E-FILED
CNMI SUPREME COURT
E-filed: Dec 31 2022 11:51AM
Clerk Review: Dec 31 2022 11:52AM
Filing ID: 68777287
Case No.: 2021-SCC-0016-CRM
Judy Aldan

IN THE

Supreme Court

OF THE

Commonwealth of the Northern Mariana Islands

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellant,

v.

KENNETH THOMAS BLAS KAIPAT,
Defendant-Appellee.

Supreme Court No. 2021-SCC-0016-CRM

SLIP OPINION

Cite as: 2022 MP 9

Decided December 31, 2022

CHIEF JUSTICE ALEXANDRO C. CASTRO
ASSOCIATE JUSTICE JOHN A. MANGLOÑA
ASSOCIATE JUSTICE PERRY B. INOS

Superior Court No. 21-0072-CR
Associate Judge Wesley M. Bogdan, Presiding

INOS, J.:

¶ 1 The Commonwealth appeals from a trial court order suppressing DNA evidence collected in a warrantless search. Applying the totality of the circumstances test, we find Defendant Kenneth B. Kaipat ("Kaipat") voluntarily consented to the search, thereby meeting an exception to the Fourth Amendment's search warrant requirement. We REVERSE the decision suppressing the evidence and remand for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 On June 2, 2019, a masked assailant attacked Jane Doe at her house, strangled her into unconsciousness, and sexually assaulted her. Police found her bruised and bleeding, with a tooth knocked out.

¶ 3 A short walk away, the police found Kaipat, then 15 years old, injured and distressed. He had gone to a church to report that while walking to a nearby store, a man whose face was covered hit him from behind and threatened him. An ambulance transported Kaipat to the hospital. He had been at Jane Doe's house prior to allegedly being attacked.

¶ 4 At the hospital, a crime scene technician ("CST") took pictures of Kaipat's injuries. The CST also observed bloodstains on his clothes and asked to collect them. Kaipat removed his clothing and put on a hospital gown. Kaipat's parents took the clothes, placed them in a bag, and handed the bag to the CST.

¶ 5 After Kaipat was discharged from the hospital late that evening, he and his parents went to the police station. At the station, Kaipat's mother ("Mrs. Kaipat") gave permission for the police to speak with him alone about the attack. The CST took swabs of Kaipat's inner cheek and fingernails.

¶ 6 The following day, June 3, Detective Buddy Igitol ("Igitol") called Mrs. Kaipat because he needed written parental consent to get Kaipat's hospital records.[1] Mrs. Kaipat and her husband were driving at the time, so they agreed to meet at a gas station. At the gas station, Mrs. Kaipat signed the medical records release form. Either at the gas station or during a separate telephone call later that day, Igitol asked Kaipat's parents to bring him back to the police station so that the FBI could take a hair follicle sample.[2]

¶ 7 Igitol and the parents decided that they would take their son to the police station on June 5. Igitol claimed that he received permission during that

---

[1] The Health Insurance Portability and Accountability Act of 1996 (HIPAA) requires written consent for release of medical records. *Summary of the HIPAA Privacy Rule*, DEPARTMENT OF HEALTH AND HUMAN SERVICES, https://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html (last visited Oct. 26, 2022).

[2] Igitol testified that one reason for the FBI getting a hair sample even though Kaipat had already provided a DNA sample was to shorten the chain of custody.

conversation to take a DNA sample, while Mrs. Kaipat said that they never discussed DNA and only talked about giving a hair follicle sample.

¶ 8 On June 5, 2019, Kaipat and his parents met with Igitol and an FBI agent at the police station. The agent took a second buccal swab instead of a hair follicle while the parents watched. There was no objection to this different method of getting a DNA sample.[3] Kaipat was not in custody on June 2 or June 5, and his parents thought he was a victim.

¶ 9 One year later, the Commonwealth arrested Kaipat after receiving the DNA test results, which indicated that he could have been the source of the semen found on Jane Doe and that Jane Doe could have been the source of the DNA found under Kaipat's fingernails.[4] Kaipat moved to suppress the evidence gathered on June 2 and June 5 because they were the product of warrantless searches done in violation of the Fourth Amendment. The Commonwealth argued search warrants were not required because his parents voluntarily consented to the searches.

¶ 10 The court ruled that the DNA collection constituted a search under the Fourth Amendment which required a search warrant. As to the June 2 evidence, the court found that Kaipat and his parents consented to the searches and that exigent circumstances existed for the fingernail swabs and denied the motion. However, the court suppressed the June 5 buccal swab collection and the evidence derived from it because it found there was no voluntary consent and that no other exceptions to the warrant requirement applied.

¶ 11 The court also discussed the validity of parental consent on behalf of a minor child to undergo a search, an issue that the parties did not brief.

¶ 12 The Commonwealth now appeals the suppression of the buccal swab obtained on June 5, 2019.

II. JURISDICTION

¶ 13 We have jurisdiction over certain interlocutory appeals, such as orders to suppress evidence. *Commonwealth v. Arurang*, 2017 MP 1 ¶¶ 11–12.

III. STANDARD OF REVIEW

¶ 14 We review de novo a ruling on a motion to suppress evidence. *Commonwealth v. Ramangmau*, 4 NMI 227, 235 (1995); *Commonwealth v. Pua,* 2009 MP 21 ¶ 11. We review findings of fact on a deferential clear error standard. "A clear error exists only if after reviewing all of the evidence we are left with a firm and definite conviction that a mistake has been made." *Commonwealth v.*

---

[3] Igitol testified that according to the FBI, a hair follicle sample was unnecessary since a buccal swab was sufficient for a known sample.

[4] This case began as a juvenile proceeding. The juvenile court waived jurisdiction in May 2021.

Crisostomo, 2014 MP 18 ¶ 8 (internal quotation and citation omitted). "The test is whether the trial court could have rationally found as it did, rather than whether the reviewing court would have ruled differently." *Markoff v. Lizama*, 2016 MP 7 ¶ 8 (quoting *In re Estate of Young Kyun Kim*, 2001 MP 22 ¶ 9).

IV. DISCUSSION

¶ 15 The Commonwealth's central issue is whether the court erred in suppressing the evidence from the June 5, 2019 search. It divides this question into eight subissues.[5] We do not find it necessary to address them all.[6] We find that the June 5 buccal swab was a reasonable search because Kaipat and his parents voluntarily consented.

A. Whether the Court Applied the Correct Legal Standard

¶ 16 The Commonwealth asserts the court applied the wrong legal standard in determining that the June 5 buccal swab was an unreasonable search. It argues that the court used the totality of the circumstances standard to determine if the search was reasonable instead of using that standard to determine whether Kaipat voluntarily consented to the search. It also asserts that the court "failed to determine whether or not the consent was voluntary." Appellant's Br. at 8. Kaipat counters that determining the voluntariness of consent is irrelevant since he did not consent in the first place.

