STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP002319-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

MANUEL GARCIA

Defendant-Appellant.

On Appeal from a Decision of the Court of Appeals, District II, Reversing a Judgment of Conviction and Sentence Entered in Racine County Circuit Court, the Honorable Michael Piontek, Presiding

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AMICUS CURIAE BRIEF OF WISCONSIN STATE PUBLIC DEFENDER

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ARGUMENT

The state's proposed exception to the exclusionary rule is contrary to U.S. Supreme Court precedent and would have a chilling effect on meaningful defenses, vastly increase the number of illegally obtained statements admitted, and appreciably undermine the deterrent effect of the exclusionary rule.

A. Introduction.

The State Public Defender is filing this amicus curiae brief to address the broad implications of the state's proposed exception to the exclusionary rule.[1] The U.S. Supreme Court decided *Miranda v. Arizona*, 384 U.S. 436 (1966), nearly 55 years ago. Yet, it has only endorsed one exception to the exclusionary rule applicable to *Miranda* violations: impeachment of the defendant.

Despite this, the state has proposed a new, broad exception allowing the state to admit statements obtained in violation of *Miranda* whenever the defense "opens the door" as a "fair response." There seems to be no limit to the proposed exception as long as the state alleges the illegally

[1] The SPD will not discuss the specific facts of this case. Instead, the SPD will address the broader implications of the state's proposed exception to the exclusionary rule and reference the parties' arguments as needed.

obtained statement is needed to rebut an allegation made (directly or implicitly) by the defense. This exception would have a chilling effect on meaningful defenses, vastly increase the number of illegally obtained statements admitted into evidence, and appreciably undermine the deterrent effect of the exclusionary rule, contrary to U.S. Supreme Court precedent. *See Harris v. New York*, 401 U.S. 222, 225 (1971); *James v. Illinois*, 493 U.S. 307, 313 (1990).

The state argues the aforementioned precedent does not control because this is not an impeachment case, but instead, a rehabilitation case. The state has alleged a distinction without a difference. This is a case about illegally obtained evidence and the exclusionary rule. Therefore, the U.S. Supreme Court's conclusions about when an exception to the exclusionary rule is permitted controls. Notably, the case the state alleges controls – *State v. Brecht*, 143 Wis. 2d 297, 421 N.W.2d 96 (1988) – does not involve illegally obtained evidence or the exclusionary rule.

The state also lodges significant accusations against the defense where – in its opinion - the defense is intentionally and unfairly sandbagging the criminal justice system in order to manipulate and mislead the jury by questioning law enforcement about its investigation. The state's theory overlooks the fact that questioning the veracity of police investigations is commonplace in criminal trials and occur irrespective of a purported confession.

It also overlooks the danger of encouraging investigations to terminate once law enforcement obtains an alleged confession. Such practices increase the risk of wrongful convictions. False or mischaracterized confessions contribute to wrongful convictions both because it is damning evidence that is difficult to rebut and because they lead to confirmation bias or tunnel vision where additional evidence is tainted or potential exculpatory investigation is foregone.

The state's proposed exception exacerbates these concerns because it incentivizes terminating the investigation after a confession by creating a catch-22 for the defense if it is later suppressed. With a suppressed statement, the defense would need to choose between: (1) presenting a meaningful defense by highlighting deficiencies in the investigation but then open the door to admission of the suppressed statement or (2) forego the meaningful defense in order to ensure the illegally obtained statement remains suppressed. There is no good answer for the defense and the illegally obtained statement has now provided the prosecution with a "stacked deck."

B. General legal principles.

Since the parties addressed the relevant law in their briefs, only a short synopsis will be included here.

When the police violate *Miranda* in obtaining a statement, the rule is that the statement is inadmissible in the prosecution's case-in-chief.

Harris, 401 U.S. at 225. One exception to that rule exists: impeachment of the defendant. The same is true for other illegally obtained statements or evidence. *James*, 493 U.S. at 313; *Walder v. United States*, 347 U.S. 62, 65 (1954).

