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WISCONSIN COURT OF APPEALS
DISTRICT II

Appeal No. 2018AP2319-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MANUEL GARCIA,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT OF RACINE COUNTY, THE HONORABLE MICHAEL PIONTEK, PRESIDING

SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLANT

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INTRODUCTION

The fundamental issue to be resolved in this appeal is whether the circuit court violated Mr. Garcia's constitutional rights when it allowed the State to introduce his previously excluded and inadmissible statements, in its case-in-chief, for the sole purpose of rehabilitating the credibility of its witness. The answer to that question is simple: **The admission of Mr. Garcia's illegally obtained statements violated his constitutional rights**.

This Court asked the parties "whether the rule set forth in *Harris v. New York*, 401 U.S. 222, 225-26 (1971) applies under the circumstances of this case where the evidence was introduced during the state's case-in-chief and was not introduced to impeach the defendant's testimony." The answer to that question is: **No, the rule set forth in *Harris* does not permit the State to introduce previously excluded evidence during its case-in-chief to rehabilitate its own witness.** By allowing just that in this case, the circuit court erred.

Secondarily, the Court asked "whether the rule of completeness applies to allow a party to introduce written or oral

statements (voluntary or not) previously excluded under *Miranda v. Arizona*, 384 U.S. 436 (1966) and the exclusionary rule." The answer to that question is: **No, the rule of completeness set forth in Wis. Stat. § 901.07 and *State v. Eugenio*, 219 Wis. 2d 391, 579 N.W.2d 642 (1998), cannot overcome a *Miranda* violation.** Moreover, the admission of previously excluded evidence in this case was not necessary to prevent the jury from being misled.

This Court should reverse.

ARGUMENT[1]

I. The circuit court's decision to admit Mr. Garcia's previously excluded statements violated his constitutional rights and no exception applies to justify the court's ruling.

The circuit court committed reversible error when it admitted Mr. Garcia's previously excluded statements during the State's case-in-chief for the inappropriate purpose of allowing the State to rehabilitate its own witness.[2] Neither *Harris* nor its progeny have

[1] This brief presumes the Court's familiarity with the underlying facts, as described in the parties' initial briefs. Accordingly, the facts will be addressed only as necessary directly in conjunction with the legal issues to which they relate.

[2] Because Mr. Garcia asserts a violation of his constitutional rights, this Court employs the two-step process used to review claims of constitutional error. *See e.g.*, *State v. Martwick*, 2000 WI 5, ¶ 16, 231 Wis.2d 801, 604 N.W.2d 552. However,

ever been extended to permit the introduction of a defendant's illegally obtained statements for such purposes. This Court should reverse.

A. The circuit court violated Mr. Garcia's constitutional rights when it admitted his illegally obtained statements at trial.

Voluntary statements obtained in violation of *Miranda v. Arizona*[3] are inadmissible at trial during the prosecution's case-in-chief and may only be admitted in limited circumstances to impeach a defendant's conflicting testimony. *See State v. Franklin*, 228 Wis. 2d 408, 412, 596 N.W.2d 855 (Ct. App. 1999).

In this case, the circuit court concluded that Mr. Garcia did not knowingly and intelligently waive his *Miranda* rights before making custodial statements to Investigator Spiegelhoff at the Racine County Police Department. R. 59 at 34:2-7.[4] Therefore, the court

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the first of those steps is not at issue, because Mr. Garcia does not dispute the underlying facts. *See id.*, ¶ 18. Thus, only the second step, requiring the Court to "independently apply constitutional principles to those facts," is at issue. *State v. Hogan*, 2015 WI 76, ¶ 32, 364 Wis. 2d 167, 868 N.W.2d 124.

[3] 384 U.S. 436 (1966).

