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SUPREME COURT

SUPREME COURT
STATE OF WISCONSIN

Appeal No. 2018AP002319 CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

MANUEL GARCIA,

Defendant-Appellant.

Appeal from a Final Judgment of the
Circuit Court of Racine County,
the Hon. Michael Piontek Presiding,
Circuit Court Case No. 2010CF000365

Reversed by the Court of Appeals of Wisconsin, Dist. II, in a published decision, 2020 WI App 71

RESPONSE BRIEF OF DEFENDANT-APPELLANT MANUEL GARCIA

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PRELIMINARY STATEMENT

A criminal defendant's unconstitutionally obtained and properly suppressed statements can never be admitted in the State's case-in-chief, or otherwise as substantive evidence of the defendant's guilt. Yet, that is precisely what happened in this case.

At trial, the State claimed the admission of Mr. Garcia's unconstitutionally obtained statements in its case-in-chief was necessary to rehabilitate its witness—an investigator in the case—after Mr. Garcia supposedly "opened the door" to the statements on cross-examination by questioning the investigator about what was investigated in the case. The circuit court agreed with the State, concluding that admitting Mr. Garcia's statements was necessary for the jury to hear both sides of the story because Mr. Garcia *might* later try to argue to the jury that the investigation was "shoddy."

The circuit court made a fundamental error in this case. By admitting Mr. Garcia's unconstitutionally obtained and suppressed statements in the State's case-in-chief, the circuit court erroneously

subordinated Mr. Garcia's constitutional rights to mere evidentiary concerns. In doing so, the court disregarded decades of established precedent surrounding the *Miranda* exclusionary rule—precedent the State now urges this Court to ignore.

The State argues that unconstitutionally obtained statements can be admitted in the prosecution's case-in-chief if a defendant "opens the door" to their admission, or alternatively, where they serve as a "fair response." Although both of these concepts have been applied in limited circumstances to allow comment on a defendant's silence in order to rebut a defendant's claim, neither this Court nor the United States Supreme Court have ever extended them to justify the admission of already suppressed, unconstitutionally obtained statements in the State's case-in-chief. Now is not the time to reverse course.

A defendant's unconstitutionally obtained statements can only be admitted during the defendant's case to impeach the

contradictory testimony of the defendant, *not* during the State's case-in-chief, *not* as substantive evidence of the defendant's guilt, and certainly *not* to rehabilitate the State's own witness—regardless of the fact that they may provide more context for the State's case.

The rule against admitting unconstitutionally obtained statements, and its narrow impeachment exception, reflect a careful balance of competing values that should not be disturbed. Doing so would contradict decades of established precedent. It would signal to law enforcement that there is no need to adhere to the Constitution because unconstitutionally obtained evidence is just as valuable as constitutionally obtained evidence. And it would destroy the constitutional rights most sacred to the accused.

ISSUE PRESENTED FOR REVIEW

Does Wisconsin law permit the State to introduce a criminal defendant's unconstitutionally obtained, properly excluded statements during the State's case-in-chief for the purpose of rehabilitating one of the State's own witnesses?

The circuit court answered "yes." The court of appeals answered "no."

This Court should answer "no," and therefore affirm the court of appeals' decision.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are both customary and appropriate.

STANDARD OF REVIEW

A two-step process is used to review claims of constitutional error. *State v. Hogan*, 2015 WI 76, ¶ 32, 364 Wis. 2d 167, 868 N.W.2d 124; *State v. Martwick*, 2000 WI 5, ¶ 16, 231 Wis. 2d 801, 604 N.W.2d 552. First, the Court should uphold findings of fact unless they are clearly erroneous. *Hogan*, 2015 WI 76, ¶ 32. Second, the Court should "independently apply constitutional principles to those facts." *Id.*

The underlying facts are not in dispute; thus, this Court needs to consider only the constitutional principles applicable to those facts.

STATEMENT OF THE CASE

A. Mr. Garcia's arrest and custodial interrogation.

Early on Friday, March 12, 2010, Investigator Brad Spiegelhoff of the Racine Police Department was called to the Wheaton Franciscan Hospital regarding a deceased child, J.E.M. (R. 1 at 1.) At the hospital, Investigator Spiegelhoff interviewed the child's mother, Lawanda Martinez, and her boyfriend, Manuel Garcia. (*Id.*; R. 59 at 4.) Investigator Spiegelhoff specifically asked Mr. Garcia whether anything happened in the preceding week where J.E.M. appeared ill or had any injuries. (R. 1 at 2.) Mr. Garcia described two incidents to the Investigator that had occurred just prior to the child's death. In one, the child slipped and fell down the stairs; in another, the child jumped out of Mr. Garcia's truck and fell to the ground. (*Id.* at 2; R. 77 at 149:1-5, 19-22.)

After the interview, Mr. Garcia and Ms. Martinez left the hospital and returned to Mr. Garcia's house where Ms. Martinez had been staying on-and-off with J.E.M. and her other kids. Around nine

o'clock Friday morning, Investigator Spiegelhoff and another officer went to Mr. Garcia's house to take photographs of the steps and truck described by Mr. Garcia. (R. 77 at 154:23-155:9; R. 59 at 4.) Later in the morning, after leaving Mr. Garcia's home, Investigator Spiegelhoff spoke with Dr. Lynda Biedrzycki—the medical examiner who performed the autopsy for J.E.M. (R. 77 at 153:13-21.)