The Court in *Harris* reasoned that "[t]he shield provided by *Miranda* cannot be perverted into a license to use **perjury** by way of a defense, free from the risk of confrontation with prior inconsistent utterances." *Id.* at 226 (emphasis added). Still, the statement can only be used to impeach the defendant's credibility, not as substantive evidence of guilt. *Id.* at 223, 226. Such an exception is warranted "where the introduction of reliable and probative evidence would significantly further the truthseeking function of a criminal trial and the likelihood that admissibility of such evidence would encourage police misconduct is but a 'speculative possibility.'" *James*, 493 U.S. at 311-12 (citing *Harris*, 401 U.S. at 225).

Courts have consistently declined the government's invitation to expand the exception to the exclusionary rule beyond impeaching the defendant. For example, in *James*, the U.S. Supreme Court denied the government's request to expand the exception to the exclusionary rule for impeachment of defense witnesses. *James*, 493 U.S. at 320.

The Court concluded expanding the exception would "create different incentives affecting the behavior of both defendants and law enforcement officers." *Id.* at 313. The requested expansion would

not promote the truthseeking function in the same way as the original exception and would "significantly undermine the deterrent effect of the general exclusionary rule." *Id.* at 313-14.

It would also "chill some defendants from presenting their best defense and sometimes any defense at all." *Id.* at 314-15. "Whenever police obtained evidence illegally, defendants would have to assess prior to trial the likelihood that the evidence would be admitted to impeach the otherwise favorable testimony of any witness they call." *Id.* at 315. The Court concluded it is not appropriate for the state to brandish illegally obtained evidence "as a sword with which to dissuade defendants from presenting a meaningful defense through other witnesses." *Id.* at 317.

Additionally, the Court in *James* explained expanding the exception would "significantly enhance the expected value to the prosecution of illegally obtained statements." *Id.* at 318. First, it would vastly increase the number of occasions when such evidence could be used. *Id.* Second, due to the chilling effect on defense strategy, illegally obtained evidence would hold greater value to the prosecution. *Id.* It would deter the defense from calling witnesses thereby keeping from the jury potentially exculpatory evidence. *Id.* Law enforcement would recognize that illegally obtaining evidence would stack the deck heavily in the prosecution's favor. *Id.* It is far from a "speculative possibility" that police misconduct would be encouraged. *Id.*

Similarly, the state cannot impeach its own witness with an illegally obtained statement. *Kuntz v. McCaughtry*, 806 F. Supp 1373, 1380 (E.D. Wis. 1992). In *Kuntz*, the court concluded the considerations in *James* against expanding the exclusionary rule were even stronger when applied to the state's witnesses. "Allowing the prosecution to use the illegal statement during the presentation of its case – even if used to impeach its own witness – would virtually negate the exclusionary rule altogether." *Id.* at 1380.

If the state cannot use illegally obtained statements to impeach its witnesses, it certainly cannot use those statements to bolster its witnesses' testimony.

C. *Brecht* does not control when evaluating use of an illegally obtained statement.

The state argues the aforementioned precedent does not apply to its proposed exception because it did not seek to impeach a witness. It sought to rehabilitate a witness. It argues *Brecht* controls, where this Court analyzed the implications of the prosecution's use at trial of the defendant's pre-*Miranda* and post-*Miranda* silence. The state is incorrect.

Rules - and related exceptions - protecting a defendant's invocation of a constitutional right do not protect the same interests as the exclusionary rule, which in large part is meant to deter police misconduct. In other words, prohibiting the

prosecution from commenting on a defendant's silence has nothing to do with deterring police misconduct. Yet, the state invites this Court to disregard one of the key components of the exclusionary rule when it argues *Brecht* is controlling.

Notably, even in the silence context there are different rules for commenting on pre-*Miranda* and post-*Miranda* silence. *Fletcher v. Weir*, 455 U.S. 603, 605-07 (1982); *Brecht*, 143 Wis. 2d 297. With post-*Miranda* silence it is fundamentally unfair to impeach based on that silence because the *Miranda* warnings assured the person that silence would not be used against him. *Weir*, 455 U.S. at 606; *Brecht*, 143 Wis. 2d at 316. Pre-*Miranda* silence is different. Without the affirmative assurances of *Miranda* warnings, the state is free to cross-examine a defendant on his post-arrest silence. *Id.* at 607.