[4] The Index of Record filed with the Court lists the incorrect year for document No. 59. The correct date for this oral ruling is 01-11-2013.

determined that the State could not use his statements at trial as part of its case-in-chief. *Id*. at 34:7-10.[5]

At trial, Investigator Spiegelhoff testified for the State. Mr. Garcia cross-examined him about his investigation of the case. In response to Mr. Garcia's questioning, the State moved to admit Mr. Garcia's excluded statements in evidence during its case-in-chief to rehabilitate the credibility of its witness. R. 77 at 182:12-16. The court deferred ruling on the State's request until it could review the transcript of Mr. Garcia's questioning. In the interim, the State conducted re-direct examination of the investigator and established several bases for why Investigator Spiegelhoff made the investigative decisions he did. *Id.* at 189:2-10, 191:2-13.

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[5] The case was originally before Judge Wayne Marik, who issued the oral ruling on January 11, 2013 suppressing Mr. Garcia's statements. Before trial, the case was reassigned to Judge Michael Piontek. Judge Piontek revisited Judge Marik's ruling in a hearing on motions in limine and considered whether the State could introduce the excluded statements in cross-examination if Mr. Garcia called an expert witness. R. 74. During this hearing Judge Piontek reaffirmed Judge Marik's decision to suppress Mr. Garcia's statements, explaining:

> "[W]hether I would have suppressed this statement or not is irrelevant. Judge Marik had the hearing, suppressed the statement. I know that it's not admissible for any purpose in the State's case in chief. Cross-examining an expert on it, I'll look at the case law, and I'll give you a decision…"

Id. at 20.

The next day, the court revisited the State's request to admit the statements. The court noted that Mr. Garcia's cross-examination of the investigator was "absolutely proper," explaining, "it is proper to inquire into the investigatory process by which Investigator Spiegelhoff determined what action to take in this case." R. 79 at 10:7-12. Nonetheless, the court concluded that Mr. Garcia's custodial statements were voluntary and allowed the State to introduce the excluded statements during its case-in-chief to rehabilitate the investigator. *Id.* at 20:24-25, 22:19-24.

The court provided no legal basis for admitting the statements – other than concluding that they were voluntary – and instead opined on the issue from a "fundamental fairness perspective," stating, "I believe it would be manifestly unfair to have the jury hear just that side of it and not allow the investigator, because of Judge Marik's ruling, to explain it." *Id.* at 21-22. The State then questioned Investigator Spiegelhoff about Mr. Garcia's statements and played a video of Mr. Garcia's custodial interrogation for the jury. *Id.* at 30-32.

Before Mr. Garcia even had the opportunity to testify, his previously excluded statements had been introduced in evidence.

By admitting his statements, the circuit court violated Mr. Garcia's constitutional right to be free from compelled self-incrimination.[6] The Fifth Amendment protects a defendant's choice to either testify at trial or remain silent. *See Miranda*, 384 U.S. at 460 (internal quotations omitted) ("[i]n sum, the privilege is fulfilled only when the person is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will").

The court deprived Mr. Garcia of this choice. But for the court's action, Mr. Garcia would not have testified. As his counsel explained, he "[had] to testify . . . given the Court's previous ruling . . . to explain many of the things that came up during his statements." R. 79 at 50. Therefore, Mr. Garcia's constitutional right

[6] The Fifth Amendment to the United States Constitution states, in relevant part, "[n]o person shall be . . . compelled in any criminal case to be a witness against himself . . .". U.S. Const. Amend. V. *See also Malloy v. Hogan*, 378 U.S. 1, 6 (1964) ("[w]e hold today that the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States"). In addition, the Wisconsin Constitution, Article I, Section 8(1), states, "[n]o person . . . may be compelled in any criminal case to be a witness against himself or herself."

against self-incrimination was destroyed. *See U.S. v. Washington*, 431 U.S. 181, 188 (1977) (explaining the "test" for a Fifth Amendment violation "is whether . . . the free will of the witness was overborne").

B. The impeachment exception introduced in *Harris v. New York* does not permit the introduction of illegally obtained statements during the State's case-in-chief to rehabilitate the State's witness.

