STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2014AP2238-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MASTELLA L. JACKSON,

Defendant-Respondent-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS REVERSING AN ORDER SUPPRESSING EVIDENCE ENTERED IN THE OUTAGAMIE COUNTY CIRCUIT COURT, THE HONORABLE MARK J. MCGINNIS, PRESIDING

BRIEF OF PLAINTIFF-APPELLANT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in any case important enough to merit this court's review, oral argument and publication of the court's decision are warranted.

STATEMENT OF THE CASE

This is an appeal by the State of Wisconsin from an order granting in part and denying in part a suppression motion filed by defendant-respondent-petitioner Mastella L. Jackson. The case comes before

the supreme court on Jackson's petition for review of a decision of the court of appeals that reversed that portion of the circuit court's order suppressing the physical evidence obtained during a search of her home.

Facts. Jackson is charged in Outagamie County Circuit Court with first-degree intentional homicide for fatally stabbing her husband, Derrick Whitlow (2:1-5; 32:1). The criminal complaint alleges that on February 21, 2012, officers were dispatched to the Roadstar Inn in Little Chute, where they discovered Whitlow's body in Room 114 (2:2). Whitlow suffered approximately twenty-five stab wounds, some of which appeared to be defensive (2:4). Six of the stab wounds were to his chest, and they caused, among other damage, a severe injury to the aorta and a laceration to the right atrium of the heart (*id*.).

The police learned from a hotel employee that Whitlow had been staying at the hotel for several days (2:2). Another hotel employee, Angelica Felipe, reported that around 1:00 to 1:30 p.m., a person wearing a hooded sweatshirt knocked on the door of Room 114 and was admitted into the room (*id*.). Felipe then heard a man screaming for help and what appeared to be the sound of someone being hit (*id*.). Hotel staff entered Room 114, found an injured Whitlow, and called the police (*id.*).

One of Whitlow 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 Roadstar Inn a few days earlier (*id.*). R.L.D.J. told the

police that during the early afternoon on the day of Whitlow's death, Jackson had become angry at Whitlow because he destroyed some family pictures (2:2-3). Jackson left the house for about fifteen to twenty minutes, R.L.D.J. said, and when she returned she went directly to the shower (2:3). Jackson told R.L.D.J. not to tell anyone that she had left the house that day (*id*.).

Jackson spoke to police officers later that day (*id*.). She told them that she was very upset with Whitlow because he had destroyed a box from the funeral of an aunt who had raised her (*id*.). She told a detective that before going to the hotel, she thought that the pain that Whitlow had caused her was not going to stop and that "it was going to be him or me" (*id*.). She acknowledged that she brought a knife with her when she went to the hotel "to confront him about what had been going on in the relationship" (*id*.).

Jackson said that after Whitlow let her into his hotel room, they began arguing (*id*.). She described to the police how she stabbed Whitlow multiple times (2:3-4). She then drove home, where she put her clothes and the knife in a garbage can (2:4).

The police obtained multiple search warrants during their investigation. As relevant to this appeal, one warrant, issued on February 21, 2012, authorized the search of Jackson's residence, including the garage, for evidence related to the homicide (3:1-2). A second warrant issued that day authorized a search of Jackson's person, clothing, and personal effects and the collection of biological samples (6:1-

2). Three warrants, issued on February 24, March 2, and April 5, 2012, authorized the police to take photographs of Jackson's body using an alternative light source to identify bruising and other injuries (12:1-2; 21:1-2; 29:1-2). Another warrant, issued on March 7, 2012, authorized the police to search Jackson's home for a jacket with the words "NEW YORK" in white or light colored letters (24:1).

The suppression motion. Jackson filed a motion to suppress all of the statements that she made to the police as well as any evidence derived from those statements (45:1; 46:1-2). Jackson asserted that she had not received the necessary *Miranda*[1] warnings and that her statements were involuntary (*id*.). She also argued that physical evidence obtained from her person and her home should be suppressed because the probable cause portion of the search warrant affidavits included information obtained from her illegal interrogation (49:23).

The court conducted a series of hearings on the suppression motion (77:1-249; 78:1-210; 80:1-205; 83:1-239; 85:1-97). Several police officers testified about the investigation, including the interrogation of Jackson and the search of her home (77:18-248; 78:7-204; 80:5-96, 119-56; 83:37-236; 85:4-97). Jackson called a toxicologist and a psychologist who testified about Jackson's state of mind while she was being interviewed by the police, including the effects of medications she was taking (80:98-118, 159-78). The court also viewed a video recording of Jackson's interrogation at the police station and reviewed a

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

transcript of the questioning (64:Exhibits 1, 2; 87:4, 18).

In an oral decision rendered on June 16, 2014, the circuit 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. (87:18, 22; Pet-Ap. 140, 144). The court suppressed as a violation of *Miranda* the statements Jackson made between 7:25 p.m. and the time the police gave her *Miranda* warnings at 12:39 a.m. (87:36-38; Pet-Ap. 158-60). Based on *Missouri v. Seibert*, 542 U.S. 600 (2004), and other cases, the court also suppressed the statements Jackson made after she was given the *Miranda* warnings (87:39-40; Pet-Ap. 161-62). The court further found that Jackson's statements were involuntary under the totality of the circumstances (87:40-43; Pet-Ap. 162-65).