¶ 17 The Fourth Amendment and Article I, Section 3 of the NMI Constitution prohibit "unreasonable searches and seizures" and require warrants for most searches and seizures. Courts generally examine the totality of the circumstances to determine whether a search is reasonable. *Samson v. California*, 547 U.S. 843, 848 (2006). Despite this flexible standard, there is a firm rule that warrantless searches are per se unreasonable "subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967); *see also Commonwealth v. Fu Zu Lin*, 2014 MP 6 ¶ 22 ("the United States Supreme Court has carved out exceptions to the warrant requirement"). Voluntary consent is one of those exceptions. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). If voluntary, consent waives the Fourth Amendment right against warrantless searches. *Id.* at 248. Voluntariness "is a question of fact to be

---

[5] The Commonwealth claims that the Superior Court erred by 1) discussing the issue of whether parents could provide consent to searches on behalf of their minor children; 2) finding that law enforcement considered Kaipat a suspect on June 5, 2019; 3) finding that Igitol called Mrs. Kaipat twice on June 3, 2019 and during the second call requested a hair follicle sample; 4) using an incorrect legal standard to analyze the reasonableness of the June 5 buccal swab; and 5) finding that there was no voluntary consent to the June 5 buccal swab. The Commonwealth additionally argues: 6) Kaipat had no reasonable expectation of privacy on June 5, 2019; 7) inevitable discovery should apply; and 8) even if inevitable discovery cannot apply, suppression is still improper.

[6] The second and third issues are irrelevant to the voluntariness of consent. Because we find that the search was reasonable and suppression unwarranted, we do not need to reach the seventh and eighth issues.

determined from the totality of the circumstances." *Id.* at 227.[7] In examining the totality of the circumstances, the government bears the burden of proving voluntariness by a preponderance of the evidence. *United States v. Matlock*, 415 U.S. 164, 177 n.14 (1974); *United States v. Ruiz-Hernandez*, No. CR 16-511-TUC-CKJ, 2017 U.S. Dist. LEXIS 38759, at *35–36 (D. Ariz. Mar. 16, 2017).[8]

¶ 18 Furthermore, determining whether a defendant provided voluntary consent and the scope[9] of any consent they provided requires objectively examining their conduct rather than peering into their subjective thoughts. *Florida v. Jimeno*, 500 U.S. 248, 251 (1991) ("The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness -- what would the typical reasonable person have understood by the exchange between the officer and the suspect?"); *United States v. Flores*, 48 F.3d 467, 468 (10th Cir. 1995) ("we must determine whether defendant consented to the search . . . using an objective reasonableness standard."); *cf. Florida v. Bostick*, 501 U.S. 429, 438 (1991) ("The fact that [respondent] knew the search was likely to turn up contraband is of course irrelevant") (quoting *Florida v. Royer*, 460 U.S. 491, 519 n.4 (1983) (Blackmun, J., dissenting)).

¶ 19 Specifically, the Commonwealth "must prove it was reasonable for an officer to believe the suspect's consent was not the result of duress or coercion, express or implied." *United States v. Magallon*, 984 F.3d 1263, 1281 (8th Cir. 2021) (internal quotation and citation omitted). *See also State v. Daino*, 475 P.3d 354, 360 (Kan. 2020) ("the key inquiry is whether, based on the totality of the circumstances, the conduct and interaction would have caused a reasonable officer to believe the defendant consented to entry or search."); *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990) (explaining that law enforcement conduct predicated on an erroneous, but reasonable belief does not violate the Constitution). In short, the Commonwealth must prove by a preponderance of the evidence that a reasonable officer, taking into account the totality of all the circumstances, would have believed that the defendant voluntarily consented.

¶ 20 When analyzing a Fourth Amendment claim, the first step is determining whether a search or seizure has occurred for constitutional purposes. *See*

---

[7] *Cf. Commonwealth v. Barnes*, 482 N.E.2d 865, 869 (Mass. App. Ct. 1985) ("A seizure does not offend the Fourth Amendment if the Commonwealth can establish that it was made with the defendant's voluntary consent.") (citing *Schneckloth*, 412 U.S. 218 (1973)). Although we discuss a search in this case, determining whether there is voluntary consent for a seizure involves a similar analysis.

[8] In addition to federal courts, the majority of states also use the preponderance of the evidence standard. *See State v. Akuba*, 686 N.W.2d 406, 412–13 (S.D. 2004) (noting "most courts no longer require clear and convincing evidence" and listing jurisdictions which have adopted the preponderance standard).

[9] "When the police are relying upon consent as the basis for their warrantless search, they have no more authority than they have been given by the consent." *State v. Brinner*, 886 P.2d 1056, 1057 (Or. Ct. App. 1994) (internal quotation and citation omitted).

Commonwealth v. Pua, 2009 MP 21 ¶ 20. This involves deciding whether or not the defendant had a reasonable expectation of privacy in the item searched or seized.[10] *Id. See also U.S. v. Nerber*, 222 F.3d 597, 599 (9th Cir. 2000). The Fourth Amendment applies only if the defendant did have such an expectation.

¶ 21 The Commonwealth claims there was no reasonable expectation of privacy in the DNA profile on June 5, 2019 because law enforcement had already acquired a DNA sample on June 2, 2019. It concludes the June 5 buccal swab was not a search under the Fourth Amendment. This issue is raised for the first time on appeal. We can consider an issue raised for the first time on appeal if it is one of law not relying on any factual record. *Reyes v. Reyes*, 2004 MP 1 ¶ 87. The issue here falls within this exception, so we will review it.[11]

¶ 22 The Commonwealth proffers a litany of opinions holding law enforcement can warrantlessly examine DNA after it is lawfully taken. None of them are on point since, on June 5, law enforcement did not examine the DNA lawfully collected on June 2. They instead took another physical sample from Kaipat's body.

¶ 23 The Fourth Amendment of the United States Constitution and Article 1, Section 3 of the NMI Constitution explicitly protect a person's body: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures[,] shall not be violated."[12] Performing a buccal swab is a search under the Fourth Amendment. *Maryland v. King*, 569 U.S. 435, 446 (2013). The Commonwealth admits that "a person undoubtedly has a legitimate expectation of privacy in his blood, hair, or saliva," and argues that this expectation of privacy vanishes once a DNA sample is acquired, but ignores the point that people have a reasonable expectation of privacy in their body as a whole, not merely

---

[10] Courts also interchangeably refer to a "legitimate expectation of privacy." *See U.S. v. Nerber*, 222 F.3d 597, 599 (9th Cir. 2000).

