STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP1317-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL J. VAN LINN,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS AFFIRMING A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR OCONTO COUNTY, THE HONORABLE MICHAEL T. JUDGE, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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INTRODUCTION

This case concerns two different blood samples, drawn at the direction of two different authorities, at two different times, for two different reasons. While tending to the injuries that Daniel J. Van Linn sustained in a car accident, hospital staff drew his blood solely to aid his treatment. Testing that "hospital sample" confirmed what was clear based on his odor of alcohol, his drinking admission, and the fact that he had crashed his vehicle into a building at bar time: Van Linn consumed too much alcohol to be driving. Twenty minutes later, a deputy sheriff ordered a separate "police sample" for Van Linn's prosecution. A court suppressed the police sample's results for lack of exigent circumstances, and the State subsequently subpoenaed the hospital sample records.[1]

This Court must now decide whether the Fourth Amendment's exclusionary rule requires suppression of the hospital sample's results just because the State requested them after the police sample results were suppressed. The court of appeals decided that it did not. This Court should hold that the independent source doctrine permits the State's use of evidence derived from the hospital sample because (1) the hospital sample and the police sample are separate, independently created pieces of evidence, (2) the drawing and testing of the hospital sample occurred solely for treatment purposes and not at the direction of law enforcement, and (3) the facts known to police at the time of Van Linn's arrest would lead a reasonable officer to believe that *any* blood samples drawn from him would contain evidence of an unlawful alcohol concentration.

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[1] Hereinafter, the State will use the terms "hospital sample" and "police sample" to distinguish the two pieces of evidence from one another.

ISSUE PRESENTED

Where hospital emergency room staff draws and tests a driver's blood purely to aid in his medical treatment, does the exclusionary rule require suppression of the corresponding results if the State does not request them until a circuit court suppressed the results of a separate blood draw ordered by police?

The circuit court did not answer this question.

The court of appeals answered: No.

This Court should answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this Court has indicated that oral argument and publication are appropriate.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

The crash investigation

Just before 2:00 a.m. on the morning of March 26, 2017, Deputy Nick School, emergency medical personnel, and firefighters responded to a reported car accident. (R. 70:4, 6.) Upon arrival, ambulance personnel saw a man running. (R. 70:8–9.) While searching for the man, Deputy School discovered a sport utility vehicle ("SUV") crashed into a cabin 50 to 75 yards off the road. (R. 23:1–2; 70:7–9.) Based on its tire tracks, it appeared that the SUV crossed the nearby road's center line, entered a ditch, struck a tree, reentered the roadway, crossed both traffic lanes, entered another ditch, crossed another road, and proceeded through a field and down a hill before striking a cabin. (R. 23:2.) Deputy School saw blood on the SUV's steering wheel and driver's side door, but there were no vehicle occupants. (R. 23:2.)

Ambulance personnel and Deputy School eventually relocated the man lying in a nearby yard. (R. 23:2; 70:10–11.) That man, subsequently identified as Van Linn, had blood on his forehead, his hands were bleeding, and his clothes were dirty and wet. (R. 23:2; 70:11, 22–23.) Van Linn denied that he was driving, claimed unawareness of the crash, and insisted he was just "out for a walk." (R. 23:2; 70:11–12.) As they spoke, Deputy School smelled the moderate odor of alcohol coming from Van Linn, and Van Linn admitted that he had consumed "two beers." (R. 23:2; 70:12.) Dispatch advised Deputy School that Van Linn had four prior OWI convictions and was subject to a reduced prohibited alcohol concentration restriction of .02. (R. 23:2; 70:13.)

Van Linn's emergency medical care

An ambulance brought Van Linn to the Shawano Medical Center. (R. 70:13–14.) There, while treating his injuries, medical personnel drew the hospital sample from Van Linn and performed routine diagnostic tests that revealed Van Linn's glucose levels, other metabolic measures, and his blood alcohol concentration. (R. 33:22.)

Deputy School waited until hospital staff finished treating Van Linn's injuries before arresting him for his fifth OWI offense. (R. 70:15–16.) Van Linn refused to provide a blood sample to police at Deputy School's request. (R. 70:18.) After conferring with his lieutenant, Deputy School believed exigent circumstances justified a warrantless blood draw based on the delays caused by searching for Van Linn and the crash, his inability to pinpoint the time of Van Linn's crash, the delay caused by Van Linn's ambulance rerouting to another hospital outside of the county, Van Linn's reduced prohibited alcohol concentration threshold, and Van Linn's admission to consuming only two beers. (R. 70:21, 30, 32.)

