STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2013AP2178-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARIE A. EZELL,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE WINNEBAGO COUNTY CIRCUIT COURT, THE HONORABLE DANIEL J. BISSETT, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication.

ARGUMENT

EZELL WAS NOT IN CUSTODY FOR THE PURPOSES OF *MIRANDA* WHEN SHE MADE HER STATEMENT, AFTER ARRIVING AS A VISITOR, AT THE OSHKOSH CORRECTIONAL INSTITUTION.

A. Introduction to argument.

Ezell contends that she was "in custody" for *Miranda* purposes when she was questioned by correctional officers at the Oshkosh Correctional Institution as to whether she was bringing drugs into the prison as a visitor. Ezell's brief at 10-13. Ezell admitted to the correctional officers that she had two balloons of K2 (synthetic marijuana) with her (33:8). Ezell further admitted that this was not the first time that she had brought drugs into the prison on visits and stated that she had brought two balloons on each of two previous visits (33:9). After Ezell made these admissions to the correctional officers, Officer Lehman of the Oshkosh Police Department arrived at the prison. He confirmed with Ezell the information she had told the correctional officers and placed Ezell under arrest (32:7).

Ezell claims that the statements she made at the correctional institution should have been suppressed, because neither the correctional officers nor Officer Lehman gave her *Miranda* warnings prior to her admission that she was bringing drugs into the prison as a visitor.[1] The

[1]After arresting Ezell, Officer Lehman transported her to the Aurora Medical Center where medical staff removed the drugs from Ezell's vagina (32:9). The trial court suppressed Ezell's statements to Officer Lehman,

trial court determined that Ezell was not "in custody" for *Miranda* purposes when questioned at the correctional institution. The State contends that Judge Bissett reached the correct conclusion. Ezell voluntarily entered the prison, knowing the restrictions that visiting a prison entails. The conditions of her questioning were not substantially more restrictive than those imposed on all visitors. Ezell was not frisked or restrained and none of the officers carried firearms (32:7; 33:9). Under the circumstances of her questioning at the correctional institution, more fully described below, Ezell was not "in custody" for *Miranda* purposes.[2]

In addition to the admissions Ezell made to the correctional officers, Ezell claims that the physical evidence—the drugs retrieved from her vagina—should be suppressed. Ezell's brief at 18-21. Because the trial court did not suppress

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which she made after arrest at the hospital (34:10). Thus, those statements are not part of this appeal.

[2]In the trial court, the State argued that the correctional officers were not state actors for *Miranda* purposes (16:6-8). On appeal, the State does not concede that the correctional officers were state actors. The correctional officers' purpose in questioning Ezell was to insure that Ezell was not introducing drugs into the prison. This is part of the officers' duty to protect the safety of the prisoners and visitors and promote the rehabilitation of the prisoners. *See* Wis. Admin. Code § DOC 306.18(1). Unlike the staff members in *United States v. D.F.*, 115 F.3d 413 (7th Cir. 1997), the correctional officers had not been "enlisted or volunteered to act as law enforcement surrogates" or "saw themselves as an arm of law enforcement." *Id.* at 420. The correctional officers acted in furtherance of a correctional purpose separate from the ultimate criminal prosecution. However, this court need not reach this issue, because the record indicates that Ezell was not in custody during her questioning at the correctional institution.

Ezell's admissions to the correctional officers, the trial court did not address this issue. The State contends that, even if this court determines that Ezell's statements to the correctional officers should have been suppressed, the physical evidence of the drugs would be admissible under *Patane*[3] and *Knapp*.[4]

Assuming—*arguendo*—that a *Miranda* violation occurred, the derivative physical evidence is not subject to exclusion, unless there is an intentional violation or actual coercion. Neither existed in this case. Ezell argues that "[i]t is unlikely that veteran correction officers . . . would be unaware that *Miranda* warnings were required in this situation." Ezell's brief at 20. However, Ezell can point to no case in Wisconsin or any other jurisdiction in which correctional officers were required to give a *Miranda* warning to a visitor entering a prison, who was suspected of transporting drugs into the prison. Here, the officers were acting in their routine duties as correctional officers to protect the security of the prison. *See* Wis. Admin. Code § DOC 309.06; *see also State v. Higgins*, 183 Ohio App. 3d 465, 917 N.E.2d 363 (2009) (visitor charged with bringing drugs into prison moved to suppress evidence of marijuana found on her person and statements made to law enforcement officers; court denied suppression).

