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SUPREME COURT

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 the Oconto County Circuit Court,
the Honorable Michael T. Judge, presiding

REPLY BRIEF

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ARGUMENT

I. The subpoena here, sought after suppression of the illegal police blood draw and with knowledge of its result, was the fruit of the illegality and not an independent source.

A. Introduction

The state and Mr. Van Linn agree that this case is about the first prong of the *Murray* independent-source test: whether the decision to seek the subpoena for the hospital's blood-test results was prompted by the original, illegal taking of Mr. Van Linn's blood. *Murray v. United States*, 487 U.S. 533, 542 (1988). The decision was so prompted; the state's contrary arguments are unavailing. Thus, the subpoena is the fruit of the poisonous tree and not an independent source of information about Mr. Van Linn's BAC.

The absence of a truly independent source requires suppression under *Murray*. Nevertheless, the state also offers a brief policy argument urging the Court not to suppress. The state claims that doing so would fail to deter police misconduct and would put the state in a worse position than if no illegality had occurred. These arguments also fail: indeed, suppression of the subpoena is not just the result required by *Murray*; it is also the *only* effective deterrent of illegal blood draws from persons also undergoing medical treatment. This Court should not

permit the state to avoid any real sanction for its Fourth Amendment violation.

B. The subpoenaed test results were not an independent source.

In his opening brief Mr. Van Linn asserted that the original, illegal search of his body "prompted" the subpoena for his BAC information in two ways. First, that search revealed important and inculpatory information: an unlawful BAC. As in *Silverthorne*, this knowledge made the hospital records' evidentiary value undeniable: they would certainly also show an unlawful BAC. App. 8; *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920). Second, the legal consequence of this illegal search—suppression—in fact motivated the district attorney to seek the subpoena to the hospital.

To this, the state responds that other facts known to the police (and thus to the prosecutor) were so indicative of a high BAC that the knowledge of Mr. Van Linn's *actual* BAC added nothing. In fact, the state claims that even if the illegal draw had revealed a BAC of .00, it would have been "remiss" not to seek out the hospital sample. Resp. 14-15.

This hypothetical is dubious. The 20 minutes between the two draws is not enough time for the body to eliminate even enough alcohol to get from Mr. Van Linn's legal limit of .02 down to .00. See *Missouri v. McNeely*, 569 U.S. 141, 152 (2013). More importantly, it's beside the point. What the state *actually* found by its illegal draw was a very high

BAC—how could this fact *not* have prompted its decision to seek a subpoena, once this result of the unlawful search was excluded?

Regarding the other information available to the trooper—Mr. Van Linn's "moderate" odor of alcohol, the early-morning crash, and his behavior afterward (he'd been in a wreck that caused bleeding from his head)—it certainly supplied probable cause that his blood would contain alcohol. It thus was enough for the judge to issue the subpoena. But this is *always* true in independent-source cases where a warrant is later claimed to supply the independent source. Were it not, of course, the warrant wouldn't have issued, or would be invalid on its own. The existence of good enough *information*, in the abstract, to seek a warrant isn't the question: it's whether the illegal search nevertheless prompted the actual *decision* to seek one. *Murray*, 487 U.S. at 542.

And though the state works hard to portray the post-suppression subpoena application here as inevitable—illegal search or no—it plainly was not. How do we know this? Well, first, it didn't happen for quite a while. The prosecutor didn't pursue a subpoena until after the court suppressed the law-enforcement sample, ten months after the arrest. (Specifically, he sought the subpoena a few weeks after his deadline to appeal that suppression ruling had passed. Wis. Stat. §§ 808.04(4), 974.05(1)(d)2.) Second, while the state accuses Mr. Van Linn of "assum[ing]" that the suppression of the illegal draw results was responsible for the prosecutor's decision, Resp. 15, Mr. Van Linn is

not assuming: the prosecutor himself said that was the reason. "The State's action in obtaining the medical information in this case was totally appropriate and necessary after the suppressions of the state's blood test result if the State of Wisconsin would have a reasonable chance to convict the defendant of the crimes he is charged with." (33:3-4). In the prosecutor's own words, the subpoena became necessary because of the suppression decision. This is a fairly workable definition of what it means for one event to be "prompted" by another.

