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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2010AP3016-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NICOLAS SUBDIAZ-OSORIO,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION
ENTERED UPON A GUILTY PLEA, PURSUANT TO
WIS. STAT. § 971.31(10), IN THE CIRCUIT COURT
FOR KENOSHA COUNTY, HONORABLE MARY
WAGNER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

J.B. VAN HOLLEN

Attorney General

DANIEL J. O'BRIEN

Assistant Attorney General

State Bar #1018324

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice

Post Office Box 7857

Madison, Wisconsin 53707-7857

(608) 266-9620

(608) 266-9594 (Fax)

obriendj@doj.state.wi.us

TABLE OF CONTENTS

	Page
ISSUES PRESENTED	1
POSITION ON ORAL ARGUMENT AND PUBLICATION.....	2
STATEMENT OF THE CASE	2
ARGUMENT	3
I. THE TRIAL COURT PROPERLY HELD THAT THE USE BY POLICE OF CELL-SITE TECHNOLOGY TO LOCATE SUBDIAZ ON AN INTERSTATE HIGHWAY EN ROUTE TO MEXICO DID NOT VIOLATE THE FOURTH AMENDMENT.	3
A. Statement of facts relevant to the location and arrest of Subdiaz in Arkansas.	4
B. The applicable law and standard for review.	6
C. Kenosha police did not violate the Fourth Amendment when they used cell phone location technology to help Arkansas police locate Subdiaz because he did not have a reasonable expectation of privacy in the movement of his car down the interstate highway.....	9

D. The trial court properly held in the alternative there was no Fourth Amendment violation because police had probable cause and exigent circumstances.....17

1. The probable cause and exigent circumstances required to justify a warrantless search.17

2. The trial court properly held that police had both probable cause and exigent circumstances to ask Sprint to provide cell-site location information for Subdiaz's phone.19

3. The "automobile exception" allowed police to "search" the cell-site information from inside the car based on the probable cause and exigent circumstances they had, along with the separate exigency created by the car's inherent mobility.23

E. Subdiaz is not entitled to greater protection under the Wisconsin Constitution.24

F. Any error was harmless because the evidence overwhelmingly shows that Subdiaz recklessly caused his brother's death under circumstances that showed utter disregard for his life even without the inculpatory statements. He would, therefore, still have pled guilty if the statements were suppressed.....26

II. THE TRIAL COURT PROPERLY HELD THAT SUBDIAZ DID NOT UNEQUIVOCALLY INVOKE HIS RIGHT TO THE PRESENCE OF COUNSEL DURING CUSTODIAL INTERROGATION.....29

A. Statement of relevant facts.29

B. The requirement of an unequivocal invocation of the right to counsel during custodial interrogation.31

C. Subdiaz did not unequivocally invoke his right to the assistance of counsel during interrogation.32

CONCLUSION.....33

CASES CITED

Arizona v. Gant,
129 S. Ct. 1710 (2009).....23

Burns v. City of Terre Haute,
744 N.E.2d 1038 (Ind. Ct. App. 2001) 17

	Page
Cady v. Dombrowski, 413 U.S. 433 (1973).....	25
Carroll v. United States, 267 U.S. 132 (1925).....	23
Davis v. United States, 512 U.S. 452 (1994).....	32
Hill v. Lockhart, 474 U.S. 52 (1985).....	27
Illinois v. Caballes, 543 U.S. 405 (2005).....	25
Illinois v. Gates, 462 U.S. 213 (1983).....	18
In re U.S. for an Order Authorizing Release of Historical Cell-Site Information, No. 11-MC-0113, 2011 WL 679925 (E.D.N.Y. Feb. 16, 2011).....	15
In re U.S. for Order Dir. a Prov. of Elec. Commun., 534 F. Supp. 2d 585 (W.D. Pa. 2008)	14
Katz v. United States, 389 U.S. 347 (1967).....	7
Kyllo v. United States, 533 U.S. 27 (2001).....	7
Miranda v. Arizona, 384 U.S. 436 (1966).....	3
New York v. Class, 475 U.S. 106 (1986).....	11
Nuvio Corp. v. FCC, 473 F.3d 302 (D.C. Cir. 2006).....	17

	Page
People v. Fernandez, No. B214476, 2011 WL 892753 (Cal. App. 2d Mar. 16, 2011)	14, 22
Rawlings v. Kentucky, 448 U.S. 98 (1980).....	7
Smith v. Maryland, 442 U.S. 735 (1979).....	6, 13
State v. Agnello, 226 Wis. 2d 164, 593 N.W.2d 427 (1999).....	24, 25
State v. Amos, 153 Wis. 2d 257, 450 N.W.2d 503 (Ct. App. 1989)	18
State v. Arias, 2008 WI 84, 311 Wis. 2d 358, 752 N.W.2d 748.....	24, 25
State v. Armstrong, 223 Wis. 2d 331, 588 N.W.2d 606, on reconsideration, 225 Wis. 2d 121, 591 N.W.2d 604 (1999).....	27
State v. Berggren, 2009 WI App 82, 320 Wis. 2d 209, 769 N.W.2d 110.....	31
State v. Bruski, 2007 WI 25, 299 Wis. 2d 177, 727 N.W.2d 503.....	6
State v. Carroll, 2010 WI 8, 322 Wis. 2d 299, 778 N.W.2d 1.....	6

	Page
State v. Coerper, 199 Wis. 2d 216, 544 N.W.2d 423 (1996).....	32
State v. Eason, 2001 WI 98, 245 Wis. 2d 206, 629 N.W.2d 625.....	25, 26
State v. Hess, 2009 WI App 105, 320 Wis. 2d 600, 770 N.W.2d 769.....	26
State v. Hughes, 2000 WI 24, 233 Wis. 2d 280, 607 N.W.2d 621.....	18
State v. Jennings, 2002 WI 44, 252 Wis. 2d 228, 647 N.W.2d 142.....	31, 32
State v. Kiekhefer, 212 Wis. 2d 460, 569 N.W.2d 316 (Ct. App. 1997)	18, 19
State v. Kiper, 193 Wis. 2d 69, 532 N.W.2d 698 (1995).....	18
State v. Kramer, 2009 WI 14, 315 Wis. 2d 414, 759 N.W.2d 598.....	24, 25
State v. Laboo, 933 A.2d 4 (N.J. Super. Ct. App. Div. 2007)	22
State v. Marquardt, 2005 WI 157, 286 Wis. 2d 204, 705 N.W.2d 878.....	26

State v. Matejka, 2001 WI 5, 241 Wis. 2d 52, 621 N.W.2d 891.....	23
State v. Miller, 2002 WI App 150, 256 Wis. 2d 80, 647 N.W.2d 348.....	23
State v. Owen, 202 Wis. 2d 620, 551 N.W.2d 50 (Ct. App. 1996)	31
State v. Pallone, 2000 WI 77, 236 Wis. 2d 162, 613 N.W.2d 568.....	23
State v. Popke, 2009 WI 37, 317 Wis. 2d 118, 765 N.W.2d 569.....	6
State v. Robinson, 2010 WI 80, 327 Wis. 2d 302, 786 N.W.2d 463.....	5, 6, 18, 24
State v. Rockette, 2005 WI App 205, 287 Wis. 2d 257, 704 N.W.2d 382.....	27
State v. Ross, 203 Wis. 2d 66, 552 N.W.2d 428 (Ct. App. 1996)	31, 32
State v. Semrau, 2000 WI App 54, 233 Wis. 2d 508, 608 N.W.2d 376.....	27
State v. Smith, 131 Wis. 2d 220, 388 N.W.2d 601 (1986).....	18, 19