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[3]*United States v. Patane*, 542 U.S. 630 (2004).

[4]*State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899.

B. Relevant legal principles and standard of review.

1. "In custody" under *Miranda*.

Miranda warnings must be administered prior to the onset of custodial interrogation. *Yarborough v. Alvarado*, 541 U.S. 652, 661 (2004). *See also State v. Armstrong*, 223 Wis. 2d 331, 351-52, 588 N.W.2d 606 (1999) (*Miranda* warnings are procedural safeguards that protect suspect's Fifth Amendment rights).

A person is "in custody" for purposes of *Miranda* if the person is either formally arrested, or has suffered a restraint on freedom of movement of the degree associated with a formal arrest. *State v. Goetz*, 2001 WI App 294, ¶ 11, 249 Wis. 2d 380, 638 N.W.2d 386. *See also Berkemer v. McCarty*, 468 U.S. 420, 440 (1984).

The test for *Miranda* custody is an objective one, determined from the perspective of a reasonable person in the suspect's position—not by the defendant's subjective experience. *State v. Torkelson*, 2007 WI App 272, ¶ 13, 306 Wis. 2d 673, 743 N.W.2d 511. The objective test does not "'place upon the police the burden of anticipating the frailties or idiosyncra[s]ies of every person whom they question.'" *McCarty*, 468 U.S. at 442 n.35 (quoted source omitted). Moreover, the custodial determination does not depend on the subjective views harbored by the interrogating officers. *State v. Mosher*, 221 Wis. 2d 203, 211, 584 N.W.2d 553 (Ct. App. 1998).

Rather, the court must examine the totality of the circumstances to determine if the suspect was in custody, and there is no single fact or feature that is determinative. *See*, *e.g.*, *State v. Gruen*, 218 Wis. 2d 581, 593, 582 N.W.2d 728 (Ct. App. 1998); *State v. Morgan*, 2002 WI App 124, ¶ 12, 254 Wis. 2d 602, 648 N.W.2d 23; *State v. Schloegel*, 2009 WI App 85, ¶ 7, 319 Wis. 2d 741, 769 N.W.2d 130.

The courts have identified numerous factors that should be considered in determining whether a suspect is in custody. *Torkelson*, 306 Wis. 2d 673, ¶ 17. The factors include "the suspect's freedom to leave, the purpose, place and length of the interrogation and the degree of restraint." *Mosher*, 221 Wis. 2d at 211. Within the degree-of-restraint factor, various sub-factors also exist:

> [W]hether the suspect is handcuffed, whether a weapon is drawn, whether a frisk is performed, the manner in which the defendant was restrained, whether the suspect is moved to another location, whether questioning took place in a police vehicle, and the number of officers involved.

Id.

The courts must determine whether the circumstances present a risk that police may coerce or trick captive suspects into confessing, or show that a suspect is subject to compelling pressures generated by the custodial setting itself. *Torkelson*, 306 Wis. 2d 673, ¶ 18. Nevertheless, the law is clear that it is not the mere number of factors added up on each side that dictate the custody determination. *Id.* Rather, the factors are reference points that help determine whether *Miranda* safeguards were necessary. *Id.*

2. Standards of review.

With respect to the question of *Miranda* custody, the trial court's findings of historical fact are upheld unless clearly erroneous, but whether a person is in custody is a question of law, reviewed *de novo*. *Mosher*, 221 Wis. 2d at 211.

In reviewing *Miranda* standards, however, this court should also keep in mind the evils addressed by *Miranda*—namely, to prevent government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment—and then determine whether the officer's conduct and words implicate this purpose. *State v. Hambly*, 2008 WI 10, ¶ 48, 307 Wis. 2d 98, 745 N.W.2d 48.

