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, District III, Reversing in Part an Order Entered in Outagamie County, the Honorable Mark J. McGinnis, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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ARGUMENT

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.

There does not appear to be any dispute as to the standard of review or that any fruits of Ms. Jackson's interrogation must be suppressed. (For clarity, these fruits include Ms. Jackson's statements recited on page 3 of the state's brief; when the state notes that Ms. Jackson "spoke to police officers later that day"; it is referring to her unwarned, involuntary custodial interrogation.) Nor does the state take issue with the trial court's finding that the constitutional violations were intentional. The only question is whether the inevitable discovery doctrine renders the knife and clothing admissible even though they were, factually, discovered by way of the interrogation when Ms. Jackson pointed them out to officers.

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

Ms. Jackson agrees with the state that it was required to show her involuntary statements were not a "but-for" cause of the discovery of the evidence. Plaintiff-Appellant's Brief at 16. She disagrees, however, that the state has met that burden. The non-interrogation evidence recited in the state's brief provides reason to suspect Ms. Jackson. Plaintiff-Appellant's Brief at 17-18. What it does *not* do, however, is prove the police would have conducted a warranted search of her home

had she not told them, under compulsion, that crucial evidence was located there. Indeed, one wonders why, if the search was such an obvious (in fact, inevitable) course of action absent Ms. Jackson's statements, the police spent several hours before the search flagrantly violating her rights in order to *obtain* those statements—which were then used to secure the warrant. If it was so certain the evidence would be found in the house, why did the police go to such lengths to compel Ms. Jackson to tell them where it was?

The fact is that that over five days of testimony, none of the investigating officers testified that the decision to seek the warrant was not motivated by the statements that were being extracted from Ms. Jackson—despite the fact that inevitable discovery was one of the primary issues being heard. (77; 78; 80; 83; 85). The state failed to meet its burden to show that the interrogation was not a "but for" cause of the warranted search.

B. 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.

The state submits that "in … context," the officer who prepared the warrants "testified that he began working on the warrant request at approximately 6:00 p.m." Plaintiff-Appellant's Brief at 20. The relevant testimony is reproduced in its entirety in Ms. Jackson's opening brief. Defendant-Respondent-Petitioner's Brief at 13-14. Contrary to the state's assertion, the officer's testimony is, at best, ambiguous about how and, crucially, *when* the decision to seek a warrant was made. This matters because it was the state's burden to prove each element of the doctrine. ***State v. Schwegler***, 170 Wis. 2d 487, 500, 490 N.W.2d 292 (Ct. App.

1992). The officer's inability to say whether the decision was made at 6:00 or "hours later" does not meet this burden.

Beyond this, the state relies on ***Lopez*** without acknowledging the crucial difference between that case and this one: the warranted search in ***Lopez*** that would have led to discovery was *already underway* when the police violated Lopez's rights, as the third prong requires. ***State v. Lopez***, 207 Wis. 2d 413, 427, 559 N.W.2d 264 (Ct. App. 1996). The state puzzlingly insists that the warranted search need only have preceded Ms. Jackson's pointing out of the knife and clothing, apparently based on ***Schwegler***'s phrasing of the third prong: that the government must be pursuing the alternate line of investigation "prior to the unlawful search." But Lopez did not even *involve* a Fourth Amendment violation—an "illegal search"—and neither does this case. As in ***Lopez***, it was an unlawful *interrogation* that led to the discovery of the evidence in this case, but unlike in ***Lopez***, that violation long preceded (and helped show probable cause for) the search that the state now wishes to portray as totally independent from the violation.

Contrary to the state's argument, it is clear that the warranted search sprang, at least in part, from the violation of Ms. Jackson's Fifth and Sixth Amendment rights, and was not an "alternate line of investigation" but part of the same line.

C. 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.

Relying on ***Nix v. Williams***, 467 U.S. 431 (1984), the state argues that police lawbreaking is adequately deterred even where evidence unlawfully uncovered is admitted via the inevitable discovery doctrine. Plaintiff-Appellant's Brief

at 26-34. Putting aside the fact that the state of the law certainly didn't deter the police in *this* case from "intentionally … flagrantly … recklessly" violating Ms. Jackson's rights, this view has a serious logical problem.

The state professes not to understand how the exclusion of Ms. Jackson's statements can be called "no loss" to the state, but as Ms. Jackson has already explained, once Ms. Jackson asked to end the interrogation, there was no way for the officers to get admissible statements from her; they could either honor her request and end the interrogation or do what they did: continue to interrogate her in violation of the Constitution, rendering anything she told them inadmissible. Either way, they would have no usable statement—the same result whether they do, or do not, violate Ms. Jackson's constitutional rights. Where, then, is the deterrent that the exclusionary rule is supposed to provide? Is it any wonder that the police in fact went ahead and coerced statements from Ms. Jackson, and went on to use those statements to locate the physical evidence they sought? Why would they *not* do so if, as the state now proposes, they can use the evidence that resulted from their intentional constitutional violations to convict her?

As one commentator has noted,

> if the "no worse off" rule is interpreted to mean what it seems to say, the Court is communicating to the police that there is no real price to be paid for illegal conduct no matter how flagrant or purposeful, and regardless of how seriously a specific constitutional right is affected, when another source of discovery exists. It is not difficult to see how this principle would materially diminish the deterrent impact of the exclusionary rule.
>
> ….

> As the Court has repeatedly asserted, the exclusionary rule best serves its goals when it is applied in situations of bad faith misconduct by the police. The more purposeful the misconduct, the greater the need to deter and the more effective is the lesson for those contemplating future illegalities. Conversely, allowing the use of evidence which is discovered through a deliberate violation of the law communicates to the police the possibility, if not the likelihood, of benefiting from their own purposeful wrongdoing. Quite often the pressure upon police to conclude an investigation is intense, and the temptation to act without obeying the rules is great. The doctrine of inevitable discovery, when applied without any regard for the purposefulness or flagrant nature of the police misconduct, adds immeasurably to that temptation. There may be, therefore, contrary to the Court's assertion, much to be gained in a police officer's mind from acting illegally when he believes the evidence is likely to be eventually discovered by legal means. When there is in the police officer's mind a likelihood of ultimate discovery, he can save time and avoid what may be viewed as needless effort by choosing an illegal shortcut.

Steven P. Grossman, *The Doctrine of Inevitable Discovery: A Plea for Reasonable Limitations*, 92 Dick. L. Rev. 326, 334-35 (1988).

The state makes much of the "societal costs" of excluding the two pieces of evidence at issue here. Plaintiff-Appellant's Brief at 28. But where, in the state's calculus, is the cost of allowing in-court use of evidence obtained by admitted, flagrant, and, in the court of appeals' words, "reprehensible" police wrongdoing? As this court has said, "[i]t is not too much to expect law enforcement to respect the law and refrain from intentionally violating it. When law enforcement is encouraged to intentionally take unwarranted investigatory shortcuts to obtain convictions, the

judicial process is systemically corrupted." ***State v. Knapp***, 2005 WI 127, ¶81, 285 Wis. 2d 86, 700 N.W.2d 899. In order to deter such "shortcuts," this court should join other jurisdictions and refuse to apply the inevitable discovery doctrine where evidence is obtained by the intentional violation of constitutional rights.

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 10th day of December, 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 1,516 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 10th day of December, 2015.

Signed:

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