State v. Sveum, 2009 WI App 81, 319 Wis. 2d 498, 769 N.W.2d 53, aff'd, 2010 WI 92, 328 Wis. 2d 369, 787 N.W.2d 317.....	2, 6-13, 16-17, 20
State v. Trecroci, 2001 WI App 126, 246 Wis. 2d 261, 630 N.W.2d 555.....	7
State v. Ward, 2009 WI 60, 318 Wis. 2d 301, 767 N.W.2d 236.....	31
State v. Young, 2006 WI 98, 294 Wis. 2d 1, 717 N.W.2d 729.....	24
United States v. Benford, No. 2:09CR861, 2010 WL 1266507 (N.D. Ind. 2010).....	14
United States v. Coleman, No. 07-20357, 2008 WL 495323 (E.D. Mich. Feb. 20, 2008).....	14
United States v. Cuevas-Perez, No. 10-1473, 2011 WL 1585072 (7th Cir. Apr. 28, 2011)	12, 14, 15
United States v. Forest, 355 F.3d 942 (6th Cir. 2004)	13, 14, 16
United States v. Garcia, 474 F.3d 994 (7th Cir.), cert. denied, 552 U.S. 883 (2007).....	8, 11, 12, 14, 16
United States v. Karo, 468 U.S. 705 (1984).....	10, 11, 20

United States v. Knotts, 460 U.S. 276 (1983).....	7, 8, 9, 10, 13, 14, 16, 17
United States v. Leon, 468 U.S. 897 (1984).....	26
United States v. Marquez, 605 F.3d 604 (8th Cir. 2010)	12
United States v. Maynard, 615 F.3d 544 (D.C. Cir. 2010).....	14
United States v. Navas, 640 F. Supp. 2d 256 (S.D.N.Y. 2009), rev'd on other grounds, 597 F.3d 492 (2d Cir. 2010)	14, 15
United States v. Pineda-Moreno, 591 F.3d 1212 (9th Cir. 2010)	12, 14, 16
United States v. Place, 462 U.S. 696 (1983).....	25
United States v. Ross, 456 U.S. 798 (1982).....	23
United States v. Sparks, 750 F. Supp. 2d 384 (D. Mass. 2010).....	14, 15
United States v. Villegas, 495 F.3d 761 (7th Cir. 2007), cert. denied, 552 U.S. 1102 (2008).....	7
United States v. Walker, No. 2:10-cr-32, 2011 WL 651414 (W.D. Mich. Feb. 11, 2011)	14, 15

STATUTES CITED

18 U.S.C. § 2702(c)(4).....23
Wis. Stat. § 940.02(1)29, 30
Wis. Stat. § 971.31(10)3, 18

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV ... 1, 3-4, 6-11, 13-15, 17, 21, 24-26
Wis. Const. art. I, § 113, 24, 25

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ISSUES PRESENTED

1. Did the trial court err in denying the defense motion to suppress statements obtained after the alleged illegal arrest of Subdiaz-Osorio (hereafter referred to as "Subdiaz") in Arkansas?

The trial court denied the suppression motion after holding that the Fourth Amendment was not violated when police learned with the help of cell phone location technology that Subdiaz was driving down I-55 in

Arkansas en route to Mexico to avoid apprehension for the murder of his brother in Wisconsin. The court held in the alternative that there was probable cause and there were exigent circumstances to justify the warrantless cell-site tracking of his flight on public highways.

2. Did the trial court err in denying the defense motion to suppress statements obtained after Subdiaz allegedly invoked his right to the presence of counsel during custodial interrogation?

The trial court denied the suppression motion after concluding that Subdiaz did not unequivocally invoke his right to counsel during custodial interrogation because he asked about counsel only in reference to extradition proceedings.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The state does not request oral argument. The briefs of the parties should adequately address the legal and factual issues presented.

Publication may be of benefit if this court determines that the use of cell-site technology to locate a suspect is not completely controlled by its recent decision authorizing the use of GPS tracking technology. *State v. Sveum*, 2009 WI App 81, 319 Wis. 2d 498, 769 N.W.2d 53, *aff'd*, 2010 WI 92, 328 Wis. 2d 369, 787 N.W.2d 317.

STATEMENT OF THE CASE

Subdiaz was charged in a criminal complaint with first-degree intentional homicide for stabbing his brother, Marcos, to death in the trailer they shared in Kenosha February 8, 2009 (1). After plea negotiations with the state, he pled to a reduced charge of first-degree reckless homicide February 15, 2010 (27; 55).

Subdiaz plead guilty only after the trial court denied pretrial motions to suppress his inculpatory statements based upon: (1) an alleged illegal search that resulted in his arrest and the subsequent inculpatory statements in Arkansas; and (2) an alleged violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), preceding his inculpatory statement (12; 18; 52:18-21, 48-50; A-Ap. at 2B and 2C).

There were no postconviction proceedings in the trial court. Subdiaz now appeals (45) from the judgment of conviction entered upon his guilty plea as permitted by Wis. Stat. § 971.31(10).

The facts relevant to the suppression motions will be developed and discussed in the Argument to follow.

ARGUMENT

I. THE TRIAL COURT PROPERLY HELD THAT THE USE BY POLICE OF CELL-SITE TECHNOLOGY TO LOCATE SUBDIAZ ON AN INTERSTATE HIGHWAY EN ROUTE TO MEXICO DID NOT VIOLATE THE FOURTH AMENDMENT.

Subdiaz argues that police violated the Fourth Amendment to the United States Constitution, and art. I, § 11 of the Wisconsin Constitution, when they located him travelling on I-55 through Arkansas on his way to Mexico by using the cell-site location capabilities of his cell phone to do so. Arkansas police then pulled his car over and arrested Subdiaz. This, he contends, was the result of an unlawful "search" of his cell phone. Consequently, the inculpatory statements he gave to Kenosha police in Arkansas the next day must be suppressed as the ill-begotten fruits of the constitutional violation.

This claim is without merit because police use of cell phone location technology does not implicate the Fourth Amendment. Even if it did, there was probable cause and there were exigent circumstances to allow police to track his movements on the public highways without a warrant.

A. Statement of facts relevant to the location and arrest of Subdiaz in Arkansas.

At approximately 9:00 a.m., February 8, 2009, three individuals came into the Kenosha Police Department to report that Marcos Ojeda-Rodriguez had been stabbed by his brother, Subdiaz, in a trailer at 8067 Sheridan Road and might be dead. They said Subdiaz had fled to an unknown destination (51:21-22, 55-56, 61, 99). Police immediately went out to the trailer and found Marcos in a bedroom deceased. He was severely battered and appeared to have been stabbed (51:23, 26). At the trailer, and shortly thereafter at the police station, police spoke with Estella Carreno-Lugo.¹ Estella explained how Subdiaz, her boyfriend, came to her trailer shortly after midnight and asked for her help because he had injured his brother. Subdiaz told Estella he stabbed his brother and asked to borrow her car. Estella said Subdiaz fled in her silver Saturn station wagon and might possibly be heading to Mexico because he had family there and he was in this country illegally. Estella gave police the license number and title for her car. Subdiaz had family in Zion and Waukegan, Illinois. Police checked those Illinois contacts to no avail (51:24-25, 28, 61-62, 64, 85-89). Estella also gave police Subdiaz's cell phone number that morning (51:63).

In the early afternoon of February 8th, one-and-one-half hours after completion of the interviews with

¹ Kenosha Police Officer Torres incorrectly referred to Estella as "Celeste" during his suppression hearing testimony.

Estella and the other witnesses, police issued a "want" for Subdiaz's arrest as a "subject of interest" on the state's CIB (Crime Information Bureau) and the NCIC (National Crime Information Center) internet networks based on the probable cause police believed they had (14:7; 51:30-32).² Then, as explained in the state's memorandum in response to the suppression motion, the following occurred:

Subsequent cell phone information provided by the defendant's cell phone provider indicated that the defendant was travelling southbound on I-55 in the State of Arkansas. Sgt. Wesley Smithee of the Arkansas State Police reports that on February 8, 2009 at approximately 5:40 p.m., he communicated with Kenosha Police Detective Jerry Kaiser to confirm the felony want and was advised by Det. Kaiser that the defendant was travelling south on I-55 into Arkansas. Sgt. Smithee states that at approximately 6:11 p.m., the suspect vehicle went by him travelling south whereupon the suspect vehicle was stopped. The defendant was a passenger in a vehicle driven by Roberto Gonzales from Kenosha. The defendant was identified, taken into custody and held on Wisconsin's felony want for the first degree murder of his brother.