C. Ezell was not "in custody" when she admitted, while visiting the Oshkosh Correctional Institution, to bringing drugs into the institution.

1. Factual background.

On October 13, 2012, Ezell voluntarily entered the Oshkosh Correctional Institution to visit an inmate. Correctional staff had received information that Ezell was bringing contraband into the institution to give to an inmate on a visit (33:4). Two correctional officers, Lieutenant Kuster and supervising officer Norman approached Ezell in the lobby. Correctional

Officer Norman asked Ezell, "Ma'am, would you come and talk with us?" (33:5). The correctional officers did not have any authority to detain Ezell or to make her accompany them and made no statements suggesting they had the authority to detain Ezell (33:5-6). Visitors are informed in writing by a posted sign or notice that they need not agree to an inspection or search and that the alternative to such a search or inspection is leaving the institution. Wis. Admin. Code DOC § 306.18(6).

The correctional officers allowed Ezell to retain her possessions. She followed the officers through a door that locked so that persons from the visiting area could not get into the administrative office areas of the prison. However, the door allowed persons from the inside to get out at any time; it was not locked from the inside (33:6, 19-20). There was a buzzer on the door, which allowed the door to be opened from the inside when staff wished to enter the administrative areas (33:19). Ezell left her mother and another friend in the lobby to accompany the correctional officers (33:5). The officers requested Ezell to follow them to the conference room away from the waiting room to protect her privacy. The waiting room was a "family environment" in which children might be present and the discussion with Ezell might be embarrassing for her, since she had hidden drugs in her vagina (33:10).

The officers were wearing their correctional uniforms, which indicated that they were employees of the Wisconsin Department of Corrections—rather than police officers (33:20). Neither correctional officer was armed when they approached Ezell (33:5). At no time did the correctional officers handcuff Ezell (33:9). In fact,

neither officer touched Ezell as they escorted her (33:13). The officers had handcuffs attached to a utility belt, but they were concealed in a pouch (33:13-14). The correctional officers did not frisk Ezell or search her belongings (33:9).

The conference room in which the correctional officers questioned Ezell was twenty to twenty-five feet from the waiting room (33:11). The conference room had a table displaying crafts that the inmates had made and some chairs set up against one wall (33:7). There were three correctional officers in the conference room. Ezell and Officer Norman were seated. Lieutenant Kuster was standing on the opposite wall (33:14-15). The third correctional officer was a woman line staff from the visiting area—Officer Todd (33:6-7). Officer Todd was standing at the back of the room (33:14). The door to the conference room was closed, but not locked. During the interview, Lieutenant Kuster was going in and out of the room (33:16).

In the conference room, Officer Norman, who was seated, explained that he had been monitoring phone calls between Ezell and an inmate. He indicated that he knew from those calls that Ezell had "contraband with her to bring to Inmate Moseby on her visit that day" (33:7). Officer Norman also told Ezell that he had contacted the police and an officer was coming to the correctional institution (33:8). After initially denying that she had anything on her person, Ezell admitted that she had two balloons of K2 (33:8). Ezell further admitted that she had brought drugs into the prison on previous visits (33:9-10).

After Ezell had made those admissions to the correctional officers, Officer Lehman of the Oshkosh Police Department arrived. Per prison policy, Officer Lehman did not have his gun with him and had locked it in his squad car. Officer Lehman told Ezell that correctional staff had informed him that she had drugs on her person. Ezell confirmed that she had two balloons of K2 hidden in her vagina. Officer Lehman placed Ezell under arrest (32:7).