The prosecutor's express motivation to seek the subpoena—the court's suppression of the results of the illegal search—distinguishes this case from *Commonwealth v. Lloyd*, 948 A.2d 875 (Pa. Super. 2008), on which the state relies. As the intermediate appellate court in that case noted, the decision to seek the warrant there was made by an officer who was brought in to conduct an "independent investigation" after the initial one was found to be tainted. *Id.* at 879. His independent decision to seek a warrant—based only on review of the pre-violation police reports, *id.* at 882—is a far cry from the decision here, where the prosecutor was openly motivated by a need to work around the court's suppression decision. Still further from this case are the facts in *State v. Gaines*, 116 P.3d 993, 995 (Wash. 2005). *Gaines* is a typical independent-source case in which the independent, warranted search preceded the suppression hearing: it's not a case like this one, where the suppression decision prompted the warrant.

The state acknowledges the concern voiced by the Second Circuit in *United States v. Eng*, 971 F.2d 854, 860 (2d Cir. 1992): that post-unlawful-search subpoenas, if permitted, will "swallow the exclusionary rule." Its only response, though, is to point out that ultimately, the *Eng* court held that independent investigation would have led to the disputed evidence there. But this goes nowhere; the fact that the government could prove, in *Eng*, that a truly independent investigation turned up the disputed evidence does not improve the state's position here, where it can make no such showing.

The state offers a similarly irrelevant distinction of *Center Art Galleries-Hawaii, Inc. v. United States*, 875 F.2d 747, 755 (9th Cir. 1989). While it is true that the court there was discussing the inevitable-discovery doctrine, rather than the independent source doctrine, the two doctrines have the same grounding and are essentially factual variants of each other: "[t]he inevitable discovery doctrine, with its distinct requirements, is in reality an extrapolation from the independent source doctrine." *Murray*, 487 U.S. at 539. Whether a subpoena actually secures the disputed evidence (independent source) or is merely offered as a route that *would have* secured the disputed evidence (inevitable discovery) the problem is the same: permitting the government to sanitize its unlawful searches by way of a post-illegality "insurance policy."

The state's other observation is that the hospital's blood sample was a different "piece[] of

evidence" from the one the trooper illegally ordered taken. Resp. 6. (For clarity's sake, the state's subpoena didn't ask the hospital for any blood at all; it sought the documents that recorded the numerical results of the testing of that blood.) There's certainly no disagreement between the parties that the portion of Mr. Van Linn's blood hospital staff took to aid in his treatment was a different portion than the one the trooper illegally ordered taken to aid in his prosecution.

But so what? This doesn't matter for a couple of reasons. First, for the reasons discussed above, the state's possession of the hospital's BAC information is the fruit of the poisonous tree. It's often the case that evidence that is suppressed as "fruit" of some illegality is not the same evidence the illegality directly turned up. *See, e.g.*, *Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (heroin found in residence as a result of statement made during illegal entry of a separate residence was fruit of the poisonous tree). That's why it's the fruit, and not the trunk, of the poisonous tree. The point of the doctrine is that it excludes evidence that was not the immediate product of the constitutional violation, but is nonetheless attributable to that violation.

Second, it's often the case that the evidence the state uncovers by an illegal search is not a unique physical object, but instead a piece of information. Mr. Van Linn's blood in a vial was of no use to the state at trial. It was useful only in that, subjected to analysis, it revealed a fact about Mr. Van Linn's body:

that it contained too much alcohol for Mr. Van Linn legally to be on the road. This is the same fact the hospital's blood, subjected to analysis, revealed.