(14:4-5; *see* 12:2, ¶ 4). Arkansas Sergeant Smithee's report is attached to the state's postconviction memorandum (14:6). According to Sergeant Smithee:

I called [Kenosha] Det. Kaiser around 5:43 p.m. Det. Kaiser told me that they had a murder suspect traveling south on I-55 coming into Arkansas. He told me they had been watching his cell phone. Det. Kaiser gave me the suspect's name, Nicolas Subdiaz-Osorio with a DOB of 03/29/82.

(14:6) (capitalization omitted). An agent from the Wisconsin Department of Justice, Division of Criminal Investigation (DCI), requested call record details and GPS location information earlier that afternoon from Subdiaz's cell phone provider, Sprint (14:8). Sprint voluntarily

² *See State v. Robinson*, 2010 WI 80, ¶ 5 n.3, 327 Wis. 2d 302, 786 N.W.2d 463, describing these databases in detail.

provided the requested information to the agent. The DCI agent alleged the following exigent circumstances to support that request:

Local law enforcement homicide suspect. Believed that suspect will flee the state or the country to avoid prosecution. Suspect has no ties to Wisconsin. Suspect considered armed and dangerous. Suspect poses a threat to the public.

(*Id.*).

In denying the suppression motion, the trial court ruled that: (1) police did not need a warrant to track Subdiaz's movements on the public highways; and, in the alternative, (2) police had probable cause and exigent circumstances to conduct a warrantless search (52:48-50; A-Ap. at 2C).

B. The applicable law and standard for review.

The issue whether police violated the constitutional protection against unreasonable searches and seizures is one of constitutional fact subject to independent appellate review. In making that determination, the appellate court independently reviews the legality of the search or seizure, but in light of the circuit court's underlying findings of fact unless they are clearly erroneous. *State v. Sveum*, 2010 WI 92, ¶ 16, 328 Wis. 2d 369, 787 N.W.2d 317; *State v. Robinson*, 2010 WI 80, ¶ 22, 327 Wis. 2d 302, 786 N.W.2d 463; *State v. Carroll*, 2010 WI 8, ¶ 17, 322 Wis. 2d 299, 778 N.W.2d 1; *State v. Popke*, 2009 WI 37, ¶ 10, 317 Wis. 2d 118, 765 N.W.2d 569; *State v. Bruski*, 2007 WI 25, ¶ 19, 299 Wis. 2d 177, 727 N.W.2d 503.

The Fourth Amendment protects against unreasonable searches and seizures. Its applicability, however, depends on whether the person invoking its protection can claim a reasonable expectation of privacy "that has been invaded by government action." *Smith v. Maryland*, 442 U.S. 735, 740 (1979). Subdiaz bore the

burden of proving at the suppression hearing that he had a reasonable expectation of privacy in the movement of his car on public thoroughfares. *See Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980); *State v. Trecroci*, 2001 WI App 126, ¶ 26, 246 Wis. 2d 261, 630 N.W.2d 555; *United States v. Villegas*, 495 F.3d 761, 767 (7th Cir. 2007), *cert. denied*, 552 U.S. 1102 (2008) (defendant bears burden of proving legitimate expectation of privacy in the area searched).

There is no "search" under the Fourth Amendment unless the individual manifests a subjective expectation of privacy in the object of the search that is also an expectation of privacy society is prepared to recognize as reasonable. *See Kyllo v. United States*, 533 U.S. 27, 33 (2001); *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Katz v. United States, 389 U.S. at 351.

A person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.

United States v. Knotts, 460 U.S. 276, 281 (1983).

In *State v. Sveum*, 319 Wis. 2d 498, this court followed precedent from across the land in holding that there is no search or seizure under the Fourth Amendment when police surreptitiously install a surveillance device on a car, such as a GPS tracking device, to observe the car's movements on the public thoroughfares because those movements, theoretically at least, could be observable with the naked eye but at great expense of time and police resources. 319 Wis. 2d 498, ¶¶ 6-15, 19. *See United*

States v. Knotts, 460 U.S. at 281-83, 285; *United States v. Garcia*, 474 F.3d 994, 996-97 (7th Cir.), *cert. denied*, 552 U.S. 883 (2007).

The Wisconsin Supreme Court granted review in *Sveum*. It affirmed, but chose not to address the Fourth Amendment issue. Instead, the court ruled that, even assuming a warrant was required, the order issued by the circuit court satisfied the constitutional and statutory requirements for a valid warrant. *State v. Sveum*, 328 Wis. 2d 369, ¶¶ 2-3, 74. The supreme court did not overrule this court's interpretation of the Fourth Amendment as it relates to GPS technology. This court's decision, therefore, remains controlling with respect to its determination that there was no search or seizure in violation of the Fourth Amendment.

This court held in *Sveum* that police may track the car's movements on the public thoroughfares without a warrant whether that be with their eyes, a beeper, a GPS device, or other similar device because an individual has no *reasonable* expectation of privacy in his car's movements on public roads. *State v. Sveum*, 319 Wis. 2d 498, ¶¶ 11, 19. *See United States v. Knotts*, 460 U.S. at 281. Police are not to be penalized because their ability to investigate what an individual exposes to public observation is technologically better now than it was one or one hundred years ago.

Of course the amendment cannot sensibly be read to mean that police shall be no more efficient in the twenty-first century than they were in the eighteenth. *United States v. Knotts, supra*, 460 U.S. at 283-84, 103 S.Ct. 1081.

United States v. Garcia, 474 F.3d at 998.

Moreover, this court in *Sveum* was aware of the threat to privacy caused by the increased potential for wholesale surveillance as the result of evolving GPS technology. 319 Wis. 2d 498, ¶ 20. That, however, did not alter its conclusion that the Fourth Amendment was

not implicated by the attachment of a GPS device to a suspect's car. Instead, as did several members of the supreme court on review, this court called for legislative action to address these issues. *Id.* ¶ 22. *See* 328 Wis. 2d 369, ¶ 77 (Crooks, J. concurring), ¶¶ 79, 84 (Ziegler, J. concurring), ¶126 (Abrahamson, C.J., dissenting).

- C. Kenosha police did not violate the Fourth Amendment when they used cell phone location technology to help Arkansas police locate Subdiaz because he did not have a reasonable expectation of privacy in the movement of his car down the interstate highway.

Kenosha police here used Subdiaz's cell phone much the same way Madison police used the GPS device in *Sveum*: to determine the location of the suspect's car on the public highways at various points in time, and nothing more.

Subdiaz tries to distinguish this case from *Sveum* by arguing that police tracked GPS signals from his own cell phone, whereas police in *Sveum* surreptitiously attached a GPS device to the undercarriage of the suspect's car. That is a distinction without a difference. Either way, the information obtained was the location of the suspect's car on public highways, something readily observable by the naked eye; something no one has a reasonable expectation of privacy in.

In *United States v. Knotts*, 460 U.S. 276, government agents surreptitiously placed a tracking device (a "beeper") into a five-gallon drum of chloroform which was then sold to the defendant's cohort, an individual suspected of manufacturing illicit drugs. The suspect loaded the container into his car. Police were able to follow the movements of the car both visually and

aided by the beeper until it arrived at the defendant's cabin in northern Wisconsin. Police eventually obtained enough information to arrest the defendant. *Id.* at 277-78.

The Court held that the insertion by government agents of the beeper into the drum, and the use of that beeper to track the movements of the suspect's car, did not implicate the Fourth Amendment. The Court reasoned there is no reasonable expectation of privacy in the movement of one's vehicle on public roadways; and the insertion of the beeper into the container placed inside the car did not constitute an unreasonable seizure of the car. *Id.* at 281-83. The Court pointed out there was nothing to show government agents used the beeper signal to reveal information about the movement of the drum inside the cabin or about anything that would not have been otherwise visible to the naked eye. *Id.* at 285. *State v. Sveum*, 319 Wis. 2d 498, ¶ 9.

