SUPREME COURT OF WISCONSIN

Case No. 2022AP882-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,
v.

RAYMAND L. VANNIEUWENHOVEN,
Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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INTRODUCTION

Raymand L. Vannieuwenhoven petitions the Supreme Court of Wisconsin, pursuant to Wis. Stats. §§ 808.10 and 809.62, to review the decision of the Wisconsin Court of Appeals, District III, in *State of Wisconsin v. Raymand L. Vannieuwenhoven*, Appeal No. 2022AP882-CR, filed April 30, 2024.

ISSUE PRESENTED FOR REVIEW

I. WHETHER THE GOVERNMENT CAN WARRANTLESSLY EXTRACT AND SUBSEQUENTLY ANALYZE AN INDIVIDUAL'S UNINTENTIONALLY AND UNAVOIDABLY SHED DNA?

Raymand[1] appealed the circuit court's denial of his motion to suppress.

The court of appeals affirmed, concluding that 1) Raymand consensually provided an envelope and its contents–including his DNA–to law enforcement; 2) once the government lawfully possessed the envelope and its contents, it was free to search and analyze Raymand's DNA; 3) by giving the envelope and its contents to law enforcement, Raymand surrendered any reasonable expectation of privacy in his DNA; and 4) the portion of DNA accessed and analyzed did not reveal a vast amount of personal information.

[1] Consistent with the court of appeals' opinion, the Defendant-Appellant-Petitioner, Raymand L. Vannieuwenhoven, will use the name designation "Raymand."

CRITERIA SUPPORTING REVIEW

This Court should accept review to clarify how the Fourth Amendment applies to the novel constitutional issues presented by constantly evolving technology. Wis. Stat. § 809.62(1r)(c).[2] This Court has taken up similar issues in *State v. Randall*, 2019 WI 80, 387 Wis. 2d 744, 930 N.W.2d 223 and *State v. Burch*, 2021 WI 68, 398 Wis.2d 1, 961 N.W.2d 314. However, both cases resulted in fractured decisions that left the law uncertain.

First, this case presents the opportunity to clarify if and how traditional Fourth Amendment principles–applicable to things whose evidentiary value is apparent on its face–apply to things that "contain–and conceal–the privacies of life."

Second, this case is a vehicle to resolve if and to what extent the government can warrantlessly extract, analyze, and search evidence–only accessible through technological advancements–so long as it lawfully obtained the evidence. Along these lines, this case can clarify whether the analysis of biological material is a separate search for Fourth Amendment purposes.

Third, this Court can use this case to declare whether one forever loses one's expectation of privacy in one's entire genetic blueprint by the unintentional and unavoidable shedding of one's DNA. In *Maryland v. King*, 569 U.S. 435 (2013), the Supreme Court foreshadowed the day that science progressed to the point where warrantless DNA searches cross the constitutional line. That day is here.

[2] This case also satisfies the criteria under Wis. Stat. § 809.62(d) in that the court of appeals' opinion is in conflict with this Court's decision in *State v. Reed*, 2018 WI 109, 920 Wis. 2d 56, 920 N.W.2d 469 and the Supreme Court's decision in *Florida v. Jimeno*, 500 U.S. 248, 251 (1991), discussed below.

STATEMENT OF THE CASE

This case involves the murder of a young couple camping at McClintock Park in Marinette County that occurred over four decades ago. R. 1 at 1-2. There was evidence that the female had been sexually assaulted, and police found semen in the female victim's shorts. *Id.* at 2. The shorts were submitted to the crime lab and apparently yielded no results; the shorts were returned to and maintained at the Marinette County Sheriff's Office. *Id.* at 2-3. There was no apparent activity on the case for two decades.

