not at issue here because, as explained above, no constitutionally significant search was performed when his genetic identity was obtained from the saliva sample. (Vannieuwenhoven's Br. 10–12.) It is the collection of the saliva sample that is subject to Fourth Amendment scrutiny—if the police violated the Fourth Amendment when they collected the sample, the genetic identity evidence gathered from it may

be subject to suppression. *See State v. Kennedy*, 2014 WI 132, ¶¶ 34–37, 359 Wis. 2d 454, 856 N.W.2d 834. Once the sample is lawfully in police's hands, though, processing that sample to obtain Vannieuwenhoven's genetic identity is of no constitutional significance. *Petrone*, 161 Wis. 2d at 545; *VanLaarhoven*, 248 Wis. 2d 881, ¶ 16. What is really at issue, then, is the voluntariness of Vannieuwenhoven's abandonment of his saliva. Indeed, this is the gravamen of what Vannieuwenhoven actually argues: he claims that the DNA evidence should have been suppressed because police did not tell him that they planned to obtain his genetic identity from his saliva, and had he known that he would not have "consent[ed]" to licking the envelope. (Vannieuwenhoven's Br. 11–12.) That is really an argument that the police unlawfully seized his saliva sample by not informing him they were seeking it, not a challenge to consent for a search.

Voluntariness is often at issue when consent to a search is challenged, though, so the case law on consent to a Fourth Amendment search or seizure is instructive on what constitutes a voluntary abandonment of property. The Constitution does not "require that the police supply a suspect with a flow of information to help him calibrate his self-interest" in his dealings with law enforcement. *Moran v. Burbine*, 475 U.S. 412, 422 (1986). Thus, "[t]he Fourth Amendment allows some police deception" in obtaining potential evidence from a suspect "so long [as] the suspect's 'will was [not] overborne'" by improper police coercion. *United States v. Spivey*, 861 F.3d 1207, 1214 (11th Cir. 2017) (citation omitted).

There is "no talismanic definition of 'voluntariness,' mechanically applicable to the host of situations where the question has arisen." *Schneckloth v. Bustamonte*, 412 U.S. 218, 224 (1973) (citation omitted). "The notion of 'voluntariness' . . . is itself an amphibian." *Id.* (citing

*Culombe v. Connecticut*, 367 U.S. 568, 604–05 (1961)). For Fourth Amendment purposes, "[a]s with police questioning, two competing concerns must be accommodated in determining the meaning of a 'voluntary' consent—the legitimate need for such searches and the equally important requirement of assuring the absence of coercion." *Id.* at 227. "[T]he question whether a consent to a search [or seizure] was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Id.* Accordingly, "all [of] the surrounding circumstances" must be examined, and account taken of "subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents." *Id.* at 229.

Importantly, however, while consent to a search or seizure must be voluntary, it does *not* need to be "knowing" and "intelligent."[7] *Id.* at 241. This is so because "[t]here is a

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[7] In *Padley*, the Wisconsin Supreme Court quoted language from a prior decision: "[O]rderly submission to law enforcement officers who, in effect, incorrectly represent that they have the authority to search and seize property, is not *knowing, intelligent* and voluntary consent under the Fourth Amendment." *State v. Padley*, 2014 WI App 65, ¶ 62, 354 Wis. 2d 545, 849 N.W.2d 867(emphasis added) (citing *State v. Giebel,* 2006 WI App 239, ¶ 18, 297 Wis. 2d 446, 724 N.W.2d 402). However, In *State v. Blackman*, 2016 WI App 69, 371 Wis. 2d 635, 886 N.W.2d 94, then-judge and now-Justice Hagedorn observed that the references to the "knowing" and "intelligent" language appearing in *Padley* and *Giebel* conflict with *Schneckloth.* Judge Hagedorn observed that "The United States Supreme Court has made clear that Fourth Amendment consent need only be voluntary, not knowing and intelligent." *Id.* ¶ 19 (Hagedorn, J., concurring) (citing *Schneckloth v. Bustamonte,* 412 U.S. 218, 241 (1973)). This Court is bound to follow United States Supreme Court precedent on federal constitutional questions, even if it conflicts with decisions from the Wisconsin Supreme Court. *State v. Jennings*, 2002 WI 44, ¶ 19, 252 Wis. 2d 228, 647 N.W.2d 142.

vast difference between those rights that protect a fair criminal trial," such as those under the Fifth and Sixth Amendment, "and the rights guaranteed under the Fourth Amendment." *Id*. "The protections of the Fourth Amendment are of a wholly different order" than trial rights, "and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial." *Id.* at 242. The purpose of the Fourth Amendment is to prevent arbitrary invasions of privacy by the government; it has nothing to do with ensuring that a trial proceeds fairly. *Id.* Accordingly, "[n]othing, either in the purposes behind requiring a 'knowing' and 'intelligent' waiver of trial rights, or in the practical application of such a requirement suggests that it ought to be extended to the constitutional guarantee against unreasonable searches and seizures." *Id.* at 241.