The court also suppressed the physical evidence found in Jackson's home during the search conducted pursuant to the first warrant (87:45-49; Pet-Ap. 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 to support a search warrant for the home (87:45-46; Pet-Ap. 167-68). The court additionally ruled that even if there was probable cause for the warrant, the evidence found during the search would be suppressed because the police brought Jackson to the house after the unlawful interrogation while the search was in progress and she told them where the items of evidentiary value were located (87:46-48; Pet-Ap. 168-70). The court rejected the State's argument that the evidence was

admissible under the inevitable discovery doctrine (87:47-49; Pet-Ap. 169-71).

The court denied the suppression motion with respect to evidence found at the hotel, evidence obtained pursuant to the warrants authorizing a search of Jackson's person, surveillance video from Walmart showing Jackson buying a knife, and a jacket that was found during the second search of her home (87:43-44, 49-50; Pet-Ap. 165-66, 171-72).

In a written order entered on September 8, 2014, the circuit court "grant[ed] in part and denie[d] in part the defendant's motion to suppress" "for the reasons stated on the record at the June 16, 2014, hearing" (62:1). The State then filed a notice of appeal pursuant to Wis. Stat. § 974.05(1)(d) (72:1).

Court of appeals proceedings. The State's appeal challenged only the portion of the circuit court's order that suppressed the physical evidence obtained during the first search of Jackson's home. The State argued that even without Jackson's statements, the untainted evidence described in the search warrant affidavit established probable cause to search Jackson's home. *See* State's court of appeals brief at 8, 10-15. The State further argued that, assuming that the police erred when they brought Jackson to her home and she told them where to find the items they were searching for, the evidence was admissible under the inevitable discovery doctrine because the officers were in the process of conducting a thorough search of the house pursuant to the search warrant and would have found those

items regardless of whether Jackson had pointed them out. *See id*. at 8, 16-26.

In her court of appeals brief, Jackson did not dispute the State's argument that the untainted evidence in the search warrant affidavit established probable cause to search her home. *See* Jackson's court of appeals brief at 2-16. Instead, she argued that the requirements of the inevitable discovery doctrine had not been met and that, as a matter of state constitutional law, the inevitable discovery doctrine should not be applied in cases of intentional constitutional violations. *See id*.

In a published decision, the court of appeals reversed the portion of the circuit court's order suppressing the physical evidence obtained during the search of Jackson's home. *State v. Jackson*, 2015 WI App 49, ¶2, 363 Wis. 2d 554, 866 N.W.2d 768; Pet-Ap. 102. The court first held that the search warrant was valid because "even when Jackson's tainted statements are omitted from the search warrant affidavit, it still contains sufficient untainted evidence to support a finding of probable cause to search Jackson's residence." *Id*., ¶21; Pet-Ap. 110. The court "agree[d] with the State that the circuit court erred by determining the affidavit did not establish probable cause for the search warrant." *Id*.

Addressing the inevitable discovery doctrine, the court of appeals noted that "[t]o establish that the evidence would have been inevitably discovered, the State must demonstrate, by a preponderance of the evidence, that: (1) there is a reasonable probability the evidence in question would have been

discovered by lawful means but for the police misconduct; (2) the leads making the discovery inevitable were possessed by the government at the time of the misconduct; and (3) prior to the unlawful search the government also was actively pursuing some alternative line of investigation." *Id*., ¶23; Pet-Ap. 110-11. The court held that the first prong of the doctrine was satisfied because it was "reasonably probable that the knife, clothes, and shoes would have been discovered by lawful means but for the police misconduct." *Id*., ¶25; Pet-Ap. 111. The court noted that "[p]olice were in the process of lawfully searching the home, pursuant to [the search] warrant, when Jackson told them where to find the items in question." *Id*.; Pet-Ap. 111-12. The court held that "even if Jackson had not provided that information, the officers' testimony at the various suppression hearings demonstrates that police would have ultimately searched the garbage can where the knife, shoes, and clothes were located." *Id*.; Pet-Ap. 112.

Because Jackson did not respond to the State's argument that the second prong of the inevitable discovery doctrine had been satisfied, the court of appeals deemed that issue conceded. *See id*., ¶35; Pet-Ap. 115.

With respect to the third prong of the doctrine, which is satisfied "when police are conducting a search of the premises pursuant to a lawfully issued warrant at the time of the unlawful activity," the court of appeals held that "[t]hat is precisely what occurred in this case – police were conducting a search of Jackson's residence pursuant to a lawfully

issued warrant when [a detective] relayed tainted information from Jackson about where she had put the knife, clothes, and shoes." *Id*., ¶36; Pet-Ap. 115-16. The court noted that "the police here were actively pursuing another line of inquiry when they received the tainted information from Jackson about the location of the knife, clothes, and shoes—namely, they were conducting a thorough and methodical search of her residence pursuant to a valid warrant." *Id*. at ¶39; Pet-Ap. 116-17. It concluded that "the knife, clothes, and shoes would have been discovered due to the thorough and methodical nature of the search, to which the officers testified, and the fact that police planned to search the garage when they finished searching the house itself." *Id*.