The police sample was drawn 20 minutes after medical personnel drew the earlier hospital sample. (*See* R. 15:1–2; 33:22.) There is no question that the two samples were separately obtained and tested wholly independent of one another. The Wisconsin State Laboratory of Hygiene later issued a report dated April 10, 2017, indicating that the police sample's blood alcohol concentration was 0.205 g/100 mL. (R. 15:1–2.)

The chemical test results litigation

Van Linn later moved to suppress the chemical test results from the police sample, arguing that exigent circumstances did not exist to dispense with the warrant requirement for a nonconsensual blood draw. (R. 12:4–6.) The circuit court agreed, issuing an order suppressing those results on October 18, 2017—less than seven months after Van Linn's arrest. (R. 18:2–5.)

Thereafter, the State sought subpoenas for medical records maintained by the hospital that treated Van Linn and the ambulance that transported him. (R. 21; 22; 23; 28; 29; 30.) In its supporting affidavits, the State detailed the investigation leading to Van Linn's arrest, including the nature of the accident, Van Linn's decision to flee from the scene and lie about his involvement in the crash, Van Linn's admission to consuming two beers, Van Linn's odor of alcohol, and the fact that Van Linn was subject to a .02 prohibited alcohol concentration limit based on his four prior OWI convictions. (R. 23:1–4; 28:1–4.) The affidavit also contained the police sample's chemical test results. (R. 23:4; 28:4.)

Van Linn later moved to suppress the evidence obtained through the State's subpoenas, arguing that the results from the hospital sample were privileged under Wis. Stat. § 905.04(2) (providing for physician-patient privilege), were gathered contrary to Wis. Stat. § 343.305(3)(c) (Wisconsin's

implied consent statute), and allowed insufficient opportunity for independent testing in accordance with Wis. Stat. § 165.79(1). (R. 32:2–3.) Additionally, referencing the circuit court's prior suppression ruling, Van Linn argued that, "[i]f the exclusionary rule is to be given proper purpose and effect, the admission of the privileged medical information requested by the State cannot be allowed." (R. 32:3.)

The circuit court issued a written order denying Van Linn's suppression motion. (R. 37.) The court reasoned that the medical records at issue were not privileged under Wis. Stat. § 905.04(2) nor protected from disclosure under Wis. Stat. § 146.82(2)(a)4. because Wis. Stat. § 905.04(4)(f) specifically provides that chemical tests for intoxication or alcohol concentration are not privileged. (R. 37:2.) The court did not address Van Linn's Fourth Amendment challenge to the admission of the test results from the hospital sample.

The plea and sentencing

Van Linn ultimately pled no-contest to a single count of fifth-offense operating while intoxicated, and the circuit court later imposed but stayed a four-year prison sentence before placing Van Linn on probation for a period of three years. (R. 51; 73:10–12; 75:2, 8.)

The court of appeals affirmed

Van Linn appealed, arguing that the circuit court erred in denying his suppression motion. *State v. Van Linn*, No. 2019AP1317-CR, 2020 WL 6733500 (Wis. Ct. App. Nov. 17, 2020) (unpublished); (Pet-App. 101–12). The court of appeals disagreed, holding that the circuit court properly denied Van Linn's suppression motion and that the independent source doctrine applied because the blood alcohol concentration evidence gathered from Van Linn's hospital records "was obtained independent of the earlier, unlawful blood draw." *Id.* ¶ 2; (Pet-App. 102).

Van Linn petitioned for review, which this Court granted.

STANDARD OF REVIEW

Review of a decision denying a motion to suppress evidence presents an appellate court with a question of constitutional fact that requires a two-step analysis. *State v. Iverson*, 2015 WI 101, ¶¶ 17–18, 365 Wis. 2d 302, 871 N.W.2d 661. First, the court applies a deferential standard to the circuit court's findings of historical fact, "upholding them unless they are clearly erroneous." *Id.* ¶ 18. Second, the court independently applies the relevant constitutional principles to these facts. *Id.*

ARGUMENT

The Fourth Amendment's exclusionary rule does not require the suppression of evidence found in Van Linn's blood sample that was drawn and analyzed independent of government action.