After speaking with Dr. Biedrzycki, Investigator Spiegelhoff returned to Mr. Garcia's house Friday afternoon to take Mr. Garcia and Ms. Martinez into custody for further questioning at the Racine Police Department. (R. 1 at 2; R. 77 at 154:14-20; R. 59 at 6.) At the police department, Investigator Spiegelhoff spoke with Ms. Martinez in more detail about the week leading up to J.E.M.'s death. (R. 77 at 160:22-25.) Ms. Martinez mentioned, for the first time, an incident that took place at a laundromat the day before the child died. (*Id.* at 162:2-7.) She stated that her older son and J.E.M. were pushing a laundry cart around when J.E.M. fell out of the cart. (*Id.*)

Investigator Spiegelhoff also interrogated Mr. Garcia at the Police Department. (R. 1 at 2.) Prior to the questioning, Investigator Spiegelhoff provided Mr. Garcia, a native Spanish speaker, a Racine Police Department Notification and Waiver of Rights form. The form was printed in English. (R. 11 (8/22/2011 Motion Hearing Ex. 1); R. 56 at 19:1-4.) Mr. Garcia was asked to read portions of the form out loud in English. (R. 59 at 7:12-16.) Mr. Garcia then signed the form and Investigator Spiegelhoff began the questioning (in English) that resulted in Mr. Garcia making statements (in English) that were inculpatory. (*Id.* at 7-8.)

On April 1, 2010 Mr. Garcia was charged with first-degree reckless homicide. (R. 3:1.)

B. The suppression and admission of Mr. Garcia's custodial statements.

Soon after charges were filed, the State moved to admit Mr. Garcia's inculpatory statements at trial. (R. 9 at 1.) Several years of

protracted litigation followed—including numerous hearings involving expert and witness testimony.

Eventually, circuit court Judge Wayne Marik issued an oral ruling on January 11, 2013, suppressing Mr. Garcia's custodial statements. Judge Marik determined that Mr. Garcia did not understandingly, knowingly, or intelligently waive his rights prior to speaking with Investigator Spiegelhoff at the police department (due in large part to the language difference) and therefore, his statements should be suppressed.[1] (R. 59 at 33-34.)

Judge Marik made clear that the State could not use the unconstitutionally obtained statements in its case-in-chief. (*Id.* at 35-36.) He explained, however, that the ruling would not preclude the State's use of the statements for rebuttal purposes if Mr. Garcia testified. (*Id.* at 36.)

[1] This ruling has not been challenged on appeal.

Before trial, the case was reassigned to Judge Michael Piontek. In a pre-trial hearing on motions in limine, Judge Piontek reaffirmed Judge Marik's decision to suppress Mr. Garcia's statements, reiterating that the statements are "not admissible for any purpose in the State's case in chief." (R. 74 at 20.)

At trial the State called Investigator Spiegelhoff as a witness during its case-in-chief. On direct-examination, the State questioned him about his investigation of the case. (R. 77 at 142-163.) Specifically, the State asked questions related to Investigator Spiegelhoff's discussions with Mr. Garcia and Ms. Martinez at the hospital, conversation with Dr. Biedrzycki, and investigation of the stairs and truck at Mr. Garcia's house, as well as the laundromat incident Ms. Martinez described at the police department. (*See id.*)

On cross-examination, Mr. Garcia also asked Investigator Spiegelhoff about his investigation and the events leading up to the child's death. The questioning focused on the timeline of events, the

other adults and family members with whom J.E.M. was staying in the preceding days and weeks, and the incidents involving the stairs, truck, and laundromat. (*Id.* at 163-181.)

Specifically—and directly relevant to the issue before the Court—counsel for Mr. Garcia asked Investigator Spiegelhoff what was investigated and what information was shared with Dr. Biedrzycki about the stairs, truck, and laundromat incidents:

Q Okay. So you never even spoke to the pathologist about the basket incident?
A No, I did not.
Q So then the pathologist has no idea, as far as you know, that -- let me rephrase that.
You've never spoke to the pathologist about the incident at the laundromat?
A No. I personally have not spoke to her.
Q So you were not -- you didn't take any -- did you do any investigation of the laundromat?
A No, I did not.

(*Id.* at 167:9-16.)

22	Q	And the only thing you presented to the pathologist is
23		the two incidences in which you asked Manuel about in
24		terms of any injuries that the child may have sustained
25		recently; am I right?

1	A	Correct.

(*Id.* at 168:22-169:1.) Later in the questioning, counsel for Mr. Garcia confirmed:

8	Q	So, again, those were the only two incidences in which
9		you brought to the examiner, to the pathologist?
10	A	When I spoke to her on the phone that morning those are
11		the two I brought up to her at the time.
12	Q	Nothing about the laundromat?
13	A	Correct.

(*Id.* at 181:8-13.) Neither the State nor the court objected to or in any way interrupted any of this questioning. At no point in the questioning did counsel for Mr. Garcia ask Investigator Spiegelhoff why his investigation went no further or why the laundromat incident was not presented to the pathologist.

Following the cross-examination, the State requested a side-bar conference and moved to admit Mr. Garcia's suppressed statements. (*Id.* at 182.) The State argued that Mr. Garcia's questioning challenged the "credibility and the job done by Investigator Spiegelhoff." (*Id.* at 182: 12-14.) The prosecutor said, "the only way I can rehabilitate that is I believe he's opened the door to the confession. Why he didn't continue on his investigation was because Mr. Garcia told him he did it." (*Id.* at 182:14-16.) Judge Piontek added that Mr. Garcia's questions about what Investigator Spiegelhoff talked to the medical examiner about caused him "concern," but he deferred ruling on the State's motion until he could review the transcript of the questioning. (*Id.* at 183:5-13; 185:19-20.)

In the interim, the State conducted re-direct examination of Investigator Spiegelhoff, establishing that he did not present the laundromat incident to the pathologist because at the time he spoke

to the pathologist on Friday morning he did not know about the laundromat incident. (*Id.* at 189:2-10.) He further testified that he did not feel it was necessary to consider events that occurred in the days prior to the day the child died because Dr. Biedrzycki told him that, based on her examination of the injuries, only the events on the day the child died would be relevant to his death. (*Id.* at 191:2-13.)

The next day, the court revisited the State's motion to admit the statements. The court quoted large portions of the cross-examination, noting that Mr. Garcia's questioning was "absolutely proper," and the State did not object to it. (R. 79 at 10:7-9.) Further, the court explained, "it is proper to inquire into the investigatory process by which Investigator Spiegelhoff determined what action to take in this case." (*Id.* at 10:9-12.) Despite this, the court then speculated that, based on the questioning, Mr. Garcia could later try to argue the investigation was "shoddy" in closing argument. (*Id.* at 10:19-23.) Even though the Judge acknowledged that, too, would be

"proper," he expressed concern about the possibility the State would not have the ability to explain why Investigator Spiegelhoff took the actions that he did. (*Id.* at 10-11.)

