EFiled: Mar 06 2023 12:37PM EST
Filing ID 69275719
Case Number 376,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

AARON GARNETT, Defendant—Below, Appellant v. STATE OF DELAWARE Plaintiff—Below, Appellee.	)	No. 376, 2022

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S OPENING BRIEF

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NATURE AND STAGE OF PROCEEDINGS

On June 8, 2020, Aaron Garnett was indicted on Murder First Degree, Offensive Touching, and two counts of Endangering the Welfare of a Child. The pertinent conduct is alleged to have occurred on March 15, 2020. A13—14.

On August 16, 2021, Garnett filed a motion to suppress. A20. The State filed its response on September 16, 2021. A35. The trial court held an evidentiary hearing on December 3, 2021. A50—219. The State and Garnett filed supplemental briefs on December 8, and December 13, 2021, respectively. A220—225. On December 23, 2021, the trial court denied the motion as to the physical evidence at issue, but reserved decision and scheduled an additional hearing regarding the statement at issue. Exhibit A. The additional evidentiary hearing was held on January 14, 2022. On March 1, 2022 (A226—306), the trial court denied Garnett's motion as to the statement. Exhibit B.

Garnett was tried before a jury on March 21—24, 2022, and convicted of all crimes charged. A11, D.I.60. On September 15, 2022, he was sentenced to serve his natural life, plus an additional one year and one month, at Level V. Exhibit C.

This is Garnett's opening brief to his timely filed (D.I 66) notice of appeal.

SUMMARY OF ARGUMENT

1. The investigation into this homicide began when the body of the deceased was unexpectedly found by police during, what the trial court held was, an unconstitutional search of Garnett's home. The trial court abused its discretion by allowing the State to use the evidence from that search based on its finding that, had police not entered the home illegally, they *inevitably* would have done so legally: pursuant to a warrant or the emergency doctrine.

The record does not support that either emergency or warrant-based entry were inevitable. There is no standard procedure which, if followed in this case, would have inevitably resulted in legal entry. The trial court relied on speculative statements of individual officers about what their personal plans would have been, failed to account for numerous uncertainties acknowledged by those same officers, and conflated what *could* have happened with what *inevitably would* have happened.

The illegal discovery of the body influenced every investigative step thereafter. Had police not illegally entered the home, it is not inevitable that they would have applied for a warrant, and if they did, it is extremely unlikely that a magistrate *would* have granted one. As to the emergency doctrine, the evidence they would have relied on to establish an emergency was nearly identical to that which the trial court found insufficient at the time of the illegal search.

2. The trial court erred in finding that Garnett's confession was a fruit of the unconstitutional entry into his home. First, the record shows the interrogation was largely prompted by information found in the illegal home search, such that the interrogators' approach, and even their decision to speak with him at all, would have meaningfully changed absent the illegality. Second, absent the illegal search, Garnett would likely have been quickly processed and no longer at the police station to be interrogated. And third, specific questions used during the interrogation directly pull from the fact that police illegally entered the home.

3. The trial court's denial of Garnett's motion to suppress relies on a rejection of Garnett's argument that the Delaware Constitution applies more protection in this scenario than does the Federal Constitution. The trial court erred. The inevitable discovery doctrine, upon which the trial court based its rulings, applies in the federal system based on the United States Supreme Court's determination that, in an inevitable discovery context, the purpose of the federal exclusionary rule (deterrence of police misconduct) is outweighed by the societal benefits of providing a jury with the evidence. However, Delaware's exclusionary rule has an entirely different purpose, making the federal system's cost/benefit analysis inapposite. Secondly, the Delaware Constitution requires that a remedy be provided for such violations regardless of the cost.

STATEMENT OF FACTS

The Wawa Incident

At approximately 5:30 AM on March 15, 2020, Dover Police responded to the Route 8 Wawa to address a call which alleged an adult, later identified as Aaron Garnett, had grabbed the neck of his child. Garnett was at the store with M.S. (age 10), F.L. (age 5), and A.G. (approximately 1).[1] A58—59, A81, A87. Police observed a scratch on M.S.'s neck which he said was from Garnett. A121. Police also watched surveillance video which they claimed corroborated the accusation. A177—178.

On top of the allegations made by the 911 caller, and the atypical time of the call, officers on scene had additional concerns about Garnett's supervision of the kids. A81. They were bothered that Garnett held the one-year-old differently than a "normal parent" does (A60); that he did not have a stroller, infant carrier, or other childcare accessories (A62) (there is no evidence Garnett owned any of these); and that Garnett had walked to the Wawa with the kids instead of driving (A84) (there is no evidence Garnett owned a car). A few of the officers testified the children were not dressed for the weather (A62, A72, A81, A119), however, video evidence shows they were wearing coats on a spring morning, (A308) and Officer Lynch conceded that if she had concerns related to the children's clothing she would have, but did not, note as much in her report. A99.

[1] Pseudonyms used pursuant to Del. Supr. Ct. R. 10.2(9)(b).

Garnett was initially hesitant to speak with the police because he did not want to leave the kids by themselves; but once he was told Officer Corrado would watch them, he agreed to speak. A73. At first Garnett provided a name that was not his, but soon after, he admitted to doing so and provided his proper name. A63—65. He told police that the infant was his child, and the other two were his nephews. A83. Garnett informed police that he had picked up the kids because their mother was in prison, they had walked to the Wawa from the Towne Point neighborhood and would be picked up to go back to Garnett's sister's home in Maryland. A63—64, A83. Although officers noted that Garnett declined to provide more information about the incarcerated mother, they observed no indications he had been involved in a struggle or altercation with anyone at all (A75, A101), and their testimony "was devoid of any indication that the Wawa incident . . . created a sense that the guardian of the children was in danger." Exhibit A at *4.