The impeachment exception set forth in *Harris v. New York*, 401 U.S. 222 (1971) does not support the admission of evidence in this case and cannot remedy the circuit court's violation of Mr. Garcia's constitutional rights.

In *Harris*, the United States Supreme Court announced a narrow exception to the standard exclusionary rule. 401 U.S. 222, 225-26 (1971). Under this exception, the state may introduce a defendant's illegally obtained statements for the very limited purpose of impeaching a defendant who testifies at trial in a manner that conflicts with his suppressed statements. *Id.* Absent that narrow purpose of impeaching a testifying defendant, *Harris* does not apply. *Id.*

Yet, even though that narrow purpose was not satisfied here, the circuit court still admitted Mr. Garcia's illegally obtained statements. In doing so, it effectively expanded *Harris'* exception to entirely new territory, inconsistent with the facts and rationale of that case.

The defendant in *Harris*, while in custody but before he was advised of his right to counsel, made statements to the police that were rendered inadmissible at trial under *Miranda. Harris*, 401 U.S. at 222-24. At trial, the defendant took the stand in his own defense and made statements that contradicted his earlier statements to police. *Id.* On cross-examination, the state asked the defendant whether he had indeed made prior, contradictory statements to the police immediately following his arrest. *Id.* The defendant said he could not remember and the state moved to admit his previously excluded statements in evidence to impeach his credibility. *Id.* The U.S. Supreme Court took the case to consider whether the defendant's statements, rendered inadmissible in the state's case-in-chief under *Miranda*, could be used to impeach his credibility at trial.

In its decision, the Supreme Court focused on its concern over the implications of *not* admitting the statements, explaining that "[t]he shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense." *Id.* at 226. In response to the concern that criminal defendants could take the stand and lie without any consequences, the Court concluded that the previously excluded statements could be admitted for the limited purpose of impeaching the defendant's credibility. *Id.*

The *Harris* court was perfectly clear, however, that the exclusionary rule remains effective—and should apply except for the limited purpose of impeaching a defendant's inconsistent testimony at trial. *See Id.* at 225. Considering the exclusionary rule's deterrent effect on police misconduct, and the concern that its deterrent effect would be diminished by its holding, the Court responded, "sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief." *Id.* at 225. Moreover, the Court explained that a criminal defendant has the option to testify in his own defense or refuse to do so. *Id.* In

other words, he is not compelled to take the stand, but if he voluntarily chooses to testify, he is under an obligation to speak truthfully or risk the consequences of impeachment. *See Id.*

In the years after *Harris*, the Supreme Court further developed the contours of the impeachment exception. *See Kansas v. Ventris*, 556 U.S. 586, 594 (2009) (evidence obtained in violation of a defendant's Sixth Amendment rights may be used to impeach his inconsistent trial testimony); *U.S. v. Havens*, 446 U.S. 620, 627-28 (1980) (illegally obtained evidence may be used to impeach a defendant's conflicting testimony elicited on cross-examination). Nonetheless, the Court never expanded the exception beyond direct impeachment of the testifying defendant. In fact, almost twenty years after *Harris*, the Supreme Court was asked to extend the impeachment exception to permit the introduction of illegally obtained evidence to impeach other defense witnesses at trial; it rejected that proposed extension. *See James v. Illinois*, 493 U.S. 307 (1990).

