STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

APPEAL NO. 2023 AP 1091-CR

STATE OF WISCONSIN,

Plaintiff – Respondent,

v.

MILES JIMMY CRUZ,

Defendant – Appellant.

BRIEF OF DEFENDANT–APPELLANT

APPEAL FROM A JUDGMENT OF CONVICTION

ENTERED IN THE CIRCUIT COURT FOR BROWN COUNTY
THE HONORABLE TAMMY JO HOCK PRESIDING

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ISSUES PRESENTED FOR REVIEW

Did law enforcement violate Mr. Cruz's Fourth Amendment rights when they seized fingernail swabs from his person without a warrant?

The Circuit Court answered: No.

Suggested Answer on Appeal: Yes.

Did law enforcement violate Mr. Cruz's Fourth Amendment rights when they seized a buccal swab from his person without a warrant?

The Circuit Court answered: No.

Suggested Answer on Appeal: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. Defendant-Appellant does not request publication as the issues raised in this appeal deal with application of well-settled legal standards to its unique facts.

STATEMENT OF THE CASE

This is an appeal from a *Judgment of Conviction* (R. 105; App. 2-4) entered in Brown County Circuit Court, the Honorable Tammy Jo Hock, presiding judge.

On October 28, 2021, the State of Wisconsin filed a *Criminal Complaint* which charged the Defendant-Appellant, Miles Jimmy Cruz, with one count of Attempted First Degree Intentional Homicide, contrary to Wis. Stat. §§ 940.01(1)(a) and 939.32, one count of First Degree Sexual Assault, contrary to Wis. Stat. § 940.225(1)(a), one count of Kidnapping, contrary to Wis. Stat. § 940.31(1)(a), one count of Strangulation and Suffocation, contrary to Wis. Stat. §

940.235(1), and one count of Second Degree Recklessly Endangering Safety, contrary to Wis. Stat. § 941.30(2). (R. 2).

On June 16, 2022, Defendant-Appellant filed a *Notice of Motion and Motion to Suppress Evidence* arguing law enforcement unlawfully obtained fingernail swabbings and a buccal swab from Defendant-Appellant. (R. 53; App. 5-9). An evidentiary motion hearing was held on July 25, 2022. (R. 114; App. 10-57). On August 15, 2022, the Court issued a written *Decision and Order Regarding Defendant's Motion to Suppress Evidence*. (R. 63; App. 58-73). On August 16, 2022, the Court issued a written *Amended Decision and Order Regarding Defendant's Motion to Suppress Evidence*. (R. 64; App. 74-89).[1] In both decisions, the Court denied Defendant-Appellant's request to suppress evidence. (R. 63, 64; App. 58-73, 74-89). In doing so, the Court found that Defendant-Appellant consented to both the fingernail swabbings and buccal swab eliminating the need for law enforcement to obtain a warrant. *Id*. The Court further found that specific to the fingernail swabbings, the exigent circumstances exception to the warrant requirement also applied. *Id*.

On October 19, 2022, Defendant-Appellant entered a plea of 'no contest' to one count of First-Degree Sexual Assault, Strangulation/Suffocation, Kidnapping, and Second Degree Recklessly Endangering Safety. (R. 105; App. 2-4). After finding that the Defendant-Appellant knowingly, voluntarily, and intelligently entered such pleas, Judge Hock adjudicated him guilty. (R. 115). Judge Hock imposed an overall sentence of 65-years imprisonment. (R. 105; App. 2-4). A *Judgment of Conviction* was entered on March 7, 2023. *Id*. A timely *Notice of Intent to Pursue Postconviction Relief* was filed on March 8, 2023. (R. 106). A timely *Notice of Appeal* was filed on June 19, 2023. (R. 127). A timely *Statement on Transcripts* was filed on June 29, 2023. (R. 132).

[1] The sole difference between the original and amended opinions was the removal of some highlighting that had been inadvertently left in the August 15, 2022, decision.