In short, "[p]loys to mislead a suspect . . . that do not rise to the level of compulsion or coercion" are constitutionally permissible. *Illinois v. Perkins*, 496 U.S. 292, 297 (1990). Here, Vannieuwenhoven indisputably made an "essentially free and unconstrained choice" to take the survey, seal the envelope, and hand it back to Deputy Laskowski. *Spivey*, 861 F.3d at 1214 (citation omitted). The undisputed testimony at the suppression hearing established that Marinette County Detective Baldwin created a survey with questions about policing in Oconto County, and then asked Oconto County Sheriff's Deputy Laskowski to meet with Vannieuwenhoven and "have him fill out the survey, if he wanted to, and ultimately asked him to have it sealed in an envelope." (R. 137:17, 42.)

Deputy Laskowski went to Vannieuwenhoven's house, knocked on the door, and explained that he "was interested in talking with him and completing a survey about law enforcement in northern Oconto County." (R. 137:45.) Vannieuwenhoven, completely on his own initiative, agreed to do so; voluntarily allowed Deputy Laskowski into the

house; and answered the survey questions. (R. 137:45.) Deputy Laskowski then folded the survey and placed it into the envelope, handed it to Vannieuwenhoven, and asked him to seal and return it. (R. 137:45–46.) Vannieuwenhoven voluntarily licked the envelope, sealed it, and handed it back to Deputy Laskowski. (R. 137:46–47.) And Deputy Laskowski testified that Vannieuwenhoven was coherent and alert when he participated—there was nothing to suggest that he lacked the capacity to make a voluntary choice. (R. 137:48); *see Bustamonte*, 412 U.S. at 226.

Police used no coercion, pressure, or duress whatsoever to get Vannieuwenhoven to participate in the survey or to lick the envelope and return it to them. Vannieuwenhoven completed every step of this process of his own free will; he could have refused at any point. There was no abuse, no badgering, no threat of violence, no battery of armed officers looming; there was not even a demand that Vannieuwenhoven participate in the survey. And in fact, the police did not lie to Vannieuwenhoven about any part of this process: they *did* conduct the survey about policing with him. Vannieuwenhoven even knew that the person he was handing the envelope to was a law enforcement officer. Laskowski simply didn't inform him that the police didn't care about his answers to the survey and were really just hoping to collect a saliva sample from him. (R. 137:43–52.) But again, the Constitution does not "require that the police supply a suspect with a flow of information to help him calibrate his self-interest" in his dealings with law enforcement. *Burbine*, 475 U.S. at 422. Deputy Laskowski did not have to inform Vannieuwenhoven about law enforcement's true objective in conducting the survey for Vannieuwenhoven's surrender of his saliva sample to be voluntary. Vannieuwenhoven simply had to make the choice to participate in the survey and hand it to Deputy Laskowski

of his own free will without any implicit or explicit threat by police. *Bustamonte*, 412 U.S. at 228. And he clearly did so.

Multiple other states have considered challenges to similar ruses used by police to obtain a DNA sample, and have concluded that they comport with the Fourth Amendment.

In *State v. Athan*, 158 P.3d 27, ¶¶ 18–19, 26 (2007), the Washington Supreme Court held that there was no Fourth Amendment infringement when police used a ruse nearly identical to this one to obtain a suspect's saliva sample to test for his genetic identity. There, police sent the suspect in a 20-year-old cold case homicide, Athan, a letter purporting to be from a law firm inviting him to join a fictious class-action lawsuit by returning an enclosed form. *Id.* ¶¶ 3–5. Athan did so and, like here, police obtained his genetic identity from the saliva he used to seal the envelope, which led to his arrest and conviction for the murder. *Id.* ¶¶ 5–8. The Washington Supreme Court rejected his subsequent Fourth Amendment challenge, noting that Athan voluntarily licked the envelope and placed it in the mail, at which point he lost all privacy interest in the saliva because it then became property of the recipient. *Id.* ¶ 18. The court was completely unbothered by the use of the ruse to obtain it; indeed, the court's discussion of the ruse focused on whether the fact that the detectives posed as attorneys transformed Athan's saliva into a "private affair" protected by the attorney-client privilege, which the court held it did not. *Id.* ¶¶ 26–28.