In the mid-nineties, after technological advances in the analysis of DNA, police reopened the case. *Id.* at 3. The shorts were sent to the crime lab and a single male DNA profile was developed from the semen in the shorts. *Id.* The profile was uploaded to CODIS, and over the next couple decades, there was never a hit. *Id.* The case went cold again. *See id.*

In 2018, the case was again reopened. *Id.* After more advances in DNA technology, police learned of "a new genealogical type of DNA program. . . ." R. 421 at 190. The profile was submitted to Parabon Nanoloabs for genealogical analysis. *Id.* at 192. Through their analysis, Parabon was able to identify characteristics of the suspect: the suspect's ancestry was mainly from the norther European area, the suspect has fair to very fair skin, blue eyes, reddish brown hair, and freckles. R. 1 at 3. Parabon was able to develop an image of what the suspect may have looked like at age 25 and at age 65. *Id.*

The Parabon lab was able to identify a possible family name of Vannieuwenhoven. R. 421 at 193. There were four brothers, four grandsons, and four nephews that possibly fit the profile. *Id.* Police then sought to obtain DNA from three of the four brothers: Cornelius, Edward, and Raymand (the fourth brother had passed away). *Id.* Police were able to obtain DNA samples from Cornelius and Edward, and there was not a match. *Id.* at 193-204.

Police then sought to obtain Raymand's DNA and employed the assistance of Chief Deputy Laskowski from neighboring Oconto County, where Raymand resided. *Id.* Police devised a scheme in which Laskowski would approach Raymand's home and ask him to fill out a survey about local policing. R. 137 at 43. The plan was a ruse. An integral part of the plot was to have Raymand seal the envelope to obtain Raymand's DNA. *Id.* at 43, 51-52.

In March 2019, Laskowski went to Raymand's home, was invited inside, and sat down at his table. R. 137 at 44. Laskowski inquired if Raymand was willing to complete a survey about law enforcement and community-related questions. *Id.* at 45. Raymand completed the survey. *Id.* Laskowski then told Raymand "So what we'll do here is I'll put it in the envelope so these answers can't get changed. Okay? And you seal it. And then we'll sign it." R. 133 at 7. Laskowski then turned the envelope over to Marinette County police. R. 421 at 208. The envelope was then sent to the crime lab. The lab extracted and analyzed Raymand's DNA. *Id.* at 229-30. Raymand's DNA matched the semen in the victim's shorts. *Id.* at 229-30.

On March 21, 2019, a criminal complaint was issued charging two counts of first-degree murder.[3] On December 2, 2020, Raymand filed a motion to suppress, asserting that his saliva and DNA was obtained through an illegal search and seizure. R. 121. Raymand asserted that any alleged consent was involuntary and that the search and seizure went beyond the scope of any alleged consent. *Id.*

The circuit court denied the motion. R. 156. The court concluded that this was "in every respect voluntary." *Id.* at 8. The court explained that Raymand "gave consent to talk to the police,

[3] The complaint also charged first-degree sexual assault. That count was later dismissed due to the statute of limitations expiring.

knew the person he was speaking to was a police officer, agreed to the police officers request that he come in to the house, freely provided information to the police officer about policing and other issues, voluntarily completed the survey, placed his DNA on the envelope when he sealed it and gave that envelope to the police officer." *Id.*

Following a 6-day trial in July 2021, Raymand was found guilty. R. 267-68. He was sentenced to life in prison. R. 387. On May 24, 2022, Raymand filed a notice of appeal. Vannieuwenhoven passed away in prison on June 17, 2022. R. 439.[4]

The court of appeals affirmed. *State of Wisconsin v. Raymand L. Vannieuwenhoven*, Appeal No. 2022AP882-CR, filed April 30, 2024. The court held that "law enforcement lawfully seized both the envelope and its contents because Raymand voluntarily consented to giving both of them, which included the DNA sample contained therein, to law enforcement." *Id.*, ¶2. In addition, the court of appeals concluded that "[o]nce the State lawfully possessed the envelope and its contents, it was free to develop a DNA profile using the saliva from the envelope and compare that profile to the DNA from the crime scene." *Id.* Finally, the court held that "once Raymand gave control of the envelope and its contents, including his saliva, to law enforcement, he surrendered any reasonable expectation of privacy in the minimally invasive DNA profile developed from that saliva sample, which the State used solely to determine whether his DNA profile matched that from the crime scene." *Id.*

This petition follows.

[4] "A defendant who dies pending appeal, irrespective of the cause of death, is no less entitled to [his right to appeal.]" *State v. McDonald*, 144 Wis 2d. 531, 537, 424 N.W.2d 411 (1998).

