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COURT OF APPEALS

IN THE SUPREME COURT OF WISCONSIN

STATE OF WISCONSIN
Plaintiff-Respondent,

Case No. 2022-AP-882-CR

V.

RAYMAND L. VANNIEUWENHOVEN,
Defendant-Appellant-Petitioner.

NON-PARTY BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF WISCONSIN FOUNDATION, AND ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF PETITION FOR REVIEW

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INTEREST OF AMICI CURIAE

The American Civil Liberties Union ("ACLU") is a nonprofit, nonpartisan membership organization devoted to protecting civil rights and civil liberties. The ACLU of Wisconsin Foundation, Inc. is a nonprofit, independent state affiliate of the ACLU, incorporated in the State of Wisconsin. The Electronic Frontier Foundation ("EFF") is a member-supported, nonprofit civil liberties organization with more than 30,000 active donors, including in Wisconsin, that works to protect free speech and privacy rights in the online and digital world. These organizations have appeared before courts around the country, including this Court, to ensure that the constitutional right to privacy is not eroded by the advance of technology. *See, e.g., Carpenter v. United States*, 585 U.S. 296 (2018); *United States v. Patrick*, 842 F.3d 540 (7th Cir. 2016); *State v. Burch*, 2021 WI 68, 398 Wis. 2d 1, 961 N.W.2d 314.

INTRODUCTION

This case warrants review for two reasons.

First, it presents a real and significant question of constitutional law, *see* Wis. Stat. § 809.62(1r)(a): When a police officer employs a ruse to get a person to touch or lick an item—like the envelope here—does the person relinquish their constitutional right to privacy in the genetic material involuntarily deposited on the item, even though they had no choice but to leave it there and notwithstanding the breadth of private information contained in their DNA?

The court below answered that question in the affirmative, reasoning that if seizure of the envelope was consensual, any further examination of the envelope was constitutional. *State v. Vannieuwenhoven*, No. 2022AP882-CR, 2024 WL 1879183, at *4–5 (Wis. Ct. App. Apr. 30, 2024). That conclusion ignores caselaw from this Court and the U.S. Supreme Court, *see* Wis. Stat. § 809.62(1r)(d), which makes clear that "[o]ne who consents to a search 'may of course delimit as [she] chooses the scope of th[at] search,'" *State v. Randall*, 2019 WI 80, 387 Wis. 2d 744,

754–55, 930 N.W.2d 223, 227 (quoting *State v. Matejka*, 241 Wis. 2d 52 (2001)); *Florida v. Jimeno*, 500 U.S. 248, 252 (1991) (same). Consent to share an envelope containing survey responses, and no more, is not consent to share private genetic information. Equally, the ruling below ignores this Court's and the U.S. Supreme Court's cautions that "genetic information about [a person's] ancestry, family connections, medical conditions, or pregnancy" deserves special protection, even when extracted from material obtained through valid consent. *Randall*, 387 Wis. 2d at 774; *see also Birchfield v. North Dakota*, 579 U.S. 486, 463 (2016).

Accepting the lower court's logic would allow the State to create a database of every Wisconsinite's DNA, without any court oversight, simply by blanketing households with surveys or other ruses, and extracting the DNA from each returned envelope or other item. That not only runs counter to recent state and federal constitutional decisions, but endangers the privacy rights of all Wisconsinites, and would disincentivize people from voluntarily engaging with government officials. This Court should grant review to correct those errors, and to answer the significant question of constitutional law this case poses.

Second, there is a compelling need for this Court to clarify the law, *see* Wis. Stat. § 809.62(1r)(c), regarding whether and when collection and analysis of biological material constitutes a separate search or seizure for constitutional purposes. A similar question was raised in *State v. Randall*, 387 Wis. 2d 744, but this Court's divided opinions failed to offer sufficient guidance.

ARGUMENT

I. This Case Presents a Real and Significant Question of Constitutional Law.

This case raises the question of whether law enforcement must obtain a warrant before it collects and analyzes unavoidably shed DNA. In concluding that it need not, the court below failed to recognize that collecting and analyzing DNA constitutes a search and seizure, and it ignored well-established constitutional law

limiting consent searches to their explicitly authorized scope, and requiring that such searches be knowing and voluntary.