New York reached the same conclusion—that there was no Fourth Amendment violation—where detectives obtained a defendant's saliva sample by falsely representing that they were investigating a theft from the defendant's employer and the defendant voluntarily licked an envelope containing a lost property report. *Moreaux*, 174 N.Y.S.3d at 241, 245–47. The New York court reached the same result in

a case where detectives contrived a "taste test challenge" and obtained the defendant's saliva sample from a piece of chewing gum he voluntarily discarded to participate. *People v. LaGuerre*, 29 A.D.3d 820, 822 (N.Y. 2d Dept. 2006).

Indeed, it is well established that the Fourth Amendment permits police to collect voluntarily abandoned items to develop a person's genetic identity, even if the police used a ruse to obtain the items or initially provided the defendant with those items in the hope that the defendant would do so. *See, e.g.*, *Commonwealth v. Ewing*, 854 N.E.2d 993, 1000–01 (Mass. Ct. App. 2006) (no Fourth Amendment violation when police engaged in a ruse to get defendant to abandon cigarette butts); *United States v. Hicks*, No. 2:18-cr-20406-JTF-7, 2020 WL 7311607, *2 (W.D. Tenn. Dec. 11, 2020) (defendant maintained no privacy interest in voluntarily abandoned cigarette butt); *Williamson v. State*, 993 A.2d 626, 633–37 (Ct. App. Md. 2010) (no Fourth Amendment violation when police extracted his DNA profile from a cup the defendant abandoned after police provided him a meal during interrogation).

And that is all that happened here. Police engineered a scenario in which they hoped Vannieuwenhoven would voluntarily abandon a saliva sample containing his genetic identity. Vannieuwenhoven did so, and the police collected the abandoned material for their own purposes. That is well within the long-recognized boundaries of the Fourth Amendment.

### B. Vannieuwenhoven had no reasonable expectation of privacy in his saliva after voluntarily abandoning the envelope containing it to police, thus no Fourth Amendment event occurred when police extracted his genetic identity from it.

"[B]efore a defendant can invoke the protections of the Fourth Amendment, he or she must establish a legitimate expectation of privacy in the object searched." *Roberts*, 196 Wis. 2d at 453. "A defendant does not have a reasonable expectation of privacy in an item once it has been abandoned." *Id.* (citing *Abel*, 362 U.S. at, 241). "In the [F]ourth [A]mendment context, the test for abandonment of property is distinct from the property law notion of abandonment; it is possible for a person to retain a property interest in an item but nonetheless to relinquish his or her reasonable expectation of privacy in the object." *Roberts*, 196 Wis. 2d at 454.

"The defendant must show two things" to establish a reasonable expectation of privacy: "(1) that he or she had an actual, subjective expectation of privacy in the area searched and item seized and (2) that society is willing to recognize the defendant's expectation of privacy as reasonable." *State v. Tentoni*, 2015 WI App 77, ¶ 7, 365 Wis. 2d 211, 871 N.W.2d 285.

Vannieuwenhoven cannot make either showing. First, he has failed to make any argument that he had any subjective expectation of privacy in his saliva that he placed on the envelope after he handed the envelope to law enforcement. Instead, he argues that courts have struggled to apply Fourth Amendment principles to new technologies, and thus appears to conclude *sub silencio* that he is relieved of showing that he had a subjective expectation of privacy in his genetic identity once he provided the envelope with his saliva on it to the police. (Vannieuwenhoven's Br. 8–12.) But

he points to no case showing that a defendant's simple failure to foresee what use police might make of evidence once it is in their possession is enough to establish a subjective expectation of privacy in that evidence. Without something explaining why Vannieuwenhoven subjectively expected that his genetic identity would not be available to police once he handed them his saliva or showing any steps he took to conceal it, he has failed to meet his burden.