[11] Determining whether someone has a reasonable expectation of privacy involves first a question of fact and second a question of law. "The first is whether the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy.'" *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (quoting *Katz v. United States*, 389 U.S. 347, 362 (1967)). "The second question is whether the individual's subjective expectation of privacy is 'one that society is prepared to recognize as 'reasonable,' whether . . . the individual's expectation, viewed objectively, is 'justifiable' under the circumstances." *Id.* The vast majority of the time, determining whether someone had a reasonable expectation of privacy requires examining their conduct, and hence the factual record. But here, the Commonwealth has presented a solely legal issue: whether a person who gives a DNA sample loses their reasonable expectation of privacy in their DNA profile.

[12] Article 1, Section 10 of the NMI Constitution also gives individuals a right of privacy which "protects a person from unconsented physical intrusions into his or her body." Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands 28–29 (1976).

individual aspects thereof. Appellant's Br. at 19.[13] As the United States Supreme Court said, "Virtually any intrusion into the human body will work an invasion of cherished personal security that is subject to constitutional scrutiny." 569 U.S. at 446 (internal quotation and citation omitted). In the same way that someone who voluntarily consents to a search of their home on one occasion does not permanently lose their reasonable expectation of privacy in their home, someone who voluntarily consents to a search of their body on one occasion—like Kaipat did on June 2—does not permanently lose their reasonable expectation of privacy in their body. The Commonwealth presents no caselaw supporting its position, and we "avoid interpretations . . . which would defy common sense [or] lead to absurd results." *Commonwealth Ports Auth. v. Hakubotan Enters.,* 2 NMI 212, 224 (1991). We find that Kaipat had a reasonable expectation of privacy when law enforcement performed the second buccal swab.

¶ 24 Before reviewing whether the court applied the correct standard in deciding the search's reasonableness, we first address Kaipat's argument that the court agreed with him that he provided no consent. He reasons this makes analyzing voluntariness irrelevant because in order for any consent to be voluntary, there has to be consent in the first place.

¶ 25 In ordinary English and in most legal contexts, "consent" implies voluntariness. Black's Law Dictionary defines it as "[a]greement, approval, or permission as to some act or purpose, esp. given voluntarily; legally effective assent." Black's Law Dictionary 277 (9th ed. 2010). Indeed, even courts analyzing Fourth Amendment claims frequently use "consent" to mean "voluntary consent."

¶ 26 However, not all consent is given voluntarily. Thus, courts will sometimes refer to "involuntary consent." *United States v. Brown*, No. 8:05CR161, 2005 U.S. Dist. LEXIS 27549, at *5 (D. Neb. Oct. 24, 2005) ("It is difficult to imagine a more classic case of an involuntary consent to search."); *People v. Perkins*, 58 Misc. 3d 171, 182 (Monroe Cnty. Ct. 2017) ("the fruits obtained as a result of [the defendant's] involuntary consent to search . . . must be suppressed."). Finding consent and finding voluntariness are two separate steps in the analysis,[14] making it critical to clarify what "consent" means in this context. Devoid of its normal implication of voluntariness, "consent" simply means compliance.

---

[13] The Commonwealth also argues that the June 2 sample is "available to be tested and would result in an identical DNA profile as the June 5 collection." Appellant's Br. at 20. This is an argument for inevitable discovery and has nothing to do with whether Kaipat had a reasonable expectation of privacy. It further asserts "it should make no difference whether the DNA sample collected on June 5 was via a hair follicle sample or buccal swab." *Id.* This too is unrelated to whether Kaipat had a reasonable expectation of privacy.

[14] The government must first show that there was consent and second prove that the consent was voluntary. *See United States v. Magallon*, 984 F.3d 1263, 1280 (8th Cir. 2021).

¶ 27 For example, in *People v. Perkins*, four armed police officers knocked on someone's door early in the morning, said they had a warrant for a person who lived there, and asked if they could enter to search for him. The person who answered said "I guess I don't have a choice, do I." and let the officers enter. 58 Misc. 3d at 179. Allowing the officers to search constituted consent, but because of the coercive nature of the encounter, the consent was involuntary, rendering the search unreasonable.

¶ 28 In the vast majority of suppression cases, the defendant took some action—fulfilling the government's request for a search—which constitutes consent, and hence the real disputed issue in cases where the government tries to rely on the voluntary consent exception is almost always whether the defendant behaved voluntarily. This case is no different.

¶ 29 Law enforcement asked Kaipat to undergo a buccal swab, and he complied. He did not resist. He consented and the court did not find otherwise. When the court found that he did not consent, it did not dispute that he complied with the request for a buccal swab; it meant that he did not *voluntarily* consent. Thus, Kaipat's claim that analyzing voluntariness is irrelevant because he (or his parents) provided no consent is wrong. Since he consented to law enforcement's request on June 5 for a second buccal swab, it clearly is necessary to determine whether he acted voluntarily.

¶ 30 Here, the court began by citing the correct standard, calling it "well settled under the Fourth Amendment that . . . a search conducted without a warrant issued upon probable cause is '*per se'* unreasonable subject to a few specifically established and well-delineated exceptions." *Commonwealth v. Kaipat*, No. 21-0072-CR (NMI Super. Ct. Aug. 27, 2021) (Order Denying in Part and Granting in Part Defendant's Motion to Suppress at 10) ("Order"). However, the court in the very next sentence then claimed:

> However, while it is often articulated in the cases that warrantless searches are '*per se*' constitutionally offensive subject to few exceptions, the fundamental inquiry of the courts in considering Fourth Amendment issues is whether or not a search or seizure is reasonable under ***all the circumstances.*** *United States v. Chadwick*, 433 U.S. 1538 (1977); *Mulligan v. United States*, 358 F.2d 604, 607 (8th Cir. 1966) (emphasis added).
> *Id.*

¶ 31 The court is correct that the fundamental inquiry in considering Fourth Amendment issues is reasonableness, and that this generally involves examining all the circumstances. *Samson v. California*, 547 U.S. 843, 848 (2006). But a search performed without a warrant is per se unreasonable unless an exception such as consent applies. *Jimeno*, 500 U.S. 248, 250–51 (1991) ("it is no doubt reasonable for the police to conduct a search once they have been permitted to do so."). When a warrantless search is based on consent, courts should not examine the totality of the circumstances to determine reasonableness. Rather,

they should examine whether the totality of the circumstances supports a finding that the defendant provided voluntary consent. If yes, the search was reasonable; if not, the search was unreasonable.

¶ 32 The court did correctly cite *Schneckloth* for the proposition that "Whether consent to a search is 'voluntary' or is the product of duress or coercion is a question of fact to be determined from the totality of the circumstances." Order at 18 n.5. The court went on to say that Igitol's testimony about his interactions with Mrs. Kaipat "reflects the notion that Nacrina Kaipat's purported 'consent' was more so acquiescence to a request to schedule a hair follicle collection, rather than unequivocal, intelligent and explicit consent to a search and seizure by way of buccal swabs." *Id*. at 20. The court therefore considered whether there was voluntary consent and found it absent. Therefore, the Commonwealth's claim that the court "failed to determine whether or not the consent was voluntary" is incorrect. Appellant's Br. at 8.

