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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2014AP002238-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MASTELLA L. JACKSON,

Defendant-Respondent-Petitioner.

On Review of a Decision of the Court of Appeals, District III, Reversing in Part an Order Entered in Outagamie County, the Honorable Mark J. McGinnis, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT-PETITIONER

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ISSUES PRESENTED

1. The police subjected Mastella Jackson to several hours of unlawful custodial interrogation, violating her ***Miranda*** rights and extracting involuntary incriminating statements. Some of these statements were included in an application for a warrant to search her home. While the search was being executed, Ms. Jackson, still in custody, was brought to the house and told police where certain physical evidence was located. Does the doctrine of inevitable discovery require the admission of this evidence absent a showing that the incriminating statements did not influence the police decision to seek the warrant?

   The circuit court did not address this issue.

   The court of appeals determined that the state was not required to show that information obtained through the illegal interrogation did not influence the decision to seek a warrant.

2. At the suppression hearings, the testimony was unclear as to when, with respect to the taking of the involuntary statements, the police decided to seek a search warrant for Ms. Jackson's house. Did the state thus fail to show, as the inevitable discovery doctrine requires, that the police were actively pursuing an alternate line of investigation prior to their illegal conduct?

   The circuit court did not address this issue.

   The court of appeals held that the doctrine requires only that the alternative line of investigation precede

an illegal *search*, despite the fact that the illegality here was an hours-long illegal interrogation. It also held that the information constituting probable cause for the search warrant constituted an alternative line of investigation being pursued before the illegal interrogation.

3. The trial court found, and the state does not dispute, that the officers intentionally violated the law in order to obtain statements from Ms. Jackson. Does the Wisconsin Constitution, by way of the inevitable discovery doctrine, permit the state to introduce evidence obtained by such intentional police misconduct?

   The circuit court held that the government should not benefit from the doctrine where its officers intentionally violated the Constitution.

   The court of appeals held that the doctrine allows the admission of evidence obtained by intentional constitutional violations.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication are customary for cases decided by this court.

STATEMENT OF THE CASE AND FACTS

This is the state's appeal of the circuit court's pretrial exclusion of physical evidence. Mastella Jackson is charged with the fatal stabbing of her husband, D.W. (2:1-5; 32:1). The complaint alleges that on February 21,

2012, officers were dispatched to a hotel in Little Chute, where they discovered D.W.'s body in a guest room. (2:2).

The police learned from a hotel employee that D.W. had been staying at the hotel for several days. (2:2). Another hotel employee reported that around 1:00 to 1:30 p.m., a person wearing a hooded sweatshirt knocked on the door of D.W.'s room and was admitted. (2:2). The employee then heard a man screaming for help and what sounded like someone being hit. (2:2). A guest in the hotel stated that he had heard a woman's voice yelling followed by a man yelling "help me, help me." (4:3; App. 178). The hotel staff then entered the room, found an injured D.W., and called the police. (2:2).

One of D.W. and Jackson's sons, R.L.D.J., told police that his family had been living together at their home but that his father had moved to the hotel a few days earlier. (2:2). R.L.D.J. told the police that during the early afternoon on the day of D.W.'s death, Jackson had become angry at D.W. because he had destroyed some family pictures. (2:2-3). He said that Jackson left the house for about fifteen to twenty minutes and when she returned she went directly to the shower. (2:3). She came out wearing different clothing and told him not to tell anyone that she had left the house that day. (2:3). The police made contact with Jackson at her house, and she agreed to come to the station. (87:15; App. 137). Her interrogation there was video recorded. (64:Exh.2).

As the video shows, Jackson was brought into the interrogation room just before 4:30 p.m. and remained there alone for most of the next two hours. (64:Exh.2 at 4:29:30). The interrogation began at about 6:24. (64:Exh.2 at 6:24; 87:18; App. 140). At 7:25, while doubled over and

complaining of stomach pain, Jackson asked—not for the first time—to leave: "Can I go home right now. Please. I don't want to talk. … Can I go with you? Can I just go home or do I have to stay?" (64:Exh.2 at 7:25:10, 7:02:40; 87:20-23; App. 142-45).