2. Ezell was not "in custody."

Ezell voluntarily submitted herself to the restrictions inherent in visiting a prison. As Judge Bissett noted in determining that Ezell had not been "in custody" for *Miranda* purposes:

> In this case, the defendant was at the prison voluntarily. She was there presumably to visit somebody in the prison system so she made a voluntary decision to go to a structured, restrictive facility. She wasn't forced to go to that structured, restrictive facility. There are certain restraints that are placed upon people who go to those facilities. Whether they be lawyers there to visit clients, whether they be individuals there to visit, they are subject to going through a metal detector, having their purses and property searched. They are generally escorted around the facility for their protection but also to observe them. When they meet with people, they're brought into certain areas where they're free to leave but somebody has to push a button or unlock a door. The doors aren't open for obvious reasons when they're in that facility. I think it's somewhat analogous to people who make a decision to go on an airplane. They go through a metal detector, they have certain portions of their freedom constrained because

> they've voluntarily elected to participate in that activity. In this case, she voluntarily elected to participate in going to the prison system to see somebody in the prison system.

(34:7.)

Ezell argues that it was significant that she went through a locked door, which made an "audible click as the door closed behind her." Ezell's brief at 11. Ezell contends that a reasonable person would not have felt free to leave the conference room, because after she left the unlocked conference room she "had no reason to believe she could exit the prison without assistance from the officer who controlled the lock for the door." Ezell's brief at 11.

First, Officer Norman testified that persons in the administrative offices could get out into the lobby at any time without aid, because the door was not locked from the inside (33:6, 19-20). However, even if a reasonable person in Ezell's situation would have believed she needed the assistance of a staff member to open the door, that is no different from the situation any visitor to the prison faces. Ezell had visited the prison in the past (33:9-10). Presumably, on other visits she went through locked doors and needed staff assistance to return to the lobby to leave, and was permitted to do so.

In a recent United States Supreme Court case, the Court determined that an inmate confined in prison was not *per se* "in custody" for *Miranda* purposes. Simply because the inmate's movements were restricted does not mean that the inmate would not feel free to leave the interrogation and return to his cell—the inmate's

usual environment. *Howes v. Fields*, ___ U.S. ___, 132 S. Ct. 1181, 1193 (2012).

> Because he was in prison, respondent was not free to leave the conference room by himself and to make his own way through the facility to his cell. Instead, he was escorted to the conference room and, when he ultimately decided to end the interview, he had to wait about 20 minutes for a corrections officer to arrive and escort him to his cell. But he would have been subject to this same restraint even if he had been taken to the conference room for some reason other than police questioning; under no circumstances could he have reasonably expected to be able to roam free.

Id. Under these circumstances, the Supreme Court determined that the restrictions did not coerce the inmate in cooperating. The Court concluded that the inmate was not "in custody" for *Miranda* purposes. *Id.* at 1194.

Relying on *Armstrong*, 223 Wis. 2d at 355, Ezell argues that the fact that the questioning took place inside a prison suggests that Ezell was in custody. Ezell's brief at 12. However, *Armstrong* dealt with the police interrogation of a prison inmate. Moreover, in *Armstrong*, our supreme court held that "a person who is incarcerated is *per se* in custody for purposes of *Miranda*." *Armstrong*, 223 Wis. 2d at 355. This is in direct contravention of the United States Supreme Court's decision in *Howes*, 132 S. Ct. 1181.

Even a prison inmate who is removed from the general population and questioned about events that occurred outside the prison is not necessarily in custody for *Miranda* purposes. *Howes*, 132 S. Ct. at 1187. The Court elaborated

and reinforced the essence of what is necessary to trigger the *Miranda* warning requirement:

> Determining whether an individual's freedom of movement was curtailed, however, is simply the first step in the analysis, not the last. Not all restraints on freedom of movement amount to custody for purposes of *Miranda*. We have "decline[d] to accord talismanic power" to the freedom-of-movement inquiry, and have instead asked the additional question whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*. "Our cases made clear . . . that the freedom-of-movement test identifies only a necessary and not a sufficient condition for *Miranda* custody."

Id. at 1189-90 (internal citations omitted).