STATEMENT OF THE FACTS

Defendant-Appellant filed a motion to suppress evidence on June 16, 2022. (R. 53; App. 5-9). The motion alleged that Detective Guth obtained Defendant-Appellant's DNA, specifically fingernail swabbings and a buccal swab, in violation of his Fourth Amendment rights. *Id*. The motion requested an order suppressing all evidence gathered by Detective Guth in violation of Defendant-Appellant's Fourth Amendment rights. *Id*.

An evidentiary motion hearing was held on July 25, 2022. (R. 114; App. 10-57). The only witness to testify was Detective Sergeant Matthew Guth. (*Id*. at 2; 11). Detective Guth, employed with the City of De Pere Police Department, testified that on October 5, 2021, he conducted a recorded interrogation with the Defendant-Appellant at the De Pere Police Department.[2] (*Id*. at 7; 16). Detective Guth began the interrogation by informing Mr. Cruz that he was in custody for being a runaway and read Mr. Cruz his *Miranda* rights. (*Id*. at 23; 32). Soon after, Detective Guth asked Mr. Cruz if he needed to use the restroom to which Mr. Cruz declined. (*Id*.)

Nearly 18 minutes into the interrogation, Detective Guth began observing Mr. Cruz's arms and had him open his mouth so he could observe his mouth and tongue for potential scratches. (R. 142 at 17:15-17:55). Then, for the first time, Detective Guth asked Mr. Cruz if he got in a fight with a lady with a baby on the trail. (*Id*. at 18:30-18:35). Mr. Cruz denied seeing any lady with a baby on the trail that morning. (*Id*.; R. 114 at 23; App. 32). Soon after, Detective Guth briefly left the interview room. (R. 142 at 19:47). Approximately three minutes later, he returned wearing latex gloves and carrying DNA collection material. (*Id*. at 22:55; R. 114 at 24; App. 33).

[2] The parties previously stipulated that the recorded interrogation be submitted in its entirety as an exhibit. (R. 114 at 4; App. at 13). This exhibit is R. 142.

Immediately upon re-entering the room, the following exchange took place:

> **Detective Guth**: Alright, what we're going to do is I'm going to collect some DNA from your fingers.
>
> **Mr. Cruz**: OK.
>
> **Detective Guth**: Is that alright? [Long pause]. The reason I'm doing this is, you wouldn't have been involved in a fight or anything on the trail or you didn't scratch anybody?
>
> **Mr. Cruz**: No, nobody touched me or anything like that.
>
> **Detective Guth**: I'm going to do your fingernails like under your nails. We'll start with your left hand.

(*Id*. at 22:56-23:45; *See* R. 114 at 25-26; *See* App. 34-35). Mr. Cruz then presents Detective Guth with his left hand. (*Id*. at 22:46; 26; 35). Detective Guth testified that he viewed this action as Mr. Cruz volunteering to have his nails swabbed. (R. 114 at 16; App. 25). Moreover, Detective Guth acknowledged that prior to this exchange, there had been no conversation concerning DNA. (*Id*. at 25; 34).

According to Detective Guth's testimony, DNA swabbings are taken early on in an interview because evidence may dissipate and be destroyed or lost over time. (*Id*. at 13; 22). Detective Guth testified that he intentionally did not tell Mr. Cruz that he would be taking fingernail swabs because he did not want Mr. Cruz to destroy potential evidence by biting his fingernails and wiping his fingers and hands on his pants. (*Id*. at 14; 23).

Nearly two hours later, at approximately two hours and 20 minutes into the interrogation, Detective Guth asked Mr. Cruz if he knew how DNA worked. (R. 142 at 2:19:30-2:19:32). This question occurs after he told Mr. Cruz that someone saw him following the female on the trail. (*Id*. at

2:19:12-2:19:24). Mr. Cruz again denies ever seeing the female with the baby on the trail. (*Id*. at 2:19:55-2:20:17; R. 114 at 28; App. 37).