One officer responded that he needed to make a phone call and left the room. (64:Exh.2 at 7:25:22). Another immediately continued the interrogation. (64:Exh.2 at 7:25:40).

The officers interrogated Jackson for the next five hours before first informing her of her ***Miranda***[1] rights at around 12:39 a.m., after which the interrogation continued for at least another hour before Jackson was taken to her home. (64:Exh.2 at 12:40:01, 1:42:01; 87:6; App. 128). During these hours of interrogation, the officers arranged for Jackson to consume oxycodone pills and also liquid Percocet, which contains oxycodone. (77:62-63, 72-73). During the interrogation, Jackson admitted to having stabbed D.W. (2:3-4). She also said that she had disposed of the knife and her bloody clothes in a garbage can at her home. (2:4).

The police sought and obtained a warrant to search Jackson's home, including in the application incriminating statements she had made. (3; 4; App. 176-79). In the early morning hours while the police were searching the home, Jackson was brought to her house, where she pointed out the location of the knife and clothing to the police. (78:197, 200-01).

Jackson moved to suppress her statements to police as well as any physical evidence derived from them. (45:1; 46:1-2). The court held a series of evidentiary hearings. (77; 78;

[1] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

80; 83; 85). In an oral decision, the court found that the interrogation began at 6:24 p.m. and that Jackson was in custody for ***Miranda*** purposes at 7:25 p.m., before any of her incriminating statements were given. (87:18, 22; App. 140, 144). The court therefore suppressed the statements Jackson made between 7:25 p.m. and the time the police gave her the warnings, 12:39 a.m. (87:36-38; App. 158-60). It also suppressed her post-warning statements under ***Missouri v. Seibert***, 542 U.S. 600 (2004). (87:39-40; App. 161-62).

During this unlawful interrogation, as the court described, the officers applied pressure tactics to induce an ill and distressed Ms. Jackson to incriminate herself, including implying that her children would be taken from her, and ignored her requests to stop talking. (87:32-38; App. 154-60). Accordingly, the court found Jackson's statements involuntary under the totality of the circumstances. (87:40-43; App. 162-65).

Stating that the officers' testimony in court that they believed Ms. Jackson was free to leave was "incredible" and that it was "somewhat offended" by what it intimated was the officers' untruthful testimony (87:24; App. 146), the court found that their violations of ***Miranda*** were intentional:

> So I want to just get back to when I first read this and every time that I've read it, I become sick to my stomach literally, and I think this is textbook interrogation of what not to do if you want to be doing good police work and get stuff admitted in during a hearing.
>
> When I watched the video for the first time within the last couple weeks, it made that opinion even worse. Any observation of that video really put into context that all of these violations in my opinion were done intentionally, they were done flagrantly, they were done

> recklessly; and they were done without any concerns involving Ms. Jackson's rights, her constitutional rights, her statutory rights, and it was done in an effort to get something out of her before those rights were read, and that's exactly what happened eventually.

(87:29-30; App. 151-52).

The court also suppressed the physical evidence found in Jackson's home during the search. (87:45-49; App. 167-71). It held that with Jackson's improperly obtained statements excised from the search warrant affidavit, the remaining facts failed to establish probable cause. (87:45-46; App. 167-68). The court additionally held that even if there was probable cause for the warrant, it was not the execution of the warrant but the unlawful interrogation that turned up the evidence, since Ms. Jackson was brought to the house and showed the officers where to look. (87:46-48; App. 168-70). The court rejected the State's argument that the evidence was admissible under the inevitable discovery doctrine. (87:47-49; App. 169-71).

Ms. Jackson had also sought the suppression of various other pieces of testimonial and physical evidence; the court denied this portion of Ms. Jackson's motion and admitted this evidence. (87:49-50; App. 171-73).

The state appealed. (72:1). It did not contest the exclusion of Ms. Jackson's statements or the trial court's findings that the ***Miranda*** violations were intentional. Appellant's Brief at 7; Reply Brief at 8-9. Instead, it argued that the circuit court had erred in excluding the physical evidence derived from the statement. The state argued that the search warrant was valid because, even with Ms. Jackson's illegally-obtained statements removed, the application showed probable cause. Appellant's Brief at 8-10. Because

the police were executing the warrant when Ms. Jackson showed them where to find the knife and clothing, the state argued, the doctrine of inevitable discovery required the admission of the evidence. Appellant's Brief at 16-26.