¶ 33 However, because the Commonwealth relied on consent, once the court found no consent, it should have ended the analysis and concluded that the search was unreasonable.[15] *Cf. Phuagnong v. State*, 714 So. 2d 527, 530 (Fla. Dist. Ct. App. 1998) ("Concluding that [the police officer] never had consent to enter the home, we do not need to address the officer safety rationale claimed as justification for the concededly nonconsensual search of [the defendant's] bedroom."); *State v. Stoebe*, 406 S.W.3d 509 (Mo. Ct. App. 2013) (finding a warrantless search unreasonable based solely on a lack of voluntary consent). Instead, the court considered a variety of other factors, such as the Commonwealth not seeking written consent when it had already sought written consent for the medical records.[16] By unnecessarily incorporating these factors into its analysis, the court failed to apply *Katz*'s per se rule. We find that the court did not correctly apply the legal standard in determining whether the search was

---

[15] Even if a search is unreasonable, suppression is not always the remedy, as an exception such as inevitable discovery may apply. *See Commonwealth v. Fu Zhu Lin*, 2014 MP 6 ¶ 29.

[16] The court said that it:

> cannot overlook the obvious fact that after the first investigatory efforts by the Commonwealth were complete, it set out to obtain ***written consent*** from Defendant's parents to retain Defendant's hospital records and to speak with his treating physicians, but for whatever reason apparently did not consider it necessary to obtain written consent (and/or a search warrant) for the collection of hair samples from Defendant it planned to obtain with aid of the United States Federal Bureau of Investigation.
> Order at 19 (emphasis in original).

The Health Insurance Portability and Accountability Act requires written consent for release of medical records; the release form itself cites this law. Appendix to Appellant's Br. at 146. No such law applies to collecting DNA samples in the Commonwealth.

reasonable, albeit for a different reason than the Commonwealth argues. When a court finds no applicable exception to the warrant requirement, the search is per se unreasonable.

B. Voluntary Consent

i. General Standards

¶ 34 The Commonwealth asserts the court clearly erred in finding that Kaipat did not voluntarily consent. Although we have not previously discussed the consent exception to warrantless searches and seizures, much ink has been spilled in other jurisdictions.

¶ 35 The leading decision on this issue is *Schneckloth*, 412 U.S. 218. There, the United States Supreme Court considered whether a person can give voluntary consent if they do not know they have a right to refuse consent. In examining the nature of voluntariness, the court looked back on older cases which discussed voluntariness in the context of confessions:

> Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. *Id.* at 225–26 (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961)).

¶ 36 "In determining whether a defendant's will was over-borne in a particular case, the Court has assessed the totality of all the surrounding circumstances -- both the characteristics of the accused and the details of the interrogation." *Id.* at 226. These factors include the accused's age, educational level, and intelligence, whether the accused was informed of their constitutional rights, the length of the detention, whether the questioning was prolonged or repeated, and whether there was physical punishment. *Id.*

¶ 37 Based on this precedent, the court ruled "the question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Id.* at 227. "[K]nowledge of the right to refuse consent is one factor to be taken into account," but not required for there to be voluntary consent. *Id.* The court said:

> In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents. Those searches that are the product of police coercion can thus be filtered out without undermining the continuing validity of consent searches. In sum, there is no reason for us to depart in the area of consent searches, from the traditional definition of "voluntariness."
> *Id*. at 229.

¶ 38 Because voluntariness is analyzed in a similar way for both confessions and consent searches, our cases examining confessions are relevant. In *Commonwealth v. Cabrera*, 4 NMI 240 (1995), we considered under the totality of the circumstances test whether the defendant's confession was voluntary. After being arrested for selling narcotics, he had signed a constitutional rights waiver form. *Id.* at 243. He asserted that "(1) he was upset and could only think about his family when his rights were being read to him, (2) the rights form is in English and his first language is Chamorro, (3) he was not offered any food or drink during the two-and-one-half hours of questioning, and (4) the officers promised to release and not file charges against him if he cooperated." *Id.* at 245–46. We said:

> First, the fact that Cabrera felt upset and was thinking of his family did not render him incapable of knowingly waiving his rights. Second, the record establishes that Cabrera understands English, and the interrogating officer spoke both English and Chamorro. Parts of the constitutional rights form were translated into Chamorro for Cabrera. Third, although DPS officers may not have offered Cabrera food or drink, there is no indication either that Cabrera requested something to eat or drink, or that the officers denied him food or drink as a coercive measure. Additionally, Cabrera was not questioned by the police for a prolonged period. Fourth, Cabrera's assertion that he was promised release and that he would not be prosecuted if he cooperated was adequately refuted by witnesses called by the government. The conflicting testimony raised a question of fact which the trial court decided in favor of the government. We are not at liberty to disturb factual findings which hinge on the trial court's assessment of a witness's credibility.
> *Id.*

We therefore affirmed the court's finding that Cabrera's confession was voluntary. *Id.*

¶ 39 The same year we decided *Cabrera*, we heard another confession case, *Commonwealth v. Ramangmau*, 4 NMI 227 (1995). Charged with vehicular homicide for killing a bike rider, the defendant asserted that he had been distracted when he signed a constitutional rights waiver form because he had been thinking about the accident. We said:

> The collision with the bicyclist may well have been on Ramangmau's mind, but this fact does not establish that he was physically or psychologically incapable of making reasoned decisions. His level of concentration was sufficient to enable him to listen to [the officer] read him his rights in both English and Chamorro, initial each statement and sign the form to acknowledge that he understood, and answer the officer's questions coherently.

> In short, we find no evidence that Ramangmau's statements were "not the product of a rational intellect and a free will."
> *Id.* at 236 (quoting *United States v. Kelley*, 953 F.2d 562, 564–65 (9th Cir. 1992).

We also noted that:

> Nothing in the record indicates that the DPS officer behaved coercively. Ramangmau was not threatened with physical harm or deprived of food or water. To the contrary, [the officer] expressly advised Ramangmau that he was not under arrest, and when Ramangmau requested a drink of water, [the officer] allowed him to walk, unaccompanied, away from DPS headquarters to get some water. After [the officer] finished questioning Ramangmau that afternoon, Ramangmau was not detained, and he left DPS headquarters.
> *Id*.

We thus upheld the court's finding that Ramangmau's confession was voluntary. *Id.*

ii. Five-Factor Test

¶ 40 Although determining voluntariness requires examining all the circumstances, courts often employ multi-factor tests to help focus their analysis. For example, the Ninth Circuit considers whether:

> "(1) the person was in custody; (2) the officer had his weapon drawn; (3) the officer failed to administer *Miranda* warnings; (4) the officer did not inform the person of his right to refuse to consent; and (5) the person was told that a search warrant could be obtained."
> *United States v. Chan-Jimenez*, 125 F.3d 1324, 1327 (9th Cir. 1997).