Approximately one hour later, at around three hours and 20 minutes into the interview, Detective Guth re-entered the interrogation room wearing latex gloves. (*Id*. at 3:18:15). The following exchange then occurs:

> **Detective Guth**: One last thing I'd like to do before we leave, we've talked about the DNA and all that stuff so we can eliminate you as a suspect is take a buccal swab, do you know what that is?
>
> **Mr. Cruz**: You put that in my mouth, right?
>
> **Detective Guth**: Mhm, so go ahead and open up your mouth here and I'll rub this on the side real well.

(*Id*. at 3:18:32-3:18:47; R. 114 at 18, 27; App. 27, 36). Detective Guth testified that Mr. Cruz nodded his head after being told that his DNA was going to be collected. (R. 114 at 18, 27; App. 27, 36).

During cross-examination, Detective Guth admitted that Mr. Cruz was a suspect for what took place on the trail the entire time he was being interrogated. (*Id*. at 28; 37). According to Detective Guth, he obtained Mr. Cruz's fingernail and buccal swabs to eliminate Mr. Cruz as a suspect. (*Id*.). Despite Mr. Cruz being a suspect, Detective Guth never informed Mr. Cruz that he did not have to consent to any of the swabbing. (*Id*. at 28-29; 37-38). Further, at no time did Detective Guth explain to Mr. Cruz what was going to happen with the swabs. (*Id*. at 30; 39). Despite this, he testified that he believed Mr. Cruz understood the DNA collection process and what was being asked of him. (*Id*. at 31-32; 40-41).

Following conclusion of the testimony at the July 25, 2022, evidentiary hearing, the parties provided oral arguments to the court. (*Id*. at 32-45; 41-54). The State first argued that

Detective Guth had consent to collect Mr. Cruz's fingernail swabs. (*Id*. at 33-34; 42-43). Second, the State argued that these were searches incident to a lawful arrest. (*Id*. at 34; 43). Third, the State argued that there were exigent circumstances warranting the collection of the fingernail swabs. (*Id*. at 34-35; 43-44). In so arguing, the State suggested that Mr. Cruz's actions were causing the evidence to dissipate and be at risk of becoming destroyed. (*Id*.). With regard to the buccal swab, the State again argued that there was consent. (*Id*. at 35-36; 44-45). Finally, the State argued that if the court found that Mr. Cruz did not consent, suppressing the evidence would not be the correct remedy. (*Id*. at 36-38; 45-47). In support of this argument, the State relied on the independent source doctrine and inevitable discovery of Mr. Cruz's DNA. (*Id*.). Specifically, the state argued that "[t]o suppress that knowing that we could obtain that at any time would be an extraordinary remedy under these particular circumstances, particularly when you balance that against the conduct of law enforcement…Detective Guth believed that he had obtained consent to take that and I think to suppress under those circumstances would be inappropriate, particularly where this information is available through an alternative source. We could swab him here today and get that same information." (*Id*. at 37-38; 46-47).

In response, the defense first argued that there was not voluntary consent with either of the swabs. (*Id*. at 38, 41-44; 47, 50-53). Second, the defense argued that this was not a search incident to arrest as Mr. Cruz was not under arrest at the time of the swabbing. (*Id*. at 41; 50). Third, and specific to the fingernail swabs, the defense argued that exigent circumstances did not exist. (*Id*. at 39-40; 48-49). In support, the defense noted that the collection didn't begin until nearly 23 minutes into the interrogation and that the detective was willing to allow Mr. Cruz to use the bathroom prior to the collection. (*Id*.). Further, there were steps short of violating Mr. Cruz's constitutional rights that the detective could have taken to ease any concern of potential evidence being destroyed.

(*Id*.). Finally, the defense argued that the appropriate remedy was suppression highlighting that the exclusionary rule should apply as otherwise there would be no applicable remedy to such a violation of constitutional rights. (*Id*. at 44; 53).