In *James*, the defendant made statements to police that were suppressed before trial. *Id.* at 309-10. At trial, the defendant did not

testify, but called a witness whose testimony contradicted the defendant's statements to police. *Id.* at 310. The state sought to introduce the defendant's illegally obtained statements to impeach the witness's credibility. *Id.* The trial court determined the statements were voluntary and allowed them to be admitted. *Id.*

The defendant was convicted and the Supreme Court of Illinois upheld the conviction, holding that the trial court's admission of the statements to impeach the defense witness was proper to prevent the defendant from engaging in perjury "by proxy." *Id.*

The U.S. Supreme Court reversed, refusing to extend the impeachment exception announced in *Harris* to other defense witnesses. *Id.* at 320. The Court explained that the rationales underlying the impeachment exception do not necessarily extend to other defense witnesses, for three primary reasons:

- *First*, the penalty function served by the impeachment exception – to punish a defendant who voluntarily takes the stand and commits perjury – cannot logically be extended to other defense witnesses. *Id.* at 314. Rather than punishing a criminal defendant for his decision to lie on the stand, introducing a defendant's statements to

impeach other witnesses would punish the defendant for the choices – or even innocent mistakes – of other witnesses. *Id.* at 314-15.

- *Second*, the threat of impeachment would likely chill criminal defendants from calling witnesses who could otherwise offer probative evidence for their case, resulting in an unfair advantage to the prosecution. *Id.* at 316. Just as "defendants ought not be able to 'pervert' the exclusion of illegally obtained evidence into a shield for perjury," the Court explained that, "it seems no more appropriate for the State to brandish such evidence as a sword with which to dissuade defendants from presenting a meaningful defense through other witnesses." *Id.* at 317. For this reason, the Court noted that the truth-seeking function served by the impeachment exception could not be extended to other defense witnesses because any purported benefit would be "offset" by the loss of valuable witness testimony. *Id.*

- *Third*, the Court explained that expanding the impeachment exception would weaken the exclusionary rule's deterrent effect on police misconduct by enhancing the value of illegally obtained evidence and greatly increasing the opportunity to use such evidence at trial. *Id.* at 317-18. The opportunity would be increased because the number of defense witnesses easily outnumbers testifying defendants. *Id.* at 318. Additionally, the value of illegally obtained evidence would greatly increase because the prosecution could use the threat of impeachment not just to deter perjured testimony, but to deter defendants from calling witnesses altogether. *Id.* The Court concluded that just excluding the use of illegally obtained evidence from the prosecution's case-in-chief *wouldn't go far enough* to protect the privacy interests underlying the exclusionary rule and thus, the impeachment exception

> could not be expanded to defense witnesses. *See Id.* at 318-19.

The same year *James* was decided, the Eastern District of Wisconsin decided *Kuntz v. McCaughtry*, 806 F. Supp. 1373, 1380 (E.D. Wis. 1992), a federal habeas case presenting a question similar to the one in this case: whether illegally obtained statements could be admitted at trial to impeach the state's witness. It resolved the question against the state. *Kuntz*, 806 F. Supp. at 1380.

In the state criminal proceedings at issue in *Kuntz*, the defendant testified and on cross-examination the state introduced his illegally obtained statements. *Id.* at 1379. On appeal, the defendant argued that his statements should not have been admitted at trial because they did not impeach his testimony, and if anything, they were admitted to impeach the state's witness. *Id.*

The Wisconsin Court of Appeals disagreed, holding that the statements were properly admitted because they impeached the state's witness. *Id.* The defendant argued that the Court of Appeals' holding contradicted the U.S. Supreme Court's ruling in *James v. Illinois*. *Id.* The Wisconsin Supreme Court did not consider *James* and

instead concluded that the defendant's statements were actually not admitted to impeach *anyone*, later clarifying that the admission was harmless error. *Id.*

On federal habeas review, the District Court concluded that the admission of the previously excluded statement for purposes of impeaching the state's witness (or for non-impeachment purposes), was unconstitutional. *Id*. Ultimately, however, because the District Court concluded that the statements were duplicative of, and consistent with, the defendant's direct testimony at trial, it did not grant habeas relief instead finding the error to be harmless despite its being of constitutional magnitude. *Id.* at 1380-81.