ARGUMENT

I. THE WARRANTLESS EXTRACTION AND SUBSEQUENT ANALYSIS OF RAYMAND'S UNINTENTIONALLY AND UNAVOIDABLY SHED DNA VIOLATED THE FOURTH AMENDMENT

The court of appeals relied on the following four general theories to affirm: 1) Raymand consensually provided the envelope and its contents–including his DNA–to law enforcement; 2) once the government lawfully possessed the envelope and its contents, it was free to search and analyze Raymand's DNA; 3) by giving the envelope and its contents to law enforcement, Raymand surrendered any reasonable expectation of privacy in his DNA; and 4) the portion of DNA accessed and analyzed did not reveal a vast amount of personal information.

A. TO THE EXTENT RAYMAND CONSENTED TO THE SEARCH, LAW ENFORCEMENT EXCEEDED THE SCOPE OF CONSENT

This Court holds that "[c]onsent to search must be unequivocal and specific, and it must be freely and voluntarily given." *State v. Reed*, 2018 WI 109, ¶ 8, 920 Wis. 2d 56, 920 N.W.2d 469. "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness–what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno*, 500 U.S. 248, 251 (1991).

In this case, "law enforcement engaged in a ruse to obtain Raymand's DNA sample in order to develop a DNA profile and to compare it with the DNA profile from the 1976 sample." *Raymand*, Appeal No. 2022AP882-CR, ¶ 19. The interaction between Chief Deputy Laskowski and Raymand went as follows:

> So what we'll do here is I'll put it in the envelope so these answers can't get changed. Okay? *And you seal it*. And then we'll sign it.

R. 133 at 7 (emphasis added). Raymand complied with the officer's directives. *Id.* A reasonable person would not have understood this exchange as giving consent to extract and analyze one's entire genetic blueprint.

The court of appeals concluded that "Raymand was not coerced or under duress when he gave the envelope to law enforcement[,]" and thus that Raymand gave voluntary consent.[5] *Raymand*, Appeal No. 2022AP882-CR, ¶ 19. True, law enforcement did not mandate, threaten, or abuse Raymand. In that sense, Raymand was not coerced or under duress in terms of voluntariness. However, the court of appeals failed to address *Reed's* other directive–that consent must not only be voluntary, but *also unequivocal and specific*. *Reed*, 920 Wis. 2d 56, ¶ 8.

B. RAYMAND HAS A REASONABLE EXPECTATION OF PRIVACY IN HIS DNA, AND RAYMAND DID NOT LOSE THAT EXPECTATION OF PRIVACY WHEN HE UNINTENTIONALLY AND UNAVOIDABLY SHED HIS DNA

The court of appeals held that "Raymand did not have a reasonable expectation of privacy in his DNA profile after he gave the envelope and its contents to law enforcement." *Raymand*, Appeal No. 2022AP882-CR, ¶ 23. In essence, once law enforcement lawfully obtains an item containing an individual's invisible and unavoidably shed DNA (an envelope, a cup, a strand of hair), that individual has forever lost his or her expectation of privacy in his

[5] As the court of appeals noted, "[b]oth parties agree on appeal that consent is not at issue in this case, and they focus their arguments on whether Raymand abandoned the envelope and its contents. We disagree that an abandonment analysis is appropriate under these facts." *Raymand*, Appeal No. 2022AP882-CR, ¶ 18, n. 12. Raymand maintains that neither the consent doctrine nor the abandonment doctrine justified the warrantless search.

or her entire genetic blueprint. This is a broad holding that must be clarified.

An individual starts with a reasonable expectation of privacy in his or her own biological material. *See Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 617 (1988) (stating "it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable[.]"); *State v. Randall*, 2019 WI 80, ¶¶ 38, 81, 387 Wis. 2d 744, 930 N.W.2d 223 (lead opinion) (stating "a person has a privacy interest in the information contained in her blood, including the concentration of alcohol or other drugs, until something happens to limit or eliminate that interest."), (dissent) (stating "the lead opinion compounds its errors by discounting . . .society's reasonable expectation of privacy in the contents of a person's blood."); *Birchfield v. North Dakota*, 579 U.S. 438, 463 (2016) (stating "[a]lthough the DNA obtained under the law at issue in this case could lawfully be used only for identification purposes, the process put into the possession of law enforcement authorities a sample from which a wealth of additional, highly personal information could be obtained.").