At the conclusion of oral arguments by counsel, the court noted that a written decision would be issued. That decision came on August 15 and 16, 2023. (R. 63, 64; 58-89). In its decision, the court denied Mr. Cruz's motion to suppress. (*Id*.). In doing so, the court first analyzed the finger swabs and found that Mr. "Cruz consented in fact to the swabbing of his fingers." (R. 64 at 8; 81). Further, the Court determined that the video showed Detective Guth explaining why he wanted to obtain the DNA samples and thus Mr. Cruz freely and voluntarily consented to the swabs. (*Id*. at 10-12; 83-85). In so holding, the Court noted that "[e]ven though Cruz was not informed he could withhold consent, the facts and circumstances surrounding the finger swabs demonstrate that Cruz still freely and intelligently submitted to the swabs." (*Id*. at 12; 85). Second, the Court held that these were not searches incident to arrest. (*Id*. at 14; 87). Third, the Court found that exigent circumstances surrounded the collection of the fingernail swabs. (*Id*. at 13; 86). Finally, the Court analyzed the buccal swab and found that "[t]here is no doubt that Cruz consented, in fact, to this sample." (*Id*. at 15; 88).

STANDARD OF REVIEW

Review of issues that concern whether a search or seizure is reasonable is a question of constitutional fact. *State v. Post*, 2007 WI 60, ¶ 8, 301 Wis. 2d 1, 733 N.W.2d 634. Courts apply a two-step standard of review to questions of constitutional fact as they are mixed questions of law and fact. *Id*. This Court reviews the "circuit court's findings of historical fact under the clearly erroneous standard" and "independently [reviews] the application of those facts to constitutional principles." *Ibid*.

SUMMARY OF THE ARGUMENT

Detective Guth unlawfully obtained Mr. Cruz's fingernail and buccal swabs. Rather than obtain a warrant, Detective Guth relied on involuntary consent. Mr. Cruz was not fully informed of the process, was not made aware of what would be done with the swabs and did not know that he had the right to refuse these searches of his person. At best, when viewing the totality of the circumstances, Mr. Cruz was merely acquiescing to Detective Guth's authority. Specifically concerning the fingernail swabs, exigent circumstances did not exist as Detective Guth waited over twenty minutes into the interrogation to obtain these samples. Detective Guth cannot rely on the search incident to lawful arrest exception to the warrant requirement as these searches happened long before Mr. Cruz was arrested. The appropriate remedy for the violation of Mr. Cruz's Fourth Amendment rights is suppression of the evidence.

ARGUMENT

I. Mr. Cruz's fingernail and buccal swabs were seized without a warrant and in violation of his Fourth Amendment rights.

The Fourth Amendment to the United States Constitution and Article 1, Section 11, of the Wisconsin Constitution protect an individual's right to be free from unreasonable searches and seizures. *State v. Young*, 2006 WI 98, ¶ 18, 292 Wis. 2d 1, 717 N.W.2d 729. Subject to certain established exceptions, the Fourth Amendment prohibits warrantless searches of any place or thing in which a person has a reasonable expectation of privacy. *Mincey v. Arizona*, 437 U.S. 385, 390, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978). The Fourth Amendment "does not protect the merely subjective expectation of privacy, but only those '[exceptions of privacy]

that society is prepared to recognize as "reasonable.'" *Oliver v. United States*, 466 U.S. 170, 177, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984) (alteration in original) (quoting *Katz v. United States*, 389 U.S. 347, 361 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring)). Thus, a "search" within the meaning of the Fourth Amendment occurs only "when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v. United States*, 533 U.S. 27, 33, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001).

"[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." *Katz*, 389 U.S. 347, 357. One of these exceptions is a search that is conducted pursuant to voluntary consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 93 S.Ct.2041, 36 L.Ed.2d 854 (1973). A warrantless search may also be justified by exigent circumstances. *State v. Reed*, 2018 WI 109, 284 Wis. 2d 469, 920 N.W.2d 56. A third exception for a warrantless search is a search incident to arrest "if the officers have probable cause to arrest before the search." *State v. Denk*, 2008 WI 130, 315 Wis. 2d 5, 18, 758 N.W.2d 775.