Relying on the Supreme Court's decision in *Havens*, the District Court said that "use of an illegal statement is thus prohibited during any part of the state's case, even if used to impeach its own witness." *Id.* at 1380. Moreover, considering the Supreme Court's recent ruling in *James*, the District Court explained:

> If impeachment of other *defense* witnesses by use of an illegally obtained statement is prohibited, as it is under *James*, use of the statement to impeach *prosecution* witnesses is foreclosed a *fortiori*.

Id. (emphasis in original). The District Court reasoned that the concerns about a fair trial discussed in *James* are even more apparent with respect to prosecution witnesses. *Id.* For instance, extending the impeachment exception to the state's witnesses would give prosecutors "free reign" to present witnesses solely for their impeachment value in order to get illegally obtained evidence before the jury. *Id.* Such circumstances, the District Court said, "would virtually negate the exclusionary rule altogether." *Id.* Therefore, the Court concluded that "under the rules and reasoning of *Harris* and *James*, impeachment use of an illegal statement is allowed against the defendant alone." *Id.* Such remains the rule today.

Wisconsin courts have followed *Harris*, limiting the impeachment exception to the testifying defendant and never extending the exception beyond those confines. *See e.g.*, *State v. Mendoza*, 96 Wis. 2d 106, 118, 291 N.W.2d 478 (1980) ("[a] statement of the defendant made without the appropriate Miranda warnings, although inadmissible in the prosecution's case-in-chief, may be used to impeach the defendant's credibility if the defendant testifies

to matters contrary to what is in the excluded statement"); *Wold v. State*, 57 Wis. 2d 344, 356, 204 N.W.2d 482 (1973) ("evidence excluded on direct should not be used for impeachment *unless the accused takes the stand* and testifies to matters directly contrary to what is in the excluded statement") (emphasis added).[7]

In all of these cases, one thing is certain: illegally obtained statements are inadmissible during the state's case-in-chief. *James*, 493 U.S. at 313 ("evidence that has been illegally obtained . . . is inadmissible on the government's direct case"); *Harris*, 401 U.S. at 225 ("sufficient deterrence flows when the evidence in question is

[7] In *State v. Brecht*, the Wisconsin Supreme Court allowed the state to introduce evidence of a defendant's pre-*Miranda* silence after the defendant raised the issue on cross-examination. 143 Wis. 2d 297, 313, 421 N.W.2d 96 (1988). However, *Brecht* is distinguishable from this case and has no bearing on the impeachment exception announced in *Harris* as it pertains to the use of statements obtained in violation of *Miranda* for three reasons. First, there is no mention of *Harris* in the Court's opinion. Second, *Brecht* dealt with a defendant's pre-*Miranda silence*, not illegally obtained and excluded *statements*. An entirely separate line of Supreme Court precedent has developed regarding use of a defendant's silence at trial which is not relevant to this case. *See generally Fletcher v. Weir*, 455 U.S. 603, 605-07 (explaining difference between pre– and post– *Miranda* silence for impeachment purposes). Third, in *Brecht*, the Wisconsin Supreme Court relied on applicable U.S. Supreme Court precedent with respect to a prosecutor's ability to comment on a defendant's silence. *Brecht*, 143 Wis. 2d at 314 (citing *U.S. v. Robinson*, 485 U.S. 25 (1988)). By contrast, the U.S. Supreme Court has refused to permit the use of illegally obtained statements at trial during the state's case-in-chief and refused to extend the impeachment exception beyond the testifying defendant. *See James*, 493 U.S. at 320.

made unavailable to the prosecution in its case in chief"); *Kuntz*, 806 F. Supp. at 1380 ("use of an illegal statement is thus prohibited during any part of the state's case, even if used to impeach its own witness"). In fact, *never* has the *Harris* exception been applied to render constitutional the use of such statements in the state's case-in-chief—not in *Harris* itself; not in *James*; not in *Kuntz* (which in fact held such use would be *un*constitutional); and not in any Wisconsin case.