Ultimately, despite the cross examination being "totally appropriate and proper cross-examination," Judge Piontek concluded that Mr. Garcia's questioning about the investigation put his suppressed statements in controversy, compelling their admission. (*See id.* at 21-22.) The Judge provided no legal authority for admitting the statements in the State's case-in-chief but reasoned that "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.*)

In response to Judge Piontek's ruling, counsel for Mr. Garcia pointed out that it was the State that first questioned Investigator Spiegelhoff about investigating the laundromat incident and the cross-examination picked up where the State left off. (*Id*. at 23:5-23.)

Counsel for Mr. Garcia argued that to not allow further questioning about the investigation would be "tying [the] hands" of the defense. (*Id.* at 23:16-23.)

Nonetheless, the State was subsequently allowed to introduce, on re-direct examination, not only the content of the unconstitutionally obtained statements, but also approximately 45 minutes of video-footage of Mr. Garcia's interrogation.[2] (*Id.* at 22:19-24, 31-32.) Mr. Garcia was not planning to testify initially, but this turn of events forced his hand. In order to explain the evidence introduced in the State's case, Mr. Garcia was compelled to take the stand. (*See* R. 79 at 52:6-10.)

The admission of this evidence was no small matter. In closing argument, the State argued to the jury: "[a]nd ***most importantly***, we know from the evidence you heard yesterday that Manual Garcia

[2] Both the DVD and transcript of Mr. Garcia's interrogation were marked as Exhibits. Prior to the close of the State's case-in-chief, both were admitted, (R. 79 at 46:10-12) and received in evidence. (*Id.* at 48:10-12.)

told us he did this, [. . .] [h]is confession matches what [the medical examiner] told us. ***This removes any doubt*** for you about who did this…". (R. 80 at 14:10-12; 15:24-16:2.) (emphasis added). Mr. Garcia was then convicted and sentenced to 50 years, with 40 years of confinement. (R. 35.)

C. Mr. Garcia appeals, and the Court of Appeals reverses.

Mr. Garcia appealed his conviction, arguing that his suppressed statements should not have been admitted at trial. (*See*, *e.g.*, Defendant-Appellant Br. at 15.) The State responded, arguing that the trial court's decision to admit the statements was proper because Mr. Garcia "opened the door." (Plaintiff-Respondent Br. at 11.) The State cited the evidentiary "rule of completeness" in support of its argument. *Id.*

After the parties submitted their initial briefs, the court of appeals requested supplemental briefing on two questions: 1)

whether the rule set forth in *Harris v. New York*,[3] outlining the circumstances by which a defendant can open the door to impeachment by his excluded statements, applies in this case; and 2) whether the "rule of completeness" allows the State to introduce illegally obtained statements during its case-in-chief. (*See* Ct. App. Order at 1-2; Defendant-Appellant Supp. Br. at 1-2.)

In its supplemental brief, the State argued that the admission of Mr. Garcia's statements was proper under *Harris* and its progeny and advanced a four-factor test for determining the admissibility of excluded evidence. (*See* Plaintiff-Respondent Supp. Br. at 1, 7.) The State conceded, however, that the rule of completeness did not govern the outcome of the case. (*Id.* at 11.)

Mr. Garcia argued that *Harris*—including its underlying rationales and progeny—does not permit the introduction of unconstitutionally obtained statements during the State's case-in-

[3] 401 U.S. 222 (1971).

chief and that no exception to the exclusionary rule justified the admission of Mr. Garcia's statements. (Defendant-Appellant Supp. Br. at 1-2.)

The court of appeals issued a published decision on October 7, 2020, reversing Mr. Garcia's conviction and remanding the case. *State v. Garcia*, 2020 WI App 71, 394 Wis. 2d 743, 951 N.W.2d 631. The court concluded that the State may not utilize a defendant's voluntary but unconstitutionally obtained statements in its case-in-chief to rehabilitate its own witness. *See Id.* at ¶¶ 1, 8. The court of appeals considered the only applicable exception to the exclusionary rule that could support the admission of properly suppressed statements, the impeachment exception, and concluded it did not permit the introduction of Mr. Garcia's statements in this case. *See Id.* at ¶¶ 9-14. The court recognized the "State present[ed] no case law holding to the contrary," and cited no cases applying the four-part test enunciated in its brief. *Id.* at ¶¶ 14-16.

The court of appeals also considered the State's argument, premised on *State v. Brecht*,[4] that Mr. Garcia "opened the door" to the admission of his statements, or, put differently, that the admission of his statements was a fair response to his questioning. *Id*. at ¶ 15. Agreeing that fairness is a concern, and considering this argument, the court still reached the "categorical" conclusion that both fairness and constitutional concerns mandate that a defendant's unconstitutionally obtained statements can be used against him only after he decides to testify, in which case the statements can be used for impeachment purposes alone. *Id.*

ARGUMENT

The State now argues that the Court of Appeals applied the wrong "theory" to the case by considering *Harris* and its progeny, when it should have based its decision on a so-called "opening the door" theory. For the reasons set forth herein, the State's argument

[4] 143 Wis. 2d 297, 421 N.W.2d 96 (1988).

is not just devoid of precedent, but it is also contrary to the constitutional values promoted by the exclusion of unconstitutionally obtained evidence. This Court must affirm.

I. No established exception to the *Miranda* exclusionary rule permits the use of a criminal defendant's unconstitutionally obtained, properly excluded statements in the State's case-in-chief.