Subdiaz insists he had a greater expectation of privacy because police effectively "entered" his car without a warrant by tracking the phone signals emanating from inside the car, while in *Sveum* police did not enter the car. Yet, the drum containing the "beeper" placed by police inside the car without a warrant in *United States v. Knotts* emitted signals from inside while it travelled along the highways, but police continued to track its movements even when the car was out of sight. That did not run afoul of the Fourth Amendment because the continuous tracking of the "beeper" signal did not reveal any information about the inside of the car and its occupants that would not also have been readily observable by the naked eye from outside the car. The only information revealed was the car's location on public roads.

In contrast, in *United States v. Karo*, 468 U.S. 705 (1984), the Court held that a warrantless search in violation of the Fourth Amendment occurred where police inserted a beeper into another drum but used information from that beeper to track the drum's movements once inside a storage facility. The Fourth Amendment was

implicated because police were now using the beeper to obtain "information that [they] could not have obtained by observation from outside the curtilage of the house." 468 U.S. at 715-16. *State v. Sveum*, 319 Wis. 2d 498, ¶ 10. Monitoring a beeper inside a private home violates the rights of those reasonably expecting privacy there. *United States v. Karo*, 468 U.S. at 714. *Also see New York v. Class*, 475 U.S. 106, 112-15 (1986) (no reasonable expectation of privacy in the publicly visible exterior of a vehicle, but the interior is subject to Fourth Amendment protection).

From these cases, this court concluded in *Sveum*:

Knotts and *Karo* teach that, to the extent a tracking device reveals vehicle travel information visible to the general public, and thus obtainable by warrantless visual surveillance, the use of the device does not normally implicate Fourth Amendment protections. It follows that no Fourth Amendment violation occurred here simply because the police used a GPS device to obtain information about Sveum's car that was visible to the general public.

State v. Sveum, 319 Wis. 2d 498, ¶ 11.

The Seventh Circuit Court of Appeals succinctly explained why tracking a car on public thoroughfares is not a "search":

If a listening device is attached to a person's phone, or to the phone line outside the premises on which the phone is located, and phone conversations are recorded, there is a search (and it is irrelevant that there is a trespass in the first case but not the second), and a warrant is required. But if police follow a car around, or observe its route by means of cameras mounted on lampposts or of satellite imaging as in Google Earth, there is no search. Well, but the tracking in this case *was* by satellite. Instead of transmitting images, the satellite transmitted geophysical coordinates. The only difference is that in the imaging case nothing touches the vehicle, while in the case at hand the tracking device does. But it is a distinction without any practical difference.

There is a practical difference lurking here, however. It is the difference between, on the one hand, police trying to follow a car in their own car, and, on the other hand, using cameras (whether mounted on lampposts or in satellites) or GPS devices. In other words, it is the difference between the old technology—the technology of the internal combustion engine—and newer technologies (cameras are not new, of course, but coordinating the images recorded by thousands of such cameras is). But GPS tracking is on the same side of the divide with the surveillance cameras and the satellite imaging, and if what they do is not searching in Fourth Amendment terms, neither is GPS tracking.

This cannot be the end of the analysis, however, because the Supreme Court has insisted, ever since *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), that the meaning of a Fourth Amendment search must change to keep pace with the march of science. So the use of a thermal imager to reveal details of the interior of a home that could not otherwise be discovered without a physical entry was held in *Kyllo v. United States*, 533 U.S. 27, 34, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001), to be a search within the meaning of the Fourth Amendment. But *Kyllo* does not help our defendant, because his case unlike *Kyllo* is not one in which technology provides a substitute for a form of search unequivocally governed by the Fourth Amendment. The substitute here is for an activity, namely following a car on a public street, that is unequivocally *not* a search within the meaning of the amendment.

United States v. Garcia, 474 F.3d at 997 (emphasis in original). The Eighth and Ninth Circuits are in accord. *United States v. Marquez*, 605 F.3d 604, 609-10 (8th Cir. 2010); *United States v. Pineda-Moreno*, 591 F.3d 1212, 1214-17 (9th Cir. 2010). The Seventh Circuit recently reaffirmed its holding in *Garcia*. *United States v. Cuevas-Perez*, No. 10-1473, 2011 WL 1585072 (7th Cir. Apr. 28, 2011).

Subdiaz disputes the reasoning of the Seventh Circuit in *Garcia* and of this court in *Sveum*. Yet, the rationale of those cases is merely consistent with that of

precedent recognizing that the Fourth Amendment is not implicated when police use a pen register to record numbers dialed on a suspect's phone. *Smith v. Maryland*, 442 U.S. at 745-46.

In *United States v. Forest*, 355 F.3d 942 (6th Cir. 2004), the Sixth Circuit extended *Knotts* to cell-site location information and held that police did not violate the Fourth Amendment when they tracked the movements of the defendant's car on the public highways through the GPS capabilities of the cell phone he carried inside the car. The court reasoned:

In the present case, Garner acknowledges that the cell-site data was used to track his movements only on public highways. The rationale of *Knotts* therefore compels the conclusion that Garner had no legitimate expectation of privacy in the cell-site data because the DEA agents could have obtained the same information by following Garner's car. . . .

. . . Although the DEA agents were not able to maintain visual contact with Garner's car at all times, visual observation was *possible* by any member of the public. The DEA simply used the cell-site data to "augment[] the sensory faculties bestowed upon them at birth," which is permissible under *Knotts*.

355 F.3d at 951.

The court in *Forest* went on to reject the defendant's alternative argument that he had a reasonable expectation of privacy in the tracking data emanating from his cell phone because he owned the phone; it was not like the government-owned beeper in *Knotts* (or, for that matter, the government-owned and installed GPS device used in *Sveum*):

Here, the cell-site data is simply a proxy for Garner's visually observable location. But, as previously noted, Garner had no legitimate expectation of privacy in his movements along public highways. We believe, therefore, that the Supreme Court's

decision in *Knotts* is controlling, and conclude that the DEA agents did not conduct a search within the meaning of the Fourth Amendment when they obtained Garner's cell-site data.

Id. at 951-52.

Other courts have followed the lead of the Sixth Circuit in *Forest*, holding that tracking cell phone data simply to observe a suspect's movements on the public highways is not a "search" in violation of the Fourth Amendment. *United States v. Walker*, No. 2:10-cr-32, 2011 WL 651414, *3-7 (W.D. Mich. Feb. 11, 2011); *United States v. Sparks*, 750 F. Supp. 2d 384, 391-96 (D. Mass. 2010); *United States v. Benford*, No. 2:09CR861, 2010 WL 1266507, *2-3 (N.D. Ind. 2010); *United States v. Navas*, 640 F. Supp. 2d 256, 263-64 (S.D.N.Y. 2009), *rev'd on other grounds*, 597 F.3d 492 (2d Cir. 2010); *In re U.S. for Order Dir. a Prov. of Elec. Commun.*, 534 F. Supp. 2d 585, 613 (W.D. Pa. 2008); *People v. Fernandez*, No. B214476, 2011 WL 892753, *6-7 (Cal. App. 2d Mar. 16, 2011). *Also see United States v. Coleman*, No. 07-20357, 2008 WL 495323, at *2-3 (E.D. Mich. Feb. 20, 2008) (police use of a suspect vehicle's factory-installed "OnStar" system to track the vehicle's whereabouts did not violate the Fourth Amendment).³

³ Subdiaz relies heavily on *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010), for the proposition that GPS surveillance over an extended period of time might violate the Fourth Amendment because: (1) it is no longer a realistic substitute for naked eye police surveillance; and (2) the extended observation enabled by ongoing GPS surveillance of the suspect's public movements allows police to also draw conclusions about the suspect's private life. *Id.* at 555-65.