In applying the standard set forth by the United States Supreme Court for determining whether a person was in custody for *Miranda* purposes, the Wisconsin Supreme Court has stated that a person is in custody if under the totality of the circumstances a reasonable person in that situation would not feel free to terminate the interview and leave the scene. *State v. Lonkoski*, 2013 WI 30, ¶ 6, 346 Wis. 2d 523, 828 N.W.2d 552; *State v. Martin*, 2012 WI 96, ¶ 33, 343 Wis. 2d 278, 816 N.W.2d 270. This court has stated that an examination of the objective circumstances includes relevant factors such as the defendant's freedom to leave the scene; the purpose, place, and length of the questioning; and the degree of restraint involved.

In assessing the degree of restraint involved, relevant factors include whether the defendant was handcuffed; whether the police drew a gun on

the defendant; whether the defendant was frisked; the manner in which the defendant was restrained; whether the defendant was moved to another location and if so, the circumstances of such movement; whether the questioning took place in a police vehicle and if so, the circumstances regarding placement in the vehicle; and the number of police officers involved. *See Gruen*, 218 Wis. 2d at 594-96; *Mosher*, 221 Wis. 2d at 211, and cases cited therein, which are omitted here.

The various factors are not in and of themselves dispositive of the custody determination. Rather, they are reference points for determining whether the *Miranda* warnings were necessary because the defendant was subject to the "compelling pressures generated by the custodial setting itself." It is the "compelling pressures generated by the custodial setting itself" that is the reason for the *Miranda* warnings requirement. *Torkelson*, 306 Wis. 2d 673, ¶¶ 18-20.

Based on the relevant, undisputed facts in this case, this court must conclude that as a matter of law, Ezell was not in custody for *Miranda* purposes. This court must conclude that when Ezell made her statement to the correctional officers at the prison she was not formally arrested and she did not suffer a restraint on freedom of movement of the degree associated with a formal arrest. *See Goetz*, 249 Wis. 2d 380, ¶ 11. A reasonable person in Ezell's position would not have considered herself to be in custody. *Id*.

As Judge Bissett determined in concluding Ezell was not "in custody" for *Miranda* purposes:

> The length of the interrogation in this case was brief. The degree of restraint; it doesn't appear she was handcuffed or escorted—physically escorted to that room. She was asked to accompany the officers to that room.
>
> As to various factors in regards to the degree of restraint, whether she was handcuffed, she was not. There [were] no weapons drawn. There was not a frisk performed. The manner in which she was restrained was a voluntary request to accompany. She was moved to a different location. The questioning did not take place in a vehicle. There were a number of correctional personnel present and ultimately law enforcement present.
>
> So I think in evaluating the factors and evaluating the purpose of the *Miranda* protections, it would appear that the defendant was not a person in custody for *Miranda* purposes when she was taken or when she went from the lobby area to the room with the department of corrections personnel and then was questioned by those personnel and then subsequently law enforcement in regards to what she had on her person.

(34:9.)

Moreover, the atmosphere in the conference room was not coercive. There were craft items on display on the table (33:7). Although there were three correctional officers in the conference room, the officer primarily questioning Ezell was seated. The other two officers were not "standing over" Ezell [Ezell's brief at 13]; one was standing by the opposite wall and the other in the back of the room (33:14-15). None of the officers had any weapons

and their handcuffs were concealed in pouches (33:5, 13-14). There was no physical contact between the correctional officers and Ezell (33:13). The conference room was clearly unlocked, since one of the correctional officers repeatedly went in and out of the room (33:16).

There is absolutely no evidence that the correctional officers separated Ezell from her mother and friend as "a deliberate ploy used . . . to obtain a confession." Ezell's brief at 12. Instead, the correctional officers asked Ezell to leave the lobby for their discussion in order to preserve her privacy. The lobby was a family area, which often contained children (33:10). It would not have been appropriate to discuss Ezell's concealment of drugs in her vagina in such an atmosphere.