At bottom, these cases make clear that the impeachment exception permits the use of illegally obtained statements to be introduced for impeachment purposes against the defendant alone. Previously excluded statements cannot be used to impeach other defense witnesses (*James*) and they cannot be used to impeach witnesses for the prosecution (*Kuntz*).

Therefore, the impeachment exception set forth in *Harris* does not apply under the circumstances in this case where the evidence was introduced during the State's case-in-chief and was not introduced to impeach Mr. Garcia's testimony.

C. Admission of an illegally obtained statement to rehabilitate a prosecution witness before the defendant has even testified would implicate all the constitutional perils from which the underlying Miranda rule seeks to protect a defendant.

The impeachment exception cannot be extended to justify the circuit court's constitutional error in this case.[8] Such an extension would not only evince a blatant disregard for existing precedent, but it would also be unconstitutional for several reasons.

First, the impeachment exception announced in *Harris* necessarily depends on a defendant being able to freely exercise his Fifth Amendment right. Only when a defendant voluntarily chooses to take the stand, does he risk impeachment with his previously excluded statements. A rule permitting the state to introduce a defendant's illegally obtained statements *before* he chooses to testify

[8] The multi-factor balancing approach set forth by the State, framed as a decision to introduce evidence, is really a request that this Court create from whole cloth a new exception to the exclusionary rule (or, more generously, to extend the impeachment exception in *Harris* to justify the circuit court's actions in this case). State's Supp. Br. at 7-8. This Court cannot create new exceptions to the exclusionary rule or extend the impeachment exception in *Harris* because doing so would afford less protection to a criminal defendant under state law than the U.S. Constitution provides. *See generally Developments in the Law- The Interpretation of State Constitutional Rights*, 95 Harv. L. Rev. 1324, 1334 (1982) (explaining that the rights afforded under federal law characterize the "minimum floor of rights below which state courts cannot slip").

is inconsistent with the impeachment exception and would destroy a defendant's Fifth Amendment rights.

Next, by admitting Mr. Garcia's excluded statements in response to "absolutely proper" cross-examination, the circuit court effectively punished him for exercising his Sixth Amendment right to confront adverse witnesses.[9] This is a far cry from the penalty function served by the impeachment exception which "penalizes defendants for committing perjury by allowing the prosecution to expose their perjury through impeachment." *James*, 493 U.S. at 314.

Furthermore, extending the impeachment exception to allow the state to use illegally obtained statements to rehabilitate its own witness would create a chilling effect far greater than what was contemplated by the Supreme Court in *James*. Based on the circuit court's actions in this case, criminal defendants would be deterred from cross-examining adverse witnesses altogether for fear that their

[9] The Sixth Amendment to the United States Constitution states, in relevant part, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. Amend. VI. This guarantee also applies to state prosecutions. *Pointer v. Texas*, 380 U.S. 400, 406 (1965). Article 1, Section 7 of the Wisconsin Constitution also guarantees a defendant "the right . . . to meet the witnesses face to face . . .".

lawful questioning would lead to the introduction of previously excluded, illegally obtained statements. Such a result would severely infringe on a defendant's constitutional right to present a complete defense. *See State v. Heft*, 185 Wis. 2d 288, 302-03, 517 N.W.2d 494 (1994) (citing *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973)) (explaining that due process "requires that a criminal defendant be afforded a meaningful opportunity to present a complete defense, including the right to call, confront and cross-examine witnesses").