Statements obtained in violation of *Miranda* are generally inadmissible at trial. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966). *See Michigan v. Harvey*, 494 U.S. 344, 351 (1990) ("[t]he prosecution must not be allowed to build its case against a criminal defendant with evidence acquired in contravention of constitutional guarantees and their corresponding judicially created protections"). *Miranda* counsels that the exclusion of unconstitutionally obtained statements is essential to the Fifth Amendment's protection against compelled self-incrimination.[5] *See Miranda*, 384 U.S. at 476.

[5] 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)

Although adherence to the dictates of *Miranda* may occasionally result in the exclusion of highly probative evidence from trial, these evidentiary concerns are overridden by a greater concern for protecting the constitutional rights of the defendant. *James v. Illinois*, 493 U.S. 307, 311 (1990) ("[t]he occasional suppression of illegally obtained yet probative evidence has long been considered a necessary cost of preserving overriding constitutional values").

Therefore, voluntary statements obtained in violation of *Miranda* are categorically inadmissible during the prosecution's case-in-chief, or otherwise as substantive evidence of guilt.[6] *United States v. Havens*, 446 U.S. 620, 628 (1980). *See also James v. Illinois*, 493 U.S.

("[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."

[6] Involuntary statements obtained in violation of *Miranda* are inadmissible at trial for any purpose. *State v. Franklin*, 228 Wis. 2d 408, 412, 596 N.W.2d 855 (Ct. App. 1999) (citing *State v. Moats*, 156 Wis. 2d 74, 93, 457 N.W.2d 299 (1990)).

307, 313 n. 3 (1990); *State v. Franklin*, 228 Wis. 2d 408, 412, 596 N.W.2d 855 (Ct. App. 1999). Even during the defendant's case, voluntary statements obtained in violation of *Miranda* are inadmissible, except for in one exceptional circumstance (which is not the case here).

It is against this backdrop—categorical exclusion of unconstitutionally obtained statements during the prosecution's case-in-chief and near categorical exclusion of them during the defendant's case—that the State comes before this Court asking it to bless the circuit court's admission of unconstitutionally obtained statements in its case-in-chief.

The State argues the admission of Mr. Garcia's statements was justified under, what it calls, a distinct "opening the door" exception to the *Miranda* exclusionary rule, triggered by Mr. Garcia's questions on cross-examination. The State's argument is incorrect because there is no exception to the *Miranda* exclusionary rule that permits

the introduction of unconstitutionally obtained statements in the State's case-in-chief. Moreover, creating such a vague exception to the exclusionary rule would destroy the constitutional values it is designed to protect.

A. Voluntary statements obtained in violation of Miranda may only be admitted in the defendant's case to impeach a defendant's conflicting testimony.

As already mentioned, the Supreme Court has recognized a narrow exception to the *Miranda* exclusionary rule that allows the prosecution to introduce a defendant's voluntary, but unconstitutionally obtained and excluded statements if—and only if—the defendant testifies at trial in a manner that conflicts with his excluded statements. *Harris*, 401 U.S. at 225-26.

This "impeachment exception" was first applied in *Walder v. United States*, in which the Court concluded that physical evidence, obtained in violation of the Fourth Amendment, could be introduced to impeach the defendant's credibility at trial after he testified in a manner that contradicted the excluded evidence. 347

U.S. 62, 66 (1954). In *Walder*, the Court found that the defendant's assertion on direct examination that he never possessed any narcotics "opened the door," solely for the purpose of impeaching his credibility, to the admission of physical evidence (there, heroin) unlawfully obtained in connection with an earlier proceeding. *Id.* at 64-65.

In *Harris v. New York*, the Court extended the *Walder* impeachment exception from physical evidence to statements obtained in violation of *Miranda*. 401 U.S. at 224-26. The defendant in *Harris* took the stand and testified in a manner that contradicted his inadmissible statements. *Id.* at 223. On cross-examination, the prosecution read the defendant's inadmissible statements aloud to the jury to impeach his credibility. *Id.* Following the questioning, the trial judge instructed the jury that the statements could only be considered in evaluating the defendant's credibility, not as substantive evidence of guilt. *Id.*

The Supreme Court affirmed the trial court's decision to admit the statements, finding an exception to the *Miranda* exclusionary rule was justified because "[t]he shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense…". *Id.* at 226. The Court reasoned that a criminal defendant is not compelled to take the stand, but if he chooses to testify, he is under an obligation to speak truthfully or risk the consequences of impeachment. *See id*. at 225. On balance, the Court found the value of admitting the statements (provided they are trustworthy) in furthering the truth-seeking function of a criminal trial, outweighed the "speculative possibility that impermissible police conduct [would] be encouraged thereby." *See id.* at 224-25. The Court concluded that "sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief." *Id.*

The Supreme Court has refused to expand the class of impeachable witnesses beyond the testifying defendant. *James*, 493 U.S. at 313. In *James*, the defendant did not testify, but called a witness whose testimony contradicted the defendant's previously suppressed, illegally obtained statements. *Id.* at 310. In response, the trial court permitted the prosecution to introduce the defendant's illegally obtained statements to impeach the defense witness's credibility. *Id.* The Illinois Supreme Court affirmed, reasoning that admission of the statements was proper to prevent the defendant from engaging in perjury "by proxy." *Id.* at 310-11.

The Supreme Court reversed, concluding that expanding the *Harris* exception would "frustrate rather than further the purposes underlying the exclusionary rule." *Id.* at 314. The Court explained that the rationales underlying the impeachment exception do not extend to other defense witnesses:

- First, the penalty function served by the impeachment exception – to punish a defendant who takes the stand

and commits perjury – cannot be extended to other defense witnesses because doing so would punish the defendant for the choices, or innocent mistakes, of other defense witnesses. *Id.* at 314-15.

- Second, the threat of impeachment would chill defendants from calling helpful witnesses out of fear that their testimony could lead to the introduction of previously excluded evidence. *Id.* at 316. The Court reasoned that just as defendants cannot use excluded evidence as a "shield for perjury," the State cannot "brandish such [excluded] evidence as a sword with which to dissuade defendants from presenting a meaningful defense through other witnesses." *Id.* at 317.