Ezell focuses on Police Officer Lehman's testimony that he would have continued to "detain" Ezell, if she had refused to answer the police officer's questions. Ezell's brief at 12. This comment says nothing about whether Police Officer Lehman believed that the correctional officers were detaining Ezell. Officer Lehman was equating his interview with Ezell with a *Terry* stop and his comments indicated that he would have continued to detain Ezell in accordance with *Terry*. Persons who are detained pursuant to *Terry* stops are not *per se* "in custody" for *Miranda* purposes, even though their freedom of action is significantly curtailed during that period. *McCarty*, 468 U.S. at 436-40. Thus, detention does not equate with "in custody" for *Miranda* purposes.

Ezell compares the facts of her interview with the custodial interrogation in *McDougal v. State*, 277 Ga. 493, 591 S.E.2d 788 (2004). Ezell's

brief at 13. However, the critical factors in *McDougal* are easily distinguishable from this case. In *McDougal,* the police transported the defendant to the police station in the detective's vehicle. *McDougal*, 277 Ga. at 494. Crucial to the court's determination that McDougal was "in custody" was the fact that the detective "told McDougal at the onset of the interview that they did not have to allow him to leave." *Id*. at 498.

> [T]he detectives reminded him several times during the interview that he could be arrested for such a charge. Detective Lee expressly told McDougal that they already had enough evidence about the gun that he "[did not] have to let [him] go home today." The detective would make no commitments to McDougal about whether he would be arrested. That McDougal was not free to leave was further reinforced by Detective Lee's statement to McDougal that he was not going to be released in time for his 2:00 p.m. appointment. In these circumstances, a reasonable person would have believed that Detective Lee's permission was required before the interview could end and he could leave the police station.

Id.

In contrast, in Ezell's case, it is undisputed that Ezell was free to leave the conference room at any time during her interview with the correctional officers. The fact that the correctional officers may not have specifically told Ezell she was free to leave is not dispositive, since such an explicit statement is not necessary. *Torkelson*, 306 Wis. 2d 673, ¶ 23. The correctional officers did not have any authority to detain Ezell or to make her accompany them and made no statements suggesting they had the authority to detain Ezell (33:5-6). Moreover, visitors are informed in

writing by a posted sign or notice that they need not agree to an inspection or search of their persons or belongings and that the alternative to agreeing to such a search or inspection is leaving the institution. Wis. Admin. Code DOC § 306.18(6).

This case is most similar to *People v. Carter*, 117 Cal. App. 3d 546, 172 Cal. Rptr. 838 (Cal. 1981). In that case, a visitor to the Los Angeles County Sheriff's Station, which housed prisoners pending transportation to court, attempted to bring an inoperable revolver into her visit with one of the inmates. The visitor moved to suppress statements she made to correctional officers, because the statements were obtained without providing a *Miranda* warning. *Id.* at 548-49. The court determined that Carter was not in custody when the correctional officer asked her whether she had a gun and she responded that she did have one. *Id.* at 549.

> Appellant's contention that she was denied her rights under *Miranda* . . . is wholly meritless. As the trial court found, she came to the sheriff's station voluntarily to accomplish her own purpose of visiting a trustee-prisoner. When the officer saw a bulge in her waistband and asked her to step behind the counter, the matter was at the investigative state only. Appellant herself testified that the officer merely asked her to come behind the counter, and did not order her to do so or take custody of her. The officers had every right to conduct the reasonable noncustodial investigation that lead to the discovery of appellant's gun and none of the concerns that gave rise to the rules enunciated in *Miranda v. Arizona, supra,* were present here.

Id. at 551.

D. Even if this court determines that Ezell's non-*Mirandized* statement should have been suppressed, the derivative physical evidence of drugs retrieved from Ezell's vagina should not be suppressed under *Patane* and *Knapp*.

Moreover, even assuming—*arguendo*—that a *Miranda* violation occurred, the derivative physical evidence is not subject to exclusion under *United States v. Patane*, 542 U.S. 630 (2004), and *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899, because no intentional violation or actual coercion occurred. Accordingly, even if Ezell's statement should have been excluded, drugs found on Ezell's person were still admissible.