The court of appeals rejected Jackson's argument that even if all three inevitable discovery prongs were satisfied, the doctrine should not be applied in cases of intentional constitutional violations. The court distinguished this case from the case on which Jackson relied, *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899, in which the supreme court had held that "'[w]here physical evidence is obtained as the direct result of an intentional *Miranda* violation,'" the evidence must be suppressed. *Jackson*, 363 Wis. 2d 554, ¶43 (quoting *Knapp*, 285 Wis. 2d 86, ¶2); Pet-Ap. 118-19. The court of appeals noted that in *Knapp,* the physical evidence was obtained as the direct result of an intentional *Miranda* violation and there was no evidence the police would have obtained the physical evidence had the *Miranda* violation not occurred. *Id*., ¶45; Pet-Ap. 119. But in this case, the court said, "we have already determined that the knife, clothes, and shoes

would have been inevitably discovered by lawful means, notwithstanding the police misconduct. Under these circumstances, the twin policy goals identified in *Knapp* are not served by suppression and are in fact outweighed by the detrimental effect of excluding important physical evidence." *Id*.; Pet-Ap. 119-20.

ARGUMENT

Jackson argues that the physical evidence that the police discovered during the search of her home is not admissible under the inevitable discovery doctrine. She advances arguments under the doctrine as it is currently formulated and also asks this court to add a new limitation on the doctrine as a matter of state constitutional law: that the doctrine should not be applied when the police have intentionally violated a suspect's constitutional rights.

This court should conclude that the court of appeals correctly determined that the well-established requirements of the inevitable discovery doctrine have been met in this case. And it should reject Jackson's request to restrict the doctrine under the Wisconsin Constitution because her proposed limitation is not necessary to further the purposes of the exclusionary rule, "would put the police in a worse position than they would have been in if no unlawful conduct had transpired" and "wholly fails to take into account the enormous societal cost of excluding truth in the search for truth in the administration of justice." *Nix v. Williams,* 467 U.S. 431, 445 (1984).

I. THE EVIDENCE FOUND IN JACKSON'S HOME IS ADMISSIBLE UNDER THE INEVITABLE DISCOVERY DOCTRINE.

After obtaining a search warrant, the police began to search Jackson's home around 12:50 a.m. (83:87). They were still conducting the search about an hour and twenty-five minutes later when a detective brought Jackson to the house (83:95-96). That detective, relying on information from Jackson, directed the searchers to a garbage can that they had not yet examined (83:97). The police found a duffel bag in that garbage can that contained a Winchester knife, bloody shoes, and bloody clothing (5:2-4; 83:99).

For purposes of this brief, the State will assume, based on the circuit court's finding that Jackson's statements to the police were obtained in violation of *Miranda* and were involuntary, that the police improperly relied on information obtained from Jackson to locate those items. For the reasons that follow, however, those items are nevertheless admissible under the inevitable discovery doctrine.

A. Applicable legal principles and standard of review.

The inevitable discovery doctrine provides that "evidence obtained during a search which is tainted by some illegal act may be admissible if the tainted evidence would have been inevitably discovered by lawful means." *State v. Lopez*, 207 Wis. 2d 413, 427, 559 N.W.2d 264 (Ct. App. 1996). To

establish that the evidence would have been inevitably discovered, the State must demonstrate by the preponderance of the evidence: 1) that there is a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct, 2) that the leads making the discovery inevitable were possessed by the government at the time of the misconduct, and 3) that prior to the unlawful search the government was also actively pursuing some alternative line of investigation. *Id.* at 427-28; *see also State v. Avery*, 2011 WI App 124, ¶29, 337 Wis. 2d 351, 804 N.W.2d 216.

The applicability of the inevitable discovery doctrine presents a constitutional question that an appellate court reviews de novo. *See Avery*, 337 Wis. 2d 351, ¶29.

B. There is a reasonable probability that the police would have discovered the evidence by lawful means.

The first prong of the inquiry requires the State to show that there is a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct. *See Lopez*, 207 Wis. 2d at 427-28. The record in this case shows that the State easily has met that requirement.

The police were in the process of lawfully searching Jackson's home – they had a valid warrant – when a detective gave the searchers information obtained from Jackson about where specifically they

should look to find the knife, bloody clothing, and bloody shoes.[2] At least six or seven officers were involved in the search (83:83). They divided the house into sections, with different groups of officers responsible for searching certain areas (*id*.). When the search began, one group searched the basement, while the other group searched the upstairs portion of the house (83:85).

The search process was very thorough. For example, in one bedroom that had a large closet, there was a large number of very large garbage bags, and the officers conducted a time-consuming examination of each of those bags that entailed dumping out the contents and sifting through all of the items in each bag (83:83-85).

After receiving a call from Detective Brad Kuehl suggesting that they check a garbage can near the garage door, the officers who had been searching the basement searched the two garbage cans that were closest to the garage door, but found nothing (83:91-92). Those officers then resumed searching the basement (83:91-92).

Detective Scott Callaway testified that the officers planned to conduct an "[e]xtremely thorough" search of the house and garage (83:92). That search would have entailed methodically

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[2] The court of appeals held that the search warrant was valid because the warrant affidavit established probable cause independent of Jackson's tainted statements. *See Jackson*, 363 Wis. 2d 554, ¶¶17-21; Pet-Ap. 107-10. Jackson did not challenge that proposition in the court of appeals and has not challenged it in this court.

dumping out garbage bags and going through boxes, drawers, and kitchen and bathroom cabinets (83:92-93). Detective Callaway testified that he told the other officers that it was going to take a long time to search the garage because of all of the bins and boxes there (83:94).