- Third, the Court said 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. *Id.* at 317-18. The opportunity to use illegally obtained evidence would be increased because the number of defense witnesses easily outnumbers testifying defendants. *Id.* at 318. Additionally, mere access to illegally obtained evidence would benefit the prosecution because it could be used not just to deter perjured testimony, but to deter defendants from calling witnesses altogether. *Id.* Either way, law enforcement would recognize that obtaining evidence unconstitutionally "stacks the deck heavily in the prosecution's favor." *Id.* The Court concluded that excluding illegally obtained evidence from the

> prosecution's case-in-chief *would not go far enough* to protect the interests underlying the exclusionary rule and thus, it held that such evidence may not be admitted to impeach other defense witnesses. *See id.* at 318-19.

As the foregoing shows, the Supreme Court's exception to the *Miranda* exclusionary rule is not only narrow, but it reflects a careful balance of competing values—a balance that Wisconsin courts have followed for decades. *See, e.g.*, *State v. Mendoza*, 96 Wis. 2d 106, 118, 291 N.W.2d 478 (1980); *Wold v. State*, 57 Wis. 2d 344, 356, 204 N.W.2d 482 (1973). *See also Kuntz v. McCaughtry*, 806 F. Supp. 1373, 1380 (E.D. Wis. 1992).

The impeachment cases are the *only* cases recognizing an exception to the *Miranda* exclusionary rule that permits the introduction of a defendant's unconstitutionally obtained and previously suppressed statements at trial.

Moreover, although the United States Supreme Court has occasionally used the phrase "opened the door" (or its cognates) as a

means of defining the circumstances triggering the impeachment exception itself, *see, e.g., James*, 493 U.S. at 314 (explaining that the impeachment exception "leaves defendants free to testify . . . without *opening the door* to impeachment by carefully avoiding any statements that directly contradict the suppressed evidence") (emphasis added), neither it nor this Court has ever applied this so-called "opening the door" exception to allow the prosecution to use a defendant's unconstitutionally obtained, properly suppressed statements at trial in the prosecution's case-in-chief. Neither court has ever considered how such a broad, undefined exception could trigger the admission of unconstitutionally obtained statements in the prosecution's case-in-chief. The court of appeals appropriately recognized this and analyzed this case in light of the governing precedent.

Nevertheless, the State maintains that "opening the door" is (or at least should be) a distinct exception to the *Miranda*

exclusionary rule that supports the admission of Mr. Garcia's statements in this case. Without articulating what "opening the door" means for purposes of admitting unconstitutionally obtained statements during the State's case-in-chief, the State cites a litany of cases addressing silence and argues that "opening the door" is analogous to "fair response," referring to the "fair response doctrine" enunciated by the Supreme Court in *United States v. Robinson*, 485 U.S. 25 (1988).

The cases cited by the State applying the "fair response" doctrine, however, are inapposite to the facts and circumstances in this case because none of them deal with unconstitutionally obtained statements, let alone permit their admission as a "fair response" to anything; nor do they grapple with the constitutional implications of creating or broadening exceptions to *Miranda* that justify admitting suppressed statements, as the impeachment cases do.

B. The fair response doctrine does not permit the admission of a defendant's previously excluded, unconstitutionally obtained statements.

The State's argument is premised on an impermissibly broad view of the rule articulated by the Supreme Court in *United States v. Robinson*, 485 U.S. 25 (1988). *Robinson* dealt solely with a prosecutor's ability to comment on a defendant's failure to testify at trial in response to "a claim made by defendant or his counsel." *Id*. at 32. The case did not even address the admission of unconstitutionally obtained statements, much less create an exception to the unbending rule that such statements cannot be admitted during the prosecution's case-in-chief.

In *Robinson*, the defendant did not testify at trial, but defense counsel argued in closing that the Government had unfairly denied the defendant an opportunity to explain his actions. *See id.* at 27 & n. 2. The prosecutor objected, arguing that defense counsel's remarks "opened the door" to allow the prosecutor to comment on the defendant's decision not to testify. *Id.* at 28. The trial court agreed

with the prosecution, permitting a limited response in rebuttal, and instructing, "I will let you say that the defendants had every opportunity, if they wanted to, to explain this to the ladies and gentlemen of the jury." *Id.* Thus, the prosecutor argued in rebuttal, the defendant "could have taken the stand and explained it to you, anything he wanted to." *Id.*

The Sixth Circuit reversed, finding that the prosecutor's comment on the defendant's decision not to testify deprived him of a fair trial under the Fifth Amendment, relying on *Griffin v. California*, 380 U.S. 609 (1965).[7] *Id.* at 29.

The Supreme Court disagreed, however, clarifying that *Griffin* applies where a prosecutor "on his own initiative" asks the jury to draw an adverse inference from a defendant's silence. *Id*. at 32. By

[7] In *Griffin*, the Supreme Court held that the Fifth Amendment forbids the prosecution from commenting on the accused's silence at trial and prohibits the court from instructing that such silence is evidence of guilt. *See Robinson*, 485 U.S. at 30.

contrast, the Court explained that there is no violation of the Fifth Amendment privilege where, "as in this case the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by defendant or his counsel." *Id.* The Supreme Court was clear that *Griffin* would not "preclude a fair response by the prosecutor *in situations such as the present one*." *Id.* at 34. (emphasis added).

In essence, *Robinson* creates a limited exception to *Griffin* that permits the prosecution to comment on a defendant's opportunity to testify at trial in response to a claim first made by the defendant that he did not have such an opportunity. As the State correctly points out, Wisconsin law is in accord. *See State v. Keith*, 216 Wis. 2d 61, 80, 573 N.W.2d 888 (Ct. App. 1997) (explaining the prosecution may give a "measured reply to defendant's calling attention to his own failure to testify") (quoting *State v. Edwardsen*, 146 Wis. 2d 198, 215, 430 N.W.2d 604 (Ct. App. 1988)). *See also State v. Doss*, 2008 WI 93, ¶

81, 312 Wis. 2d 570, 754 N.W.2d 150 (recognizing that three factors must be present for a prosecutor's comments to violate the rule articulated in *Robinson*).[8]

Neither the *Robinson* fair response doctrine, nor the Wisconsin cases applying it, nor the three-factor *Doss* test are relevant to this case. All dealt with the prosecution's ability to comment on a defendant's failure to testify. None deal with the admission of unconstitutionally obtained statements. In this case, the State did not comment on Mr. Garcia's failure to testify in response to an argument made by him; the State admitted his unconstitutionally obtained statements in its case-in-chief to rehabilitate its witness.