Nor can Vannieuwenhoven establish that there is an objectively reasonable expectation of privacy that society is prepared to accept as legitimate in one's genetic identity after one voluntarily abandons it, and particularly voluntarily abandons it directly to law enforcement. The court in *Tentoni* described the following non-exclusive factors relevant to the determination of whether a person has a recognizable, reasonable expectation of privacy in an area or item:

> (1) Whether the person had a property interest in the premises;
>
> (2) Whether the person was legitimately on the premises;
>
> (3) Whether the person had complete dominion and control and the right to exclude others;
>
> (4) Whether the person took precautions customarily taken by those seeking privacy;
>
> (5) Whether the person put the property to some private use; and
>
> (6) Whether the claim of privacy is consistent with historical notions of privacy.

*Tentoni*, 365 Wis. 2d 211, ¶ 7 (citation omitted). In *Tentoni*, this Court applied those factors and held that a person has no reasonable expectation of privacy in text messages sent to another person's phone because the person has no property interest in the person's phone, no control over that phone or any right to exclude others from it or control over whom the

receiving party showed the text messages, and the defendant did not claim that he took any steps to enhance the privacy of the messages or tell the person to keep them private. *Id.* ¶ 8. The court observed that, similarly, "it is widely accepted that the sender of a letter has no privacy in the contents of that letter once it reaches the recipient," *id.* ¶ 9, and that the sender of an email likewise retains no reasonable expectation of privacy in an email once it reaches its recipient. *Id.* This is because the sender then loses all control over what the receiver does with the letter, email, or text messages. *Id.* ¶ 10.

Here, application of the *Tentoni* factors shows that Vannieuwenhoven did not retain any objective expectation of privacy in his saliva after he voluntarily provided the sealed envelope to police. Vannieuwenhoven retained no property interest in either the saliva or the envelope once he handed it to police officers. He had no control over what police did with the envelope or the saliva sample once it left his possession nor any right to exclude others from access to them. He did not take any steps to guard his genetic identity—after all, licking an envelope, while customary, is not the only way to seal one—and he did not tell the police what they could or could not do with the saliva or the envelope once it left his hands.

And historical notions of privacy are such that Vannieuwenhoven retained no reasonable expectation of privacy in the envelope or saliva he willingly handed to law enforcement. Again, a person has no reasonable expectation of privacy in a letter once the recipient receives it. *Tentoni*, 365 Wis. 2d 211, ¶ 9. And "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351 (1967). The Fourth Amendment is

thus not implicated when a person is compelled[8] to provide physical evidence that is regularly exposed to the public such as handwriting samples, voice samples, or fingerprints.[9] *See United States v. Dionisio*, 410 U.S. 1, 10–14 (1973); *United States v. Mara*, 410 U.S. 19 (1973); *See also State v. Doe*, 78 Wis. 2d 161, 168–71, 254 N.W.2d 210 (1977). And people are exposing their genetic identity to the public all the time, certainly no less frequently than fingerprints; people leave their genetic identities on cups, silverware, clothing, papers, shopping cart handles, doorknobs, and everything else they may touch, put in their mouths, or bleed upon on a daily basis. Accordingly, Massachusetts held that a person retained no reasonable expectation of privacy in his DNA profile police collected from his saliva after the person spit on the sidewalk. *Commonwealth v. Cabral*, 866 N.E.2d 429, 432–33 (Mass. Ct. App. 2007). The fact that a process is required to collect and utilize this genetic identity evidence does not change the analysis and is no different than fingerprints, either—those

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[8] Again, Vannieuwenhoven was not compelled to provide anything—he could have told officers he was not interested and demanded that they leave his property.

[9] As the Supreme Court recognized in *Dionisio*, that Court indeed held in *Davis v. Mississippi*, 394 U.S. 721 (1969) that the Fourth Amendment required suppression of the defendant's fingerprints in that case. *United States v. Dionisio*, 410 U.S. 1, 15 (1973). But that result followed because they were compelled from the defendant after an unconstitutional seizure and detention of the defendant's person for the purpose of taking the fingerprints with no probable cause or even reasonable suspicion, making the fingerprints themselves the fruit of an unconstitutional seizure. *Id.* And even then, the Court underscored that "the fingerprinting itself 'involves none of the probing into an individual's private life and thoughts that marks and interrogation or search.'" *Id.* (citation omitted). There was no seizure of Vannieuwenhoven's person in this case that would compel the result from *Davis*.

must also be collected, analyzed, and compared to other samples, but that does not mean that people are not regularly exposing their fingerprints to the public.

