STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2018AP001051

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

VANCE D. REED,

Defendant-Appellant.

On Notice Of Appeal From an Order Entered in the Circuit Court for Outagamie County, the Honorable Mark J. McGinnis, presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF ISSUES

1. Whether the police encounter with the defendant constituted an unlawful "stop" under Wisconsin Statute Section 968.24, and an "unlawful seizure" in violation of the Fourth Amendment to the United States Constitution and Article I Section 11 of Wisconsin Constitution?

How the circuit court ruled: The circuit court denied the defendant's motion to suppress DNA evidence.

2. Whether the unlawful stop vitiated defendant's consent to the subsequent taking of a DNA buccal swab from the defendant?

How the circuit court ruled: The circuit court denied the defendant's motion to suppress DNA evidence.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The defendant believes oral argument would be helpful to the court in this case. Publication of an opinion on this case would be helpful to the development of law on issues related to the Fourth Amendment.

STATEMENT OF THE CASE AND FACTS

On September 14, 2016, police officers were dispatched to W1177 Beachtree Lane, Oneida, Wisconsin after receiving a telephone call that the residents, Harry Brown Bear and Lorraine Brown Bear, had not been seen in several days. Outagamie County Sheriff's Department Officers

and Oneida Police Department Officers responded to the location and made entry into the residence. Upon entering, they found two dead people, one male and one female. The doors and windows of the home appeared to be intact and untampered. The male decedent, covered in blood, was found sitting in a recliner. Next to him was a large butcher knife. In the hallway, a female was found lying on her back having sustained multiple stab wounds. Officers also found in a bedroom at the home an empty revolver holster. Near the gun holster there were several small bloodstains. Ammunition for both a .357 and a .44 caliber firearms were located. (14: 1-4; 72: 1-33; 60: 3-4)

The male victim was identified as Harry Brown Bear and the female victim as Lorraine Brown Bear. The victims were covered with blood and had sustained significant injuries. Blood was located throughout the home as well. (14: 1-4; 72: 1-33; 60: 3-4)

Officers executed a search warrant at the home, Through investigation, a number of facts were determined. The victims were married to each other and the residence was their home. A large amount of blood was found around Harry Brown Bear's neck and blood spray extended several feet out from his body. Blood was also observed in the kitchen and bathroom sink. (14: 1-4; 72: 1-33; 60:3-4)

A knife was embedded in Lorraine Brown

Bear's chest cavity. The walls and furniture had blood spatering. A woman's purse, with a wallet partially opened, was found. The wall switch also had blood on it. In a bedroom, three boxes were located on the bed. In front of one of the boxes, officers observed the empty revolver holster.(14: 1-4; 72: 1-33; 60: 3-4)

On September 15, 2016, Dr. Giese performed autopsies on both Harry Brown Bear and Lorraine Brown Bear at the Fon du Lac County Medical Examiner's Office. He determined the cause of death was multiple stab wounds suffered by Harry Brown Bear and Lorraine Brown Bear. Harry Brown Bear sustained significant injuries from a laceration to his neck. Lorraine Brown Bear sustained multiple stab wounds to her chest and heart area. (14: 1-4; 72: 1-33; 60: 3-4)

Since large quantities of bloodstains were found in the home, multiple samples were collected and sent to the Wisconsin State Crime Lab for analysis. DNA analysis was conducted on the handle of the knife found next to Harry Brown Bear as well as the blood stains on a bed sheet. Both of these samples revealed a DNA standard from a male party that was not Harry Brown Bear. The same unknown male individual was the source of both samples. Officers interviewed several neighbors and potential witnesses. DNA samples were taken from these persons. On October 6, 2016, officers stopped and interviewed Vance Reed, the defendant,

who lived near the Brown Bear residence, along with Peter Penass and Desmond Hill. Reed, Penass, and Hill signed consent forms to provide DNA samples. All three provided the officers with a buccal swab for DNA analysis. The results of the swab test indicated the DNA from Reed matched the blood stain on a bed sheet and the blood on a the knife handle near Harry Brown Bear's body. (14: 1-4; 72: 1-33; 60: 3-4; 36:1-2; 76: 36-40; 77: 1-57; 78: 1-15)