Most courts, including this court in *Sveum*, do not agree. *See United States v. Forest*, *United States v. Cuevas-Perez*, *United States v. Garcia*, *United States v. Pineda-Moreno*, and the other cases cited above. So long as the technology merely allows police to observe in public places what they theoretically could observe with the naked eye, it satisfies the Fourth Amendment as interpreted by the Court in *United States v. Knotts*. Moreover, *Maynard* involved warrantless 24/7 police cell-site surveillance for a month without (footnote continued)

There was no Fourth Amendment violation here because there was no search. If Subdiaz did not want police to track his movements on public highways, he could have simply turned his cell phone off. *United States v. Navas*, 640 F. Supp. 2d at 264. Moreover, Subdiaz's fears of "dragnet" police activities are greatly exaggerated. Subdiaz's brief at 13, 15. There is no evidence that Kenosha police routinely and indiscriminately track cell phone locations on a lark. Kenosha police merely asked the provider of this particular cell phone (Sprint) to give them location information under the "exigent circumstances" exception to Sprint's privacy agreement with the cell phone's owner. That request was made only after all of the following had occurred: police learned on the morning of February 8th that the phone's owner had stabbed his brother to death the previous night and might be headed to Mexico in a borrowed car; he was on the road for at least half a day by the time police figured out what happened; the defendant's girlfriend freely gave police his cell phone number, as well as all the necessary information about the car she had loaned him; based on the probable cause they had obtained by early afternoon, police sent out a national bulletin to apprehend Subdiaz on both the CIB and NCIC databases; meanwhile, police sought out the advice of a State Justice Department DCI agent regarding the use of cell phone location technology to assist in these efforts; the DCI agent then requested and obtained the cooperation of the cell phone provider to disclose cell-site location information under the "exigent circumstances" exception to its privacy policy; the cell-site location information

probable cause or exigent circumstances – a far cry from the single trip, half-day surveillance on both probable cause and exigent circumstances that occurred here. *See United States v. Cuevas-Perez*, 2011 WL 1585072, *2-3. *Also see id.* at *4-12 (Flaum, J., concurring); *In re U.S. for an Order Authorizing Release of Historical Cell-Site Information*, No. 11-MC-0113, 2011 WL 679925, *2 (E.D.N.Y. Feb. 16, 2011); *United States v. Walker*, 2011 WL 651414, *3-7; *United States v. Sparks*, 750 F. Supp. 2d at 395.

obtained in the late afternoon of February 8th revealed that Subdiaz was indeed driving into Arkansas on I-55, likely on his way to Mexico, when Arkansas authorities were asked by Wisconsin authorities to pursue and arrest him.

Kenosha County authorities were "not engaged in mass surveillance" of its citizens. *United States v. Garcia*, 474 F.3d at 998. Their measured actions, acquisition of probable cause, the exigencies of the situation and their request through the DCI from the cell phone provider for cell location information – and cell location information *only* – all prove that this was a narrowly-focused, case-specific police action dictated by rapidly developing exigencies:

They do GPS tracking only when they have a suspect in their sights. They had, of course, abundant grounds for suspecting the defendant.

Id. Kenosha police manifestly did not engage in "dragnet type law enforcement practices" here. *United States v. Knotts*, 460 U.S. at 284.

Finally, logic dictates that the invasion of privacy would seem to be greater when police crawl onto a driveway late at night to surreptitiously attach a tracking device underneath a suspect's car, as in *Sveum*, than when they merely ask a cell phone provider for voluntary disclosure of cell-site location information to help find the suspect's car. If the individual does not have a reasonable expectation of privacy in the former situation, as cases such as *Sveum*, *United States v. Garcia*, *United States v. Pineda-Moreno* and *United States v. Forest* clearly hold, it follows that the individual does not have a reasonable expectation of privacy in the latter situation. Police acted reasonably here in merely asking Sprint for the cell-site information.⁴

⁴ Subdiaz insists he had a reasonable expectation of privacy in the location tracking capabilities of his cell phone. Yet, he acknowledges that according to one study 65% of cell phone users (footnote continued)

- D. The trial court properly held in the alternative there was no Fourth Amendment violation because police had probable cause and exigent circumstances.

Even if this court concludes that *Sveum* and *Knotts* do not control the outcome here, and that locating the car through cell-site location technology amounted to a warrantless "search," it was a reasonable warrantless search because police had both probable cause and exigent circumstances.

1. The probable cause and exigent circumstances required to justify a warrantless search.

The Fourth Amendment requires that a search or seizure be supported by probable cause in order to protect

now understand that law enforcement has the capability to track their location through their cell phones. Subdiaz's brief at 9. Moreover, most cell phone users understand – and welcome – the now commonly known fact that cell phones and GPS services for automobiles such as "On-Star" contain "Enhanced – 911," or "E-911," allowing emergency personnel to instantly track the location of the phone when a "911" call is made from it. *See Nuvio Corp. v. FCC*, 473 F.3d 302, 311-12 (D.C. Cir. 2006) (Kavanaugh, J., concurring); *Burns v. City of Terre Haute*, 744 N.E.2d 1038, 1039 (Ind. Ct. App. 2001) (describing how the "E-911" system operates: "The system is considered enhanced because a dispatcher automatically receives, without having to ask the caller: the phone number of the person calling 911, the name of the person who has registered the phone number, and the address where the phone is located. . . . The E-911 system also includes a computer mapping program that displays the approximate location of the phone being used to place the emergency call."). Most cell phone owners, therefore, now know that their location may be tracked by law enforcement officers at any given time, at least when the available information and the exigencies of the situation justify it.

the privacy of the individual against an arbitrary intrusion by government officials. *State v. Robinson*, 327 Wis. 2d 302, ¶ 26; *State v. Hughes*, 2000 WI 24, ¶ 19, 233 Wis. 2d 280, 607 N.W.2d 621. To arrest a suspect, police need probable cause to believe that a particular individual has committed a crime. *State v. Hughes*, 233 Wis. 2d 280, ¶ 20. To establish probable cause for a search, the state must show at least a "fair probability" that contraband or evidence of a crime will be found in a particular place. *State v. Robinson*, 327 Wis. 2d 302, ¶ 26; *State v. Hughes*, 233 Wis. 2d 280, ¶ 21 (citing *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). This comes down to a question of reasonableness. *State v. Robinson*, 327 Wis. 2d 302, ¶ 26.

Police may conduct a warrantless search if the state meets its burden of proving the existence of both probable cause and exigent circumstances. *State v. Smith*, 131 Wis. 2d 220, 228, 388 N.W.2d 601 (1986); *State v. Kiekhefer*, 212 Wis. 2d 460, 476, 569 N.W.2d 316 (Ct. App. 1997); *State v. Amos*, 153 Wis. 2d 257, 269-70, 450 N.W.2d 503 (Ct. App. 1989). The test for "exigent circumstances," like the test for probable cause, is an objective one. *State v. Robinson*, 327 Wis. 2d 302, ¶ 30.

The objective test for determining whether exigent circumstances exist is whether a police officer, under the facts as they were known at the time, would reasonably believe that delay in procuring a search warrant would gravely endanger life, risk destruction of evidence, or greatly enhance the likelihood of the suspect's escape. *Smith*, 131 Wis. 2d at 230.

State v. Hughes, 233 Wis. 2d 280, ¶ 24. See *State v. Robinson*, 327 Wis. 2d 302, ¶ 30; *State v. Kiper*, 193 Wis. 2d 69, 89-90, 532 N.W.2d 698 (1995).

There are four circumstances which, if proven, will each permit a warrantless search or seizure based on exigent circumstances: (1) an arrest made in "hot pursuit," (2) a threat to the safety of the suspect or of others, (3) a risk that evidence will be destroyed, and (4) a likelihood that the suspect will flee. *State v. Robinson*, 327 Wis. 2d 302, ¶ 30; *State v. Hughes*, 233 Wis. 2d 280, ¶ 25 (citing

State v. Smith, 131 Wis. 2d at 229). See *State v. Kiekhefer*, 212 Wis. 2d at 476;

2. The trial court properly held that police had both probable cause and exigent circumstances to ask Sprint to provide cell-site location information for Subdiaz's phone.