Although Van Linn severely downplays the significance of this fact in his brief, it cannot be overstated that the hospital sample and the police sample are two different pieces of evidence, created for different purposes, and requested by two different authorities. They may have taken the same form and revealed the same type of damaging information about Van Linn's intoxication, but Van Linn's contention that the State would never have uncovered the hospital sample were it not for the suppressed police sample is simply not true. Rather, the State easily concluded from the facts surrounding Van Linn's arrest that any blood sample drawn at the hospital would likely show that his blood had an illegal alcohol concentration.

Nevertheless, Van Linn seeks to exploit the Fourth Amendment to prohibit the State's use of evidence that was

obtained, tested, and preserved without government involvement, and retrieved from an obvious source. Because the record demonstrates that the State obtained the chemical test results of Van Linn's hospital sample from an independent source guided by common sense, not unlawful police action, this Court should affirm.

A. The exclusionary rule and the independent source doctrine

"The Fourth Amendment protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" *Herring v. United States*, 555 U.S. 135, 139 (2009) (alteration in original) (quoting *Arizona v. Evans*, 514 U.S. 1, 10 (1995)). However, the Fourth Amendment "contains no provision expressly precluding the use of evidence obtained in violation of its commands." *Id.* (quoting *Evans*, 514 U.S. at 10).

To that end, the United States Supreme Court established an exclusionary rule that "when applicable, forbids the use of improperly obtained evidence at trial." *Id.* (citing *Weeks v. United States*, 232 U.S. 383, 398 (1914)). "[T]his judicially created rule is 'designed to safeguard Fourth Amendment rights generally through its deterrent effect.'" *Id.* at 139–40 (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)).

The exclusionary rule is also designed to "put[ ] the police in the same, not a *worse*, position tha[n] they would have been in if no police error or misconduct had occurred." *Murray v. United States*, 487 U.S. 533, 537 (1988) (quoting *Nix v. Williams*, 467 U.S. 431, 443 (1984)). When "challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation." *State v.*

Carroll, 2010 WI 8, ¶ 44, 322 Wis. 2d 299, 778 N.W.2d 1 (quoting *Murray*, 487 U.S. at 537).

To determine whether law enforcement obtained evidence from a source independent of a constitutional violation, courts look to two factors: (1) whether, absent the unlawful seizure, police would still have applied for the search warrant, and (2) whether the unlawful seizure influenced the magistrate's decision to grant the search warrant. *State v. Gant*, 2015 WI App 83, ¶ 16, 365 Wis. 2d 510, 872 N.W.2d 137; *see also Murray*, 487 U.S. at 542. Concerning the test's second prong—whether the magistrate's decision was influenced—the central inquiry is whether "the untainted evidence [in the subpoena application] is sufficient to support a finding of probable cause to issue the [subpoena]." *Carroll*, 322 Wis. 2d 299, ¶ 44.

B. Van Linn's hospital sample test results were obtained from an independent source, untainted by illegal activity, and suppression was therefore inappropriate.

The court of appeals correctly decided that the independent source doctrine precluded suppression of the blood alcohol concentration results found in Van Linn's hospital sample. *See Van Linn*, 2020 WL 6733500, ¶ 2; (Pet-App. 102). This Court should affirm. The State did not need the suppressed police sample results to recognize that Van Linn's hospital records would contain inculpatory evidence. Deputy School's observations of Van Linn at the time of his arrest and his investigation of the crime scene provided ample grounds to believe that any blood sample taken from Van Linn after the accident would reveal evidence of intoxication. The State sensibly sought physical evidence of Van Linn's intoxication from an obvious source based on Deputy School's investigation, and suppression of the hospital sample results would have no deterrent effect on police misconduct while

placing the State in a worse position than if no unlawful search had occurred.

1. The affidavit supporting the subpoena for Van Linn's medical records was sufficient to establish probable cause even after excising the suppressed police sample test result.

To begin, Van Linn does not argue that the circuit court's decision to authorize the challenged subpoena turned on the chemical results derived from the police sample. (*See* Van Linn's Br. 4–11.) Thus, there should be no question that *Murray*'s second prong was satisfied because the unlawful search for the police sample did not influence the court's decision to authorize the subpoena for Van Linn's hospital sample results. Indeed, after excising the police sample's result, the State's four-page affidavit easily established probable cause that Van Linn's hospital sample would contain evidence of a crime. (*See* R. 23.)