In *Chan-Jimenez*, a police officer pulled over a truck and with his hand on his revolver, asked to search the truck's tarp-covered bed. The defendant gave no verbal response, but moved to the truck's rear and raised the tarp, revealing marijuana. *Id.* at 1325. The Ninth Circuit found that the defendant had been seized, that the officer gave no *Miranda* warning, that he did not tell the defendant his right to refuse to consent, and that the officer keeping his hand on his gun was coercive. It held that the district court had clearly erred in finding voluntary consent and reversed. *Id.* at 1325–28.

iii. Implicit Consent

¶ 41 Consent does not need to be explicit; it may be implicit or implied. The United States Supreme Court has said "consent to a search need not be express but may be fairly inferred from context." *Birchfield v. North Dakota*, 579 U.S. 438, 476 (2016). *See also State v. Brar,* 898 N.W.2d 499, 505 (Wis. 2017) ("It is well-established that consent may be in the form of words, gesture, or conduct.")

(internal quotation and citation omitted); *United States v. Wilson*, 914 F. Supp. 2d 550, 558 (S.D.N.Y. 2012) ("Consent may be granted either explicitly or implicitly.") (citation omitted); *United States v. Hylton*, 349 F.3d 781, 786 (4th Cir. 2003) ("Consent may be inferred from actions as well as words."). Thus, "a search may be lawful even if the person giving consent does not recite the talismanic phrase: 'You have my permission to search.'" *United States v. Buettner-Janusch*, 646 F.2d 759, 764 (2nd Cir. 1981).

¶ 42 Here, the court repeatedly said that consent had to be "explicit." Order at 12, 20. The cases it cited do not say so and in fact stand for a different proposition: consent must be "unequivocal" and "specific." *Channel v. United States*, 285 F.2d 217, 219 (9th Cir. 1960); *United States v. Cole*, 195 F.R.D. 627, 631 (N.D. Ind. 2000). *See also State v. Reed*, 920 N.W.2d 56, 67 (Wis. 2018) ("Whether consent is verbal or inferred from one's actions, consent must be unequivocal and specific."); *United States v. Price*, 925 F.2d 1268, 1270 (10th Cir. 1991) ("The consent must be unequivocal and specific and freely and intelligently given.") (internal quotation and citation omitted); *State v. Daino*, 475 P.3d 354, 360 (Kan. 2020) ("an individual may express his or her consent through gestures or other indications of affirmation, so long as they sufficiently communicate an individual's unequivocal, specific, and freely given consent."); *United States v. Shaibu,* 920 F.2d 1423, 1427 (9th Cir. 1990) ("in implied consent cases, the suspect himself takes some action showing unequivocal and specific consent.") (internal quotation and citations omitted).

¶ 43 As consent may be implied, "[M]agic words (such as 'yes') are not necessary to evince consent." *Guerrero v. Deane*, 750 F. Supp. 2d 631, 646 (E.D. Va. 2010). "As a general matter, per se rules are anathema to the Fourth Amendment." *United States v. Montgomery*, 621 F.3d 558, 572 (6th Cir. 2010). Thus, even if it is true that law enforcement never explicitly asked for consent to the June 5 buccal swab or that Kaipat never explicitly agreed to it, that does not prevent a finding of voluntary consent. By erroneously introducing a requirement that consent be "explicit," the court failed to correctly apply the totality of the circumstances standard.

¶ 44 To provide guidance, we elaborate on when courts may find voluntary implicit consent to a search. In some situations, statutes may establish implicit consent.[17] But generally, implicit consent to a search is demonstrated when the defendant performs an action which facilitates or fulfills a request by law enforcement.

¶ 45 For example, in *United States v. Carter*, 378 F.3d 584 (6th Cir. 2004) (en banc), police officers knocked on the hotel room door of a suspected drug dealer. When he opened the door, the officers in plain view saw what appeared to be narcotics. *Id*. at 588. They asked if they could enter and speak with him. "In

---

[17] For example, 3 CMC § 5436 and 9 CMC § 7106 respectively provide that anyone who operates boats and motor vehicles in the Commonwealth are considered to have consented to breathalyzer or blood tests to determine if they are intoxicated.

response, [the defendant] stepped back and cleared a path for the officers to enter," after which they confirmed that he possessed narcotics and arrested him. *Id*. at 593.

¶ 46 The district court had found that the defendant voluntarily consented to the officers entering his hotel room. On appeal, the defendant argued that "consent was not given because [the officers] carried out [their] intent and barged ahead to seize the [drugs], and [he] merely jumped out of the way." *Id.* at 589. The Sixth Circuit admitted "[t]his is one possible reading of [the] testimony, and such a scenario would not amount to consent." *Id.* However, it found no clear error and affirmed the finding of voluntary consent. It said the defendant "was not threatened, coerced, or tricked when he chose to let the officers into his room . . . The police may be kept out or invited in as informally as any other guest." *Id.* at 588–89. Moreover, "[n]othing in the record indicates that he was unaware of his well-known right to refuse entry." *Id.* at 588.[18]

iv. Mere Acquiescence

¶ 47 *Carter* demonstrates the importance of—and the difficulty that can lie in—distinguishing between voluntary implicit consent and "mere acquiescence."[19] Black's Law Dictionary defines "acquiescence" as "tacit or passive acceptance; implied consent to an act." Black's Law Dictionary 21 (9th ed. 2010). However, "mere acquiescence" is close to the opposite from a Fourth Amendment perspective. "Mere acquiescence" is a term of art describing when someone submits to a request by law enforcement because of duress or coercion—that is, a lack of voluntary consent or involuntary consent. *United States v. Wilson*, 11 F.3d 346, 351 (2nd Cir. 1993); *State v. Schultz*, 248 P.3d 484, 486 (Wash. 2011) ("mere acquiescence to an officer's entry is not [voluntary] consent"); *United States v. Clark*, No. 2018-009, 2019 U.S. Dist. LEXIS 126985, at *34 (D.V.I. July 30, 2019) (finding "involuntary consent" when the defendant eventually acquiesced after "denying the officers' request to search three separate times."). *Chan-Jimenez,* the case where a defendant seized by an officer keeping his hand on his gun wordlessly raised the tarp covering the bed of his truck, is a clear example of mere acquiescence. 125 F.3d at 1325–28.

¶ 48 Even in the absence of overt force, courts will find mere acquiescence "when an individual is not given a reasonable opportunity to choose to consent or when he or she is informed that a search will occur regardless of whether consent is given." *State v. H.K.D.S.*, 469 P.3d 770, 773 (Or. Ct. App. 2020)

---

18 *Cf. Turner v. State*, 754 A.2d 1074, 1077 (Md. Ct. Spec. App. 2000) (finding there was no implied consent to enter when "Nothing was said - - the officers did not ask permission to enter or tell appellant that they were about to enter, and appellant did not tell them not to enter.")).