Probable Cause

Here, police plainly had probable cause. They knew from talking to several witnesses, including Estella, and after inspecting the murder scene, that Subdiaz stabbed, beat and killed his brother, and then fled the jurisdiction, perhaps for Mexico, in a borrowed car. Estella also gave police his cell phone number and detailed information describing her car. Indeed, based on the same information, police obtained a warrant from a judge at 2:37 p.m. on the afternoon of February 8th authorizing them to search the trailer for evidence (51:47-48, 100-02, 114). Police did not put out the national CBI/NCIC bulletin until after they believed they had probable cause to arrest Subdiaz (51:30-32, 42-43). It cannot, then, be seriously disputed that police had probable cause to stop and arrest Subdiaz had they seen him driving down the street anywhere on the afternoon of February 8th. Once the CIB and NCIC bulletins were issued, any officer in any other jurisdiction could have then stopped the car matching the posted description and arrested Subdiaz.

Exigent Circumstances

The pivotal issue is whether there were exigent circumstances.⁵ Obviously, Subdiaz was a flight risk because he had fled the jurisdiction in a borrowed car and, as several witnesses advised police, he was an illegal immigrant who might be headed home to Mexico. Subdiaz was a danger to others. He had just killed his brother with a knife and was now desperately trying to avoid apprehension. Indeed, Subdiaz did not call police to help his severely wounded brother because he feared apprehension. The murder weapon – a knife – was not located and might be still in Subdiaz's possession to be either discarded by him or used to facilitate his escape (51:27, 36). Anyone confronting him, be it a law enforcement officer or a citizen, risked serious injury and death in doing so.

This situation was akin to "hot pursuit" in the sense that Kenosha police reasonably believed Subdiaz was on the road, fleeing apprehension. The cell phone location information allowed Wisconsin law enforcement officers to "pursue" him down the highway, just as they theoretically could in their own squad cars using their own eyes; this then enabled them to direct officers in Arkansas to engage Subdiaz in actual "hot pursuit" and apprehend him in the Arkansas officers' squads using their own eyes.

⁵ The concept of exigent circumstances to justify warrantless searches and seizures applies when assessing the reasonableness of warrantless GPS or cell-site location tracking. *See State v. Sveum*, 328 Wis. 2d 369, ¶ 80 (Ziegler, J., concurring) ("Absent a warrant *or exigent circumstances*, the monitoring of a tracking device in a private area, a location not open to visual surveillance, violates the Fourth Amendment rights of those who have a justifiable interest in the privacy of that area") (emphasis added); *United States v. Karo*, 468 U.S. at 736 (Stevens, J., dissenting) ("The impact of beeper surveillance upon interests protected by the Fourth Amendment leads me to what I regard as the perfectly sensible conclusion that *absent exigent circumstances* Government agents have a constitutional duty to obtain a warrant before they install an electronic device on a private citizen's property") (emphasis added).

The arresting officer in Arkansas relied on the CIB and NCIC bulletins, on the information provided by Kenosha Detective Kaiser in a telephone call, and on his own eyes to pursue and apprehend Subdiaz as he drove past on I-55 on his way to Mexico. The conduct of law enforcement officers in both Wisconsin and Arkansas was eminently reasonable.

Subdiaz complains that Kenosha police acted unreasonably because they could have gotten a warrant in the early afternoon of February 8th (presumably at 2:37 when they got a warrant for the trailer – 51:100-02) to compel Sprint to provide the cell-site location data. It is, apparently, Subdiaz's belief that police had plenty of time to get a warrant because they should have realized he could not get to the Mexican border that quickly by driving.

The short answer is that police did not need a judicial warrant to compel Subdiaz's cell phone provider, Sprint, to provide the cell-site information because Sprint *voluntarily* turned this information over to police upon request under the "exigent circumstances" exception to its privacy policy. Any complaint Subdiaz has is with his cell phone provider – a private actor - who voluntarily revealed this information to police without the compulsion of judicial process. It is not with law enforcement, who merely requested the cooperation of the cell phone provider. Had it chosen to do so, Sprint could have rejected the request and forced the state actors to engage in "state action" by obtaining judicial process. This case never progressed to that point; there was no state action compelling disclosure of the information by Sprint. Simply put, the voluntary actions of the private corporate cell phone provider took this case out of the Fourth Amendment's realm and obviated the need for police to get a warrant or any other judicial process.

In any event, Subdiaz had already covered quite a bit of ground between the time he fled in the early morning of February 8th and the time he was stopped by

Arkansas police on I-55 shortly after 6:00 p.m. that same day. Police also could have reasonably feared that Subdiaz might park the car at an airport and fly home to Mexico, perhaps from Chicago after obtaining the help of his relatives in Zion and Waukegan, Illinois. Or, he could have parked the car somewhere and hopped a bus or hitchhiked to Mexico. He might have been of a mind to quickly get rid of the car knowing that police were likely looking for it; or, he was desirous of leaving the car so that it could be returned to his girlfriend, its owner, rather than taking it into Mexico where he would likely not be able to return it. Also, Subdiaz would likely want to get rid of the car at some point before arriving at the border knowing that the border patrol might by then have been notified to be on the lookout for this particular car.

Police could reasonably fear that Subdiaz might dispose of the murder weapon and any other evidence of the crime at some point on his journey.⁶ Police could reasonably fear that Subdiaz might violently resist anyone who had the misfortune of crossing his path at any point during his journey. Police needed the cell-site tracking information, and they needed it "now," once they learned that Subdiaz had fled the jurisdiction hours earlier in his girlfriend's car. These were "exigent circumstances" by any reasonable understanding of that term. *See People v. Fernandez*, 2011 WL 892753, *6 (Cal. App. 2d Mar. 16, 2011); *State v. Laboo*, 933 A.2d 4, 8-11 (N.J. Super. Ct. App. Div. 2007).⁷ Police acted reasonably.

⁶ The two knives used by Subdiaz were not recovered at the scene and Kenosha police told Arkansas police the murder weapon had not been recovered (51:27, 36).

⁷ For these reasons, Subdiaz's claim that he had a reasonable expectation of privacy by virtue of the privacy policy he had with Sprint is meritless. That written policy, as Subdiaz readily acknowledges at p. 19 of his brief, allows Sprint to disclose personal cell phone information to law enforcement if Sprint ("we") believes there is "an emergency involving immediate danger or death or serious physical injury to any person." Just such an emergency existed here: a fleeing fugitive from a murder who, if confronted by (footnote continued)

3. The "automobile exception" allowed police to "search" the cell-site information from inside the car based on the probable cause and exigent circumstances they had, along with the separate exigency created by the car's inherent mobility.

Armed as they were with probable cause, police were authorized to seize and search the car without a warrant under the "automobile exception" to the warrant requirement because the car's inherent mobility created a separate exigency. *United States v. Ross*, 456 U.S. 798, 824 (1982); *Carroll v. United States*, 267 U.S. 132, 147-59 (1925); *State v. Matejka*, 2001 WI 5, ¶¶ 19, 22-27, 241 Wis. 2d 52, 621 N.W.2d 891; *State v. Pallone*, 2000 WI 77, ¶¶ 30, 58, 64-71, 236 Wis. 2d 162, 613 N.W.2d 568. *See Arizona v. Gant*, 129 S. Ct. 1710, 1721 (2009) ("*Ross* allows searches for evidence relevant to offenses other than the offense of arrest, and the scope of the search authorized is broader"); *State v. Miller*, 2002 WI App 150, ¶ 15, 256 Wis. 2d 80, 647 N.W.2d 348 (the probable cause police had to search the vehicle for controlled substances gave them probable cause to search the purse found therein without a warrant).

Police were authorized to seize Subdiaz's car and to search it without a warrant on probable cause to believe the car contained both the prime suspect in, and evidence of, the crime of murder.

anyone, might react violently to facilitate his escape to Mexico. This "exigent circumstances" exception to Sprint's privacy policy is permitted by federal law. 18 U.S.C. § 2702(c)(4).

If tracking the cell-site information to locate the car on the highway was a "search," police could "search" the interior of the car from afar for the cell-site location information emanating from inside without a warrant under the "automobile exception."