Certainly, any reasonable magistrate would believe that Van Linn's hospital records would contain evidence of intoxication or an illegal blood alcohol concentration after reading that Van Linn—a perennial drunk driver subject to a reduced prohibited alcohol concentration limit—drove off the road at bar time, struck a tree, confused that tree for another vehicle, crashed into a building, fled on foot, lied to police about his involvement in the crash, smelled of alcohol, admitted to consuming multiple drinks, and refused to submit to a blood test upon an officer's request. (*See* R. 23.)

Simply put, the circuit court's decision to issue the subpoena for hospital records containing Van Linn's medical sample results was not "influenced" by the single reference to the suppressed police sample result given that the above-listed facts contained in the supporting affidavit, which were

all discovered through lawful police conduct, were more than sufficient to support the necessary probable cause finding. *See Carroll*, 322 Wis. 2d 299, ¶ 44.

2. The State would have pursued Van Linn's hospital sample results even absent the unlawful search.

Having established that the unlawful police sample did not influence the circuit court's decision to authorize the subpoena for medical records containing the results of the hospital sample, this Court must next decide whether law enforcement's unlawful conduct prompted the State to pursue the results of Van Linn's hospital sample months later. *See Murray*, 487 U.S. at 542. In other words, would the State have thought to subpoena Van Linn's medical records in the absence of the information obtained from the warrantless blood draw and the police sample?

This Court should hold that the unlawful search did not impermissibly motivate the State to pursue Van Linn's medical records because, regardless of the police sample, the facts known to police at the time of Van Linn's accident and arrest would lead a reasonable officer to believe that any blood samples drawn from Van Linn would contain evidence of an unlawful blood alcohol concentration.

For starters, it cannot be overstressed that Deputy School's decision to request the police sample from Van Linn did not lead the State to seek out other inculpatory evidence in an odd or unusual place. Undoubtedly, Van Linn's case does not present the typical fruit-of-the-poisonous-tree scenario whereby police officers use ill-gotten information from their unlawful conduct to uncover an avenue to inculpatory evidence that would have otherwise remained undiscovered. On the contrary, even a minimally experienced police officer would recognize that any blood samples drawn from a

suspected drunk driver would yield evidence of his or her intoxication, regardless of who ordered the blood drawn.

Here, before the police sample was drawn and tested, Deputy School already suspected that Van Linn's blood would contain evidence of his intoxication. Otherwise, he would have had no reason to order a warrantless blood draw after medical personnel finished treating Van Linn's injuries.

The court of appeals recognized this when it noted that "police reasonably suspected Van Linn of—and arrested him for—OWI even before law enforcement had any inkling of what a blood test would reveal." *Van Linn*, 2020 WL 6733500, ¶ 24; (Pet-App. 112). The affidavit supporting the subpoena for hospital records revealed that police knew, on the evening of his arrest, that Van Linn (1) had four prior OWI convictions, (2) was subject to a reduced prohibited alcohol concentration limit, (3) had driven off the road at bar time, confused the tree he struck for another vehicle, and slammed his SUV into a building, (4) immediately fled from the scene and lied to police about his involvement in the crash, (5) smelled of alcohol during police contact, (6) admitted that he had been drinking, and (7) refused a blood test upon request. (R. 23:1–4.)

From this, the conclusion that any blood sample taken from Van Linn that day would be inculpatory was logical. And to argue, as Van Linn now does, that an entirely separate blood draw (the police sample) *prompted* the State to seek out his hospital records is to ignore how obvious it was that inculpatory evidence would be found in any blood samples drawn from his body on the morning of his arrest. Indeed, based on analogous facts, the Superior Court of Pennsylvania concluded that the independent source doctrine permitted the admission of a drunk driver's medical records even though the District Attorney's Office had previously obtained *the exact*

same records unlawfully. *Commonwealth v. Lloyd*, 948 A.2d 875 (Pa. Super. 2008).