The court of appeals reversed the circuit court in a published opinion. ***State v. Jackson***, No. 2014AP2238-CR, 2015 WL 2192984 (Wis. Ct. App. May 12, 2015). (App. 101-22). It agreed with the state's argument described above. It rejected Ms. Jackson's argument that two of the elements of the inevitable discovery doctrine were not met and that, even if they were, the doctrine should not apply where the police intentionally violate a person's rights. ***Id.***, ¶¶33-43, 48 (App. 115-19, 122). Ms. Jackson petitioned for this court's review, which was granted.

ARGUMENT

I. The Physical Evidence in This Case Was The Product of Statements Made by Ms. Jackson During Her Unlawful Interrogation, And the Inevitable Discovery Doctrine Does Not Render Them Admissible.

A. Standard of review and burden of proof.

It is the state's burden to show each element of inevitable discovery by a preponderance of the evidence. ***State v. Schwegler***, 170 Wis. 2d 487, 500, 490 N.W.2d 292 (Ct. App. 1992). In reviewing constitutional questions, this court defers to the trial court's findings of historical fact unless they are clearly erroneous, but independently applies the legal standard to the facts as found. *See* ***State v. Marquardt***, 2001 WI App 219, ¶9, 247 Wis. 2d 765, 635 N.W.2d 188.

B. Ms. Jackson's statements were obtained in violation of ***Miranda*** and were also involuntary, requiring the suppression of any physical evidence derived from them.

As the circuit court found and the state concedes, the police subjected Ms. Jackson to custodial interrogation for more than five hours before informing her of her ***Miranda*** rights. The state further does not dispute the court's finding that this violation was intentional, and that the statements Ms. Jackson ultimately made were compelled in violation of her Fifth Amendment rights. Appellant's Brief at 7; Reply Brief at 8-9.

These concessions are apt. As the circuit court noted, the officers persisted in questioning Ms. Jackson despite her repeated requests to leave and to stop talking, and in spite of her obvious mental distress and physical pain. The court was amply justified in rejecting the officers' testimony that Ms. Jackson was free to go and in concluding that they had intentionally violated ***Miranda***. (87:24, 29-30; App. 146, 151-52).

Also not in dispute is the fact that Ms. Jackson's involuntary statements brought about the discovery of the physical evidence at issue. As one of the officers testified, Ms. Jackson was eventually brought to her house, where she pointed out the location of the items to the police. (78:197, 200-01).

Finally, Ms. Jackson has not appealed the partial denial of her suppression motion; the evidence that the court deemed not obtained by way of her interrogation may still be used against her. (87:49-50; App. 171-73).

As for the evidence that was the fruit of Ms. Jackson's interrogation, it is inadmissible for two independent reasons. First, the Wisconsin Constitution provides for suppression of physical evidence derived from intentional ***Miranda*** violations. ***State v. Knapp***, 2005 WI 127, ¶2, 285 Wis. 2d 86, 700 N.W.2d 899. Second, the Federal Constitution requires exclusion of all evidence derived from compelled statements. ***Chavez v. Martinez***, 538 U.S. 760, 769 (2003). Thus the state may not use the physical evidence here at issue unless it can prove that Ms. Jackson's statements did not serve as an "investigatory lead" toward its discovery—that it was "derived from a legitimate source wholly independent of" the statements. ***Id.***, 769-770 (noting that protection of involuntary statements is "coextensive with the use and derivative use immunity mandated by" ***Kastigar v. United States***, 406 U.S. 441 (1972)); ***Kastigar***, 406 U.S. at 460 (barring use of compelled statement as "investigatory lead" and requiring prosecution prove that any offered evidence is "derived from a legitimate source wholly independent of the compelled testimony").

C. The state did not meet its burden to show inevitable discovery because it failed to show that the evidence would have been discovered "but for" the illegal interrogation.