On October 14, 2016, officers interviewed Reed about his interactions with the Harry Brown Bear and Lorraine Brown Bear family. Police had determined that Harry Brown Bear and Lorraine Brown Bear likely died on the evening of September 7, 2016. Reed admitted to being in the victims' home approximately six weeks before the interview. He stopped by the house to check in on Harry Brown Bear and Lorraine Brown Bear and socialize. When he stopped by, he began to drink with Harry Brown Bear and Lorraine Brown Bear at approximately 3:00 p.m. Reed had dinner with them and remained in the home into the evening hours. He believed Lorraine Brown Bear went to bed at approximately midnight or 1:00 a.m.. He continued to drink with Harry Brown Bear and believed he blacked out. Reed argued with Harry Brown Bear and was upset with him. He then grabbed a knife and cut Harry Brown Bear's throat. Lorraine Brown Bear came out of the bedroom, and Reed stabbed her multiple times. She fell back into the hallway and he cut her throat. Afterwards, he went into the bedroom and found a gun while he

searched through items. Reed put the gun in his house. He cleaned up the victims' kitchen and washed off the blood from his hands. He showed the officer interviewing him the injuries he received from the knife he used in the homicides. (14: 1-4; 43: 1-1; 44: 1-1; 45:1-19; 72: 1-33; 76:36-40, 52-100, 100-114; 60: 3-4; 79:1-45).

On October 17, 2016, the state filed a criminal complaint charging Vance D. Reed with one count of 1st Degree Intentional Homicide of Harry Brown Bear and another count of 1st Degree Intentional Homicide of Lorraine Brown Bear contrary to Wisconsin Statues Section 940.01(1)(a). (14: 1-4). An Initial Appearance was held on October 17, 2016. (70: 1-7). A Preliminary Hearing occured on November 15, 2016 and Reed was bound over for trial. Probable cause was found. (72: 1-33). The state filed an Information charging Reed with two counts of 1st Degree Intentional Homicide on November 22, 2016. (29: 1-2). An Arraignment occured on November 28, 2016, and not guilty pleas were entered as to both counts in the Information. (73: 1-10).

On February 15, 2017, Reed filed a Motion to Suppress his statement to law enforcement officers. (33: 1-2). On March 8, 2017, Reed filed a Motion to Suppress DNA evidence. (36: 1-2). On March 22, 2017, the state filed a Response to the Defense Motion to Suppress DNA results. (40: 1-4). On March 31, 2017, the circuit court held a hearing on Reed's motions. (76: 1-130). Another hearing was held on

April 11, 2017. (77: 1-57). On April 18, 2018, Reed filed a Brief in Support of the Motion to Suppress DNA Results and Statements. (61: 1-3). The State filed an Additional Response to Defense Motion to Suppress DNA results and Statements on April 21, 2017. (57: 1-6).The circuit court denied the Motion to Supress DNA evidence and Statements in an oral decision in a hearing held on April 24, 2017. (78: 1-15).

On May 4, 2016, Reed entered no contest pleas to the two counts of 1st Degree Intentional Homicide charged in the Information. (59:1-6; 79:1-45). The circuit court sentenced Reed to life imprisonment as to both counts with eligibility to petition for release 45 years from October 14, 2016. The sentences on both counts run concurrent to each other. (64:1:1; 80:1-42; App. 2:1).

Reed timely filed a notice of intent to seek pos-conviction relief (63: 1-1; 65:1-1) and notice of appeal and amended notice of appeal of the court's decision denying the motion to suppress and the resulting judgement of conviction. (66:1-3; 67: 1-3).

Further facts will be discussed where necessary below.

ARGUMENT

I. The Police Encounter With the Defendant Constituted an Unlawful "Stop" Under Wisconsin Statute Section 968.24, and an "Unlawful Seizure" in Violation of the Fourth Amendment to the United States Constitution and Article I, § 11 of the Wisconsin Constitution .

Standard of Review

Wis. Stat. § 971.31(10) permits appellate review of an order denying a motion to suppress evidence, nothwithstanding a guilty plea. *See County of Racine v. Smith*, 122 Wis. 431, 434, 362 N.W.2d 439 (Ct. App. 1984). Review of an order granting or denying a motion to suppress evidence presents a question of constitutional fact, which appellate courts review under two differrent standards."*State v. Hughes*, 2000 WI 24, § 15, 233 Wis. 2d 280, 607 N.W.2d 621. Unless clearly erroneous, a circuit court's findings of fact will be upheld. *Id*. Appellate courts independently apply the law to those facts *de novo*. *Id*.

The Fourth Amendment to the United States Constitution assures that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ." Article I, § 11 of the Wisconsin Constitution guarantees a virtually identitical protection against unreasonable searches and seizures. Wis. Stats. § 968.24 authorizes a law enforcement officer to stop a person when the officer reasonably suspects the person is involved in criminal activity.