Like Deputy School, officers in *Lloyd* arrested a man suspected of violating the state's impaired driving laws. *Id*. at 878. Like Van Linn, Lloyd was taken to the hospital for injuries he sustained prior to his OWI arrest. *Id*. And like the hospital staff who treated Van Linn, medical personnel drew blood from Lloyd solely for treatment purposes and not at law enforcement's direction. *Id*. at 878 & n.8. The District Attorney's Office then secured Lloyd's hospital records through a subpoena for documents instead of a search warrant as required by law. *Id*. at 878–79. As a result, the records were ordered suppressed. *Id*.

Thereafter, aware of Lloyd's blood test results by virtue of the unlawful subpoena, the District Attorney's Office directed a police sergeant to investigate Lloyd's case. *See id*. at 879–80. Unsurprisingly, the sergeant prepared an affidavit and search warrant to obtain the same hospital records the District Attorney's Office had previously obtained. *Id*. at 879. Like Van Linn, Lloyd unsuccessfully moved to suppress those hospital records, arguing that the warrant "was tainted by information obtained by way of an earlier improper subpoena for those same records." *Id*.

Applying *Murray*'s two-prong inquiry, the Superior Court of Pennsylvania held that the independent source doctrine allowed for the hospital records' admission at trial. *Id*. at 881. The court examined whether the evidence would have been obtained independent of the initial illegal activity. *Id*. at 882. It noted that the police department's investigation into Lloyd's arrest "consisted of little more than their own observations on the night of the incident," which "were, of themselves, adequate to support the probable cause suspicion that [Lloyd] was driving under the influence of alcohol." *Id*. The court also recognized that police could have successfully

sought a search warrant for Lloyd's medical records after the hospital completed its blood alcohol concentration testing. *Id*. Finally, the court noted that the search warrant application did not mention the illegally-obtained blood test results. *Id*.

Based on the record before it, the court held that "cause to search [Lloyd]'s medical records (and attendant BAC test results) would have existed despite the improperly-served subpoena and that, unquestionably, a warrant would have issued by the magisterial district judge absent the initial, illegal procurement of the medical records by the District Attorney's Office." *Id*.

Admittedly, unlike *Lloyd*, the supporting affidavit in this case contained the unlawfully obtained blood test result. But as previously noted, Van Linn does not dispute that the State's affidavit was sufficient even if the suppressed blood test results were excised. *See supra* p. 9. Moreover, although the District Attorney's Office employed another police officer to insulate the investigation from the unlawfully discovered information, it cannot be ignored that the sergeant never would have applied for a warrant in Lloyd's case had the District Attorney's Office (the entity that knew the suppressed results) not directed him to investigate the matter in the first place. Despite that fact, the Superior Court of Pennsylvania still decided that the independent source doctrine aptly applied to allow for the admission of Lloyd's medical records, even though they were the exact same evidence that the State had previously obtained unlawfully. *Lloyd*, 948 A.2d at 882.

The Supreme Court of Washington employed a similar analysis in *State v. Gaines*, 116 P.3d 993 (Wash. 2005). The court applied the independent source doctrine to evidence initially discovered during a warrantless search of an automobile trunk but later seized after police applied for a search warrant of the same location. Like Van Linn, Gaines

argued that the State could not satisfy *Murray* without showing that police would have sought the warrant for the trunk absent the earlier illegal search. *Id*. at 998. The court disagreed, concluding that the police would have otherwise obtained the items "through the course of predictable police procedures" because they would have sought a search warrant for the suspect's trunk based on facts gathered independently from the improper search. *Id.* at 998. As a result, the court held that the independent source doctrine applied. *Id*. at 998–99.

The holdings of *Lloyd* and *Gaines* make sense when considering the nature of police work and the exclusionary rule's purpose. Law enforcement *should* be prevented from exploiting a prior unlawful search to pursue an avenue of investigation that would have gone unnoticed had police not trampled on a defendant's rights. But where, as here and as in *Lloyd* and *Gaines*, the State uses an untainted path to obtain evidence that it would have discovered without the preceding illegality, the concerns animating the exclusionary rule simply are not implicated.

Still, Van Linn makes two observations that, in his opinion, show that the decision to seek evidence of his hospital sample was prompted by evidence discovered from the police sample: (1) the State was already aware of the police sample's results when it sought his hospital records; and (2) the State did not seek out his hospital records until after the circuit court had suppressed the police sample's results. (Van Linn's Br. 7–9.) But neither point undermines the undeniable conclusion that the independent source doctrine applies in this case.