According to Detective Callaway, when Detective Kuehl arrived at the house with Jackson, his group either had just finished or were about to finish searching the basement and the other group was still searching the upstairs (83:96). The only search of the garage to that point was the earlier search of the two garbage cans near the garage door (83:96-97).

Detective Michael Renkas testified that because this was a homicide investigation, "[i]t was a very serious matter, so we were going to be very thorough. We were going to search everywhere and anywhere that we could search looking for relevant items that could be related to the incident and searching anywhere that the search warrant would allow us to search" (83:211).

Detective Renkas testified that he and three other officers began their search in the master bedroom (83:211). He also searched a closet area in the basement that contained several garbage bags and that they searched each of those bags (83:212).

While he was searching the basement, Renkas testified, the searchers received the information that a knife and clothing would be found in a garbage container near the garage door (83:212). After

participating in the unsuccessful search of that garbage can and of a garbage bin outside the house, he resumed searching the basement (83:212-13). He did that "to keep everything systematic and as thorough as possible to make sure that we were doing a complete search of the residence" (83:213).

Detective Renkas testified that it was the searchers' plan to search other areas of the garage because "[t]he search of the garage would have been just starting" as a result of the earlier diversion to search the two garbage containers (*id*.). Before Detective Kuehl arrived at the house, Renkas testified, there had been no search of the garage other than those two containers (83:215).

Another of the searchers, Officer Russell Blahnik, testified that he also was involved in the search of the master bedroom (83:192). He testified that in the hour and a half he had been searching before Detective Kuehl arrived at the house, he had not completed searching the bedroom (83:192). Blahnik testified that had they not received the information from Detective Kuehl, "at some point we were going to search the garage" because the warrant authorized a search of the entire residence (83:182). According to Blahnik, it was important to conduct the search "anywhere and everywhere" in the areas he was searching (83:200).

The officers' testimony demonstrates that they intended to conduct a thorough and methodical search of the house and the garage that would have entailed examining every container or compartment that might have contained evidence of the crime.

Had Detective Kuehl not arrived at the home and given the searchers the information provided by Jackson about which garbage can to search, there is a reasonable probability, at the very least, that the lawful search of the premises pursuant to the search warrant would have continued and that the investigators would have searched that garbage can and discovered the knife and the bloody shoes and clothing. Indeed, it is highly improbable that they would not have discovered those items.

Jackson argues that the State has not satisfied the first prong of the inevitable discovery doctrine because "[i]f 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." Jackson's brief at 11. That argument erroneously equates "motivating-factor" causation and "but-for" causation." A motivating factor is a sufficient condition but not a necessary one, while a "but-for" cause is a necessary condition. *See Greene v. Doruff*, 660 F.3d 975, 978 (7th Cir. 2011). In the inevitable discovery context, the question is not whether the illegality was a motivating factor in the discovery but whether the illegality was a necessary cause of the discovery. The court of appeals was correct, therefore, when it held that "the first prong of the inevitable discovery doctrine does not require the State to show that information obtained in violation of *Miranda* had no influence on the decision to seek a warrant." *Jackson*, 363 Wis. 2d 554, ¶ 34; Pet-Ap. 115.

In this case, the *Miranda* violation was not a but-for cause – that is, a necessary cause – of the discovery of the physical evidence. There was ample evidence that would have led the police to seek a search warrant for Jackson's home even if Jackson had not said a word to the police.

► At 1:25 p.m., officers discovered the body of Derrick Whitlow in a hotel room. Whitlow had significant cut wounds and there was substantial blood and blood splatter on the wall, bed and floor of the hotel room. Based on the amount of blood, the officers believed that anyone who had been in the room with Whitlow when he was injured likely would have a significant amount of blood on their clothing or shoes (4:2).

► A hotel employee told the police that Whitlow had been having problems with his wife (*id*.).

► Another employee reported that at about 1:00 to 1:30 p.m., she saw someone knock on the door of Whitlow's room and be admitted. She then heard a man screaming for help and what she thought was someone getting hit. (4:2-3).

► A hotel guest heard a woman yelling and then heard a man yelling "help me, help me" (4:3).

► Jackson and Whitlow's son, R.L.D.J., told police that his dad had moved to the hotel because he and his mom had been having issues that included loud "adult conversations" (*id*.).

► R.L.D.J. told police that in the early afternoon of the day Whitlow was killed, Jackson became

angry because Whitlow had destroyed some family keepsakes. R.L.D.J. told police that Jackson left the house and was gone for about fifteen to twenty minutes (*id*.). When she returned home, R.L.D.J. told police, she went directly to the bathroom and took a shower. When she got out of the shower, she was wearing different clothing. R.L.D.J. said that after Jackson got out of the shower, she told him not to tell anyone that she had left the house that day (*id*.).