A. Mr. Cruz did not consent to the fingernail swabs.

A voluntary consent analysis has two steps. First, the Court determines whether there was consent-in-fact by the defendant. *State v. Phillips*, 218 Wis. 2d 180, 190-94, 577 N.W.2d 794, 800 (1998). In the first step of this analysis, the court examines what the defendant said or did. *Id*. Consent can be both verbal and non-verbal. *Id*. at 24. If consent-in-fact is found, the second step is to determine whether the defendant's consent was constitutionally valid. *Id*. "Consent-in-fact" is constitutionally valid if it is "freely and voluntarily given." *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973); *See Phillips* at 194-95.

Consent that is the product of duress, coercion, or misrepresentation by law enforcement is not voluntarily given consent. *Phillips* at 227; *Bumper v. North Carolina*, 391 U.S. 543, 548, 88 S.Ct. 1788, 20 L.Ed. 29 797 (1968). There is no single fact, the absence or presence of, that determines whether consent was voluntarily given. *Schneckloth* at 226. Rather, to determine whether consent was voluntarily given, the totality of the circumstances of each individual case must be examined. *Id*. at 223. In examining the totality of the circumstances, courts consider "both the circumstances surrounding the consent and the characteristics of the defendant." *Phillips* at 198 (additional citations omitted). In addressing the issue of consent, it is crucial to not conflate consent-in-fact with the voluntariness of the consent inquiry. When a verbal response is given, consent to search and the voluntariness of the consent are two separate issues that require separate determinations. *Id*. at 196-97.

Here, Mr. Cruz did not consent-in-fact. Further, voluntary consent cannot be found to exist. At absolute best, it can be demonstrated that Mr. Cruz merely acquiesced and yielded to the detective's show of authority. If consent is granted only in acquiescence to a claim of lawful authority, the consent is invalid. *See Bumper v. North Carolina*, 391 U.S. 543, 548-49, 88 S.Ct. 1788 (1968).

a. Mr. Cruz did not provide consent-in-fact.

Mr. Cruz did not provide consent-in-fact to the swabbing. Consent to search can be verbally or non-verbally expressed. "Consent may be given or inferred through gestures or conduct. Whether consent is verbal or inferred from one's actions, consent must be unequivocal and specific. Consent to a search should not, however, be lightly inferred." *Reed*, 384 Wis. 2d 469, ¶ 57.

Here, approximately twenty minutes into the interrogation, Detective Guth re-entered the room wearing latex gloves and carrying DNA collection material. R. 142 at

22:55; R. 114 at 24; App. 33. Detective Guth set the material on the table and told Mr. Cruz that he will be collecting some DNA from his fingernails. *Id*. at 22:56-23:45; 25-26; 34-35. He does not give Mr. Cruz any option to refuse this bodily invasion. R. 114 at 28-29; App. 37-38. In response to Detective Guth's command, Mr. Cruz simply responds "OK". R. 142 at 22:56-23:45; R. 114 at 25-26; App. 34-35. Detective Guth then asked if that was alright and after a long pause, Mr. Cruz meekly nodded his head. *Id*. At this point, there was no explanation for why Detective Guth was collecting the swabs, and Mr. Cruz was never informed that he could refuse. *Id*. Responding "OK" to a detective's command and meekly nodding one's head when asked if that is alright cannot be enough to support a finding of consent-in-fact.

The facts at hand are vastly different than those found in *Phillips*, the case in which the Circuit Court primarily relied. *Phillips*, 218 Wis. 2d 180, 577 N.W.2d 794, 800 (1998). When law enforcement asked Phillips if they could search his bedroom, he did not respond verbally. *Id*. at 187. Rather, Phillips opened his bedroom door, walked in, retrieved a bag of marijuana and gave it and other paraphernalia to police. *Id*. The court concluded that these facts supported the trial court's finding of consent in fact to the bedroom search." *Id*. at 203. In this case, Mr. Cruz was not asked if law enforcement could swab his fingernails until after he was told that was what was going to happen. Further, Mr. Cruz was never given a choice or an opportunity to refuse. Moreover, unlike in *Phillips*, Mr. Cruz was not made aware of the reason why Detective Guth wanted to swab his fingernails until the process was already underway and even then, the explanation was uninformative.