Notwithstanding this fundamental distinction, the State places principal reliance on *State v. Brecht*, a case which, like *Robinson*,

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[8] *Doss* recognized three factors initially set forth in *State v. Jaimes*: "[F]or a prosecutor's comment to constitute an improper reference to the defendant's failure to testify, three factors must be present: (1) the comment must constitute a reference to the defendant's failure to testify; (2) the comment must propose that the failure to testify demonstrates guilt; and (3) the comment must not be a fair response to a defense argument." 2006 WI App 93, ¶ 21, 292 Wis. 2d 656, 715 N.W.2d 669 (citing *Robinson,* 485 U.S. at 34).

involved a prosecutor's ability to comment on a defendant's silence after defense counsel asked questions about that silence during cross-examination. 143 Wis. 2d 297, 313-14, 421 N.W.2d 96 (1988). In *Brecht*, counsel for the defendant cross-examined the arresting officer and asked questions about what the defendant said (or didn't say) during his arrest:

> Q: After you had taken him into custody he made a statement to you as you approached the squad car didn't he?
> A: Yes.
> Q: In fact he told you that it was a big mistake, he wanted to talk to someone.
> A: Yes he did.
> Q: He never explained further to you what he meant by 'big mistake', did he?
> A: No he didn't.

Id. at 313. Unsurprisingly, this Court held that it was not constitutional error for the prosecutor to question the officer on re-direct about the defendant's pre-*Miranda* silence during arrest "[b]ecause Brecht's counsel initially raised the issue of Brecht's silence when under arrest." *Id.* at 314. This Court noted that its conclusion was in accord with *Robinson*. *Id.* And it was – and, for

that reason, *Brecht* is also inapposite here because it does not address circumstances in which the State can introduce unconstitutionally obtained statements to rehabilitate its witness.

The other federal cases cited by the State address a concept related to the fair response doctrine that is equally distinguishable and unrelated to the circumstances of this case. Specifically, these cases address a prosecutor's ability to comment on a defendant's post-*Miranda* silence when a defendant argues he cooperated with law enforcement at trial.[9] The impeachment-related concept

[9] *See United States v. Martinez-Larraga*, 517 F.3d 258, 268 (5th Cir. 2008) ("…a prosecutor's reference to a defendant's post-*Miranda* silence may *properly* be made… to respond to some contention of the defendant concerning his post-arrest behavior") (emphasis in original); *United States v. Shue*, 766 F.2d 1122, 1129-32 (7th Cir. 1985) (recognizing that the prosecution can "elicit testimony of the defendant's post-arrest silence to rebut the impression of full cooperation" but refusing to apply it in that case because the government's use of the post-arrest silence went "beyond [the] fair limits to impeach his explanatory story as a recent fabrication"); *United States v. Fairchild*, 505 F.2d 1378, 1383 (5th Cir. 1975) ("evidence of Fairchild's Miranda silence was admissible for the purpose of rebutting the impression which he attempted to create: that he cooperated fully with the law enforcement authorities").

addressed in those cases is derived from the Supreme Court's decision in *Doyle v. Ohio*, 426 U.S. 610 (1976).

In *Doyle*, the Court held that a defendant's post-arrest, post-*Miranda* silence may not be used to impeach a defendant's exculpatory story first told at trial; however, the Court explained in a footnote, "the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest." 426 U.S. 610, n.11 (1976) (citing *Fairchild*, 505 F.2d at 1383). In that situation the fact of prior silence would not be admitted to impeach, but rather to "challenge the defendant's testimony as to his behavior following arrest." *Id.* Courts have referred to this caveat as an exception to *Doyle*. *See, e.g.*, *Martinez-Larraga*, 517 F.3d at 268; *Shue*, 766 F.2d at 1129.

The *Doyle* exception is also inapposite to the circumstances of this case for two reasons: (1) it applies to silence, not statements, and

(2) even if it did extend to unconstitutionally obtained statements, Mr. Garcia's suppressed statements were not admitted in an effort to contradict any testimony or argument as to his behavior following arrest.

C. The fair response doctrine cannot be extended to meet the circumstances in this case because Mr. Garcia did not testify in contradiction of or otherwise raise the issue of his suppressed statements.

None of the fair response doctrine or *Doyle* exception cases cited by the State address the prosecution's use of a defendant's unconstitutionally obtained statements in the prosecution's case-in-chief for rehabilitation purposes. While this alone is enough to dismiss them outright, they are distinguishable on another, important basis.

Generally speaking, the fair response doctrine and *Doyle* exception are premised on a defendant's affirmative suggestion of a proposition that relates directly to the conduct the constitutional protection seeks to shield (i.e., the defendant's silence) and that

cannot be refuted except by lifting the erstwhile constitutional protection (i.e., by commenting on the defendant's silence). Specifically, they are triggered when a defendant: (1) comments on his ability or inability to testify (*Robinson*); or (2) creates the impression of cooperation with law enforcement (*Doyle* exception).

For example, in the cases cited by the State, the prosecution was permitted to comment on the defendant's silence because the defendant first raised the issue of his silence or cooperation with law enforcement:

- In *Fairchild*, the defendant raised the issue of his cooperation with law enforcement. 505 F.2d at 1383.

- In *Martinez-Larraga*, counsel for the defendant argued in closing that the government presented no evidence the defendants made inculpatory statements. 517 F.3d at 268-69.