The state seeks to avoid exclusion, however, by arguing that the evidence would have been found absent the violations by the execution of the search warrant. This inevitable discovery exception to the exclusionary rule requires the state to show, by a preponderance of the evidence, three things: first, that "the evidence in question would have been discovered by lawful means but for the

police misconduct";[2] second, "that the leads making the discovery inevitable were possessed by the government at the time of the misconduct"; and third, that the police "prior to the misconduct were actively pursuing the alternate line of investigation." ***United States v. Cherry***, 759 F.2d 1196, 1204 (5th Cir. 1985); *see also* ***Schwegler***, 170 Wis. 2d at 500.

The first element of the doctrine requires the state to show that the evidence would have been discovered by lawful means (here the warranted search) "but for" the illegal conduct (the interrogation). Below, the state argued, and the court of appeals agreed, that this prong was met because the warrant application showed probable cause even absent the

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[2] This first prong is often phrased as requiring only that the government show a "*reasonable probability* that the evidence in question would have been discovered but for the misconduct." ***See, e.g.***, ***Cherry***, 759 F.2d at 1204. This may simply be shorthand for the ***Nix*** statement that the state must carry the burden to show inevitable discovery by a preponderance of the evidence, 467 U.S. at 444, but it should not be taken to suggest that the state must simply show some likelihood that events would have led to the discovery of the evidence absent police wrongdoing. This would be inconsistent with the discussion in ***Nix*** itself, which stated that the doctrine "involves no speculative elements but focuses on demonstrated historical facts capable of ready verification" ***Id.*** n.5., and with the very notion of inevitability expressed by the phrase "*inevitable* discovery." *See* ***United States v. Heath***, 455 F.3d 52, 59 n.6 (2d Cir. 2006) (Noting the "semantic puzzle" of "using the preponderance of the evidence standard to prove inevitability"; concluding that it was sufficient to "note the difference between proving by a preponderance of the evidence that something *would have happened* and proving by a preponderance of the evidence that something *would inevitably have happened*."); 6 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.4(a) at 359 (5th ed. 2012) ("A majority of the courts that have utilized the exception have tended to define the necessary probability in terms of 'would,' which is the constitutional standard.").

illegally-obtained statements. Appellant's Brief at 8-15; ***Jackson***, No. 2014AP2238-CR, ¶34; (App. 115). Possessing such evidence, the argument goes, it was impossible that the police would not seek a search warrant for her house. ***Jackson***, 2015 WL 2192984, ¶34; (App. 115). But the burden to show the elements of inevitable discovery is on the state and, as will be seen, the officer who applied for the warrants did not give any testimony about how or when the decision to seek a warrant was made. Moreover, none of the non-tainted information available to the police informed them that the physical evidence sought was located inside the house; that information came from Ms. Jackson's illegal interrogation. (3:2-4; 78:197,200-01; App. 177-79).

The state also argued, and the court agreed, that it was not required to show that Ms. Jackson's compelled statements did not lead the police to obtain the warrant in the first place; simple probable cause for a warrant was enough to apply the doctrine. Reply Brief at 4; ***Jackson***, No. 2014AP2238-CR, ¶34; (App. 115).

This view is error. If Ms. Jackson's incriminating statements influenced the decision to seek a warrant, it cannot be said that the evidence would have been uncovered "but for" the illegality—as without the illegality, there would have been no search. *See* ***United States v. Madrid***, 152 F.3d 1034, 1041 (8th Cir. 1998) ("Whatever balance is to be achieved by the inevitable discovery doctrine, it cannot be that police officers may violate constitutional rights the moment they have probable cause to obtain a search warrant."); ***United States v. Brown***, 64 F.3d 1083, 1085 (7th Cir. 1995) ("what makes a discovery 'inevitable' is not probable cause alone … but probable cause plus a chain of events that would have led to a warrant (or another justification) independent of the [illegality]"); *see also* ***Murray v. United States***,

487 U.S. 533, 539, 543 (1988) (independent source doctrine, from which inevitable discovery doctrine is extrapolated, requires a showing that police "would have sought" warrant absent illegal act).

Where, as here, police obtain information through constitutional violations, further investigation using that information is also tainted, and cannot be the "lawful means" justifying the application of the inevitable discovery doctrine. If the illegal interrogation instead *led to* the putatively lawful search, that search is itself a fruit of the illegality and cannot purge it. To hold otherwise would be to negate the fruit of the poisonous tree doctrine. ***United States v. Thomas***, 955 F.2d 207, 211 (4th Cir. 1992) ("the fact making discovery inevitable must arise from circumstances other than those disclosed by the illegal search itself. That test is necessary to prevent the inevitable discovery exception from swallowing the exclusionary rule.") To use the physical evidence here, the state was required to show that the information gleaned by its illegal conduct did not, in fact, help bring about the "lawful" search of Ms. Jackson's home.