Finally, extending the impeachment exception to permit the introduction of illegally obtained statements to rehabilitate the credibility of the state's witness would sanction the very circumstances the District Court cautioned against in *Kuntz*—circumstances in which the prosecution could call a witness solely for the purpose of placing illegally obtained evidence before the jury. *See Kuntz*, 806 F. Supp. at 1380. The state frequently calls officers and detectives as witnesses at trial to testify about the criminal investigation of the case. Likewise, criminal defendants often seek to create a reasonable doubt as to their guilt by pointing

out inconsistencies or flaws in the state's investigation through cross-examination. If, every time an investigation is questioned, the state were allowed to introduce a defendant's illegally obtained statements under the guise of rehabilitating the credibility of an investigator, the value of illegally obtained evidence to the prosecution would be greatly increased—not to mention the opportunity to use such evidence would occur in almost every case. Where both the value of illegally obtained evidence and the opportunity to use such evidence are increased, an officer's incentive to obtain evidence through illegal means is also increased. *See James*, 493 U.S. at 318 (explaining that "police officers and their superiors would recognize that obtaining evidence through illegal means stacks the deck heavily in the prosecution's favor"). Therefore, for the same reasons the Supreme Court discussed in *James*, it would be "far more than a 'speculative possibility' that police misconduct will be encouraged by permitting such use of illegally obtained evidence." *Id.*

In sum, there is no basis to extend the impeachment exception to the circumstances of this case. The circuit court's decision to admit Mr. Garcia's statements was unconstitutional and must be reversed.

II. The rule of completeness does not permit the introduction of illegally obtained evidence.

The rule of completeness set forth in Wis. Stat. § 901.07 does not warrant the admission of statements previously excluded under *Miranda*. Moreover, the admission of Mr. Garcia's statements in this case was not necessary to prevent the jury from being misled.[10]

The rule of completeness says that when one party introduces a writing or statement in evidence, or part thereof, an adverse party may introduce any other part of the writing or statement, or any additional writing or statement which, out of fairness, should be considered to provide a complete picture. *See* Wis. Stat. § 901.07; *State v. Eugenio*, 219 Wis. 2d 391, 407-09 (1998). The "critical consideration" in applying the rule of completeness is "whether the

[10] The State concedes that the rule of completeness does not govern the outcome of this case. State's Supp. Br. at 11.

part of the statement offered into evidence creates an unfair and misleading impression without the remaining statements." *Eugenio*, 219 Wis. 2d at 411. If the remaining evidence is necessary for completeness and to avoid creating a misleading impression, "the evidence is admissible *unless otherwise proscribed by law*." *Id*. (emphasis added).

The rule of completeness may, in some cases, permit the introduction of evidence that is otherwise inadmissible under the rules of evidence. *See State v. Sharp*, 180 Wis. 2d 640, 653-55, 511 N.W.2d 316 (1993) (inadmissible hearsay may be admissible under the rule of completeness). However, "[t]he rule of completeness . . . should not be viewed as an unbridled opportunity to open the door to otherwise inadmissible evidence." *Eugenio*, 219 Wis. 2d at 412.

While the rule may permit the introduction of inadmissible hearsay evidence in some instances, it does not permit the introduction of evidence deemed inadmissible because it was obtained in violation of *Miranda*. There is a significant difference between evidence deemed inadmissible on evidentiary grounds, and

evidence deemed inadmissible on constitutional grounds.[11] For a defendant's statement to be admissible, "it must not only be voluntary, but it must be constitutionally antiseptic in terms of the mandate of the United States Supreme Court in Miranda." *Scales v. State*, 64 Wis. 2d 485, 490 (1974). Here, the lower court ruled that Mr. Garcia's statements were not "constitutionally antiseptic" and not admissible. Therefore, because Mr. Garcia's statements were "otherwise proscribed by law," *see Eugenio*, 219 Wis. 2d at 411, the rule of completeness cannot justify their admission.