A. Officers Detained Reed Without Reasonable Suspicion.

As part of their investigation into the homicide of Harry and Lorraine Brown Bear, Outagamie County Sheriff Sargeants Travis Liskens and Christopher Hammen were made aware by Jonathan Melchert that Desmond Hill and Vance D. Reed were his friends and may have known the Brown Bears. Reed and Hill are brothers. And so, on October 6, 2016, Sargeant Liskens and Sargeant Hammen located and stopped Peter Penass, Vance Reed, and Desmond Hill. The officers asked questions about the Brown Bear homicides and over the course of a fifteen minute encounter obtained consent from all three individuals to provide DNA buccal swabs. Consent forms were signed. Reed was only 19 years old at the time. DNA swabs were taken and placed into evidence. The results of the swab test indicated the DNA from Reed matched the blood stain on a bed sheet and the blood on a the knife handle near Harry Brown Bear's body.(14: 1-4; 43: 1-1; 44: 1-1; 45:1-19; 76:36-40, 52-100, 100-114). On October 14, 2016, Reed was arrested. On the same date, he confessed to the homicides of Harry Brown Bear and Lorraine Brown Bear . (14: 1-4; 20: 1-4).

Under *Terry v. Ohio*, 392 U.S. 1, 30 (1968), "police officers may conduct a brief investigatory stop of a suspect if they have reasonable suspicion based on articulable facts that a crime is about to be or has been committed." *United States v. Wimbush*, 337 F.3d 947, 949 (7th Cir. 2003). "Reasonable suspicion" means "some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *United States v. Swift*, 220 F.3d 502, 506 (7th Cir. 2000) (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981).

Officers didn't simply encounter Reed on October 6, 2016. Reed was clearly stopped. Reed was clearly detained. And at the time Reed was stopped, he was asked investigatory questions about the Brown Bear Homicide, and he was asked to submit to a buccal swab of his mouth for DNA and he was asked to consent to do so. At the same time, his brother, Desmond Hill, was placed in a squad car in order to be interviewed and obtain his DNA. Officers had their badges and service revolvers clearly visible. At the time of the stop, the only reason for the stop was that Reed and Hill may have known the Brown Bears. Officers completely lacked reasonable suspicion based on articulable facts that a crime is about to be or had been committed by Reed. (14: 1-4; 43: 1-1; 44: 1-1; 45:1-19; 76:36-40, 52-100, 100-114). The officers knowledge base before stopping Reed was bereft of some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity. In short, there was no reasonable suspicion to stop him not to mention request that he provide a biological sample in the form of a DNA buccal swab of the inside of his cheek. *Terry*, 392 U.S. at 30; *Cortez*, 449 U.S. at 417.

The Fourth Amendment applies to all seizures of a person, including seizures that involve only a brief detention short of traditional arrest. *Brown v. Texas*, 443 U.S. 47, 50 (1979). A seizure arises when the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded. *United States v. Delgado*, 466 U.S. 210, 217. "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Florida v. Bostick*, 501 U.S. 429, 434 (1991). Mere police questioning does not constitute a seizure. *Id.* (citing

Florida v. Royer, 460 U.S. 491, 497 (1993) (plurality opinion)). Rather an officer may, in compliance with the Fourth Amendment, approach an individual on the street or other public place and ask whether the individual is willing to answer questions by putting questions to the individual. *Royer*, 460 U.S. 497. *Delgado*, 466 U.S. at 216 ("interrogation relating to one's identity or request for identification by the police does, not itself, constitute a Fourth Amendment seizure.").

This case was most certainly not about interrogation relating to Reed's identity or request for identification. Here officers with a police squad car, badges and service revolvers clearly visible demonstrated a show of authority in approaching Reed and did more than engage him in conversation about his identity. The officers detained him long enough to request a DNA buccal swab of the inside of his cheek. All of this constituted a seizure. Reed's freedom of movement was restrained by the questioning about the homicides. The officers seized Reed by a show of authority that did not leave Reed with any choice but to comply with the request for a DNA buccal swab of the inside of his cheek. (14: 1-4; 43: 1-1; 44: 1-1; 45:1-19; 76:36-40, 52-100, 100-114).

Contrary to his right under the Fourth Amendment to the United States Constitution as well as Article I, § 11 of the Wisconsin Constitution to be free from unreasonable searches and seizures, Reed was unlawfully stopped by officers without a reasonable, articulable suspicion that he was about to commit a crime, or had committed a crime. *Terry* 392 U.S. at 30. *See* Wis. Stats. § 968.24.

Reed argues that even if there is a determination that he voluntarily consented to the

DNA buccal swab of the inside of his cheek, the DNA test results linking him to items in the Brown Bear home must be suppressed. Because the consent to provide a DNA buccal swab is not sufficiently attenuated from the illegal stop, the DNA test results must be suppressed. It is the "forbidden fruit" of the unlawful stop. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

B.The Unlawful Stop Vitiated Defendant's Consent to the Subsequent Taking of a DNA Buccal Swab From the Defendant.