A. DNA Contains Highly Sensitive Information.

A DNA sample contains a person's entire genetic makeup. With current technology, DNA testing can expose personal information, including one's likelihood for having Alzheimer's, cystic fibrosis, breast cancer, Huntington's disease, and substance use disorders, as well as previously unknown family members and parentage.

Two types of DNA analysis are widely available today, both of which were used in this case. The first generates a single nucleotide polymorphism ("SNP") profile, which enables law enforcement officers to conduct forensic genetic genealogy ("FGG") investigations, as in this case. FGG involves building out family trees spanning generations, and can reveal everything from adoptions to infidelities, not only about a suspect but also their relatives.[1] It can also involve law enforcement surreptitiously and warrantlessly collecting DNA from many relatives, including people who are never arrested, in an effort to match one crime-scene sample. Here, for example, an FGG analyst "believed the suspect was one of . . . four sons or . . . four grandsons," and a detective "attempted to covertly collect DNA from each possible family member[.]" *See Vannieuwenhoven*, 2024 WL 1879183, at *2.

The second type of DNA analysis—also used by law enforcement in this case—measures how many times "short, tandem, repeat" ("STR") sequences occur at designated locations on the genome.[2] Though sometimes mischaracterized as revealing only identity, STR profiles can expose far more, particularly as research and technology continue to evolve.

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[1] *See, e.g.,* Rafil Kroll-Zaidi, *Your DNA Test Could Send a Relative to Jail*, N.Y. Times (Dec. 27, 2021), https://www.nytimes.com/2021/12/27/magazine/dna-test-crime-identification-genome.html.

[2] *See* Erin Murphy, *Inside the Cell: The Dark Side of Forensic DNA* 7–8 (2015).

A 2017 study suggests that STR profiles can be linked to SNP profiles, shedding light on "precise ancestry estimates, health and identification information."[3] A 2020 research review found that 57 studies have linked forensic STRs to 50 unique traits, including schizophrenia, Parkinson's disease, and Down syndrome.[4] A 2022 study found "six significant correlations" through which STRs may offer information about psychiatric conditions and physical characteristics, like "severe skin and platelet conditions."[5] "These results join a growing body of work showing that [STR] genotypes may contain more information than purely identity," and "raise concerns about the medical privacy of individuals whose [STR] profiles are seized, databased, and accessed, as well as the genetic relatives of those persons."[6]

B. Extracting an Individual's Genetic Material and Generating a DNA Profile From it Constitutes a Search and Seizure.

Courts have recognized people's "very strong privacy interests" in the "vast amount of sensitive information that can be mined from a person's DNA," *United States v. Amerson*, 483 F.3d 73, 85 (2d Cir. 2007), and have held that "the creation of [a person's] DNA profile constitute[s] a search for Fourth Amendment purposes." *United States v. Davis*, 690 F.3d 226, 246 (4th Cir. 2012). *See also State v. Medina*, 102 A.3d 661, 691 (Vt. 2014) (DNA "provide[s] a massive amount of unique, private information about a person that goes beyond identification of that person"); *Thompson v. Spitzer*, 307 Cal. Rptr. 3d 183, 199 (Cal. Ct. App. 2023) ("[A] DNA

[3] Michael D. Edge et al., *Linkage Disequilibrium Matches Forensic Genetic Records to Disjoint Genomic Marker Sets*, 114 Proceedings Nat'l Acad. Scis. 5671, 5675 (2017), https://www.pnas.org/content/114/22/5671.

[4] Nicole Wyner, et al., *Forensic Autosomal Short Tandem Repeats and Their Potential Association with Phenotype*, Frontiers in Genetics (Aug. 5, 2020), https://www.frontiersin.org/articles/10.3389/fgene.2020.00884/full.

[5] Mayra M. Bañuelos, et al., *Associations Between Forensic Loci and Expression Levels of Neighboring Genes May Compromise Medical Privacy*, PNAS (Sept. 27, 2022), https://www.pnas.org/doi/10.1073/pnas.2121024119.

[6] *Id.*

sample contains a trove of personal information.").