As the court of appeals stated, "[i]t beggars belief to suggest that, possessing all of that information, none of which was the product of Jackson's custodial questioning, the police would not have sought a warrant to search Jackson's home." *Jackson*, 363 Wis. 2d 554, ¶34; Pet-Ap. 115. The record demonstrates, therefore, that there is a "reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct." *Lopez*, 207 Wis. 2d at 427-28.[3]

[3]In a footnote, Jackson suggests that the first prong of the inevitable discovery doctrine should not be framed in terms of a "reasonable probability" that the evidence in question would have been discovered by lawful means but for the police misconduct. *See* Jackson's brief at 10 n.2. She suggests the State should be required to show by a preponderance of the evidence that the evidence would have been discovered by lawful means without the police misconduct. *See id*. Because Jackson does not ask the court to overrule cases that use the "reasonable probability" standard such as *Lopez* and *State v. Schwegler*, 170 Wis. 2d 487, 500, 490 N.W.2d 292 (Ct. App. 1992), the State will simply note that the evidence summarized above easily satisfies Jackson's alternative formulation of the first prong.

Even if Jackson were correct that the State had to show that the police decided to seek a search warrant before they received any relevant information from Jackson, the record demonstrates that the State met that burden. Jackson identifies 7:25 p.m. as the crucial moment because that is the point at which the trial court determined that Jackson was in custody. *See* Jackson's brief at 14 (citing 87:22; Pet-Ap. 144). But the record demonstrates that Jackson did not make any inculpatory statements until 8:35 p.m. (64-1:Exhibit 1:29). Before that time, Jackson had said only that she may have spoken by phone with Whitlow that day and denied going to the hotel (*id*. at 24-29).

Even if Jackson's understanding of the inevitable discovery doctrine were correct, therefore, the relevant time before which the police would have had to have decided to seek a search warrant was 8:35 p.m. because nothing Jackson said before then added anything to probable cause for a search. But Detective Renkas testified that the approximate time that he began working on the warrant application was 6:00 p.m. (80:87). He could not give an exact time, he testified, but it was "early" (*id*.).

Jackson notes Renkas's response to a question on cross-examination at a later hearing, when Renkas, after testifying that he could not recall the exact time, was asked whether it could have been "[h]ours later" than when he returned to the station at 5:20 p.m. (85:7). Renkas responded, "I don't recall," but stood by his prior response that it was approximately 6:00 p.m. when he began work on the warrant application (85:8).

Jackson interprets Renkas's "I don't recall" answer to mean that it could have been "hours later" than 5:20 p.m. when he began work on the warrant application. *See* Jackson's brief at 14. But read in the context, Renkas's testimony confirmed that he began working on the warrant request at approximately 6:00 p.m. Thus, even if Jackson were correct that the State had to show that the police decided to seek a search warrant before Jackson provided any relevant information, the record demonstrates that they did.

C. Jackson does not argue that the State failed to prove the second inevitable discovery prong.

The second requirement of the inevitable discovery doctrine is that "the leads making the discovery inevitable were possessed by the government at the time of the misconduct." *Lopez*, 207 Wis. 2d at 428. The court of appeals observed that "the State present[ed] a persuasive argument that this second prong is satisfied" but that Jackson had "fail[ed] to respond to the State's argument." *Jackson*, 363 Wis. 2d 554, ¶35; Pet-Ap. 115. The court therefore "deem[ed] it conceded."*Id*. (citing *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp*., 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979)).

Jackson does not argue in this court that the second prong of the inevitable discovery doctrine has not been satisfied, nor does she challenge the court of appeals' holding that she conceded this point. Accordingly, the State will not discuss the second prong further.

D. Law enforcement was actively pursuing an alternate line of investigation.

The third requirement of the inevitable discovery doctrine requires the State to demonstrate that prior to searching the garbage can based on Jackson's information, police were actively pursuing an alternate line of investigation. *See Lopez,* 207 Wis. 2d at 428. That requirement is satisfied when the police are conducting a search of the premises pursuant to a lawfully issued warrant. *See State v. Pickens*, 2010 WI App 5, ¶49, 323 Wis. 2d 226, 779 N.W.2d 1; *Avery*, 337 Wis. 2d 351, ¶33. That is what the police were doing in this case when Detective Kuehl relayed the information provided by Jackson about where she had put the evidence.

Lopez supports the conclusion that the evidence in this case is admissible under the inevitable discovery doctrine. In *Lopez*, police executing a search warrant of Lopez's residence found marijuana in a locked freezer. *See Lopez*, 207 Wis. 2d at 424, 427. Lopez argued that the search warrant was not supported by probable cause and that even if it were, the discovery of marijuana was tainted by his non-*Mirandized* statement telling a police officer where to find the key to the freezer. *Id*. at 424-427.

After concluding that the search warrant was valid, *see id*. at 425-227, the court of appeals held that the evidence was admissible under the inevitable

discovery doctrine notwithstanding the tainted information the police received while conducting the search. The court explained:

> Even without Lopez's statement regarding the key, the freezer would have been searched and the evidence therein seized. Prior to going upstairs to ask Lopez about the key, [Officer] Gibbs had already located and decided to search the freezer as part of the search of the residence. In addition, Gibbs was actively pursuing his decision to search the freezer when he asked Lopez about the key. If he had not found the key, Gibbs testified that he would have pried the freezer open. Inevitably the contents, if any, of the freezer would have been discovered. Accordingly, we conclude that the trial court correctly denied Lopez's motion to suppress based on the doctrine of inevitable discovery.