It has also historically been recognized that a person has no reasonable expectation of privacy in items over which a person relinquishes control, regardless of the fact that they may later be processed for personally identifying biological evidence. *State v. Bauer*, 127 Wis. 2d 401, 407, 379 N.W.2d 895 (Ct. App. 1985). For example, a person has no reasonable expectation of privacy in their garbage once it has been collected or disposed of in a communal place. *State v. Stevens*, 123 Wis. 2d 303, 367 N.W.2d 788 (1985) (no reasonable expectation of privacy in garbage once it has been collected from the curb for disposal); *State v. Yakes*, 226 Wis. 2d 425, 595 N.W.2d 108 (Ct. App. 1999) (no reasonable expectation of privacy in garbage abandoned in a commercial dumpster available to the public); *State v. Knight*, 2000 WI App 16, ¶¶ 13–14, 232 Wis. 2d 305, 606 N.W.2d 291 (former attorney had no reasonable expectation of privacy in client files that "ended up in the garage attic of a third party who was preparing to place the files at curbside for disposal" and were thus abandoned). Similarly, a person has no reasonable expectation of privacy in an item they have discarded from their person or disclaimed owning. *Hester v. United States*, 265 U.S. 57, 58 (1924) (defendant had abandoned and thus had no reasonable expectation of privacy in a bottle he threw while being chased by police); *State v. Kirby*, 2014 WI App 74, ¶ 21, 355 Wis. 2d 423, 851 N.W.2d 796 (defendant had no reasonable expectation of privacy in a backpack after he denied ownership of it).

That the relinquished item contains a DNA sample that allows law enforcement to collect one's genetic identity is immaterial, and does not transform collection and analysis of an abandoned item into a Fourth Amendment event. Numerous other courts around the country have addressed

this same argument, and nearly[10] every single one of them has held that a person retains no reasonable expectation of privacy in their genetic identity when they have deposited DNA on an item over which they then relinquish control, including when police used contrived methods to obtain the item, as long as the contrivance used did not rise to the level of a due process violation. *See, e.g., Athan*, 158 P.3d 27 (defendant who licked envelope to return communication to a fictitious law firm but was actually police maintained no reasonable expectation of privacy in his DNA profile extracted from the envelope); *Moreaux*, 174 N.Y.S.3d at 245–46 (defendant who licked an envelope to purportedly seal a stolen property report lacked any reasonable expectation of privacy in his DNA profile after handing the envelope back to police); *United States v. Wilhern*, Nos. 17-cr-6016, 17-cr-6017, 2019 WL 5075838, *6 (W.D.N.Y. 2019) (defendant who licked envelope to seal what he believed was a form about becoming an informant lacked any reasonable expectation of privacy in DNA profile derived from envelope); *LaGuerre*, 29 A.D.3d at 822 (police did not deprive the defendant of due process when they obtained his DNA from a piece of chewing gum he voluntarily discarded in the course of a contrived Pepsi taste test challenge); *Ewing*, 854 N.E.2d 993 (holding that a defendant did not have a reasonable expectation of privacy in cigarette butts that he voluntarily abandoned as trash and DNA obtained from them was admissible); *Piro v. State*, 190 P.3d 905 (Ct. App. 2008) (holding that a suspect

[10] *Davis* appears to be the only court that has reached the opposite conclusion. But unlike in this case, there, the defendant did not voluntarily relinquish the clothing; police seized it without asking him if they could take it when they were investigating a shooting in which the defendant was the victim, and that was later determined to be lawful under the plain view exception to the warrant requirement. *Davis*, 690 F.3d at 230–33.

did not have a reasonable expectation of privacy in genetic material left on a water bottle in an interrogation room of the police station); *Commonwealth v. Perkins*, 883 N.E.2d 230 (2008) (same regarding cigarette butts and a soda can left in an interrogation room).

Vannieuwenhoven discusses none of the above cases nor *Tentoni*, and merely declares he has a reasonable expectation of privacy in his genetic identity, based again on *Riley*, *Davis* and *Skinner*. (Vannieuwenhoven's Br. 8–11.) The State explained above why those cases are distinguishable from this one and will not repeat that discussion here.

In short, Vannieuwenhoven voluntarily licked the envelope, voluntarily relinquished the envelope to law enforcement, and thus voluntarily abandoned the envelope and his genetic identity—which he exposes to the public regularly—by handing it to the police officer. He maintained no reasonable expectation of privacy in his genetic identity once he handed it to law enforcement, no matter what he believed the police planned to do with it.