1. Relevant legal principles.

In *Patane*, the United States Supreme Court recently articulated the test for physical derivative evidence obtained after a *Miranda* violation, and held that the "fruit of the poisonous tree" doctrine does not extend to nontestimonial derivative evidence discovered as a result of a defendant's voluntary statements obtained without *Miranda* warnings. *Patane*, 542 U.S. at 640-42.

Although the *Miranda* rule is "a prophylactic employed to protect against violations of the Self-Incrimination Clause," the self-incrimination clause is "not implicated by the admission into evidence of the physical fruit of a voluntary statement," and as such, "there is no

justification for extending the *Miranda* rule to this context." *Id.* at 636-37 (clause cannot be violated by introduction of nontestimonial evidence obtained as result of voluntary statements).

Thus, *Patane* makes clear that the "fruit of the poisonous tree" doctrine has no application in Fifth Amendment jurisprudence, because unlike the Fourth Amendment, the Fifth Amendment is self-executing and limits its own remedy to self-incriminating statements only. *Id.* at 640. As the Court explained:

> It follows that police do not violate a suspect's constitutional rights (or the *Miranda* rule) by negligent or even deliberate failures to provide the suspect with the full panoply of warnings prescribed by *Miranda.* Potential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial. And, at that point, "[t]he exclusion of unwarned statements . . . is a complete and sufficient remedy" for any perceived *Miranda* violation.

Id. at 641-42.

In other words, the exclusionary rule does not apply to exclude post-*Miranda*-violation physical evidence, because "there is, with respect to mere failures to warn, nothing to deter. There is therefore no reason to apply the 'fruit of the poisonous tree' doctrine of *Wong Sun*." *Id.* at 642.

Consequently, introduction of a "nontestimonial fruit of a voluntary statement," such as the defendant's weapon in *Patane*, does not implicate the self-incrimination clause, because the "admission of such fruit presents no risk that a defendant's coerced statements (however defined) will be used against him at a

criminal trial." *Id.* at 643. The Court still would require the exclusion of the physical fruit of "actually coerced statements," but "statements taken without sufficient *Miranda* warnings are presumed to have been coerced only . . . when necessary to protect the privilege against self-incrimination." *Id.* at 644.

After *Patane*, the Wisconsin Supreme Court held that when physical evidence is obtained as the direct result of an intentional or deliberate *Miranda* violation, the Wisconsin Constitution requires that the evidence must be suppressed. *Knapp*, 285 Wis. 2d 86, ¶¶ 2, 73.

In *Knapp*, the detective had taken the defendant into custody, and knew that he had to *Mirandize* the defendant before interviewing him; nonetheless he proceeded to interview the defendant without warning him. *Id.* ¶ 13. The detective also testified that he did not read the defendant his rights because the defendant had tried to call his attorney. *Id.* ¶ 14. The defendant told the detective that he had previously been advised by his attorney not to speak to the police, but the detective continued to question him, without reading his *Miranda* warnings. *Id.* ¶ 10.

Thus, the *Knapp* decision makes clear that the determinative factor resulting in the exclusion of post-*Miranda*-violation physical fruits was purposeful misconduct by police. *Id.* ¶ 75 (when conduct at issue is particularly repugnant, it requires deterrence). In such situations, admission of the evidence would "encourage" law enforcement to "intentionally take unwarranted investigatory shortcuts to obtain convictions," resulting in the "systematic[] corrupt[ion]" of the judicial process. *Id.* ¶ 81.

Knapp's predicate of intentional or flagrant misconduct makes sense, because the primary purpose of the exclusionary rule is to deter future unlawful or illegal police misconduct. *Id.* ¶¶ 22-24 (fruit of poisonous tree doctrine is device employed to prohibit use of secondary evidence discovered by exploitation of illegal government activity). Accordingly, without intentional misconduct, the exclusionary rule does not apply. *Patane*, 542 U.S. at 640-42; *Knapp*, 285 Wis. 2d 86, ¶ 73.