Like pre-*Miranda* and post-*Miranda* silence, exclusion of illegally obtained evidence requires the court to evaluate different factors. Whether an exception to the exclusionary rule is warranted requires consideration of the chilling effect on presenting meaningful defenses and deterrence for law enforcement, as explained in *James*. Neither of these considerations have been addressed by the state's proposed exception.

Additionally, affirmative evidence of guilt (such as a confession) is far more prejudicial than commenting on the defendant's invocation of a

constitutional right. And, illegally obtaining evidence and then using it against the accused is more troubling than commenting on invocation of a right, thus requiring different consideration.

D. Practical implications of the state's proposed exception to the exclusionary rule.

The state relies heavily on its claim that the defense sandbagged the criminal justice system in order to manipulate and mislead the jury by cross-examining the lead investigator about his investigation (or lack thereof). It claimed "the State can imagine no other reason for this line of questioning than to mislead the jury." (State's brief-in-chief, 26). It also told this Court it was Garcia, not the state, who created the situation this Court must now untangle. (Id.)

As to the latter point, according to the circuit court, it was law enforcement that violated *Miranda* when they interrogated Mr. Garcia. And now, this Court is asked to address the implications of that violation.

As to the former point, the state's theme of manipulation and sandbagging serves to inflame emotions but offers little guidance about the practical implications of its broad proposed exception to the exclusionary rule. The state's assertions are incorrect and overlook the realities of criminal trials and basic defense strategy.

1. Challenging police investigation is a meaningful defense strategy and important protection against wrongful convictions.

The heart of the state's claim – both in alleging manipulation by the defense and in proposing the new exception to the exclusionary rule - is that a confession ends the investigation and the defense should know that. Certainly, a confession may be the end of an investigation where there are no more viable leads to investigate. But in that circumstance, it is the substantive reason for terminating the investigation – not the fact the police obtained a confession – that would rehabilitate the investigator after the defense suggested the investigation was not thorough. The theory that police investigations should terminate upon obtaining what they deem a confession, and that practice should be rewarded with admission of an illegally obtained statement, raises systemic concerns about the criminal justice system.

Discrediting police investigation is a common and appropriate defense strategy. *See Kyles v. Whitley*, 514 U.S. 419, 445-46 (1995) (citing *Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir. 1986) - "A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady* violation"). This is true irrespective of a confession.

Challenging the police investigation is a viable strategy because it serves to educate the jury about information such as: (1) why the police missed the fact a crime was not actually committed (e.g. accidental or natural death), (2) why the police overlooked exculpatory evidence, or (3) why other evidence is unreliable (e.g. tainted scientific evidence). However, it is not just a viable defense strategy. It also serves to combat the risk of wrongful convictions and encourage thorough police investigation.

Examination of DNA exonerations have shown that false confessions happen. Saul M. Kassin, Steven A. Drizin, Thomas Grisso, Gisli H. Gundjonsson, Richard A. Leo, & Allison D. Redlich, *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & Human Behavior 3 (2010). The breadth of the problem is unknown because DNA exonerations do not account for false confessions disproved before trial, cases without DNA evidence, and minor offenses that may not have the same postconviction scrutiny. *Id.* Despite substantial documentation and analysis by scholars, the concept of false confessions is still counterintuitive to most people, who incorrectly believe false confessions only occur when people are physically tortured or mentally ill. Richard A. Leo, *False Confessions: Causes, Consequences, and Implications*, 37 J Am. Acad. Psychiatry Law 332, 333 (2009).

Still, identified false confession cases have provided insight into the causes of wrongful convictions. "Numerous false confession cases reveal that once a suspect confesses, police often close their investigation, deem the case solved, and overlook exculpatory evidence or other possible leads – even if the confession is internally inconsistent, contradicted by external evidence, or the product of coercive interrogation." *Police-Induced Confessions*, 23 (citations omitted).

This is exactly why the state's proposed exception to the exclusionary rule is problematic. It disincentivizes further investigation after obtaining an alleged confession – even if there is a plausible alternative theory that should be tested – because they already have strong evidence of guilt against their suspect. And, if that alleged confession is later suppressed, the defense will not be able to question the quality of the investigation without also opening the door to admission of the alleged confession. It's a win, win for the prosecution.