Certain circumstances can reduce one's expectation of privacy in one's own biological material, such as an arrest. *Riley v. California*, 573 U.S. 373, 391 (2014)(explaining that arrestees have "reduced privacy interests upon being taken into police custody."). For example, in *Randall*, this Court concluded that it was Randall's arrest for operating while intoxicated that triggered the elimination of her expectation of privacy in the alcohol concentration in her blood. *Randall*, 387 Wis. 2d 744, ¶¶ 38, 76 (lead opinion)(stating "Randall lost her privacy interest in the alcohol and drug concentration in her blood when she was arrested for intoxicated driving."); (concurring opinion)(stating "a defendant who has been arrested for driving while under the influence of alcohol has no reasonable expectation of privacy in the

alcohol concentration in [her] blood. . . .").[6]

In this case, there was no triggering event–such as an arrest–that eliminated Raymand's expectation of privacy in his DNA.

In addition, the court of appeals erred when it mechanically applied law relating to physically observable things to DNA extraction and analysis. *Raymand*, Appeal No. 2022AP882-CR, ¶ 27 (citing *State v. Tentoni*, 2015 WI App 77, 365 Wis.2d 211, 871 N.W.2d 285). According to the court of appeals, "Raymand had no property interest in the DNA sample because he voluntarily gave the envelope and its contents to law enforcement; he had no control over what law enforcement did with the DNA sample; and he did not take any steps to enhance his privacy in the DNA sample." *Id.*

But *Tentoni* involved someone who was aware of what he disclosed and who had the ability to control its initial disclosure. *See id.*, ¶ 26. Individuals unintentionally and unavoidably shed DNA all the time.[7] One cannot prevent the dissemination of one's DNA, one cannot password protect one's DNA, and one cannot maintain exclusive control over one's DNA. Does that mean that everyone (or everyone who sheds DNA) forever loses their expectation of privacy in their entire genetic blueprint–something

[6] The court of appeals cited *Randall* for the proposition that "by a two-justice lead opinion and a concurrence by three other justices, that there is no reasonable expectation of privacy in the alcohol concentration of blood that has been lawfully seized." *Raymand*, Appeal No. 2022AP882-CR, ¶ 21. Raymand respectfully submits that the court of appeals' interpretation is too broad. It was Randall's *arrest* for operating while intoxicated–not just the lawful seizure of her blood–that was the triggering event. *Randall*, 387 Wis. 2d 744, ¶¶ 38, 76.

[7] People constantly shed staggering numbers of skin cells (Erin Murphy, *Inside the Cell: The Dark Side of Forensic DNA* 5 (2015)); the average person loses between 40 and 100 hairs per day, ((Sheldon Krimsky & Tania Simoncelli, *Genetic Justice: DNA Data Banks, Criminal Investigations, and Civil Liberties* 117 (2012)); and a single sneeze disseminates about 3,000 cell-containing droplets into the world. (*Id.*).

accessible or visible only through constantly advancing scientific technology? The court of appeals says yes.

C. THE EXTRACTION OF RAYMAND'S DNA FROM THE ENVELOPE AND THE SUBSEQUENT ANALYSIS OF THE DNA ARE CONSTITUTIONALLY SIGNIFICANT EVENTS

The court of appeals concluded that once "law enforcement lawfully seized the envelope and its contents through Raymand's consent, it was not required to obtain a search warrant to extract and analyze his DNA[,]" relying on *State v. VanLaarhoven*, 2001 WI App 275, ¶ 16, 248 Wis. 2d 881, 637 N.W.2d 411. *Raymand*, Appeal No. 2022AP882-CR, ¶ 20.

In so holding, the court of appeals "toss[ed] a saddle on a spaceship and call[ed] it a horse." *State v. Burch*, 2021 WI 68, ¶ 86, 398 Wis.2d 1, 961 N.W.2d 314 (Rebecca Frank Dallet, J., concurring in part, dissenting in part, joined in relevant part by Jill J. Karofsky, J. and Ann Walsh Bradley, J.). The court of appeals ignored the distinction between a search that "reveals nothing more than the physically observable item itself" and a search of items that "contain–and conceal– the 'privacies of life,' which are generally not viewable by others at a glance." *Id.*, ¶ 61 (Rebecca Grassl Bradley, J. concurring).