19 We discuss "mere acquiescence" at length because the court believed the conduct of Kaipat's parents amounted to "mere acquiescence." Order at 20. For a case finding "voluntary implied consent" to one search and "acquiescence to a show of authority" (mere acquiescence) to another, *see State v. Smith*, 172 So. 3d 993, 997–98 (Fla. Dist. Ct. App. 2015).

(finding mere acquiescence when a police officer told a 12-year-old boy he would undergo a search instead of asking for his permission) (internal citation omitted). For example, in *State v. Rios*, 371 P.3d 316, 318 (Idaho 2016), a drunk driver who caused a fatal accident was taken to the hospital and asked by a police officer to sign a consent form to give a blood sample. Although the driver refused to sign, the officer told hospital staff to take a blood sample anyway. *Id.* The driver then held out his arm and did not resist. *Id*. Under Idaho law, "a person gives implied consent to evidentiary testing, including blood alcohol testing, when that person drives on Idaho roads and a police officer has reasonable grounds to believe that person has been driving in violation of Idaho's DUI statutes." *Id.* at 319. The Supreme Court of Idaho found that by refusing to sign the consent form, the defendant had withdrawn his implied consent, and that his subsequent "actions show only that [he] complied with the officer's orders," not that he consented. *Id.* at 322.

¶ 49 Although mere acquiescence is more commonly found in cases where the government claims the defendant voluntarily implicitly consented, it can also occur even if the defendant explicitly said something. For example, in *United States v. Worley*, the Sixth Circuit found no clear error and upheld the district court's ruling that a traveler suspected of smuggling drugs at an airport did not provide voluntary consent when he said to DEA agents, "You've got the badge, I guess you can [search]." *United States v. Worley*, 193 F.3d 380, 386 (6th Cir. 1999). The court found that, rather than representing unequivocal and specific consent, the traveler's statement was "merely a response conveying an expression of futility in resistance to authority or acquiescing in the officers' request." *Id.*

¶ 50 Ultimately, a finding of mere acquiescence represents a conclusion that the government failed to prove by a preponderance of the evidence that a reasonable officer would have believed the defendant acted voluntarily in complying with the request to undergo a search. To reiterate, this requires examining the totality of the circumstances, including the personal characteristics of the defendant. *Schneckloth,* 412 U.S. at 226.[20]

v. Applying the Law

¶ 51 Here, Igitol asserted that Mrs. Kaipat consented to her son providing a DNA sample, while she denied providing such consent. Appendix to Appellant's Br. at 15–16, 28. If the answer depended merely on who was the more believable witness, we would have to defer to the court. However, as the United States Supreme Court has said, voluntary consent "may be fairly inferred from context." *Birchfield*, 579 U.S. at 476. Because of the totality of the circumstances standard, we must examine how Kaipat and his parents' interaction with law enforcement both at and before the June 5 buccal swab.

[20] The multi-factor test used in the Ninth Circuit is not a substitute for this standard.

¶ 52 Both the Commonwealth and Mrs. Kaipat testified that on June 5, 2019, they considered her son a victim of a crime, not a potential perpetrator. Tr. at 37, 81–82.[21] Just three days earlier, Kaipat had told law enforcement he was attacked. Appendix to Appellant's Br. at 7. He and his mother—in fact, both of his parents—then fully cooperated with law enforcement's requests. At CHCC, the CST asked to collect the blood-stained clothes. Mrs. Kaipat collected the clothes and gave them to the CST. Tr. at 16–17, 65–66. Then, the parents accompanied Kaipat to the police station, where his mother gave permission for officers to speak with him alone about what had happened. *Id.* at 67–69. Kaipat without objection let the CST take buccal and fingernail swabs. *Id*. at 69. The next day, Igitol called Mrs. Kaipat to explain that he needed parental consent to get her son's medical records. Along with her husband, she met Igitol at a gas station and signed the form. *Id.* at 33–35, 69–70. Either at the gas station or during a second phone call later that day, Igitol arranged with the parents bringing Kaipat down to the police station at a convenient time and day to provide DNA via a hair follicle sample. *Id.* at 35–36, 70–71; Order at 22. On June 5, Kaipat's parents brought him to the police station as discussed. Without objection, law enforcement performed a buccal swab instead of getting a hair follicle sample as the parents watched. Tr. at 38–39, 70–71.

¶ 53 While not dispositive, the fact that Kaipat helped initiate the investigation is significant. When people voluntarily inform the police that they are a victim of a crime, it is generally reasonable for the police to believe that the victim wants the crime investigated and to believe that the victim would be willing to provide evidence to aid the investigation. In such circumstances, courts are particularly likely to find voluntary consent. *See Commonwealth v. O'Brien*, 736 N.E.2d 841, 850–51 (Mass. 2000) (noting that the 15-year-old defendant "presented himself as a victim of a crime" and finding that his statements to police were made voluntarily).

¶ 54 The Ninth Circuit's five-factor test strongly suggests that Kaipat voluntarily consented. He was not in custody, no officer had their weapon drawn, and he was not told that a search warrant could be obtained. The factor whether an officer administered *Miranda* warnings is irrelevant since there was no custodial interrogation. *See Miranda v. Arizona*, 384 U.S. 436, 498–99 (1966). The only factor weighing against voluntariness is the lack of evidence showing Kaipat was informed of the right to refuse consent. However, like the defendant in *Carter*, Kaipat does not claim he was unaware of this right. *Carter*, 378 F.3d at 588.

¶ 55 Per *Schneckloth*, courts must consider the "characteristics of the accused" to determine vulnerability to duress or coercion. *Schneckloth,* 412 U.S. at 226.

---

[21] At the suppression hearing, counsel for Kaipat said "the Commonwealth does not believe my client that he was a victim . . . They've never believed him." Tr. at 100. But earlier, the Motion to Suppress said "the Defendant was never under arrest when the [DNA samples were taken] as he too was considered a victim in this case." Appendix to Appellant's Br. at 11–12.

These include age and intelligence. Kaipat's parents submitted declarations averring they are of sound mind and body, and nothing indicates that Kaipat himself is not. Appendix to Appellant's Br. at 15–18. However, he is quite young and was only 15 in June 2019. *Id.* at 5. This means he was vulnerable to duress or coercion. "Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens." *Haley v. Ohio*, 332 U.S. 596, 599 (1948) (finding that a confession to murder made by a 15-year-old African-American who was interrogated for five hours in the middle of the night without counsel was involuntary).