Id. at 428.

The same rationale applies here. As in *Lopez*, the police were conducting the search of the home pursuant to a valid search warrant. As in *Lopez*, the officers' discovery of the evidence was facilitated by tainted statements by the defendant. And, as in *Lopez*, the officers would have found the evidence even without the tainted statements – in *Lopez* because the officer would have pried open the freezer, and in this case because the officers were conducting a thorough and methodical search of the home and its contents that would eventually have led them to search the garbage can that held the knife, clothes, and shoes.

Jackson argues that the State has not shown that the police were actively pursuing the leads making discovery inevitable prior to their unlawful conduct because they had not begun the search prior to the *Miranda* violation. *See* Jackson's brief at 14-15. There are two flaws in that argument.

First, the third prong of the inevitable doctrine requires that "prior to the unlawful search the government also was actively pursuing some alternate line of investigation." *Lopez*, 207 Wis. 2d at 428. That requirement was satisfied because, before Jackson was brought to the house and told the police where she had placed the items, the police were conducting a search pursuant to a valid warrant. *See State v. Carroll*, 2010 WI 8, ¶44, 322 Wis. 2d 299, 778 N.W.2d 1 ("where an application for a warrant contains both tainted and untainted evidence, the issued warrant is valid if the untainted evidence is sufficient to support a finding of probable cause to issue the warrant"). As the court of appeals correctly held, "the search only became unlawful when Jackson was brought to the house and showed police where to find the knife, clothes, and shoes. Before that point, police were actively pursuing an alternative line of investigation—i.e., a search pursuant to a valid warrant." *Jackson*, 363 Wis. 2d 554, ¶41; Pet-Ap. 117-18.

Second, even accepting Jackson's erroneous premise that the police must have been pursuing the leads that made the discovery inevitable before the *Miranda* violation that occurred when police questioned her after 7:25 p.m., the record

demonstrates that the police were doing so. *See id*., ¶42; Pet-Ap. 118. The police spoke to the witnesses at the hotel and learned about the relationship between Whitlow and Jackson when they initially responded to the call to the hotel at around 1:45 p.m. (77:23-27, 244). The police began questioning R.L.D.J. at about 5:00 or 5:30 p.m. (83:154). Even though R.L.D.J. did not disclose the inculpatory information about Jackson until sometime between 8:00 and 9:00 p.m., the police were "pursing the leads" that made discovery of the physical evidence in Jackson's home inevitable before the *Miranda* violation that began at 7:25 p.m. *See Avery*, 337 Wis. 2d 351, ¶¶32-35.

Jackson argues that the court of appeals' "view of the third prong of inevitable discovery would effectively do away with the fruit of the poisonous tree doctrine" because "[i]f one defines 'alternative line of investigation' broadly enough, one can virtually always say that investigation was ongoing before the police violated a person's constitutional rights." Jackson's brief at 17. She argues that "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" and that "[t]his purpose is defeated by admitting evidence derived from constitutional violations any time the police happen to augment their unlawful activities with lawful ones." *Id*.

Jackson misreads the court of appeals' decision. The court of appeals did not remotely suggest that the third prong of the inevitable discovery doctrine is satisfied "in any case in which

the police happen to augment their unlawful activities with lawful ones." *Id*. Rather, the court of appeals held that, "even accepting Jackson's premise that police must have been actively pursuing the leads that made the discovery inevitable before the *Miranda* violation . . ., the record demonstrates that they were doing so." *Jackson*, 2015 WI App 49, ¶42; Pet-Ap. 118.

Jackson concludes her argument on this topic by asserting that the State "seeks . . . the admission of evidence that was concededly obtained by way of a coercive, illegal interrogation . . . on the strength of a warrant that could well be a product of the same interrogation." Jackson's brief at 17. That is not what the State seeks. The State seeks the admission of evidence discovered in a search of Jackson's house pursuant to a warrant that was valid because it was based on probable cause independent of her tainted statements – a proposition not challenged by Jackson in the court of appeals or this court – and because the police inevitably would have discovered the evidence without any of Jackson's statements. The State does not, as Jackson asserts, ask the court to "reward the illegal tactics of the police," *id*., but to allow into evidence the items that the police inevitably would have discovered had Jackson not spoken a single word to law enforcement.

II. THE COURT SHOULD DECLINE JACKSON'S INVITATION TO ADD A NEW REQUIREMENT TO THE INEVITABLE DISCOVERY DOCTRINE.

Jackson asks this court to hold that even if all of the requirements of the inevitable discovery doctrine have been satisfied, the doctrine should not be applied "[w]here the state intentionally violates a citizen's constitutional rights." Jackson's brief at 18. She acknowledges that the United States Supreme Court rejected that contention in *Nix*, but urges this court to adopt that rule under Wisconsin Constitution, as three states have done under their state constitutions. *See* Jackson's brief at 18-23.

Jackson argues that adoption of her proposed restriction is necessary to advance the exclusionary rule's purpose of deterring law enforcement from violating the rights of citizens. *See id*. at 22. She contends that "[a]n 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." *Id*.