As this Court's lead opinion in *Randall* recognized, when it comes to biological material, "[i]f the State could not ascertain th[e information it seeks] without also learning genetic information about [a person]," collection and analysis of that information could "not be conducted without a warrant," even if the biological specimen was obtained lawfully. *Randall*, 387 Wis. 2d at 774. In *Randall*, that rule didn't require a warrant because the information at issue, blood alcohol concentration, could be obtained without revealing genetic information; here, genetic information is precisely what the state sought.

Contrary to the court's conclusion below, it does not matter whether the police use DNA only to reveal identity. *Vannieuwenhoven*, 2024 WL 1879183, at *7. For constitutional purposes, what matters is the "wealth of additional, highly personal information [that] could potentially be obtained" from whatever the police acquired. *Birchfield*, 579 U.S. at 463. In *Birchfield*, the U.S. Supreme Court held that blood tests for alcohol concentration are more concerning than breath tests because extracting blood makes it "possible" for law enforcement "to extract information beyond" alcohol data—including genetic information. *Id.* at 464. *Accord Carpenter v. United States*, 585 U.S. 296, 302, 311 (2018) (holding that defendant had reasonable expectation of privacy in location data, notwithstanding the small portion the government relied on, because of all that *could be* revealed by the entirety of the data).

Finally, in addition to constituting a search, the State's extraction and analysis of Petitioner's DNA constituted a seizure because it "meaningful[ly] interfere[d] with [his] possessory interests," *United States v. Jacobsen*, 466 U.S. 109, 113 (1984), including the ability to control and exclude others from access. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982).

C. The DNA in Saliva that Sealed an Envelope Cannot Be Seized or Searched Without a Warrant Merely Because the State Lawfully Obtained the Envelope.

"[A] DNA sample may only be collected by a search warrant supported by probable cause," unless some exception applies. *State v. Ward*, 807 N.W.2d 23, 28 (Wis. Ct. App. 2011) (citing *State v. Banks,* 790 N.W.2d 526, 532 (Wis. Ct. App. 2010)); *see also Arizona v. Gant*, 556 U.S. 332, 338, 345 (2009). Relying on the consent and government-deceit doctrines, the lower court concluded that Petitioner's willingness to hand over an envelope containing responses to a fake survey constituted consent to hand over his DNA, negating the warrant requirement. *See Vannieuwenhoven,* 2024 WL 1879183, at *4-5. That conclusion was incorrect.

Both the consent and government-deceit doctrines hinge on voluntariness. The consent exception "is jealously and carefully drawn." *State v. Burch*, 2021 WI 68, ¶ 70, 961 N.W.2d 314, 335 (Dallet, J., concurring in part and dissenting in part) (marks and citations omitted). "Consent to a particular search must . . . be 'unequivocal and specific,'" *id.* (quoting *State v. Reed*, 2018 WI 109, ¶8, 920 N.W.2d 56, 59), its scope must be "particularly described," and any resulting search must be "limited by the particular terms of [that] authorization," *Walter v. United States*, 447 U.S. 649, 657 (1980). The scope of consent "is limited not only to a particular area but also to a specific purpose." *Florida v. Jardines*, 569 U.S. 1, 9 (2013). Just as "[c]onsent at a traffic stop to an officer's checking out an anonymous tip that there is a body in the trunk does not permit the officer to rummage through the trunk for narcotics," *id.*, consent to collection of an envelope to deliver survey results does not permit an officer to rummage through the same envelope for a DNA profile.

The government-deceit cases, arguably a subset of consent-search cases, also require that an individual know what information is being accessed, and voluntarily grant that access. "[T]he Fourth Amendment [does not] protect[] a wrongdoer's misplaced belief that a person to whom he *voluntarily* confides his wrongdoing will not reveal it" because the wrongdoer "kn[o]w[s] full well [that the information]

could be used against him by [the recipient]." *Hoffa v. United States*, 385 U.S. 293, 302–03 (1966) (emphasis added). But that rationale doesn't apply where the government agent "seiz[es] something surreptitiously without [the defendant's] knowledge." *Id.* at 303. While the government may be able to "see, hear, or take anything that was . . . *contemplated, and in fact intended*, [to be shared]," it may not engage in "secret[ ] ransacking and seiz[ures]." *Lewis v. United States*, 385 U.S. 206, 209–10 (1966).