b. <u>Any consent-in-fact was not freely and voluntarily provided.</u>

If consent-in-fact is found, it was not freely and voluntarily provided by Mr. Cruz. Consent to a search is not voluntary if the consent was coerced, by explicit or implicit

means, by implied threat or covert force. *Schneckloth v. Bustamonte*, 412 U.S. 218, 229 (1973). "In examining all the surrounding circumstances to determine if in fact consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents." *Id*. Important factors trial courts should consider when determining whether consent was voluntarily given are: "(1) whether the police used deception, trickery, or misrepresentation in their dialogue with the defendant to persuade him to consent; (2) whether the police threatened or physically intimidated the defendant or "punished" him by the deprivation of something like food or sleep; (3) whether the conditions attending the request to search were congenial, non-threatening, and cooperative, or the opposite; (4) how the defendant responded to the request to search; (5) what characteristics the defendant had as to age, intelligence, education, physical and emotional conditions, and prior experience with the police; and (6) whether the police informed the defendant he could refuse consent." *State v. Artic*, 2010 WI 83, ¶ 33, 327 Wis. 2d 392, 786 N.W.2d 430 (citing *Phillips*, 218 Wis. 2d at 198-203, 577 N.W.2d 794 (1998)).

At the time Detective Guth began collecting the fingernail swabs, he had not explained to Mr. Cruz why he wanted to do so. R. 114 at 25; App. 34. Up until that point, he had only asked Mr. Cruz if he had gotten into a fight with a lady on the trail or if anything had happened on the trail. R. 142 at 18:30-18:35. Mr. Cruz adamantly denied ever seeing such a lady and adamantly denied anything occurring on the trail. *Id*.; R. 114 at 23; App. 32. Further, there was no explanation to Mr. Cruz as to what was going to happen with his fingernail swabs. R. 114 at 30; App. 39. Based on the facts of this case, Mr. Cruz cannot be found to have voluntarily consented as he had no knowledge as to what he was even consenting to.

These two facts alone certainly outweigh the other factors the court should consider. It is true that Mr. Cruz was not in handcuffs in the interrogation room and that Detective

Guth did not employ overtly aggressive interrogation tactics; however, these factors are trivial when considering Mr. Cruz was placed in the interrogation room under the pretext of being a runaway. *See* R. 142. He was never told that he was a suspect in an assault that had taken place on the trail that morning. *Id*. In fact, he was never explicitly told that an assault had occurred. R. 114 at 30; 39. Additionally, while there were no threats of punishment should Mr. Cruz refuse to cooperate, he was never given the opportunity to refuse. *Id*. at 28-29; 37-38. Rather, he was told by Detective Guth that the swabbings were going to unequivocally happen. *See* R. 142. This is important considering that Mr. Cruz was merely 17 years old and did express distrust of the police. *Id*. Importantly, Detective Guth only asked Mr. Cruz if it was okay to collect the samples after he had explicitly told him he was going to collect them. *Id*. at 22:56-23:45, 3:18:32-3:18:47.

Based on these facts, it is clear that Mr. Cruz did not freely and voluntarily submit to the finger swabs. At best, it could be argued that Mr. Cruz merely acquiesced to Detective Guth's commands. The State's burden of proving consent to a search was freely and voluntarily given cannot be discharged by showing no more than acquiescence to a claim of lawful authority. *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). Stated differently, "Acquiescence to an unlawful assertion of police authority is not equivalent to consent." *State v. Johnson*, 207 WI 32, 299 Wis. 2d 675, 687, 729 N.W.2d 182 (quoting *State v. Wilson*, 229 Wis. 2d 256, 269, 600 N.W.2d 14 (Ct. App. 1999)). "This includes when the police incorrectly assert that they have a right to conduct a warrantless search or indicate that they are going to search absent legal authority to do so, as opposed to asking for permission to search." *Id*.