It did not so show. The testimony at the hearings establishes that the officer preparing the warrant application was in communication with the interrogating officers, and the affidavit itself contained statements taken from the unlawful interrogation. The state, which bears the burden of proof, introduced *no* evidence to show that despite these connections, the decision to seek a warrant was not influenced by the confession that the officers had extracted from Ms. Jackson.

Officer Renkas, who signed the warrant application and testified that he had prepared it (4:4; 80:87), was unable to recall when the decision was made to seek a warrant. At

one hearing, he testified that while he could not recall exactly when he began the warrants, it "could have been between 6:00 or so." (80:87). When asked about this at a later hearing, he backpedaled:

> Q. When did you start working on the warrants?
>
> A. I don't recall the exact time. I know I responded back to the police department at approximately 5:20 p.m. It would have been sometime after that and between the period that, responding back to the police department, receiving this information, as it was being provided to me throughout the night until the search warrant was signed.
>
> Q. So pretty much as soon as or shortly after you got back to the police department and started working on gathering information for the warrant; is that correct?
>
> A. Whenever there was enough information provided and the decision, however the decision was made to begin the search warrants where we were actually going to be conducting the search warrants to get into the … like I said, I can't recall the exact time that they were, that they began.
>
> Q. Hours later?
>
> A. I don't recall.
>
> Q. You had previously testified you started working on them approximately at 6:00.
>
> A. I know. I responded back at approximately 5:20 and a period of time. I know last time previously I responded I didn't exactly recall and gave an approximate time of 6:00.

Q. And that's still your approximate?

A. It could be an approximate time, yes, but the exact time, I'm unsure.

(85:6-8).

As noted above, the violation of Ms. Jackson's ***Miranda*** rights commenced at 7:25, and the warrant was not signed until 11:32. (87:22; App. 144; 80:86-87). Given Officer Renkas' testimony, it is impossible to determine whether the information that was being extracted from Ms. Jackson was part of the "information" he referred to as leading to the "decision … to begin the search warrants": a decision which he did not deny may have come "hours later" than his 5:20 return to the police station. (85:6-8).

By failing to demonstrate that the search warrants would have been sought independently of the constitutional violation, the state has failed to meet its burden on the first prong of the inevitable discovery test: to show that the warranted search would have occurred "but for" the illegal interrogation of Ms. Jackson. ***Cherry***, 759 F.2d at 1204.

D. The state failed to prove that the police were actively pursuing an alternate line of investigation leading to the evidence prior to the unlawful interrogation.

For related reasons, the state also failed to meet its burden on the third prong of the inevitable discovery test: a showing that the police were actively pursuing some alternate line of investigation prior to their unlawful conduct. In the court of appeals, the state posited that the warranted search of Ms. Jackson's house provided this alternate line. Appellant's Brief at 25-26. But as discussed above, the violation of Ms. Jackson's rights commenced four hours before the

warrant was signed, so the search was clearly not being pursued prior to the illegal interrogation. Indeed, the officer who prepared the warrant application could not even place the decision to seek the warrant before or after the unlawful interrogation began.

Nevertheless, the state argued and the court of appeals held that the alternative line of investigation (again, the warranted search) needed only to have commenced before the "unlawful search." Reply Brief at 7; ***Jackson***, 2015 WL 2192984, ¶41; (App. 118). In the court's view, the search of the house only became unlawful when Ms. Jackson was brought to the scene to point out the evidence, after the search of the house was being actively pursued. ***Id.***

This reasoning is, again, faulty. The "unlawful search" language comes from ***State v. Avery***, 2011 WI App 124, ¶29, 337 Wis. 2d 351, 804 N.W.2d 216, which ultimately owes it to ***State v. Schwegler***, 170 Wis. 2d 487, 500, 490 N.W.2d 292, 297 (Ct. App. 1992). ***Schwegler*** was, in fact, about an unlawful search, which is why it uses this specific language. The case that it relies on, ***United States v. Cherry***, 759 F.2d 1196, 1204 (5th Cir. 1985), was about an unlawful interrogation and uses the broader "prior to the misconduct." Here, the misconduct at issue was the unlawful interrogation, which commenced hours before the search of the house even began. To insist that active pursuit must precede only an "unlawful search" is to miss the point of the third prong of the inevitable discovery doctrine: it seeks to guarantee that the investigation making the discovery "inevitable" is not *itself* the fruit of the primary illegality. Here, because the search did not precede the illegal interrogation, there is no such guarantee.