The problem of false confessions is exacerbated by confirmation bias. Confirmation bias "typically connotes the tendency to seek or interpret evidence in ways that support existing beliefs, expectations or hypotheses." Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 Wis. L. Rev. 291, 309. A form of "tunnel vision" can exist where focus on one suspect could lead investigators to seek out and favor

inculpatory evidence, while overlooking or discounting exculpatory evidence that may exist. Saul M. Kassin, Itiel E. Dror, Jeff Kukucka, *The Forensic Confirmation Bias: Problems, Perspectives, and Proposed Solutions*, 2 J. Applied Research in Memory & Cognition 42, 45 (2013) (citing *Tunnel Vision*). And, it can lead investigators to misinterpret statements made by the suspect during an interrogation as incriminating or as a confession. *Tunnel Vision*, 338.

"Tunnel vision is a natural human tendency that has particularly pernicious effects in the criminal justice system." *Tunnel Vision*, 292. Police investigators are not the only people susceptible to tunnel vision. Defense lawyers, prosecutors, and judges may also be impacted. *Id.* It is usually a product of human condition as opposed to maliciousness or indifference. *Id*.

Due to this natural human condition, investigators may forego viable investigation due to confirmation bias or tunnel vision after obtaining a confession. *Id.* at 327. The state's proposed exception to the exclusionary rule will exacerbate these risks because it incentivizes terminating the investigation after obtaining a statement police deem a confession.

Again, investigations may terminate after a confession because there are no more plausible leads to investigate. If that is the case, there is no need to use a suppressed statement to rehabilitate the investigator. The explanation that there were no

plausible leads or avenues to investigate *is* the rehabilitation.

2. The state's proposed exception to the exclusionary rule would chill meaningful defenses and diminish the deterrent effect of the exclusionary rule.

The state's proposed rule would have a chilling effect on meaningful defenses. As explained earlier, questioning the adequacy of the investigation is a proper defense strategy. If the case is a "whodunit" and the police failed to investigate viable alternative suspects, that is important information for the jurors to know when they are assessing whether the state has met its burden. Likewise, if there is a viable alternative theory that a death was accidental, and the police did not investigate it, that is important information for the jury to know. The state's proposed exception would discourage the defense from presenting this information to the jury.

The proposed exception uses circular logic to create a catch-22 for the defense where both options benefit the state. First, the police illegally obtain a statement and therefore stop investigating. Second, the illegally obtained statement is suppressed but now the defense has to choose between: (1) pursuing a meaningful defense by questioning the investigation but then open the door to admission of the illegally obtained statement or (2) forego a

meaningful defense so the statement remains suppressed.

In other words, the illegally obtained statement "stacks the deck heavily in the prosecution's favor." *James*, 493 U.S. at 318. And, as such, creates more than a "speculative possibility" that police misconduct will be encouraged.

Finally, the state's proposed exception is not limited to the facts of this case. It applies any time the defense "opens the door" and the state argues admitting the statement is a "fair response." What if a witness did not disclose relevant information because the police already obtained an alleged confession and the investigation ended? If the defense cross-examines the witness about his failure to disclose relevant information, could the state use the suppressed confession to rehabilitate the witness? Or, what if certain evidence was not collected or tested because there was an alleged confession and that evidence was irrelevant to information provided in the confession, but was potentially exculpatory? If failure to pursue those leads were a part of cross-examination, could the state use the suppressed statement to rehabilitate its witness?

As in this case, the fact scenarios will be tied to the whims of a particular witness. Thus, more surprises will occur where defense counsel unwittingly opens the door based upon subjective decisions by the state's witnesses, further chilling meaningful defenses and vastly increasing the

number of occasions where illegally obtained evidence is admitted at trial.

CONCLUSION

For these reasons, the Court should decline the state's invitation to expand the exception the exclusionary rule.

Dated this 22nd day of April, 2021.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,000 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 22nd day of April, 2021.

Signed:

KATIE R. YORK
Appellate Division Director