The examination of DNA "differ[s] in both a quantitative and a qualitative sense from other objects." *See Riley*, 573 U.S. at 393 (as applied to smartphones). In *Burch,* this Court stated that "it is a grave analytical error to 'mechanically apply[]' to cell phone data Fourth Amendment rationales that were developed without such invasive technologies in mind." *Burch*, 398 Wis.2d 1,¶ 86 (Rebecca Frank Dallet, J., concurring in part, dissenting in part, joined in relevant part by Jill J. Karofsky, J. and Ann Walsh Bradley, J.). Cell phones and DNA are similar in that they both involve something that can "contain–and conceal" a trove of sensitive personal information easily accessible through

technological advances. *See id.*, ¶ 61.

In *Burch*, this Court left for another day whether antiquated law applicable to physical items governs the novel constitutional problems presented by DNA evidence that is accessible only by constantly advancing scientific technology. *See id.*, ¶ 15 (concluding that "regardless of whether the data was unlawfully obtained or accessed, we conclude suppression of the data is not warranted under the exclusionary rule.").

In addition, the law is unclear whether the analysis of Raymand's DNA constituted a search separate from the extraction of his DNA for Fourth Amendment purposes. In *Randall*, the two-justice lead opinion concluded that a blood draw and the subsequent analysis of the blood do not constitute two separate searches. 387 Wis. 2d 744, ¶¶ 14-17. In her dissent, Justice A.W. Bradley criticized the lead opinion as "erroneously ascrib[ing] no independent constitutional significance to the chemical testing of blood seized by law enforcement." *Id.*, ¶ 79. The three-justice concurrence did not address whether the drawing and testing of blood is one search or two because it did not matter for purposes of resolving that case. *Id.*, ¶ 64.

D. SCIENCE HAS PROGRESSED SINCE *MARYLAND V. KING* SUCH THAT THE WARRANTLESS EXTRACTION AND ANALYSIS OF DNA IMPLICATES THE FOURTH AMENDMENT

The court of appeals mentioned that the portion of DNA analyzed did not reveal a vast amount of personal information about Raymand and thus does not present the privacy concerns outlined in *Riley*. *Raymand*, Appeal No. 2022AP882-CR, ¶ 31. The court of appeals explained that is because "[t]he SCL analyzed Raymand's saliva for noncoding DNA–i.e., DNA not related to Raymand's race, hair color, or other phenotypes[,]" relying on *Maryland v. King*, 569 U.S. 435, 464-65 (2013). *Id.*, ¶ 31.

At the time of *King*, the Court explained that "alleles at the CODIS loci are not at present revealing information beyond identification." 569 U.S. at 464 (internal citation omitted). In doing so, the Court hedged its conclusion by noting that "science can always progress further, and those progressions may have Fourth Amendment consequences." *Id.*

Science has indeed progressed. Research now indicates that noncoding portions of DNA are no longer just "junk." Natalie Ram, *Genetic Privacy After* Carpenter, 105 VA. L. REV. 1357, 1379 (2019)(explaining that "noncoding DNA can be highly informative about genetic relatedness….researches have uncovered links between noncoding regions of the genome and a host of genetic disorders, including certain neurodegenerative disorders and mental retardation syndromes.").

In any event, regardless of what portion of DNA the government deems relevant (at least for now), the government still has access to one's entire genetic blueprint. *See e.g.*, *Birchfield*, 579 U.S. at 464 (stating that a blood test "places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading. Even if the law enforcement agency is precluded from testing the blood for any purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested.").

It is unresolved whether the government can retain evidence beyond what it deemed relevant in one investigation and conduct future warrantless searches of the entirety of that information in unrelated investigations. *See Burch*, 398 Wis.2d 1, ¶ 15.

CONCLUSION

Based on the above reasons, Raymand requests that this Court grant his petition for review.

Dated this 24th day of May 2024

Electronically signed by:

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