The facts here are directly on point with the facts of *Johnson*. In *Johnson*, the Wisconsin Supreme Court held that the defendant did not freely and voluntarily give his consent to search but merely acquiesced to the search. *Id*. at ¶ 17. The officers in *Johnson* did not ask for permission to search just as

Detective Guth did not ask for permission. *Id*. at ¶ 19. Rather, Johnson went along with the search after he was advised that the search was going to happen. *Id*. That is exactly what happened here. Detective Guth told Mr. Cruz he was going to swab his fingernails. He then followed up with, "Is that OK?" When Mr. Cruz nodded, Detective Guth told him they would be starting with the left hand. R. 142 at 3:18:32-3:18:47; R. 114 at 18, 27; App. 27, 36. Mr. Cruz's response of placing out his hands is mere acquiescence. Throughout the entire interrogation, Mr. Cruz was simply following Detective Guth's orders.

B. Exigent circumstances did not exist.

A second exception to the warrant requirement "applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *Missouri v. McNeely*, 569 U.S. 141, 149, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013) (quoting *Kentucky v. King*, 563 U.S. 452, 131 S.Ct. 1849, 1856, 179 L.Ed.2d 865 (2011)). One category of exigent circumstances is "a risk that evidence will be destroyed." *State v. Richter*, 2000 WI 58, ¶ 29, 235 Wis. 2d 524, 612 N.W.2d 29. In such circumstances, a warrantless search is potentially reasonable because "there is compelling need for official action and no time to secure a warrant. *Id*. To determine whether a law enforcement officer faced an emergency that justified acting without a warrant, a court should examine the totality of circumstances. *Id*. In practice, "[a]pplication of the exigent circumstances exception requires probable cause and exigent circumstances" and the "burden is on the State to establish both." *Id*. ¶ 30.

First, there was no probable cause in this case. At that time Mr. Cruz's fingernail swabbings were taken, he was in custody as a runaway only. R. 114 at 23; App. 32. Mr. Cruz had adamantly denied anything occurring on the trail at every point in which he was asked. *See* R. 142. The only support for

an assertion of probable cause would be Mr. Cruz being found in the area of the assault.

Next, even if probable cause existed, there were no exigent circumstances. Detective Guth did not take finger swabs until nearly 23 minutes into the interrogation with Mr. Cruz. *Id*. at 22:46; R. 114 at 26; App. 35. In addition to those 23 minutes would have been the time from which Mr. Cruz was located on the trail until he was placed in the interrogation room at the station. Well over 23 minutes is plenty of time for law enforcement to start securing a search warrant. Further, prior to the fingernail swabs, Mr. Cruz was offered the chance to use the restroom. R. 114 at 23; App. 32. These facts cannot support a finding of exigent circumstances.

Any assertion that exigent circumstances did not arise until the few minutes prior to the swabbings being collected does not stand. Such assertion is contrary to the fact that Detective Guth did not do anything for over twenty minutes of Mr. Cruz being in the interrogation room. A light going on in a Detective's mind cannot support exigent circumstances. *See* R. 64 at 13; App. 86. Either exigent circumstances existed or they did not; a detective's own realization cannot compel the need to invade one's body without a warrant when there had been plenty of time to secure one. Moreover, at the point in time when 'the light goes on", Detective Guth had the ability to have Mr. Cruz place his hand on the table and to be observed by a different officer while a warrant was applied for. It is not objectively reasonable to create exigent circumstances to evade the warrant requirement.

C. <u>These were not searches incident to arrest.</u>

A search incident to arrest must be contemporaneous to the arrest. *State v. Sykes*, 2005 WI 48, 279 Wis. 2d 742, 751, 695 N.W.2d 277. A warrantless search incident to arrest can occur in two circumstances. *See State v. Denk*, 315 Wis. 2d 5, 20, 758 N.W.2d 775, 783, 2008 WI 130. First, an officer "can

search for and remove any weapons in order to protect the officer's safety and to effectuate the arrest." *Id*. Second, an officer can "search for and seize evidence in order to prevent its concealment or destruction." *Id*. The Wisconsin Supreme Court has consistently held that when these two justifications are no longer present, "a warrantless search is unconstitutional." *Id*. at ¶ 43.