- In *Shue*, the defendant testified that he cooperated with police. 766 F.2d at 1129. However, the court ultimately held that the government's subsequent references to the defendant's silence violated the defendant's constitutional rights because the assertions went "beyond fair limits to impeach his explanatory story,"

and implied that his silence was inconsistent with his claim of innocence. *Id*. at 1131-32.

- In *Brecht*, counsel for the defendant questioned the arresting officer *about the defendant's silence*. 143 Wis. 2d at 313.

While all of these cases demonstrate how defendants can waive constitutional protection otherwise afforded to their *silence* and thus, trigger limited comment by the prosecution on such silence, they have nothing to do with the circumstances triggering the admission of *statements* obtained in violation of *Miranda* and excluded from trial.

The Supreme Court has made clear that the *only* way a defendant can raise his or her suppressed statements in such a way that waives the constitutional protection afforded to unconstitutionally obtained *statements* is by testifying in a manner that contradicts the statements. *See infra*, Part I.A. Here, Mr. Garcia's statements were admitted in the State's case-in-chief before he ever had the opportunity to testify or exercise his right not to do so.

Assuming, *arguendo*, a defendant could somehow waive *Miranda* protection by referencing unconstitutionally obtained statements in the prosecution's case-in-chief no such waiver ever occurred in this case. Mr. Garcia never referenced, commented on, or argued his suppressed statements. His "absolutely proper" (*see* R. 79 at 10:7-9.) cross-examination of the Investigator about the investigation and what incidents were presented to the pathologist had nothing to do with the suppressed statements. Counsel for Mr. Garcia did not state or imply that Mr. Garcia made in-custody statements to the investigator; he did not comment on Mr. Garcia's ability or inability to make statements to the investigator; and he did not broach Mr. Garcia's custodial interrogation in any way, shape, or form. Thus, even the premise underlying the fair response doctrine and *Doyle* exception cannot be applied or extended to the circumstances of this case.

Furthermore, Mr. Garcia's questioning did not seek to capitalize on or take advantage of the prosecution's inability to comment on his suppressed statements. It was the State that first questioned Investigator Spiegelhoff on direct about his investigation of the case, including his investigation of the laundry-cart incident.[10]

Therefore, Mr. Garcia's cross-examination of Investigator Spiegelhoff about the investigation was not a deliberate trial strategy designed to take advantage of the suppression of his statements or convert the *Miranda* shield into a sword. Rather, his questioning was directly related to the State's questions on direct. In this case, it would have been ineffective assistance of counsel for Mr. Garcia's

[10] Specifically, the State asked:

> Q: And did you go follow-up and investigate this laundry cart at the laundromat that she described [J.E.M.] falling out of?
> A: No, I did not.
> Q: Why?
> A: Because based on what Dr. Biedrzycki told me, it was – it could absolutely not be involved in the injury that caused his death.

(R. 77 at 162:19-25, 163:1.)

lawyer *not* to follow-up on the State's questions to Investigator Spiegelhoff about his investigation of the laundromat incident.

The way the State tried to disprove and discredit other potential causes for the child's death, bolstering its case, Mr. Garcia simply sought to establish that there were multiple ways in which the child could have sustained the injuries eventually causing his death. Mr. Garcia's theory of the case would have been the same regardless of whether his statements had been suppressed, and it remained unchanged even after they were admitted.

Finally, without addressing whether obtaining inculpatory statements from a defendant is a justifiable basis for stopping an investigation, Mr. Garcia's questioning did not call for that explanation. He did not ask *why* Investigator Spiegelhoff did or did not pursue other leads, and he did not argue the propriety of the investigation in the cross-examination. His questioning focused solely on *what* incidents were investigated. Even Judge Piontek

noted that the questioning was proper, and that his concern was based on what Mr. Garcia *might* later argue in closing. (*See* R. 79 at 21: 9-18.)

Thus, the State's "opening the door" argument suffers from a fundamental flaw in that Mr. Garcia, even if the law permitted him (it does not), never opened any doors.

II. Extending the fair response doctrine to permit the introduction of unconstitutionally obtained statements in the State's case-in-chief when a defendant has not yet testified, in order to rebut arguments the defendant might make (but has not) would defeat the purpose of *Miranda* and the exclusionary rule.

To the last point, what the State is really asking the Court to do in this case—though not explicitly or by providing any clear framework—is to create a new exception to the *Miranda* exclusionary rule out of whole cloth that says even when a defendant does *not* waive constitutional protection by testifying in a manner that contradicts his suppressed statements, but merely pursues a theory of innocence the State thinks can be rebutted by

suppressed statements, the State should be permitted to introduce unconstitutionally obtained statements as a means of rehabilitating its case. Crafting such an exception, however, would destroy the constitutional rights the *Miranda* exclusionary rule is intended to protect.

The rules referenced by the State, prohibiting comment on a defendant's silence, while intended to protect a defendant's right against self-incrimination, are not directed at deterring arbitrary and oppressive police conduct in the way the Fourth and Fifth Amendment exclusionary rules are. Silence is not *obtained*, so the concerns about illegal evidence gathering underlying the exclusionary rules do not exist in that context. Thus, "exceptions" to those rules—the "fair response" doctrine, *Doyle* exception—do not encourage improprieties in evidence gathering, nor do they account for this concern.

By contrast, exceptions to the exclusionary rules must account for the constitutional values on which they are based, primarily, deterring unconstitutional police conduct. As the Supreme Court explained in *James*, the impeachment exception to the *Miranda* exclusionary rule "reflects a careful weighing of the competing values." *James*, 493 U.S. at 320. Thus, the Court instructed:

> When defining the precise scope of the exclusionary rule… we must focus on systemic effects of proposed exceptions to ensure that individual liberty from arbitrary or oppressive police conduct does not succumb to the inexorable pressure to introduce all incriminating evidence, no matter how obtained, in each and every criminal case.

Id. at 319-20. Considering the systemic effects of the State's preferred outcome in this case reveals how damaging such a result would be on a defendant's constitutional rights. Several reasons compel this conclusion.