¶ 56 The NMI Constitution safeguards minors in criminal proceedings. Article I, Section 4(j) reads: "Persons who are under eighteen years of age shall be protected in criminal judicial proceedings and in conditions of imprisonment." The Analysis of the Constitution says "The requirement that persons under 18 be protected is a flexible standard that looks to the prevention of harm to juveniles beyond the requirement of participation in the hearing or trial or the imposition of sentence." Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands 23 (1976). It adds that "In addition to any legislation, it is intended that the courts may interpret this provision on a case by case basis and give it meaningful content over time." *Id.*

¶ 57 Citing this constitutional provision, we have said:

> In our society, both Chamorro and Carolinian cultures, children are held in high esteem. Every effort should be made to ensure that they are protected by due process of law in any possible deprivation of life, liberty, or property. At a minimum, this is required under our concept of fundamental fairness and protection for children.
>
> *In re the Matter of "C.T.M."* 1 NMI 410, 413 (1990) (ruling that juvenile delinquency proceedings required proof beyond a reasonable doubt).

¶ 58 We interpret Article I, Section 4(j) to hold that when a defendant had undergone a search by law enforcement at a time when they were a minor, and the Commonwealth relies on the voluntary consent exception to introduce evidence obtained from that search, both the defendant and a parent or legal guardian must have provided voluntary consent.[22] Thus, while the parties' discussion of voluntariness focused on Kaipat's parents, particularly his mother, and not Kaipat himself, we must analyze both his and his parents' conduct.

¶ 59 Kaipat's assertion that there was no voluntary consent has a critical flaw; an almost complete absence of any evidence that law enforcement threatened or pressured him or his parents. Whereas the youthful defendant in *Haley* was

[22] In a situation where one parent provided consent and the other refused to, we might not necessarily find voluntary consent, but that issue is not before us.

arrested around midnight, interrogated for hours alone, and browbeaten into confessing murder, Kaipat showed up at the police station with his parents at a convenient time and date to provide evidence for a crime which he claimed to be a victim of. 332 U.S. at 599. Compared to the defendants facing serious charges in *Ramangmau* and *Cabrera*, whose confessions we found "the product of a rational intellect and a free will," he was in a much less stressful position. *See* 4 NMI at 233, 236; 4 NMI at 245.

¶ 60 The only indication of duress or coercion that Kaipat offers is his perfunctory declaration discussing his experience at the police station on the night of June 2 and early hours of June 3. Like on June 5, he went there with his parents in the capacity of a victim of a crime which he reported. Kaipat says "I was made to sit on a chair located under an air conditioning unit which was blowing really cold air to the right side of my head/face and my body." Appendix to Appellant's Br. at 36. He also says that Igitol "told me to remove my sweater and my t-shirt" and "remain standing and spin around, which I did several times" without explanation. *Id*. He concludes "The experience at DPS, especially during the time that I was left with Det. Duenas and Det. Buddy scared me, not to mention that I was freezing all the while in the room and hungry and tired all the while both Det. Duenas and Det. Igitol were questioning me and ordering me to remove my sweater/t-shirt and to spin around several times." *Id.*

¶ 61 Kaipat implies these were interrogation tactics intended to pressure him into letting law enforcement take the fingernail and first buccal swabs. But the court found these were taken voluntarily, a finding Kaipat does not challenge on appeal. Like the defendant in *Cabrera*, Kaipat does not claim that the Commonwealth was responsible for him being hungry and tired. *Cabrera*, 4 NMI at 246. It may be true that Kaipat felt some fear during the questioning. However, if any level of fear meant that people could not voluntarily consent to law enforcement searches, the consent exception would always be swallowed whole, since interacting with law enforcement may induce anxiety even among entirely innocent people and would almost certainly worry those who actually have something to hide. What is crucial is that Kaipat does not claim his experience on June 2 led him or his parents to continue their cooperation with law enforcement out of fear or that it affected their subsequent interactions with law enforcement. In fact, he does not cite his declaration as proof of duress or coercion, and the court mentioned the declaration only once in passing in a footnote, suggesting it should count for little when considering what happened days later on June 5. Order at 1 n.1.[23]

---

[23] Even if we regarded the Commonwealth's conduct on June 2 as an improper display of force, "the fact that a person is in custody or has been subjected to a display of force does not automatically preclude a finding of voluntariness." *United States v. Snype*, 441 F.3d 119, 131 (2nd Cir. 2006) (finding voluntary consent when the display of force was sufficiently remote in time). The totality of the circumstances standard prevents the drawing of bright-line rules. *See also State v. Brooks*, 838 N.W.2d 563, 569 (Minn. 2013) ("consent can be voluntary even if the circumstances of the encounter are uncomfortable for the person being questioned.").

¶ 62 Regarding the scheduling of the June 5 DNA sample, the court said "Asking for or setting an appointment infers mere acquiescence, while asking for consent infers undisputed and voluntary permission." Order at 20. This confuses the colloquial sense of "acquiescence" with the term of art "mere acquiescence," which again means involuntary consent. If voluntary, "acquiescence" to a law enforcement request is not a constitutional violation. *See Carter*, 378 F.3d at 589 ("Focusing on the word 'acquiescence' [which was used by the district court], [the defendant] reminds us that consent will not be found upon mere acquiescence . . . [the defendant]'s verbal quibble is bootless . . . the district judge explicitly used 'acquiescence' to mean 'permission'—that is, consent.") (internal quotation and citation omitted).

¶ 63 Mrs. Kaipat's testimony regarding the events of June 3, when Igitol asked her to bring Kaipat back to the police station, is not entirely consistent. She had the following exchange with the Commonwealth about the gas station meeting:

> MR. HOUSTON: And when Detective Igitol asked you for the DNA you agreed to let him do it with the FBI?
>
> MRS. KAIPAT: He never mentioned any DNA to us that day.
>
> MR. HOUSTON: Okay.
>
> MRS. KAIPAT: He only asked a consent for him to get our son's medical records from CHC.
>
> . . . .
>
> MR. HOUSTON: Okay. So, you knew you were going to get tested on the 5th for the DNA – Kenneth was going to get tested for the DNA?
>
> MRS. KAIPAT: Yes, because that's what Detective Igitol said.
> Tr. at 70, 74.

Thus, after first claiming that Igitol never mentioned DNA on June 3, Mrs. Kaipat testified that Igitol said Kaipat would be providing a DNA sample. If Igitol told Mrs. Kaipat that her son would be providing a DNA sample, he must have told her on June 3, since they arranged the June 5 encounter that day and did not have any contact after June 3.

¶ 64 Mrs. Kaipat knowingly brought her son to the police station so he could provide a DNA sample. The Commonwealth had the following exchange with her on the stand:

> MR. HOUSTON: Okay. So, did Detective Igitol or the FBI agent get your consent to collect the DNA sample?