[11] Federal courts, interpreting the federal counterpart to Wis. Stat. § 901.07, cannot even agree on whether the rule of completeness supports the admission of evidence deemed inadmissible on *evidentiary* grounds, let alone *constitutional* grounds. *Compare e.g., U.S. v. Lopez-Medina*, 596 F.3d 716, 735 (10th Cir. 2010) ("[e]ven if the [statement] would be subject to a hearsay objection, that does not block its use when it is needed to provide context for a statement already admitted"), *and U.S. v. Bucci*, 525 F.3d 116, 133 (1st Cir. 2008) ("the rule of completeness may be invoked to facilitate the introduction of otherwise inadmissible evidence"), *with U.S. v. Vargas*, 689 F.3d 867, 876 (7th Cir. 2012) ("a party cannot use the doctrine of completeness to circumvent Rule 803's exclusion of hearsay testimony"), *and U.S. v. Wilkerson*, 84 F.3d 692, 696 (4th Cir. 1996) ("even if . . . Rule 106 had applied to this testimony, it would not render admissible the evidence which is otherwise inadmissible under the hearsay rules"). If, as some courts believe, the rule of completeness does not support the admission of inadmissible hearsay evidence, then its use to support the admission of unconstitutionally-obtained evidence is foreclosed *a fortiori.* Nonetheless, there is no precedent for using the rule of completeness as a vehicle to overcome a constitutional violation.

Finally, admitting Mr. Garcia's excluded statements in this case was not necessary to prevent the jury from being misled. When the court reviewed the transcript of Mr. Garcia's cross-examination of Investigator Spiegelhoff, its primary concern was Mr. Garcia's questioning about whether the officer followed up on other possible causes of the child's injury in the week preceding his death, and whether any other incidents, besides those identified by Mr. Garcia, were presented to the medical examiner. R. 79 at 4-10. Considering the cross-examination, Judge Piontek said "[t]he question is whether the State has the ability to explain that." *Id.* at 10:24-25.

The reality is that the State *did* have the ability to explain why Investigator Spiegelhoff took the actions he did on re-direct examination immediately following Mr. Garcia's cross-examination the previous day. The State established that Investigator Spiegelhoff did not discuss an earlier incident that occurred at a laundromat with the medical examiner, because at the time he spoke with the medical examiner he was unaware that any such incident had occurred. R. 77 at 189:6-10. In addition, through the State's

questioning, the investigator explained that he did not follow up on or investigate events that took place in the days prior to the child's death because the medical examiner told him he only needed to know about injuries that would have occurred on the day the child died. *Id.* at 191:2-13. Therefore, by the time Judge Piontek considered whether it would be "manifestly unfair" to not allow the jury to hear Investigator Spiegelhoff's reasoning, the jury had *already* heard Investigator Spiegelhoff explain why he took the actions he did.

Of course, allowing the state to introduce a defendant's inculpatory statements would help the state explain its investigation in every case. But a rule allowing the state to introduce illegally obtained evidence every time it would help the state provide a fuller picture ignores the exclusionary rule altogether. Courts are always tasked with the difficult job of balancing competing concerns—fairness included—however, when it comes to the exclusion of evidence, "inadmissibility of illegally obtained evidence must remain the rule, not the exception." *James*, 493 U.S. at 319.

CONCLUSION

The circuit court's decision to admit Mr. Garcia's previously excluded statements was unconstitutional. Neither the impeachment exception, nor the rule of completeness can remedy the constitutional error in this case. This court must reverse.

Dated this 24th day of July, 2020.

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RULE 809.19(8)(D) CERTIFICATION

I hereby certify that this brief conforms to the rule contained in s. 809.19(8)(b) for a brief produced with a proportional serif font. The length of those portions of this brief referred to in s. 809.19(1)(d), (e), and (f) is 5,325 words.

RULE 809.19(12) CERTIFICATION

I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 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 24th day of July, 2020.

By: */s/ Emma Jewell*

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WISCONSIN COURT OF APPEALS CERTIFICATE OF MAILING

I hereby certify that on July 24, 2020, the Supplemental Brief of Defendant-Appellant was mailed by the U.S. Postal Service to the Clerk of the Wisconsin Court of Appeals on behalf of the Defendant-Appellant at:

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I hereby certify that a copy of the brief will be mailed by U.S. Postal Service to counsel for Plaintiff-Respondent:

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