Information obtained by illegal searches and seizures can often be available elsewhere. Text messages and emails can often be found on two or more phones; documents stored on Google Drive, Apple's iCloud and similar services may be found both on a particular person's personal computer or phone and also on one or many servers located all over the country. *See David A. Couillard*, Defogging the Cloud: Applying Fourth Amendment Principles to Evolving Privacy Expectations in Cloud Computing, 93 Minn. L. Rev. 2205 (2009). Consider the illegal search of a person's phone in *Riley v. California*, 573 U.S. 373, 379 (2014), which turned up incriminating photographs. After suppression of a search like that, could the government simply subpoena Google or Apple for those companies' copies of the same files as an "independent source"? The configurations of electromagnetic impulses that make up two digital copies of a photo are, after all, different physical objects, just as the two samples of Mr. Van Linn's blood are different physical objects. But that doesn't change the fact that the two files comprise the same *information*, just as the two samples here revealed the same information about Mr. Van Linn's blood alcohol level. In neither case should the courts permit the government to circumvent suppression simply because it is possible to access the suppressed information in a different form.

C. Permitting the state to introduce the subpoenaed blood-test results would remove any disincentive for illegal searches in similar circumstances.

The state's final argument is that suppressing the fruits of its subpoena will not curb police misconduct, and would also violate the maxim that the courts should place the government in the same position it would occupy if the illegal search had not occurred, rather than a worse one. Resp. 18-20.

These two claims can't both be true: a remedy that deprives the state of BAC evidence because of an illegal police blood draw is obviously a deterrent to future illegal police blood draws. And the state's argument that suppression would place it in a worse position than if it had followed the law depends on accepting the premise that its subpoena wasn't prompted by that search—a premise that, for the reasons given above, it cannot establish.

As to the state's other claim about deterrence, in a situation like this one—where a hospital is likely to possess the same information that was the target of the illegal draw—refusal to permit post-suppression subpoenas is the *only* effective deterrent.

The state's argument begins with a detour into exigent circumstances, claiming drivers requiring medical treatment put officers in "an unfortunate Catch-22" in deciding whether to seek a warrant. Resp. 18. This is, first, false: the Supreme Court has made clear that an officer with reason to believe

getting a warrant will risk losing evidence doesn't need to get the warrant; that's what "exigent circumstances" means. *McNeely*, 569 U.S. at 158 n.7 (judgment about whether there is time to get a warrant assessed "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight"). It also has nothing to do with this case; the circuit court found no exigency and the state didn't appeal that ruling and, appropriately, hasn't argued exigency was present. The record supports the lower court's ruling; during his hourlong drive to the hospital, the deputy made no attempt to secure a warrant. (70:26).

So this is not the "heat of the moment" situation the state portrays: there will be many instances (like this one) in which there's no reason to think an officer can't deliberately consider whether to get a warrant, or whether instead to risk a warrantless, possibly illegal search of a person at the hospital. And when these moments *do* arise, it's implausible to claim, as the state does, that an officer wouldn't consider the law as laid out in decision by this Court. Resp. 18. Like lawyers and other participants in the criminal justice system, police receive training on this Court's Fourth Amendment decisions; some of that training is provided by the Department of Justice. If this Court announces that an unlawful blood draw from a motorist receiving medical treatment has no adverse consequences for the prosecution, it will have removed any deterrence of those unlawful blood draws.

And the implications of such a decision would extend beyond the realm of blood draws at hospitals. As is noted above, there are many searches—increasingly many, with the proliferation of digital data and cloud computing—in which the object of a search is not a particular object, but information which may be stored in multiple locations. This Court should not permit the state to uncover such information by illegal search, and then to respond to suppression of its illegality by locating another copy of the same information elsewhere.

CONCLUSION

Because the state unlawfully obtained Mr. Van Linn's BAC evidence, and because its later subpoena was not an independent source of that evidence, Mr. Van Linn respectfully requests that this Court vacate his plea, conviction and sentence, and that it remand with directions that the subpoenaed BAC evidence be suppressed.

Dated this 30th day of June, 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 2,358 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 30th day of June, 2021.

Signed:

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