Just as police could stop Subdiaz and search his car on the highway for evidence of the crime (such as a knife) without a warrant based upon the probable cause they acquired earlier, and based on the exigent circumstances described above, they could search the car based on the independent exigency of the car's inherent mobility. These combined exigent circumstances all existed before police requested the cell-site information from Sprint that enabled them to locate the car on I-55 and notify Arkansas authorities to stop and arrest Subdiaz without a warrant. Once again, police in Wisconsin and Arkansas acted reasonably.

E. Subdiaz is not entitled to greater protection under the Wisconsin Constitution.

In every situation save one, the Wisconsin Supreme Court has interpreted art. I, § 11 of the Wisconsin Constitution to provide the same protections to Wisconsin citizens that the United States Supreme Court has held the Fourth Amendment to the United States Constitution provides to all citizens. *State v. Kramer*, 2009 WI 14, ¶ 18, 315 Wis. 2d 414, 759 N.W.2d 598; *State v. Arias*, 2008 WI 84, ¶ 20, 311 Wis. 2d 358, 752 N.W.2d 748; *State v. Young*, 2006 WI 98, ¶¶ 19, 30, 294 Wis. 2d 1, 717 N.W.2d 729.

Where, as here, the state and federal provisions are virtually identical, the court has construed the state provision consistently with how the United States Supreme Court has interpreted the federal provision. *State v. Robinson*, 327 Wis. 2d 320, ¶ 24 n.11; *State v. Agnello*, 226 Wis. 2d 164, 180-81, 593 N.W.2d 427

(1999). This was so even before the United States Supreme Court made the protections of the Fourth Amendment applicable to the states via the Fourteenth Amendment. *State v. Kramer*, 315 Wis. 2d 414, ¶ 18 n.6; *State v. Arias*, 311 Wis. 2d 358, ¶ 20.

There are sound policy reasons for this consistency in our jurisprudence. By following the Supreme Court's Fourth Amendment jurisprudence in interpreting Article I, Section 11, we impart certainty about what the law requires for those who will apply our decisions with respect to searches and seizures, and we provide distinct parameters to those who must enforce the law while maintaining the constitutionally protected rights of the people. Therefore, were we to conclude that a dog sniff of the exterior of a vehicle in a public place constitutes a search under Article I, Section 11, we would be undertaking a significant departure from the Supreme Court's Fourth Amendment jurisprudence in interpreting the right to be free of unreasonable searches under the Wisconsin Constitution.

State v. Arias, 311 Wis. 2d 358, ¶ 21.

Consistent with that longstanding approach, the court held as had the United States Supreme Court that a drug dog sniff of the exterior of a car is not a "search" under either the federal or state constitution. *Id.* ¶¶ 14-16, 22-24. *See Illinois v. Caballes*, 543 U.S. 405, 410 (2005); *United States v. Place*, 462 U.S. 696, 707 (1983).

Consistent with that longstanding approach, the court held as had the United States Supreme Court that police may search a car without a warrant when reasonably exercising their "community caretaker" function. *State v. Kramer*, 315 Wis. 2d 414, ¶¶ 18-21. *See Cady v. Dombrowski*, 413 U.S. 433, 441, 446-48 (1973).

The lone case where the court interpreted art. I, § 11, somewhat more expansively than the Fourth Amendment does not provide much comfort to Subdiaz. In *State v. Eason*, 2001 WI 98, ¶¶ 3, 37-63, 245 Wis. 2d

206, 629 N.W.2d 625, the court followed the lead of the United States Supreme Court in recognizing a "good faith" exception to the exclusionary rule applicable to Fourth Amendment violations. See *United States v. Leon*, 468 U.S. 897, 913 (1984); *State v. Marquardt*, 2005 WI 157, ¶¶ 24-26, 286 Wis. 2d 204, 705 N.W.2d 878. While it decided to follow the Supreme Court's lead by also recognizing a "good faith" exception under art. I, § 11 of the Wisconsin Constitution, the court imposed a burden on the state to make specific showings not required by the Supreme Court to satisfy the "good faith" exception. *State v. Eason*, 245 Wis. 2d 206, ¶ 63.

The *Eason* decision is the exception that proves the rule of the court's close adherence to United States Supreme Court precedent on search and seizure issues. Its significance is that the court chose to follow the Supreme Court's lead in recognizing a "good faith" exception to the exclusionary rule when it had the clear opportunity to go a different route under the state constitution. This court should not depart from the Supreme Court's lead. See *State v. Hess*, 2009 WI App 105, ¶¶ 19-21, 320 Wis. 2d 600, 770 N.W.2d 769.

F. Any error was harmless because the evidence overwhelmingly shows that Subdiaz recklessly caused his brother's death under circumstances that showed utter disregard for his life even without the inculpatory statements. He would, therefore, still have pled guilty if the statements were suppressed.

It is now well-established in Wisconsin that the harmless-error rule applies not only to appellate review of

convictions obtained after trials, but also to appellate review of convictions obtained after a guilty or no-contest plea. *See State v. Armstrong*, 223 Wis. 2d 331, 367-71, 588 N.W.2d 606, *on reconsideration*, 225 Wis. 2d 121, 121-22, 591 N.W.2d 604 (1999).

The harmless-error test applicable to review of a guilty or no-contest plea is whether there is a reasonable probability that Subdiaz would not have pled guilty and would have insisted on going to trial had his statements been suppressed. *See State v. Armstrong*, 223 Wis. 2d at 370-71; *State v. Semrau*, 2000 WI App 54, ¶ 22, 233 Wis. 2d 508, 608 N.W.2d 376. *See also State v. Rockette*, 2005 WI App 205, ¶ 31, 287 Wis. 2d 257, 704 N.W.2d 382 ("[g]iven all these factors, we conclude that no reasonable doubt remains that Rockette would have accepted the plea regardless of the circuit court's decision on his motion to suppress"); *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (when there is an ineffective-assistance-of-counsel challenge to a conviction based upon a guilty or no-contest plea, there is no prejudice unless the defendant shows there is a reasonable probability he would not have pled guilty and would have insisted on going to trial but for counsel's deficient performance).

In determining harmless error, the court considers a number of factors, including: the strength of the state's case, the comparative weakness of the defense case, the defendant's incentive for pleading guilty, and the thoroughness of the plea colloquy. *See State v. Rockette*, 287 Wis. 2d 257, ¶¶ 27-31; *State v. Semrau*, 233 Wis. 2d 508, ¶ 22.

The state's case remains overwhelming even without Subdiaz's inculpatory statement.

As established at the preliminary hearing, police found Subdiaz's brother Marcos deceased in a bedroom in the trailer the victim had shared with Subdiaz (47:10-12). He had been battered and stabbed. An autopsy determined that Marcos died of a stab wound to the head (47:27-28). An eyewitness, Lanita Mintz, described how

Subdiaz got into an argument with his brother in Subdiaz's bedroom, Marcos hit Subdiaz in the mouth, knocking him backwards, and Subdiaz then retrieved two knives from the closet and stabbed his brother with both knives, once in the chest and once under the eye. After the victim fell to the floor, Subdiaz then began to kick and punch him repeatedly, ignoring Mintz's pleas to stop (48:10-19).

As established at the suppression hearing, Subdiaz asked a friend, Liborio, to help him but rejected Liborio's pleas that he call for emergency assistance because Subdiaz did not want to get caught (51:22-23). The next morning, Liborio returned to the trailer and found Marcos dead (51:23). Police went to the trailer and found Marcos's body "severely battered and appeared to have been stabbed," with blood all around and evidence of heavy drinking (51:26).

After he attacked his brother, Subdiaz asked his girlfriend, Estella Carreno-Lugo, to help him clean up and attend to his brother. She did so. The next morning, Estella and her sister, Olga, told police Subdiaz fled in Estella's silver Saturn wagon. They did not know where he went, but said he had family in Mexico and may be headed there (51:23-25, 28, 62-64, 85-87).

