STATE OF WISCONSIN

IN SUPREME COURT

No. 2022AP882-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RAYMAND L. VANNIEUWENHOVEN,

Defendant-Appellant-Petitioner.

REPSONSE TO PETITION FOR REVIEW

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ARGUMENT

There is no law development nor any issue of statewide importance raised by this case. As the court of appeals properly recognized, the issue here is a straightforward one that has been long established by existing Fourth Amendment law: when a person abandons any control over an item and particularly when he or she voluntarily consents to law enforcement collecting the item—as Vannieuwenhoven did here with the envelope containing his saliva sample—the person no longer retains any reasonable privacy interest in the item, and its examination is not a separate Fourth Amendment event.

That proposition is well settled in the law. 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. Police are not 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); to seize and examine abandoned property, *Abel v. United States*, 362 U.S. 217, 241 (1960); or to process evidence lawfully in their possession. *State v. Riedel*, 2003 WI App 18, ¶¶ 6, 11–16, 259 Wis. 2d 921, 656 N.W.2d 789.

Particularly relevant here, law enforcement does not need a warrant to examine an item lawfully seized. *State v. Petrone*, 161 Wis. 2d 530, 544–45, 468 N.W.2d 676 (1991) (*overruled in part on other grounds by State v. Greve*, 2004 WI 69, 272 Wis. 2d 444, 681 N.W.2d 479) (holding that law enforcement did not require a second warrant to develop a roll of film seized during a warranted search); *State v. VanLaarhoven*, 2001 WI App 275, ¶¶ 12, 14–16, 248 Wis. 2d 881, 637 N.W.2d 411 (holding that law enforcement did not need a warrant to test a blood sample obtained under the implied consent law for alcohol); *Riedel*, 259 Wis. 2d 921, ¶¶ 6, 11–16 (same under exigent circumstances test). Indeed, all of these cases hold that analysis of the item after its lawful acquisition by law enforcement is not a separate Fourth Amendment search. *State v. Randall*, 2019 WI 80, ¶¶ 29, 32, 387 Wis. 2d 744, 930 N.W.2d 223. Law enforcement's seizure of the envelope was the only potential Fourth Amendment event in this case, and Vannieuwenhoven freely and voluntarily handed it to Deputy Laskowski.

It is important to recognize what specifically was obtained from the envelope in this case. It was *far* from his "entire genetic blueprint" as Vannieuwenhoven claims. (Pet. 4.) 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 saliva on the envelope matched those same markers from the semen left at the crime scene 40 years earlier. (R. 421:149.) According to the United States Supreme Court, the fact that other information about a person could be gleaned from a different type of DNA test 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)[1]; *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)).

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, long-standing case law holds 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.

The only issue in this case was thus 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 voluntarily licked the envelope and voluntarily handed it to

[1] A multitude of other courts have reached this conclusion, as well. *See, e.g.*, *Williamson v. State*, 993 A.2d 626, 638–41 (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), *aff'd en banc*, 745 F.3d 1269 (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. 2007) (en banc) (DNA testing for genetic identity only is no different than fingerprints and does not implicate any heightened privacy interests).

law enforcement. There is no need for this Court to revisit this issue. 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, and Vannieuwenhoven's claim that the Fourth Amendment required him to know what the police intended to do with the envelope to consent to providing it to them enjoys no support. (Pet. 9.)

The law actually holds precisely the opposite. 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). "Ploys 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). Every part of Vannieuwenhoven's interaction with Deputy Laskowski was voluntary; Vannieuwenhoven could have refused to participate in the survey at any point, and did not. And every court to consider similar claims has rejected them.

In *State v. Athan*, 158 P.3d 27, ¶¶ 18–19, 26 (Wash. 2007) (en banc), 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. *People v. Moreaux*, 174 N.Y.S.3d 237, 241–42, 245–47 (N.Y. Sup. Ct. 2022). 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*, 815 N.Y.S.2d 211, 213 (N.Y. App. Div. 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 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. App. Ct. 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, at *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. 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.)

Vannieuwenhoven indisputably made an "essentially free and unconstrained choice" to take the survey, seal the envelope, and hand it back to Deputy Laskowski. *United States v. Spivey*, 861 F.3d 1207, 1214 (11th Cir. 2017) (citation omitted). The unchallenged 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, 42–43.) Police engineered a scenario in which they hoped Vannieuwenhoven would consent to complete the survey and return it, thus voluntarily providing him a saliva sample containing his genetic identity. Vannieuwenhoven did so, and the police examined the material for their own purposes using a tightly circumscribed procedure that could reveal no more about Vannieuwenhoven than whether his non-coding genetic loci matched those left at the crime scene. That is well within the long-recognized boundaries of the Fourth Amendment.

To the extent that this case involves a slightly unique fact pattern in Wisconsin (though one that has survived Fourth Amendment scrutiny in every court to consider it elsewhere),[2] that is no different than any other Fourth Amendment case; they all turn on the totality of the circumstances in the specific factual scenario presented. Other than misstating what is required for "abandonment,"[3] which was not germane to the outcome on appeal, the court of appeals properly applied established Fourth Amendment law to these facts in a published opinion, meaning there is no important or compelling need for this Court to do so a second time.