The state and the court of appeals' reliance on ***State v. Lopez*** is thus misplaced. In that case, officers were conducting a warranted search of the defendant's residence when they encountered a locked freezer. 207 Wis. 2d 413, 427, 559 N.W.2d 264 (Ct. App. 1996). An officer then asked the defendant, who was in custody and present at the residence, where the key was located, and the defendant told him. ***Id.*** at 428. The court concluded that the drugs in the freezer would inevitably have been found because the officer "had already located and decided to search the freezer" when he asked about the key, and thus "was actively pursuing his decision to search the freezer" when the violation occurred. ***Id.*** Further, the court noted, the officer testified that if he had not found the key, he would have pried the freezer open. ***Id.***

Lopez, like the seminal inevitable discovery case of ***Nix v. Williams***, 467 U.S. 431 (1984), cuts in favor of Ms. Jackson. In ***Lopez***, the opening of the freezer would have occurred whether or not the officer had violated ***Miranda*** by asking about the key. We know this because the plan to search the freezer was already in progress – that is, the police were "actively pursuing [the] alternate line of investigation" – when the violation occurred. ***Lopez***, 207 Wis. 2d at 427-28. Similarly, in ***Nix***, the famous "Christian burial speech" that violated ***Miranda*** came while a massive and systematic search of the area where the victim's body was located was already underway. ***Nix***, 467 U.S. 435-36. Here, by contrast, the police commenced their hours-long violation of Ms. Jackson's ***Miranda*** rights four hours before the search warrant was even issued and six or seven hours before she finally pointed out the sought-after evidence. The inevitable discovery doctrine articulated in ***Nix*** and ***Lopez*** is not a means for the police to launder such ill-gotten evidence by ignoring the causal chain from violation to recovery.

The court of appeals also posited that, even accepting the premise that the police were required to be actively pursuing another line of investigation when the unlawful interrogation began, they were doing so. ***Jackson***, 2015 WL 2192984, ¶42. (App. 118). The reasoning appears to be that because police had other information pointing to Ms. Jackson before she began making incriminating statements, they were "actively pursuing" the investigation culminating in the search.

As with the first prong, this view of the third prong of inevitable discovery would effectively do away with the fruit of the poisonous tree doctrine. If one defines "alternative line of investigation" broadly enough, one can virtually always say that such investigation was ongoing before the police violated a person's constitutional rights. Again, the point of the active pursuit requirement is to ensure that the police illegality did not bring about the investigation purported to render discovery inevitable. This purpose is defeated by admitting evidence derived from constitutional violations any time the police happen to augment unlawful activities with lawful ones.

It is important to recall that what the state seeks is the admission of evidence that was concededly obtained by way of a coercive, illegal interrogation. It seeks admission on the strength of a warrant that could well be a product of the same interrogation. Rather than placing the prosecution in the same position it would be absent the violations, the state asks this court to, in effect, reward the illegal tactics of the police. The rules of the inevitable discovery doctrine are designed to prevent such results, and they are not satisfied here.

E. Where the state intentionally violates a citizen's constitutional rights, it should not be permitted to rely on the inevitable discovery doctrine to introduce the fruits of that violation.

In ***State v. Knapp***, this court considered whether physical evidence obtained as the result of intentional ***Miranda*** violations should be suppressed. 2005 WI 127, ¶2, 285 Wis. 2d 86, 700 N.W.2d 899. The Supreme Court of the United States had held that the federal Constitution did not require suppression. ***Id.***, ¶1 (citing ***United States v. Patane***, 542 U.S. 630 (2004)).