1. Consent Analysis.

Warrantless searches are per se unreasonable and are subjct to only a few limited exceptions. *See Katz v. United States,* 389 U.S. 347, 357 (1967). "Consent searches are 'a constitutionally permissible and wholly legitimite aspect of effective police activity.'" *State v. St. Martin*, 2011 WI 44, ¶ , 334 Wis. 2d 290, 800 N.W.2d 858 (citation omitted). Reed did not seem to meaningfully dispute that consent to the buccal swab was given voluntarily subsequent to the stop. (36: 1-2; 76: 1-130; 77: 1-57; 61: 1-3; 78: 1-15).

2. Attenuation Analysis

Even if consent to the taking of evidence from a defendant is determined to have been given, appellate courts review whether consent is voluntary and sufficiently attenuated from the Fourth Amendment violation. If it is not, the search and seizure of evidence is the "forbidden fruit" of the unlawful stop. *Cf. State v. Walker*, 154 Wis.2d 158, 185, 453 N.W.2d 127, 138 (1990)(determining whether a lineup and in court identification of the

defendant were the forbidden fruit of the unlawful arrest). And the question in this case is "whether, granting establishment of the primary illegality, the evidence to which the instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* at 186, 453 N.W.2d at 139 (quoting *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)). *Cf. id.* (citing *Brown v Illinois*, 422 U.S. 590, 604 (1975)). *State v. Bermudez,* 221 Wis. 2d 338, 348, 585 N.W.2d 628 (Ct. App. 1998).

In Reed's case, the question of consent even if resolved against him, however, does not end the inquiry. Reed contends that the DNA buccal swab evidence seized during the search of his cheek and the subsequent DNA results linking him to the crime scene should be excluded because it was obtained as a result of the officers exploiting their unlawful stop and questioning of Reed. The question of attenuation addresses a seperate constitutional value. It must be determined not only that consent was voluntarily given, but that evidence obtained was not an exploitation of the illegal stop. *Cf. Bermudez*, 221 Wis. 2d at 352. (determining whether cocaine and drug paraphenalia seized were the forbidden fruit of an illegal entry into a motel room where consent to search was found to have been given subsequent to illegal entry).

As determined in *Wong Sun*, the question is whether the connection between the illegal police activity and the later consent has 'become so attenuated as to dissipate the taint." *See Brown*, 422 U.S. at 598 (quoted source omitted). If Reed's consent to the search of the DNA buccal swab was obtained by the exploitation of prior illegal activity, than any evidence obtained during the search must be excluded despite the voluntariness of the

consent. *Bermudez*, 221 Wis. 2d at 352. When applying the attentuation theory, the following must be considered: (1) the temporal proximity of the misconduct and the subsequent consent to search; (2) the presence of intervening circumstances, and (3)the purpose and flagrancy of the official misconduct. *See State v. Anderson* 165 Wis. 2d 441, 448, 477 N.W.2d 277 (1991). *Bermudez*, 221 Wis. 2d at 353. Reed's case fails to provide sufficient indicia of attenuation, and the circuit court erred in determining that the evidence seized during the search of the DNA buccal swab of his cheek and subequent test results is admissible. (78: 1-15).

Here, only moments passed between the stopping and questioning without reasonable suspicion about the Brown Bear homicides and the consent to the DNA buccal swab search by Reed. No intervening circumstances occurred between the unlawful stop of Reed and the DNA buccal swab search. Finally it is hard to imagine a more flagrant and unreasonable police misconduct than a warrantless stop and seizure of what amounts to biological evidence without reasonable suspiction and probable cause. (14: 1-4; 43: 1-1; 44: 1-1; 45:1-19; 76:36-40, 52-100, 100-114).

3. The circuit court's erroneous decision

And the circuit court's basis for denying Reed's motion to suppress failed to even get to the attenuation analysis because the circuit court eroneously ruled, " . . . this encounter between law enforcement and Mr. Reed was not a *Terry* stop. It does not constitute a Fourth Amendment seizure and at the time of the stop there was no facts or conduct by law enforcement that a reasonable person would feel like they were not free to leave. So the motion is denied." (78:10; App. 1:1-7).