But the inevitable discovery doctrine, in its current formulation, does not permit the State to introduce "the physical fruits of flagrant wrongdoing" because the doctrine requires the State to prove that the physical evidence would have been discovered absent the wrongdoing. *See Nix*, 467 U.S. at 448 ("when . . . the evidence in question would inevitably have been discovered without reference to

the police error or misconduct, there is no nexus sufficient to provide a taint"). Nor, as the Court explained at length in *Nix*, is imposing Jackson's new rule necessary to deter police misconduct.

> It is clear that the cases implementing the exclusionary rule "begin with the premise that the challenged evidence is in some sense the product of illegal governmental activity." Of course, this does not end the inquiry. *If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale has so little basis that the evidence should be received. Anything less would reject logic, experience, and common sense.*
>
> The requirement that the prosecution must prove the absence of bad faith, imposed here by the Court of Appeals, 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.
>
> *The Court of Appeals concluded, without analysis, that if an absence-of-bad-faith requirement were not imposed, "the temptation to risk deliberate violations of the Sixth Amendment would be too great, and the deterrent effect of the Exclusionary Rule reduced too far." We reject that view. A police officer who is faced with the opportunity to obtain*

> *evidence illegally will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered. Cf. United States v. Ceccolini*, 435 U.S. 268, 283 (1978):
>
> > "[T]he concept of effective deterrence assumes that the police officer consciously realizes the probable consequences of a presumably impermissible course of conduct" (opinion concurring in judgment).
>
> On the other hand, when an officer is aware that the evidence will inevitably be discovered, he will try to avoid engaging in any questionable practice. In that situation, there will be little to gain from taking any dubious "shortcuts" to obtain the evidence. Significant disincentives to obtaining evidence illegally—including the possibility of departmental discipline and civil liability—also lessen the likelihood that the ultimate or inevitable discovery exception will promote police misconduct. In these circumstances, the societal costs of the exclusionary rule far outweigh any possible benefits to deterrence that a good-faith requirement might produce.

Nix, 467 U.S. at 444-46 (emphasis added; footnote and some citations omitted).

The Court also held in *Nix* that "if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings." *Id*. at 447. "In that situation," the Court said, "the State has gained no advantage at

trial and the defendant has suffered no prejudice. Indeed, suppression of the evidence would operate to undermine the adversary system by putting the State in a worse position than it would have occupied without any police misconduct." *Id*.

Following *Nix*, the Sixth Circuit rejected the argument that a court must "consider the severity and intentionality of the government's constitutional violation in deciding whether the inevitable discovery rule applies." *United States v. Alexander*, 540 F.3d 494, 502 (6th Cir. 2008). The court explained why such a rule would run contrary to *Nix*.

> [M]ost importantly, Alexander's argument gives short shrift to the *Nix* Court's determination that the inevitable discovery rule applies even if there were police misconduct. In evaluating whether exclusion is proper, courts must "evaluate the circumstances of th[e] case in the light of the policy served by the exclusionary rule." It is true that the "rule is calculated to prevent, not repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effective way—by removing the incentive to disregard it." However, the *Nix* Court was very clear that despite these purposes of the exclusionary rule, the government cannot be made worse off because of misconduct than it would have been if the misconduct had not occurred.

Alexander, 540 F.3d at 503-04; *see also* 6 Wayne R. LaFave, *Search and Seizure*, § 11.4(a), at 346 (5th ed. 2012) ("[I]n *Nix v. Williams*, the Supreme Court rejected the court of appeals' limitation that the prosecution must prove the absence of bad faith, explaining that it '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' and 'would put the police in a *worse* position than they would have been in if no unlawful conduct had transpired.'" (footnotes omitted).

The North Carolina Supreme Court has rejected the argument that under its state constitution, the police must have acted in good faith as a condition of applying the inevitable discovery doctrine. *See State v. Garner*, 417 S.E.2d 502, 510-11 (N.C. 1992). The court explained that "[i]f the State finds itself in any situation where it must prove that the evidence inevitably would have been discovered by other legal, independent means, and it fails to do so, the doctrine is not applied and the evidence is suppressed. This risk of suppression inherently preserves the deterrence value of the exclusionary rule." *Id*. at 511. "Further," the court observed, "if the State carries its burden and proves inevitable discovery by separate, independent means, thus leaving the State in no better and no worse position, any question of good faith, bad faith, mistake or inadvertence is simply irrelevant." *Id*.

After the Supreme Court decided *Nix*, the Arkansas Supreme Court eliminated the good faith requirement that it previously had imposed for the application of the inevitable discovery doctrine. *See Brunson v. State*, 753 S.W.2d 859, 861-62 (1988). Three years before *Nix*, the Arkansas court adopted an inevitable discovery rule under which the state was required to prove "'that it would have acquired the items through legal means . . . [and] the officers

involved must have acted in good faith in accelerating the discovery of the evidence.'" *Id*. at 861 (quoting *Fain v. State*, 611 S.W.2d 508 (1981)). In *Brunson*, the court found "the standard adopted by the Supreme Court in [*Nix*] well suited to the task of securing the goals of the exclusionary rule while assuring that the police are not placed in 'a *worse* position than they would have been in if no unlawful conduct had transpired.'" *Id*. (quoting *Nix,* 467 U.S. at 445). "Contrary to our position in *Fain*," the court concluded, "we now find that it is not incumbent that the State establish good faith conduct as to the accelerated discovery of the evidence." *Id*. at 861-62.