In *Carpenter*, the U.S. Supreme Court declined to apply a different consent-based rule—the third-party doctrine—because it concluded that our location information is not *voluntarily* shared with cellphone providers. 585 U.S. at 315. Instead, cellphones "are 'such a pervasive and insistent part of daily life' that carrying one is indispensable to participation in modern society," and location information is shared "by dint of [a phone's] operation, without any affirmative act on the part of the user." *Id.* (internal citation omitted).

No doctrine that turns on consent can permit the state to gather sensitive information that people never intended to share. And that is exactly what happens when the state treats someone's decision to share *an envelope* as a decision to share *their genetic profile*. In doing so, the state is not relying on someone's informed consent to share DNA. It is not even looking to someone's deceit-induced consent to share DNA. Rather, as with the location data in *Carpenter*, the state is exploiting the simple fact that we cannot avoid making personal, sensitive data available by dint of modern life and available technologies. *See* Pet. at 11, n.7.

With every sealed envelope, used tissue, discarded coffee cup, and flake of dandruff, people involuntarily leave a copy of their genetic blueprint behind.[7] It is

[7] The court below relied on cases about blood drawn explicitly to test for blood alcohol concentration ("BAC") levels. *See Vannieuwenhoven,* 2024 WL 1879183, at *5 (discussing *State v. VanLaarhoven*, 2001 WI App 275, ¶16 and *Randall*, 2019 WI 80, ¶¶14, 64). But in those cases, the blood was drawn specifically, and with explicit consent, to test for BAC levels; here, the envelope was sealed and handed over specifically, and with explicit consent, only to communicate responses to a survey. No mention was ever made of DNA.

not possible to avoid depositing DNA in one's wake. Even attempting to do so would require full-body protective suits, hair coverings, and respirators. It would mean either wiping down or lugging home every item someone touches in public, and then incinerating those along with household trash. Society simply does not expect—nor do the federal or state constitutions require—people to take such measures.

Moreover, contrary to the lower court's conclusion that any expectation of privacy Petitioner had in his DNA evaporated when he "gave the envelope and its contents to law enforcement," *Vannieuwenhoven,* 2024 WL 1879183, at *5 , the unique privacy expectation in genetic information informs why consent to hand over an object does not relieve law enforcement of its obligation to get a warrant to collect and analyze DNA unavoidably shed on it. *See Burch*, 2021 WI 68, ¶ 73 (Dallet, J., concurring in part and dissenting in part) (making this point with regard to "[t]he unique privacy expectation in cell phone data"). "[P]hysical items such as rings are qualitatively different than searches of . . . data" that can "contain—and conceal—the privacies of life, which generally are not viewable by others at a glance." *Id.* ¶ 61 (Bradley, J., concurring) (marks and citations omitted).

This Court should grant review to answer the critical question posed: whether law enforcement can collect an individual's unavoidably shed DNA without a warrant or valid consent to collect that genetic material.

II. There Is a Compelling Need for This Court to Help Clarify the Law in Light of the Fractured Opinion in *State v. Randall*.

This case also raises the question of whether the collection and analysis of Petitioner's DNA constituted a constitutionally-significant event separate from the seizure of the envelope. A similar issue was raised in *Randall*, which considered whether measuring the alcohol concentration in blood that was consensually gathered specifically to test for that information was a separate Fourth Amendment event from the seizure of the blood, but no majority of this Court offered a clear answer. *See* 387 Wis.2d 744, 757 (2019) (lead opinion rejecting argument "that a

blood draw and test involve two searches"); *id.* at 790 (concurrence concluding that "[i]n actuality, it does not matter"); *id.* at 796 (dissent noting that the lead opinion's "collaps[ing of] the seizure and search into a single constitutional event" is a "flawed construct").

The lower court relied on *Randall* to conclude that, once an object is seized, extraction and analysis of DNA unavoidably shed on that object does not constitute a separate event for constitutional purposes. *See Vannieuwenhoven*, 2024 WL 1879183, at *5. That ignores the divide between this Court's opinions, which do not offer clear guidance on whether and when a separate Fourth Amendment event occurs when it comes to extraction and testing of biological material. This Court should grant review to provide clarity on that question.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge the Court to grant the petition for review.

Dated: June 7, 2024

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 2,964 words.

Dated: June 7, 2024

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