2. There was no intentional *Miranda* violation.

Here, in contrast to *Knapp*, there is no evidence to suggest that the correctional officers intentionally or deliberately violated *Miranda* when they failed to warn Ezell. *Compare Knapp*, 285 Wis. 2d 86, ¶¶ 10-14. Ezell argues that "[i]t is unlikely that veteran correction officers . . . would be unaware that *Miranda* warnings were required in this situation." Ezell's brief at 20. On the contrary, it probably came as quite a surprise to the correctional officers that Ezell contended that they needed to provide a *Miranda* warning before following through on a tip that a visitor was bringing drugs into the prison.

Ezell's novel extension of *Miranda* to correctional officers monitoring the introduction of contraband into prisons is not supported by any specific cases. If this court determines that such warnings are required, it will be a decision of first impression. Here, the correctional officers were simply following through on their obligation to be "satisfied that [a] visitor is not carrying any unauthorized objects into the institution." Wis. Admin. Code § DOC 306.18(1). Their actions were

in furtherance of administering visitation to ensure "the secure and orderly operation of institutions, public safety, and the protection of visitors, staff and inmates." Wis. Admin. Code § DOC 309.06. There is a substantial public interest in keeping contraband out of a penal institution. *See*, *e.g.*, *Higgins*, 183 Ohio App. 3d at 477. As the Ohio Court of Appeals explained:

> Appellee, who was seeking to visit an inmate in the legal custody of the state, exercised a privilege to enter the institution, not a right. "Prison officials may regulate the visitation of prisoners. 'Consequently, prison authorities may subject inmates to intense surveillance and search unimpeded by Fourth Amendment barriers. Prison officials may regulate communications and visitation.' It necessarily follows that they may restrict the manner of visitation by conditioning the privilege in ways reasonably consistent with the security of the facility."

Id. at 472 (citations omitted).

Accordingly, under *Patane*, the derivative physical evidence was properly admissible because the poisonous fruit doctrine did not apply. *Patane*, 542 U.S. at 642 (*Wong Sun* fruit of poisonous tree doctrine does not apply to exclude post-*Miranda* violation evidence because there is nothing to deter with respect to mere failure to warn). Similarly, under *Knapp*, the derivative physical evidence was properly admissible because there was no intentional *Miranda* violation, nor was there any unlawful, flagrant, or illegal police conduct that requires future deterrence. *Knapp*, 285 Wis. 2d 86, ¶¶ 22-24.

3. There was no evidence of actual coercion.

Finally, the record is clear that Ezell's statement was not "actually coerced." *See Patane*, 542 U.S. at 644 (Court still requires exclusion of physical fruits of "actually coerced" statements).[5]

For example, there was nothing to suggest excessive physical or psychological pressure brought to bear on Ezell, nor were there any inducements, threats, methods or strategies used to compel her response. *State v. Hoppe*, 2003 WI 43, ¶ 39, 261 Wis. 2d 294, 661 N.W.2d 407. Further, there was nothing in the record about Ezell's personal characteristics[6]—such as her age, education, intelligence, physical and emotional condition—that would suggest that she was more susceptible to police pressure or that any alleged police pressure amounted to the level of coerciveness that overcame her free will. *Id.* ¶¶ 37-38.

Accordingly, even if Ezell's statement is inadmissible as a *Miranda* violation, this court should still find that the derivative physical evidence—the drugs found on Ezell's person—was properly admissible. Under *Patane* and *Knapp*, these nontestimonial physical fruits were not subject to the exclusionary rule because they were voluntarily obtained and were not the result of an

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[5]Indeed, Ezell has never argued that her statement and the physical evidence were involuntary or coerced; she only argues that her statement was obtained in violation of *Miranda*.

[6]Ezell did not testify at the suppression hearings.

intentional or deliberate *Miranda* violation. *Patane*, 542 U.S. at 640-42; *Knapp*, 285 Wis. 2d 86, ¶ 73.

CONCLUSION

For the reasons set forth, the State respectfully requests that this court affirm the judgment of conviction.

Dated this 14th day of April, 2014.

Respectfully submitted,

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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 5,878 words.

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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 14th day of April, 2014.

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