Jackson compares this case to *Knapp*, 285 Wis. 2d 86, and asks the court to apply *Knapp*'s rationale here. *See* Jackson's brief at 18-19. But there is a significant difference between this case and *Knapp* that Jackson fails to acknowledge.

The issue in *Knapp* was whether "physical evidence obtained as the direct result of a *Miranda* violation is inadmissible when the violation was an intentional attempt to prevent the suspect from exercising Fifth Amendment rights." *Knapp*, 285 Wis. 2d 86, ¶1 (footnote omitted). This court initially concluded that the physical evidence was inadmissible, but the United States Supreme Court vacated and remanded that decision in light of *United States v. Patane,* 542 U.S. 630 (2004), in which a plurality of the Court concluded that the fruit of the poisonous tree doctrine does not extend to derivative evidence discovered as a result of a

defendant's voluntary statements obtained without *Miranda* warnings. *See Knapp*, 285 Wis. 2d 86, ¶1.

On remand, this court held that "the fruit of the poisonous tree doctrine applies under the circumstances of this case under Article I, Section 8 of the Wisconsin Constitution." *Id*., ¶2. "Where physical evidence is obtained as the direct result of an intentional *Miranda* violation, we conclude that our constitution requires that the evidence must be suppressed." *Id*. The court held that exclusion of the evidence was necessary to deter police misconduct and to preserve judicial integrity. *Id*., ¶¶75, 79.

The crucial difference between this case and *Knapp* is that in *Knapp*, the "physical evidence was obtained as the direct result of an intentional *Miranda* violation." *Id*., ¶82. In *Knapp*, the police *would not* have obtained the physical evidence but for the *Miranda* violation. But the inevitable discovery doctrine applies only when "the evidence in question *would* have been discovered by lawful means but for the police misconduct." *Lopez,* 207 Wis. 2d at 428 (emphasis added). By its very nature, the inevitable discovery doctrine ensures that the evidence at issue is not a "fruit of the poisonous tree." *See Nix*, 467 U.S. at 448.

When, as in this case, the police inevitably would have discovered the physical evidence regardless of the *Miranda* violation, suppressing the physical evidence exacts a substantial price – the exclusion of important physical evidence – that outweighs the purposes of the exclusionary rule. *See Knapp*, 285 Wis. 2d 86, ¶23 ("the exclusionary rule is

not absolute, but rather is connected to the public interest, which requires a balancing of the relevant interests"). As the court of appeals explained in its decision in this case:

> [I]n *Knapp*, there was no evidence the police would have obtained the physical evidence had the *Miranda* violation not occurred. Conversely, in this case, we have already determined that the knife, clothes, and shoes would have been inevitably discovered by lawful means, notwithstanding the police misconduct. Under these circumstances, the twin policy goals identified in *Knapp* are not served by suppression and are in fact outweighed by the detrimental effect of excluding important physical evidence.

Jackson, 363 Wis. 2d 554, ¶45; Pet-Ap. 119-20.

The court of appeals noted that "Jackson has already received a remedy for the *Miranda* violations that occurred in this case—her inculpatory statements were suppressed, and they were also excised from the search warrant affidavit for purposes of determining whether the affidavit established probable cause to search her residence." *Id*.; Pet-Ap. 120. Because Jackson has received that remedy, it concluded, "[n]o additional remedy is required." *Id*.

Jackson argues that the fact that the State "cannot use [her] statement in court is no loss, since without their illegal tactics they would not have any statement at all." Jackson's brief at 22. The State does not understand how Jackson can plausibly describe the suppression of her confession as "no loss" to the

State. The constitutional violation of which she complains is a *Miranda*/voluntariness violation. The remedy she has received for that violation is real and substantial – her confession to stabbing her husband has been excluded from trial.

Jackson also argues that what the police gained from their illegal interrogation was "at the very least, the police gained a 'shortcut' to the physical evidence they sought." *Id*. She is wrong. Because the conditions for the inevitable discovery have been satisfied, Jackson's statements *at most* led the police to locate more quickly physical evidence that they would have discovered anyway.

"Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial." *Nix*, 467 U.S. at 446. "Suppression, in these circumstances, would do nothing whatever to promote the integrity of the trial process, but would inflict a wholly unacceptable burden on the administration of criminal justice." *Id*. at 447. "As the Court stated in *Nix,* '[e]xclusion of evidence that would inevitably have been discovered would also put the government in a worse position, because the police would have obtained that evidence if no misconduct had taken place.'" *State v. Weber*, 163 Wis. 2d 116, 142, 471 N.W.2d 187 (1991) (quoting *Nix,* 467 U.S. at 444).

Because the requirements of the inevitable discovery doctrine were satisfied in this case, the circuit court erred when it excluded the physical evidence that the police discovered during the

search of Jackson's home. The court of appeals correctly reversed that ruling.

CONCLUSION

For the reasons stated above, the court should affirm the decision of the court of appeals.

Dated this 25th day of November, 2015.

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 8,266 words.

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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 25th day of November, 2015.

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