Acknowledging the textual similarity between the Fifth Amendment and Article I, Section 8 of the Wisconsin Constitution, this court concluded that the Wisconsin Constitution provided greater protection, and suppressed the evidence. ***Id.***, ¶¶2, 57-61. It reasoned that the intentional violation of ***Miranda*** in that case was:

> particularly repugnant and requires deterrence…. [T]he rule argued for by the State would minimize the seriousness of the police misconduct producing the evidentiary fruits, breed contempt for the law, and encourage the type of conduct that ***Miranda*** was designed to prevent, especially where the police conduct is intentional, as it was here.

Id., ¶75.

The court went on to note that where the police have reason to believe that important physical evidence, such as a murder weapon, may result from a confession, they will have an incentive to intentionally violate the law if courts deem such fruits admissible:

> Police officers seeking physical evidence are not likely to view the loss of an unwarned confession as particularly great when weighed against the opportunity to recover highly probative nontestimonial evidence, such as a murder weapon or narcotics.
>
> In short, failing to suppress the physical fruits will result in police officers coming away with the wrong message: It is better to interrogate a suspect without the ***Miranda*** warnings than to use legitimate means to investigate crime. Permitting such interrogation would send an ominous signal to the police and prosecutors that citizens may be "exploited for the information necessary to condemn them before the law."

Id., ¶77.

Concluding that admitting the physical fruits of intentional ***Miranda*** violations would provide "an unjustifiable invitation to law enforcement officers to flout ***Miranda*** when there may be physical evidence to be gained" the court suppressed the evidence. ***Id.***, ¶78.

In this case, the trial court found, and the state does not dispute, that police intentionally violated Jackson's ***Miranda*** rights. As the trial court noted, they did so "flagrantly" and ultimately extracted involuntary incriminating statements. (87:30, 43; App. 152, 65). The court of appeals, while calling the officers' intentional law breaking "reprehensible," nevertheless held that the inevitable discovery doctrine required admission of evidence derived from it. ***Jackson***, No. 2014AP2238-CR, ¶48; (App. 122).

That court based its conclusion on ***Nix***, in which the federal appellate court had held that the doctrine requires an absence of bad faith on the officers' part. 467 U.S. at 439-40. The Supreme Court disagreed:

> The requirement that the prosecution must prove the absence of bad faith…would place courts in the position of withholding from juries relevant and undoubted truth that would have been available to police absent any unlawful police activity. Of course, that view would put the police in a worse position than they would have been in if no unlawful conduct had transpired. And, of equal importance, it wholly fails to take into account the enormous societal cost of excluding truth in the search for truth in the administration of justice. Nothing in this Court's prior holdings supports any such formalistic, pointless, and punitive approach.

Id. at 445.

The ***Nix*** approach has come in for criticism. *See, e.g.*, LAFAVE §11.4(a) at 344-45 ("Because one purpose of the exclusionary rule is to deter such shortcuts, there is much to be said for the proposition that the inevitable discovery rule should be applied only when it is clear that the police officers have not acted in bad faith to accelerate the discovery of the evidence in question."); Steven P. Grossman, *The Doctrine of Inevitable Discovery: A Plea for Reasonable Limitations*, 92 Dick. L. Rev. 313, 332-35 (1988) (arguing that, contrary to ***Nix*** reasoning, inevitable discovery doctrine absent good faith requirement often gives officers incentive to intentionally violate law); George C. Thomas III & Barry S. Pollack, *Balancing the Fourth Amendment Scales: The Bad-Faith "Exception" to Exclusionary Rule Limitations*, 45 Hastings L.J. 21, 57 (1993) (government should not be permitted to "make believe" evidence was discovered lawfully when it is guilty of bad faith conduct that prevented lawful discovery); Hon. John E. Fennelly, *Refinement of the Inevitable Discovery Exception: The Need for A Good Faith Requirement*, 17 Wm. Mitchell L. Rev. 1085, 1100-06 (1991)

(arguing that the courts should not favor intentional police lawbreaking with the same treatment given honest mistakes).