First, permitting the introduction of unconstitutionally obtained statements in response to "absolutely proper" cross-examination would effectively punish defendants for exercising

their Sixth Amendment rights to confront adverse witnesses.[11] The right to confront adverse witnesses necessarily carries with it the right to challenge the witnesses' credibility. To allow the State to admit unconstitutionally obtained evidence in an effort to rehabilitate the credibility of its witness, is to punish the defendant for properly exercising a constitutional right. This is a far cry from the penalty function served by the *Harris* impeachment exception which "penalizes defendants for committing perjury by allowing the prosecution to expose their perjury through impeachment... ." *James*, 493 U.S. at 314.

Faced with the choice of exercising one's constitutional right or risking the admission of unconstitutionally obtained statements, a defendant will likely always choose the less risky option and forego

[11] The Sixth Amendment to the United States Constitution provides, 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 includes 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 witnesses.

entirely proper, lawful lines of defense. This would create a chilling effect far greater than what the Supreme Court contemplated in *James* when it considered whether expanding the impeachment exception to other defense witnesses would chill defendants from presenting their best defense through the testimony of others. *See id*. at 314-15.

In deciding *James*, the Supreme Court was not blind to the fact that there could be "gains to the truth-seeking process" if unconstitutionally obtained statements could be admitted in response to defense witness testimony. *See James*, 493 U.S. at 317. However, the Court unequivocally concluded that any purported benefits would be offset by the loss of probative witness testimony. *Id.* The same rationale applies here.

In almost every case a defendant will cross-examine the State's witnesses or challenge the State's investigation, and in some cases, this may be his or her only defense. To then punish a

defendant for doing just that through effective cross-examination would severely infringe—if not eliminate—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"). If the State is permitted to introduce excluded evidence to rehabilitate its case every time a defendant seeks to create a reasonable doubt, there will be nothing left of the exclusionary rule and the constitutional rights it is designed to protect.

Moreover, the rule urged by the State creates a Catch-22 for defendants that undermines the deterrent value of the exclusionary rule. If a defendant is chilled from pursuing a valid defense for fear that it could lead to the admission of suppressed evidence, the State

inures a benefit. On the other hand, if a defendant risks admission of the unconstitutionally obtained evidence and pursues a theory of innocence that—in the State's opinion—could be undermined by the excluded evidence, the State benefits from the admission of evidence to rehabilitate its case. Under either circumstance, the State benefits by having unconstitutionally obtained evidence in its possession.

When the value of illegally obtained evidence is increased, so too is the incentive to disregard constitutional restraints on evidence gathering. *James*, 493 U.S. at 318-19. Importantly, in *James*, the Court concluded that just excluding illegally obtained evidence from the prosecution's case-in-chief *wouldn't go far enough* to uphold constitutional limits on evidence gathering. *See id*. at 319.

Furthermore, a rule permitting the State to introduce properly suppressed statements to rehabilitate its witness would create an end-run around the very circumstances the Supreme Court precluded in *James*. Under *James*, the prosecution cannot introduce a

defendant's unconstitutionally obtained statements during the defendant's case to impeach a defense witness' testimony. *Id*. at 319-20. A rule allowing the State to introduce unconstitutionally obtained statements during its case-in-chief to rehabilitate its witness would permit the State to introduce evidence in its case-in-chief that it would otherwise be prohibited from introducing during the defendant's case. Such a perverse and unconstitutional result must be rejected. *See Kuntz*, 806 F. Supp. at 1380 ("…use of an illegal statement is thus prohibited during any part of the state's case…. 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*.") (emphasis in original).

Because the admission of Mr. Garcia's statements in this case cannot rest on established precedent and crafting a new exception to the *Miranda* exclusionary rule would have disastrous consequences

on the rights of the accused, this Court must reject the State's argument.

III. Even if the fair response doctrine could be triggered by something other than a claim made by the defendant about his opportunity to testify, as well as extended to justify the admission of unconstitutionally obtained statements in the State's case-in-chief, the trial court's admission of Mr. Garcia's unconstitutionally obtained statements was not a fair response to his questioning.

Assuming *arguendo* that proper cross-examination could somehow waive constitutional protection or trigger the admission of a defendant's unconstitutionally obtained statements during the State's case-in-chief, the State's actions in this case went far beyond any tolerable response. If *any* response from the State is warranted, it must be measured in comparison to the questioning by the defendant. *C.f. Robinson*, 485 U.S. at 33 ("it is important that both the defendant and the prosecutor have the opportunity to meet *fairly* the evidence and arguments of one another") (emphasis added).

The Judge in this case permitted a significantly unbalanced response to Mr. Garcia's lawful cross-examination. Mr. Garcia's

questioning related solely to *what* was investigated. No subjective explanation from the Investigator was required to answer the question, period. But even if the Investigator was permitted to mention a discussion with Mr. Garcia, there was no justifiable reason to permit questioning and argument focused on the content of that discussion—let alone 45 minutes of video footage from the interrogation. To use the State's preferred analogy, if Mr. Garcia's questioning somehow unlocked the door, the State's response blew the door wide open.

At bottom, even if this Court thinks *some* measured exception to the *Miranda* exclusionary rule may be warranted in certain situations this case cannot be used as the vehicle for creating it.

CONCLUSION

For all these reasons, the Court should affirm the court of appeals' decision and remand to the circuit court for a new trial.

Dated this 30th day of March, 2021.

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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 proportional serif font. The length of this brief if 7,162 typed words; the word count for imaged portions is 154; total words is 7,316.

Dated this 30th day of March, 2021.

By: /s/ Emma Jewell
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I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Section 809.19(12), Stats.

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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 30th day of March, 2021.

By: /s/ Emma Jewell
Emma Jewell

WISCONSIN SUPREME COURT
CERTIFICATE OF MAILING

I hereby certify that on March 30, 2021, the Brief and Appendix of Manuel Garcia was sent to the Wisconsin Supreme Court on behalf of the Defendant-Appellant via FedEx at:

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I hereby certify that three copies of the brief will be mailed by U.S. Postal Service to counsel for plaintiff-respondent-petitioner at:

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