> MRS. KAIPAT: No.
>
> MR. HOUSTON: Okay. Did they collect a DNA sample?
>
> MRS. KAIPAT: Yes.
>
> MR. HOUSTON: Did you object to the collection?
>
> MRS. KAIPAT: No.
>
> MR. HOUSTON: So, you and your husband were both in the room when the FBI agent collected it?
>
> MRS. KAIPAT: Yes.
>
> MR. HOUSTON: And you brought your son there to have it collected?
>
> MRS. KAIPAT: Yes.
>
> MR. HOUSTON: So, you knew ahead of time that's why you were meeting there?
>
> MRS. KAIPAT: Yes.
> *Id.* at 70–71.

¶ 65 From the June 3 request for a DNA sample and the June 5 buccal swab, there was ample opportunity to decide whether to go forward with Igitol's request. When Mrs. Kaipat arrived at the police station on June 5 for the explicitly-stated purpose of giving a DNA sample, it was reasonable for law enforcement to believe that she acted voluntarily. *See Magallon*, 984 F.3d at 1281; *Daino*, 475 P.3d at 360; *Rodriguez*, 497 U.S. at 186. Specifically, it was reasonable for law enforcement to believe that Mrs. Kaipat would approve performing a buccal swab instead of getting a hair follicle sample as originally discussed, because they are both brief and harmless procedures. Indeed, a buccal swab is likely less painful. Just as the defendant in *Carter* consented to law enforcement entering his hotel room by opening the door and stepping aside, Mrs. Kaipat implicitly gave unequivocal and specific consent to her son providing a DNA sample by bringing him to the police station at the time and date she accepted along with her husband to do just that. *Carter*, 378 F.3d at 588. Even if Mrs. Kaipat did not explicitly consent to the buccal swab, the search fell within the scope of the consent she implicitly provided. *Jimeno,* 500 U.S. at 251. As the court said, "Nacrina Kaipat and Detective Igitol both testified that neither the Defendant nor his parents objected to the collection." Order at 21. This crucial fact distinguishes this case from *Rios*, where the defendant had refused to sign a consent form. 371 P.3d 316, 322 (Idaho 2016).

¶ 66 Kaipat himself implicitly consented to the June 5 buccal swab. He presented himself as an innocent victim of a crime. He had already willingly given a buccal swab on June 2. When he showed up at the police station on June 5, it was reasonable for law enforcement to believe that he would be willing to provide a DNA sample by buccal swab instead of a hair follicle sample. Letting the FBI agent perform the buccal swab without objection constituted unequivocal and specific consent to the search. Because he and his parents had voluntarily cooperated with law enforcement up until that point, it was objectively reasonable to interpret their compliance with the request for a buccal swab a continuation of that voluntary conduct rather than mere acquiescence. Nothing in the record indicates Kaipat or his parents had any reluctance or hesitation to cooperate with law enforcement.

¶ 67 The compliance with the request for the buccal swab was either "'voluntary' or was the product of duress or coercion." *Schneckloth*, 412 U.S. at 227. We find no evidence of any duress or coercion and conclude that Kaipat and his parents voluntarily consented. This case is unlike *Cabrera*, where we neglected "to disturb factual findings which hinge on the court's assessment of a witness' credibility." 4 NMI at 246. Even if we believe every word Mrs. Kaipat said and disregard Igitol's testimony, the Commonwealth still prevails. We are left with a firm and definite conviction that a mistake has been made. The Commonwealth has proved by a preponderance of the evidence that a reasonable officer would have believed that Kaipat and his parents voluntarily consented to the search.

¶ 68 We find the court clearly erred in holding that there was no voluntary consent to the June 5 buccal swab. The search was reasonable under the Fourth Amendment.

C. Discussing Whether Parents Can Consent on Behalf of Minors

¶ 69 We now address a final issue separate from the merits of the case. The court briefly discussed whether parental consent is a valid exception to a warrantless search or seizure. Noting that neither party briefed this issue and it appears to present a matter of first impression, the court examined how other jurisdictions treat parental consent. The Commonwealth argues the court sua sponte raised this issue, and by doing so, it independently challenged the search and "stepped over the line from neutral jurist to that of an advocate for defendant to raise and rule on issues that were neither controlled by clear precedent nor dictated by an interest in a just result." *People v. Givens*, 934 N.E. 470, 479 (Ill. 2010). It asks that we "disregard the issue of parental [consent] v. minor consent as raised *sua sponte* by the trial court." Appellant's Br. at 23. We do not agree.

¶ 70 First, it was the Commonwealth that explicitly raised consent. It specifically claims that the police received consent from Kaipat's legal guardian before collecting his DNA. Appendix to Appellant's Br. at 25. It repeated this point at the suppression hearing, stating that because "defendant is and was a minor his parents are responsible for giving consent." Tr. at 94. As this was the Commonwealth's core opposition, claiming that the court raised it sua sponte is

incorrect. While Kaipat never challenged the contention that parental consent is an exception to the warrant requirement, courts have the duty "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803); *see also Parr v. Breeden*, 489 S.W.3d 774, 779 (Mo. 2016) ("Courts are not bound by stipulations or concessions as to questions of law.").

¶ 71 Second, NMI Rule of Practice 8(a)(2) requires an opposition to a motion to "includ[e] citation of supporting authorities"); *see also Kohler v. Englade*, 470 F.3d 1104, 1114 (5th Cir. 2006) (holding that plaintiff failed to adequately brief an issue where "he failed to cite any legal authority for the proposition"). Here, the Commonwealth asserted that parents are responsible for giving consent to searches of minors, but did not support this claim with any authorities, citing only cases that stand for the general preposition that consent is an exception to the warrant requirement.[24] It was appropriate to survey caselaw in other jurisdictions since the Commonwealth gave no relevant cases for its contention. We find the court did not err in discussing the issue of parental consent on behalf of minors.

V. Conclusion

¶ 72 For the foregoing reasons, we REVERSE the order suppressing the evidence obtained from the June 5 buccal swab and remand for further proceedings consistent with this opinion.

SO ORDERED this 31st day of December, 2022.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLOÑA
Associate Justice

/s/
PERRY B. INOS
Associate Justice

COUNSEL

J. Robert Glass, Jr., Saipan, MP, for Petitioner.

Brian Sers Nicholas, Saipan, MP, for Appellee

---

[24] The Commonwealth cited *Katz v. United States*, 389 U.S. 347, 357 (1967), *Vale v. Louisiana*, 399 U.S. 30 (1970), and *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

NOTICE

This slip opinion has not been certified by the Clerk of the Supreme Court for publication in the permanent law reports. Until certified, it is subject to revision or withdrawal. In any event of discrepancies between this slip opinion and the opinion certified for publication, the certified opinion controls. Readers are requested to bring errors to the attention of the Clerk of the Supreme Court, P.O. Box 502165 Saipan, MP 96950, phone (670) 236–9715, fax (670) 236–9702, e–mail Supreme.Court@NMIJudiciary.com.