Van Linn's first argument fails largely because the State's awareness of the suppressed police sample results does not demonstrate that its decision to seek pertinent hospital records "was motivated specifically by the

'information obtained' via the unlawful blood draw" as he contends. (Van Linn's Br. 8.) Van Linn simply assumes that the suppressed chemical test results were responsible. But the State has already explained how the facts known to police before Van Linn's arrest would lead any reasonable officer to conclude that evidence of intoxication would be found in his blood. *See supra* pp. 10–11. The suppressed police sample results were not necessary to reach that obvious conclusion.

Indeed, the State would have been remiss to ignore the existence of the hospital sample results even if the police sample had yielded a negligible or nonexistent blood alcohol concentration. Again, this case involves two distinct blood samples drawn from Van Linn at two distinct times; even if the later (suppressed) blood draw result had shown no alcohol in Van Linn's system, there was reason to pursue his hospital records to examine whether his blood contained trace alcohol quantities when drawn earlier that morning, closer to the time of his crash.

Van Linn also draws a strained comparison between his facts and those in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), where the Supreme Court held that federal agents were not entitled to subpoena records that were initially discovered during an unlawful, warrantless sweep of the defendants' business. (Van Linn's. Br. 5–6.) *Silverthorne* does not help Van Linn. There, absent the unlawful "clean sweep" of the defendants' place of business, government agents would not have known of the documents it intended to reobtain by subpoena. *Silverthorne*, 251 U.S. at 390–91.

At the risk of becoming a broken record, the facts known to police at the time of Van Linn's arrest would have caused any reasonable police officer to believe that Van Linn's blood contained an unlawful alcohol concentration. *See supra* p. 10–11. This was simply not a situation, as in *Silverthorne*, where

police officers would not have known of the existence of inculpatory evidence absent prior unlawful activity.

Van Linn's second unpersuasive point is that the State sought his hospital records only after it lost the suppression motion. (Van Linn's Br. 8–9.) The court of appeals made short shrift of that argument, astutely recognizing that the sequence of the State's subpoena request and the circuit court's suppression order simply did not matter. *See Van Linn*, 2020 WL 6733500, ¶ 22; (Pet-App. 110–11). The court appropriately observed that the fruits of an unlawful search do not impermissibly prompt an ensuing investigation where "police seek different, lawfully obtained evidence *that is otherwise known to be available to them*." *Id.* (emphasis added).

Here, the results from the police sample did not inform the State that medical personnel had also drawn and tested the hospital sample from Van Linn's body earlier that morning, nor did the police sample identify what the results of the hospital sample would be. (*See* R. 15.) In fact, Deputy School's actions at the hospital seemingly played no role in the State discovering that Van Linn's blood was previously drawn to aid in his treatment earlier that morning. Because the State sought out evidence that was otherwise available to them and not uncovered by unconstitutional police conduct, the precise timing of the State's subpoena request is nothing but a red herring; the request for Van Linn's hospital sample was simply not prompted by the drawing and testing of the police sample.

None of the remaining authorities cited by Van Linn rebuts this simple conclusion. He offers *United States v. Eng*, 971 F.2d 854 (2nd Cir. 1992), for the principle that "after-the-fact subpoenas for information previously obtained illegally have the effect of 'swallowing the exclusionary rule' such that 'special care is required … when the government relies on the

subpoena power,'" particularly where the subpoena is requested after the unlawful search. (Van Linn's Br. 9.) Yet Van Linn conspicuously fails to acknowledge that the Second Circuit ultimately determined that *none* of the evidence that the government obtained by subpoena following an earlier unlawful search was unconstitutionally obtained in that case. *See United States v. Eng*, 997 F.2d 987 (2nd Cir. 1993).

Van Linn also cites *Center Art Galleries-Hawaii, Inc. v. United States*, 875 F.2d 747 (9th Cir. 1989), and the underlying district court decision for the principle that a subpoena for records should not serve as an "insurance policy" to protect the fruits of an earlier unlawful search or seizure. (Van Linn's Br. 10.) But the Ninth Circuit's analysis involved the application of the inevitable discovery doctrine—not the independent source doctrine central to this case—and the court's decision was clearly fueled by the government's inability to prove that a later subpoena would have uncovered the same evidence. *See Center Art Galleries*, 875 F.2d at 754–55.