### C. Even if Vannieuwenhoven retained some expectation of privacy in his genetic identity after he handed the envelope to law enforcement, the public interest in identifying the perpetrator of an unsolvable serious crime demonstrably outweighed the minimal intrusion of determining his genetic identity and was thus not one society recognizes as reasonable.

Even if Vannieuwenhoven retained some minimal expectation of privacy in his genetic identity after he handed his saliva sample to police, it is not an expectation that society is prepared to recognize as reasonable. As the New York Supreme Court aptly observed, "to adopt the position

proposed by [Vannieuwenhoven] and find that the defendant retained a privacy interest in DNA that he abandoned and that the police lawfully obtained, would effectively result in the elimination of the use of abandoned DNA as an investigative tool—an untenable, unreasonable and unsound result." *Moreaux*, 174 N.Y.S.3d at 250. "Indeed, and as the Supreme Court has stated '[s]ince the first use of forensic DNA analysis to catch a rapist and murderer . . . in 1986, law enforcement, the defense bar, and the courts have acknowledged DNA testing's "unparalleled ability to both exonerate the wrongly convicted and to identify the guilty."'" *Id.* (quoting *King*, 569 U.S. at 442) (citations omitted).

Society has an extraordinarily significant interest in solving serious crimes; indeed, the Supreme Court has recognized that the State's power "to bring an accused to trial is fundamental to a scheme of 'ordered liberty' and prerequisite to social justice and the peace." *Illinois v. Allen*, 397 U.S. 337, 347 (1970) (Brennan, J., concurring). And as noted, DNA testing provides an "unparalleled ability both to exonerate the wrongly convicted and to identify the guilty." *King*, 569 U.S. at 442. Removing this powerful tool from the police's investigative toolbox unless they had sufficient probable cause for a warrant would leave solvable crimes unsolved, and would cause those who could've been cleared by a DNA non-match—such as Vannieuwenhoven's brothers in this case—to be subjected to unnecessary police scrutiny and invasion into their private lives.

And again, Vannieuwenhoven *handed his sample to police*. In light of the compelling interest society generally—not to mention victims—has in identifying and punishing wrongdoers, society would certainly not recognize as reasonable an expectation that a person's genetic identity would remain private after he voluntarily hands it to law enforcement. Even if Vannieuwenhoven maintained some expectation of privacy in his genetic identity, it was not a

reasonable one. The Fourth Amendment simply was not implicated by the extraction and processing of his genetic identity from the envelope.

### D. If this Court holds that the DNA extraction was unlawful, it should remand to the circuit court for a hearing on whether the Fourth Amendment violation required exclusion of the evidence in these circumstances.

"When evidence is obtained in violation of the Fourth Amendment, the judicially developed exclusionary rule usually precludes its use in a criminal proceeding against the victim of the illegal search and seizure." *Illinois v. Krull*, 480 U.S. 340, 347 (1987). However, "The exclusionary rule is a judicially created remedy, not a right, and its application is restricted to cases where its remedial objectives will best be served." *State v. Dearborn*, 2010 WI 84, ¶ 35, 327 Wis. 2d 252, 786 N.W.2d 97 (citing *Herring v. United States*, 555 U.S. 135 (2009); *Arizona v. Evans*, 514 U.S. 1, 10–11 (1995)). The exclusionary rule does not apply to all constitutional violations. *Id.* Instead, "exclusion is the last resort." *Id.*

"To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Dearborn*, 327 Wis. 2d 252, ¶ 36 (quoting *Herring*, 555 U.S. at 144). "[T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Id.* (quoting *Herring*, 555 U.S. at 144). When officers act in good faith based on existing law or simply make an honest mistake, exclusion is not an appropriate remedy.

Here, the circuit court made no findings on whether the exclusionary rule should apply, because it found no

Fourth Amendment violation. Should this Court disagree, it should remand the case to the circuit court for findings on whether the police's conduct in this case was "sufficiently culpable such that deterrence is worth the price paid by the justice system." *Dearborn*, 327 Wis. 2d 252, ¶ 36.

## CONCLUSION

There was no Fourth Amendment violation committed in this case and this Court should thus affirm the decision of the circuit court. If this Court disagrees, it should remand the case for additional factfinding on whether the exclusionary rule should apply.

Dated this 18th day of November 2022.

Respectfully submitted,

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## FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,997 words.

Dated this 18th day of November 2022.

Electronically signed by:

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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 Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 18th day of November 2022.

Electronically signed by:

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