Here, the fingernail and buccal swabs were not searches incident to arrest. First, and most obvious, they occurred prior to Mr. Cruz ever being arrested. R. 114 at 20; App. 29. Second, they occurred while Mr. Cruz was in custody only for being a runaway. *Id*. at 23; 32. This warrant exception is completely inapplicable to the facts of this case.

D. Mr. Cruz did not consent to the buccal swabs.

Mr. Cruz did not provide consent-in-fact to the taking of the buccal swabs. Like the taking of the fingernail swabbings, Detective Guth walked into the room with latex gloves and other equipment. R. 142 at 3:18:15. When he returned to the room, he told Mr. Cruz that there is one last thing he wants to do. *Id*. at 3:18:32-3:18:47; R. 114 at 18, 27; App. 27, 36. "We talked about DNA and all that stuff so we can eliminate you as a suspect is take a buccal swab." *Id*. He then asks Mr. Cruz if he knows what that is and he responds by stating, "you put that in my mouth, right?" *Id*. Detective Guth affirmatively responds and tells Mr. Cruz to open his mouth so he can rub the swab on the side. *Id*. Mr. Cruz responds to this show of authority by opening his mouth. *Id*. Again, this action cannot be consent but rather the mere acquiescence to the show of authority. This certainly is not voluntary consent. Like with the fingernail swabbings, Mr. Cruz had not been told that he had the right to refuse. R. 114 at 28-29; App. 37-38. The only information Mr. Cruz had is that this DNA would be used to eliminate him as a suspect to something he had not even been fully informed of. *Id*. at 30; 39. There is no consent-in-fact, and

if consent is found, it certainly was not voluntary but rather the product of complying with the detective's orders.

II. The Exclusionary Rule mandates that the appropriate remedy is suppression of the evidence.

Evidence obtained as the result of an unconstitutional search is subject to suppression. *See Mapp v. Ohio*, 367 U.S. 643, 656-57, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) (federal exclusionary rule); *Hoyer v. State*, 180 Wis. 407, 193 N.W.2d 89 (1923) (adoption of same in Wisconsin). So, too, is any derivative evidence obtained as a fruit of the unlawful search. *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). The exclusionary rule provides for the suppression of evidence that "is in some sense the product of the illegal governmental activity." *State v. Knapp*, 2005 WI 127, ¶ 22, 285 Wis. 2d 86, 700 N.W.2d 899 (quoting *Nix v. Williams*, 467 U.S. 431, 444, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984)). Thus, the analysis and comparison of Mr. Cruz's DNA samples are subject to suppression.

In *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), the United States Supreme Court acknowledged that not all derivative evidence must be suppressed to fulfill the deterrent purpose of the exclusionary rule. Some derivative evidence may be so attenuated from the underlying illegal conduct that "the deterrent effect of the exclusionary rule no longer justifies its cost." *Id*. at 609 (Powell, J., concurring in part). The court recognized, however, that persistent refusal to suppress fruits of the poisonous tree would "substantially dilute[]" the "effect of the exclusionary rule." *Id*. at 602.

Here, the idea that the court should not suppress the DNA analysis because, even at this point, the state could get a warrant to obtain new DNA samples from Mr. Cruz, if nothing else, would substantially dilute the effect of the exclusionary rule. Why would a law enforcement officer ever get a warrant

to seize DNA samples? It would be far more expeditious to just seize the DNA samples, whether the defendant consented or not, because, even if it were later determined to be an illegal seizure, the state could simply get a warrant at that point and seize new DNA samples.

CONCLUSION

It is respectfully requested that this Court reverse the circuit court's denial of the motion to suppress in this matter and remand with directions that the circuit court issue an order suppressing all evidence obtained consequent to the unlawful searches and seizures.

Dated this 30th day of November 2023.

Respectfully Submitted,

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CERTIFICATION OF FORM AND LENGTH

I, Kirk B. Obear, hereby certify that this brief conforms to the rules contained in s. 809.19 (8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 5,590 words.

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