In short, by seeking out medical records for evidence of a drunk driver's intoxication, the State was in no way trying to "violate the Fourth Amendment with impunity" as Van Linn exaggerates. (*See* Van Linn's Br. 10–11.) The State merely pursued relevant evidence that was produced and preserved without government involvement in a place where basic common sense would prescribe. Thus, the independent source doctrine aptly applied to the State's request for Van Linn's hospital records because it was not prompted by unlawful police activity. *See Murray*, 487 U.S. at 542.

3. Evidence suppression would not deter police misconduct, and it would place the State in a worse position than had no unlawful search occurred.

This Court's decision should be guided by the purpose of the exclusionary rule and the interests it protects: deterring police misconduct while putting the State in no worse position than it would be if no misconduct had occurred. *Herring*, 555 U.S. at 139–40; *Murray*, 487 U.S. at 537. The State submits that suppressing Van Linn's medical records in this case will do nothing to curb police misconduct, and it will instead place the State in a worse position than if Deputy School did nothing to seek Van Linn's blood sample following his arrest.

Sadly, history tells us that drunk drivers like Van Linn will continue to plague Wisconsin's roadways, and some drivers will require emergency medical treatment when they crash. When that occurs, officers like Deputy School will find themselves in an unfortunate Catch-22: apply for a search warrant at the risk that the driver's blood alcohol concentration will completely dissipate by the time the warrant is authorized and executed, or order warrantless blood draw at the risk that a court may someday second-guess the officer's on-scene exigent circumstance evaluation.

In cases like Van Linn's, where an officer is forced to quickly decide if there is enough time to secure a search warrant in the heat of the moment, the last thing going through his mind will be that he is safe to violate a suspect's constitutional rights because medical records will serve as an "insurance policy" against a hypothetical adverse evidence suppression decision. This should be evident because there would be no reason to order a warrantless blood draw minutes or hours after a defendant's hospital admission if the plan was to request the driver's medical records from the very start.

Simply put, a decision by this Court that Van Linn's medical records should have been suppressed will do nothing to dissuade police misconduct. What it would do, unfortunately, is put the State in a worse position than it would be had no unlawful search occurred. The court of appeals recognized this when it explained that, because Van Linn's blood was drawn and tested for treatment purposes and not to obtain evidence of a crime, suppressing the result "merely because it was of the same nature as separate, unlawfully obtained evidence" would contravene the exclusionary rule's purpose by placing police in a worse position than had no unlawful search ever occurred. *See Van Linn*, 2020 WL 6733500, ¶ 20; (Pet-App. 110).

The court of appeals was correct in that assessment. Suppressing Van Linn's medical records containing the test results of his hospital sample would do little more than to punish the State for waiting more than a few months after filing criminal charges to assemble all the evidence it would hope to present at a trial that was not scheduled to begin until much later that year, even though the existence of the evidence was just as obvious on the morning of his arrest as it was when the State ultimately requested it.

Indeed, it is highly likely that this case would never have arrived before this Court had the State requested Van Linn's medical records on April 9, 2017—approximately two weeks after his arrest and one day before the Wisconsin State Laboratory of Hygiene reported the chemical test results for the police sample. This timeline reveals just how arbitrary it would be to suppress Van Linn's hospital records based on the mere timing of the record request, particularly where police conduct did not cause the State to look for inculpatory evidence in some innocuous spot. *See supra* pp. 10–11.

In sum, the exclusionary rule's purpose is not furthered by suppressing evidence that was obtained, tested, and

preserved irrespective of government command, and the independent source doctrine aptly applies in Van Linn's case because the State merely looked for evidence where common sense dictated. The circuit court was correct to deny Van Linn's suppression motion, the court of appeals correctly upheld that decision, and the State respectfully requests that this Court now affirm.

CONCLUSION

This Court should affirm the court of appeals' decision.

Dated this 16th day of June 2021.

Respectfully submitted,

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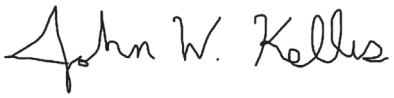

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,460 words.

Dated this 16th day of June 2021.

JOHN W. KELLIS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 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.

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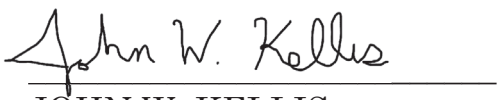

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