Should this Court take the case, however, the State requests that this Court bring Wisconsin law on voluntariness in the Fourth Amendment context back in line with the

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[2] *Illinois v. Perkins*, 496 U.S. 292, 297 (1990); *State v. Athan*, 158 P.3d 27, ¶¶ 18–19, 26 (Wash. 2007) (en banc); *Commonwealth v. Ewing*, 854 N.E.2d 993, 1000–01 (Mass. App. Ct. 2006); *Williamson*, 993 A.2d at 633–37; *United States v. Hicks*, No. 2:18-cr-20406-JTF-7, 2020 WL 7311607, at *2 (W.D. Tenn. Dec. 11, 2020); *People v. LaGuerre*, 815 N.Y.S.2d 211, 213 (N.Y. App. Div. 2006); *Piro v. State*, 190 P.3d 905 (Idaho Ct. App. 2008) (holding that a suspect did not have a reasonable expectation of privacy in genetic material left on a water bottle in an interrogation room of the police station).

[3] The court of appeals determined that Vannieuwenhoven did not "abandon" his saliva sample because he "did not 'throw[] . . . away' the envelope." (Pet-App. 11 n.12 (citation omitted).) That was incorrect—something does not have to be specifically discarded into the trash for it to be considered "abandoned." The person simply has to do something indicating relinquishment of any continuing property or privacy interest in it. *See 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); *State v. Tentoni*, 2015 WI App 77, ¶¶ 7–10, 365 Wis. 2d 211, 871 N.W.2d 285 (sender abandoned any privacy interest in text messages after they were sent to recipient).

United States Supreme Court's pronouncements on the issue. In *Padley*, the court of appeals 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) (quoting *State v. Giebel,* 2006 WI App 239, ¶ 18, 297 Wis. 2d 446, 724 N.W.2d 402).

However, the Supreme Court was unequivocal in rejecting the idea that consent to a search or seizure must be "knowing" and "intelligent" under the Fourth Amendment:

> There is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment. Nothing, 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.

Schneckloth v. Bustamonte, 412 U.S. 218, 241 (1973). "The protections of the Fourth Amendment are of a wholly different order [than trial rights that must by knowingly and intelligently waived], and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial." *Id.* at 242. Police cannot coerce consent by implied threat or covert force, such as by affirmatively misstating they have lawful authority to perform a search when they do not. *Id.* at 228–29; *Bumper v. North Carolina*, 391 U.S. 543, 548–50 (1968). But engineering a contrived scenario with the hopes that the suspect will voluntarily or inadvertently provide police with evidence involves no such coercion; it is merely a ploy to mislead the suspect, which is expressly permitted. *Perkins*, 496 U.S. at 297.

This Court is bound to follow United States Supreme Court precedent on federal constitutional questions, even if it conflicts with decisions from this Court. *State v. Jennings*, 2002 WI 44, ¶ 19, 252 Wis. 2d 228, 647 N.W.2d 142. *Padley*'s statement was an incorrect articulation of what is required for voluntariness in the Fourth Amendment context, and should be overruled to the extent that it grafted a knowing and intelligent requirement onto the voluntariness analysis.

The State believes that this case would be a poor vehicle for making this legal adjustment, however, because it would have no effect on the outcome. The court of appeals did not rely on *Padley*—it, too, must follow the United States Supreme Court's pronouncements on questions of Federal Constitutional law even if they conflict with this Court's decisions, *Jennings*, 252 Wis. 2d 228, ¶ 19—and it correctly determined that Vannieuwenhoven voluntarily consented to law enforcement taking the envelope containing his saliva sample. Just as a letter-sender who mails a letter to a recipient no longer has any privacy interest in the letter because he has relinquished all control over what the recipient does with it once it reaches its destination, Vannieuwenhoven lost all privacy interest in the envelope and its contents once he voluntarily gave it to law enforcement. At any rate, on these facts he also knowingly and intelligently consented to the deputy taking the envelope: he knew Deputy Laskowski was a law enforcement officer, and Vannieuwenhoven knowingly and intelligently acquiesced in taking the survey and handing the envelope, which he knew had his saliva on it, back to Deputy Laskowski. He thereafter retained no reasonable privacy interest in the envelope nor his genetic identity contained on it.

* * * * *

Vannieuwenhoven's assertion of what the Fourth Amendment requires in this circumstance is a gross misarticulation of the law, and one that at least one court has

gone so far as to describe thus: "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. The court of appeals properly rejected it, and this Court should decline to review its decision.

CONCLUSION

This Court should deny Vannieuwenhoven's Petition for Review.

Dated this 6th day of June 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this petition or response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition or response produced with a proportional serif font. The length of this petition or response is 3004 words.

Dated this 6th day of June 2024.

Electronically signed by:

Lisa E.F. Kumfer
LISA E.F. KUMFER
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Supreme Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 6th day of June 2024.

Electronically signed by:

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