Subdiaz entered a plea to the amended charge of first-degree reckless homicide (reduced from first-degree intentional homicide). Beyond a reasonable doubt, Subdiaz would have entered that same plea even if his statements were suppressed as the poisoned "fruits" of his arrest. Subdiaz's actions in stabbing his brother once in the chest, once in the eye, then kicking and pummeling his brother as he lay helpless on the floor after being stabbed – all in response to one punch in the mouth - followed by Subdiaz's callous disregard for his brother's well-being as evidenced by his refusal to call, or let anyone else call, for help, followed by his flight to Mexico to avoid apprehension while his brother lay helpless in the trailer slowly dying, amount to nothing less than conduct that recklessly caused his brother's death under circumstances

that showed Subdiaz's utter disregard for his brother's life. Wis. Stat. § 940.02(1).

Subdiaz had no viable defense. He might try to claim self-defense at a trial, but a reasonable jury would likely find that one punch in the mouth does not merit two stab wounds, one fatal, and the pummeling that followed as the unarmed victim lay helpless on the floor. Nor does it justify Subdiaz's refusal to get medical help for the seriously injured victim and his decision to flee the jurisdiction instead.

The incentive for Subdiaz to accept the plea offer would remain high because he risked a conviction for first-degree intentional homicide, and its attendant mandatory life sentence, had he gone to trial with or without his inculpatory statement.

II. THE TRIAL COURT PROPERLY HELD THAT SUBDIAZ DID NOT UNEQUIVOCALLY INVOKE HIS RIGHT TO THE PRESENCE OF COUNSEL DURING CUSTODIAL INTERROGATION.

Subdiaz contends that his inculpatory statements should be suppressed because police continued to question him after he had unequivocally invoked his right to counsel. The trial court denied the suppression motion after finding that he did not unequivocally invoke the right to counsel.

A. Statement of relevant facts.

Kenosha Detectives Kaiser and May, and Officer Torres, all travelled to Arkansas after Subdiaz's arrest there February 8th and interviewed him in the Luxora County jail February 9, 2009 (51:37-38, 64-65, 103). Officer Torres, who speaks Spanish, interviewed Subdiaz in Spanish. Torres opened by reading the *Miranda* warnings and waiver form to him in Spanish. Torres also

provided Subdiaz with the card bearing the Spanish translation of those warnings for him to read along. Subdiaz signed and dated the waiver form, as did Officer Torres, at 3:34 p.m. February 9th. After he agreed to be interviewed both orally and in writing, police engaged Subdiaz in an audio and video recorded interview that lasted less than an hour (23; 51:65-69, 71, 75, 91-93, 103-04; 52:3-4). Subdiaz agreed to speak without an attorney present, never refused to answer a particular question and never asked to stop the interview. No force was used or promises made. The handcuffs were removed before the interview and Subdiaz was provided a soda. Subdiaz never complained of pain or discomfort. He had a ninth grade education and seemed to understand what was going on "very well." Torres told Subdiaz to let him know if there was something he did not understand. Subdiaz was cooperative and forthcoming during the interview (51:72-75, 105).

Despite all of this, Subdiaz insists that he unequivocally invoked his right to counsel when Torres tried to explain the process of extraditing him from Arkansas back to Kenosha. Subdiaz asked Torres whether they would be taking him back to Kenosha. Torres answered that he would first have to appear before a judge in Arkansas who would make that determination (51:93-94; 52:9-10; A-Ap. at 2A, pp. 9-10). After Torres explained this to him, Subdiaz asked: "How can I do [sic] to get an attorney here because I don't have enough to afford for one?" (52:10). Torres said the State of Arkansas would appoint a lawyer for the hearing (*id.*). The interview then continued and Subdiaz confessed within the hour.⁸

Subdiaz did not testify at the suppression hearing to explain what his thoughts were. He did not take the stand

⁸ Subdiaz eventually appeared before an Arkansas judge, waived extradition and was returned to Kenosha a week later (51:108-09).

to explain whether he wanted an attorney for the extradition proceedings, for the interview or both.

The trial court determined that this was not an unequivocal invocation by Subdiaz of his right to the assistance of counsel during the interview. Rather, his inquiry related only to the extradition process. His statements were freely and voluntarily made in full compliance with *Miranda* (52:18-20; A-Ap. at 2B).

B. The requirement of an unequivocal invocation of the right to counsel during custodial interrogation.

The issue whether the state violated Subdiaz's invocation of his right to the presence of counsel during custodial interrogation is reviewed *de novo*, but in light of the not clearly erroneously facts as found by the trial court. *State v. Jennings*, 2002 WI 44, ¶¶ 20-21, 25, 252 Wis. 2d 228, 647 N.W.2d 142; *State v. Berggren*, 2009 WI App 82, ¶ 35, 320 Wis. 2d 209, 769 N.W.2d 110. *See State v. Ross*, 203 Wis. 2d 66, 79, 552 N.W.2d 428 (Ct. App. 1996); *State v. Owen*, 202 Wis. 2d 620, 640-41, 551 N.W.2d 50 (Ct. App. 1996).

If the statement is ambiguous or equivocal such that a reasonable police officer under the circumstances would understand only that the suspect *might* be invoking his right to counsel, the officer need not stop questioning or try to clarify the statement. *State v. Jennings*, 252 Wis. 2d 228, ¶¶ 29, 32, 36; *State v. Berggren*, 320 Wis. 2d 209, ¶ 35. *See State v. Ward*, 2009 WI 60, ¶ 43, 318 Wis. 2d 301, 767 N.W.2d 236.

In *State v. Ross*, this court held that a suspect must *unequivocally invoke* his right to remain silent before police are required to either stop their interview or even clarify any equivocal remarks by him. 203 Wis. 2d at 75-79. In adopting the "clear articulation rule," this court

followed the same analysis used to assess whether a suspect has invoked the right to counsel during interrogation. *Id.* at 70, 74-75. See *Davis v. United States*, 512 U.S. 452, 459 (1994); *State v. Jennings*, 252 Wis. 2d 228, ¶¶ 5-6; *State v. Coerper*, 199 Wis. 2d 216, 223, 544 N.W.2d 423 (1996).

C. Subdiaz did not unequivocally invoke his right to the assistance of counsel during interrogation.

It should be plain from the summary of the facts above that Subdiaz and Torres were discussing extradition proceedings when Subdiaz remarked that he would be unable to afford a lawyer for that Arkansas court hearing.

Subdiaz had just orally and in writing unequivocally waived his rights to remain silent and to the presence of counsel during the interview about the murder. That never changed. Subdiaz never went back on his oral and written waiver. He cooperated fully and answered questions during the relatively short interview. The discussion about affording a lawyer occurred during a separate conversation with Officer Torres about extradition. It was prompted by Subdiaz's own question whether he would be going back to Kenosha with the officers. That prompted the discussion about extradition and the need for a court hearing in Arkansas. This separate conversation had nothing to do with, and had no impact on, Subdiaz's express willingness to then and there discuss his brother's murder with the three Kenosha officers.

This did not come close to an *unequivocal* invocation of the right to the assistance of counsel during the interview. Or, at least, a reasonable police officer could so conclude. If anything, it was an unequivocal expression of Subdiaz's desire that counsel guide him through the extradition process; a process with which he,

like most lay persons, would not be familiar. The trial court properly so concluded.

D. Any error was harmless.

If the statements should have been suppressed for having been obtained in violation of *Miranda*, the error was harmless for the reasons set forth at "I. F.," above.

CONCLUSION

Therefore, the State of Wisconsin respectfully requests that the judgment of conviction entered upon Subdiaz's guilty plea be AFFIRMED.

Dated at Madison, Wisconsin this 2nd day of May, 2011.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

DANIEL J. O'BRIEN
Assistant Attorney General
State Bar #1018324

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9620
(608) 266-9594 (Fax)
obriendj@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,728 words.

Dated this 2nd day of May, 2011.

DANIEL J. O'BRIEN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 2nd day of May, 2011.

DANIEL J. O'BRIEN
Assistant Attorney General