In light of these concerns, several jurisdictions have concluded that the inevitable discovery doctrine cannot apply to admit evidence discovered as a result of intentional constitutional violations. ***Smith v. State***, 948 P.2d 473, 481 (Alaska 1997) (exception "should not be available in cases where the police have intentionally or knowingly violated a suspect's rights"); ***Com. v. Sbordone***, 678 N.E.2d 1184, 1190 (Mass. 1997) (doctrine may apply "as long as the officers did not act in bad faith to accelerate the discovery of evidence"); ***State v. Holly***, 833 N.W.2d 15, 33 (N.D. 2013) (same, noting that contrary holding would encourage police "shortcuts whenever evidence may be more readily obtained by unlawful means"); *see also* ***Madrid***, 152 F.3d at 1041 (courts not required to apply inevitable discovery doctrine "without regard to the severity of the police misconduct").

Wisconsin should join them. As discussed above, Jackson does not agree that the elements of the inevitable discovery doctrine are satisfied. But even if they were, the reasoning of ***Knapp*** militates against applying the doctrine to the intentional and flagrantly unlawful police conduct here. As in ***Knapp***, the officers here, searching for a murder weapon and bloody clothing, clearly did not "view the loss of an unwarned confession as particularly great when weighed against the opportunity to recover highly probative nontestimonial evidence." 285 Wis. 2d 86, ¶77. Permitting the state to use this illegally-obtained evidence sends the same "ominous signal" with which ***Knapp*** was concerned: that it is "better to interrogate a suspect without the ***Miranda*** warnings than to use legitimate means to investigate crime." ***Id.***

The court of appeals rejected this argument, saying that:

> even if police had never spoken to Jackson and had never violated her rights under ***Miranda***, they still would have obtained a warrant to search her residence and would have inevitably discovered the crucial physical evidence linking her to [D.W.]'s death. Under these circumstances, suppressing the physical evidence would serve little purpose and would actually place the State in a worse position than it would have been in absent the misconduct, contrary to the rationale of ***Alexander*** and ***Nix***.

Jackson, 2015 WL 2192984, ¶47. (App. 121).

The court of appeals is mistaken. The exclusionary rule's "purpose" is to deter law enforcement from violating the rights of citizens. An anemic rule that permits the state to introduce the physical fruits of flagrant wrongdoing cannot serve this purpose, because it leaves the police with an incentive to ignore the law. This case serves as an excellent example: the police had a suspect who had told them in no uncertain terms that she did not wish to talk. There was thus no way they were going to get a lawful statement usable in court. So, they went ahead and intentionally compelled an unlawful one. That they cannot use this statement in court is no loss, since without their illegal tactics they would not have any statement at all. But they *did* gain something from their flagrant illegality. At the very least, the police gained a "shortcut" to the physical evidence they sought. More troublingly, since we can never be certain what would have occurred had the police not broken the law, it is entirely possible that they uncovered evidence that they never would have had. If this evidence is admissible, the purported deterrence of the exclusionary rule looks much more like a reward for police malfeasance.

The circuit court, in excluding the evidence, understood this:

> [W]hen officers are simply looking for evidence of the crime, it's not good policy to award them or provide them the benefit of the doubt when they violate somebody's constitutional rights for over six to seven hours by simply saying, well, we would have gotten it anyway through a back door. It's not going to be a deterrent, it's not going to encourage good police work, it's not going to encourage officers to follow the constitution and do what they're supposed to do, and it's simply going to lead to in my opinion the type of police work that was conducted in this case.

(87:48-49; App. 170-71).

In reversing, the court of appeals stated that "[w]e acknowledge that the officers' actions during the interrogation of Jackson were reprehensible. We do not in any way condone their conduct." ***Jackson***, 2015 WL 2192984, ¶48. (App. 122). Unfortunately, this is not so. To "condone" means, among other things, to allow to continue. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (UNABRIDGED) 473 (1993) ("permit the continuance of"). That is precisely the effect of admitting evidence discovered through the "reprehensible" conduct of police officers.

Though the federal constitution, as interpreted by the Supreme Court, may permit this result, this court should join other jurisdictions in rejecting it.

CONCLUSION

For the foregoing reasons, Ms. Jackson respectfully requests that this court reverse the court of appeals and reinstate the circuit court's order suppressing all physical evidence derived from her unlawful interrogation.

Dated this 9th day of November, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 5,857 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 9th day of November, 2015.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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

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