In reaching this decision, the circuit court failed to properly weigh the following factors. (Id.) Officers didn't simply encounter Reed on October 6, 2016. Reed was clearly stopped. Reed was clearly detained. And at the time Reed was stopped, he was asked investigatory questions about the Brown Bear homicides, and he was asked to submit to a buccal swab of his mouth for DNA and he was asked to consent to do so. At the same time, his brother, Desmond Hill, was placed in a squad car in order to be interviewed and obtain his DNA. Officers had their badges and service revolvers clearly visible. At the time of the stop, the only reason for the stop was that Reed and Hill may have known the Brown Bears. Officers completely lacked reasonable suspicion based on articulable facts that a crime is about to be or had been committed by Reed. (14: 1-4; 43: 1-1; 44: 1-1; 45:1-19; 76:36-40, 52-100, 100-114). The officers knowledge base before stopping Reed was bereft of some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity. In short, there was no reasonable suspicion to stop him not to mention request that he provide a biological sample in the form of a DNA buccal swab of the inside of his cheek.(Id.) *Terry*, 392 U.S. at 30; *Cortez*, 449 U.S. at 417.

The circuit court also erred in not considering the facts below as well. (App. 1:1-7) The case was not focused on interrogation relating to Reed's identity or request for identification. Here officers with a police squad car, badges and service revolvers clearly visible demonstrated a show of authority in approaching Reed and did more than engage him in conversation about his identity. The officers detained him long enough to request a DNA buccal swab of the inside of his cheek. All of this constituted a seizure. Reed's freedom of movement was restrained by the questioning about the homicides. The officers seized

Reed by a show of authority that did not leave Reed with any choice but to comply with the request for a DNA buccal swab of the inside of his cheek. (14: 1-4; 43: 1-1; 44: 1-1; 45:1-19; 76:36-40, 52-100, 100-114).

A reasonable person in these circumstances would not have felt at liberty to ignore the police presence, walk away from the officers and go about his business. Reed was not informed he was at liberty to refuse to allow the DNA buccal swab of his cheek and simply walk away. Indeed , in all likelihood, Reed might have faced arrest for obstructing an officer. It is worth keeping in mind that Reed was only 19 at the time of the encounter that led to the DNA buccal swab of his cheek. And additionally important, before taking Reed's DNA, police did not have even a hunch he was involved in the Brown Bear homicides. (Id.)

Even questioning in the most circumscribed of spaces may be deemed non-coercive if, for example, police explicitly communicate to the citizen that compliance is not required. See *United States v. Thompson*, 106 F.3d 794, 798 (7th Cir. 1997) (rejecting argument there could be no consensual interrogation of citizen in confines on a police squad car where trooper explicitly informed citizen she was free to leave). Here however, no such message was converyed to Reed. (Id.)

In *Maryland v. King*, 133 S. Ct. 1958 (2013) the Supreme Court ruled that the Fourth Amendment does not prohibit the collection of DNA samples from arrestees without a warrant or probable cause, the traditional requirements of searches and seizures. Yet the words of Justice Scalia's dissent, quoted below, are worth emphasizing for their application to Reed's case. These principles are immutable. "The Fourth Amendment forbids searching a person for evidence when there is no basis for believing the person is

guilty of the crime or is in possession of incriminating evidence. That prohibition is categorical and without exception; it ties at the very heart of the Fourth Amendment. Whenever this Court has allowed a suspicionless search; it has insisted upon a justifying motive apart from the investigation of crime." *King* at 1980.

It is obvious that no such noninvestigative motive exists in Reed's case. *Id*. The stop here violated the Fourth Amendment and so did the DNA buccal swab search of Reed. And under the doctrine of *Wong Sun* and its progeny, the DNA test results and later confession of the defendant and all other forbidden fruit of the unlawful stop and search must be suppresssed.*Wong Sun,* 371 U.S. at 488.

CONCLUSION

For the reasons stated above, Vance D. Reed respectfully requests that this court reverse the circuit court's decision denying his motion to suppress DNA evidence.

Dated this 24th day of October, 2018.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(b) and (c) for a brief produced using the following font:

Arial: 14 characters per inch; 2 inch margin on the left and right; 1 inch margins on the top and bottom. The brief's word count is 4171 words.

Dated at Milwaukee, Wisconsin, this 24th day of October, 2018.

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CERTIFICATE OF COMPLIANCE WITH 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 s. 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 at Milwaukee, Wisconsin, this 24th day of October, 2018.

/s/Edward J. Hunt
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CERTIFICATION OF APPENDIX

I hereby certify that filed with this Brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis.Stat. 809.19(2)(a) and that contains, at a minimum:

(1) a table of contents;
(2) relevant trial court record entries;
(3) the findings or opinions of the trial court;
(4) portions of the record essential to an under- standing of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.
(5) and a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b).

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated at Milwaukee, Wisconsin, this 24th day of October, 2018.

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