After arresting Garnett, Police care for the children and try to find a guardian

Garnett was arrested for criminal impersonation and taken back to the station. A73—74. As a result, police "needed to find a way to contact a parent or guardian to take custody of the children while the [he] was under arrest." A68. The children said their mother was home sleeping. A89, A121. Officer Lynch asked the kids where they lived. A88. M.S. told her the name of the street, and F.L. told her the number. A88. Officer Toto ordered Officers Krumm, Starke, and Lynch to the

address to see if the kids' mom would take care of them. A69, A90. Krum and Starke knocked for a few minutes at the front door and announced their presence. A90—91. There was no answer, which Officer Lynch recognized could just mean mom was sleeping or in the bathroom. A111.

Despite having no warrant, valid safety concern, or any legitimate justification for doing so, Officer Starke found an unlocked door in the back of the house and entered. A147—48. Officer Corrado testified this practice is routine. A123. After illegally accessing the home, police observed the body of a woman who was quickly determined to be deceased. A92. Officer Starke indicated that they did not conduct a full search at that point because they did not have a warrant. A152. However, both Detective Mullaney, the Chief Investigating Officer, and Detective Nolan Matthews, who oversaw evidence detection, knew there was no warrant and searched the home anyway. A161, A178—79. Det. Matthews admitted that he was not willing to wait for one because it could take a few hours. A161--63, A165. A search warrant was obtained around 10:40. A28—32, A188-89. Ultimately, the body was identified as that of Naquita Hill, the mother of A.G., and aunt of M.S. and F.L.

The hypothetical investigation, had Dover Police not illegally entered the home.[2]

Around the time officers illegally entered the home, Garnett was being put into a cell when Officer Clancy noticed some blood on his sock and asked if he was injured. A139—40. Elsewhere in the station, officers spoke with the kids and brought in a victim's advocate. A68. Officer Corrado noticed M.S. had something in his pocket. A124. M.S. gave the items to Corrado– Garnett's phone, watch, and a bunch of cards including Hill's social security card, Garnett's credit cards, and Hill's driver's license – and told her that Garnett asked him to hide them. A125.

There is no record of any standard operating procedures which, if followed, would have resulted in police entering the home under the emergency doctrine. Officer Lynch testified that if Officer Starke had not entered the home when he did, she would have "tried back later." A101—02. She did not give any detail about when that would be, or whether she would do anything other than knock upon return. Det. Mullaney testified that he would have tried to identify a guardian through a school resource officer. A182. However, no school resource officer testified about what information they would have provided to Det. Mullaney or confirmed they would have been available to speak to him on the date in question.

[2] Because the trial court addressed an inevitable discovery argument, testimony was elicited about what would have taken place had the illegal entry not occurred.

There is no record of any standard operating procedures which, if followed, would necessarily have resulted in police applying for a warrant to enter the home. The officer who actually applied for the warrant did not testify. Detective Mullaney was unsure when, or even if, he would have been contacted. A268—69. He did not know if he would have drafted a warrant application, when he would have done it, what would have been in it, or if it would have been granted. A270—73.

There is no evidence of a standard operating procedure, or established practice, which if followed, would have resulted in Garnett being interviewed had the illegal entry not occurred. Had police not illegally entered the home, it is reasonably likely Garnett would have been quickly booked and released. A277—80. Instead, Garnett remained in a holding cell until he was interviewed by Det. Mullaney and Detective Bumgarner at around 2:00PM. Det. Mullaney specifically informed Garnett that (1) they were *not* there to talk about what happened at Wawa, (2) they had been to the house, and (3) wanted to talk about what caused him to go to Wawa. Garnett initially stated that he had happened upon the body but was not involved in Hill's death, but eventually he confessed. A186—88, A307.

I. The trial court abused its discretion by finding that, had police not searched Garnett's home illegally, they would inevitably have done so legally, pursuant to a warrant or the emergency doctrine, when neither's requirements would have inevitably been satisfied, and there was no independent investigation or established procedure which would have inevitably led to either of those paths to entry.

Question Presented

Whether a trial court abuses its discretion by finding police would inevitably have entered a home with a warrant or pursuant to the emergency doctrine, when neither's requirements would have inevitably been satisfied, and there was no independent investigation or established procedure which would have inevitably led to either of those paths to entry? A35—48.

Scope of Review

This Court reviews the denial of a motion to suppress evidence for abuse of discretion.[3] This Court reviews alleged constitutional violations *de novo.*[4]

Merits of Argument

The trial court was correct that the officers who entered Garnett's residence did so illegally, the "chief evil against which . . . the Fourth Amendment is directed." Exhibit A at *8, 11. However, the decision went awry when it applied the "inevitable discovery doctrine" in a manner inconsistent with the directive of *Nix v. Williams*

[3] *Smith v. State*, 887 A.2d 470, 472 (Del. 2005).
[4] *Wheeler v. State*, 135 A.3d 282, 295 (Del. 2016).

that the analysis focus on "demonstrated historical facts capable of ready verification or impeachment" and not "speculative elements[.]"[5]

Under the "inevitable discovery doctrine, a court may only admit illegally obtained evidence if the prosecution can prove [by a preponderance of the evidence] that [it] 'would have been discovered through legitimate means in the absence of official misconduct.'"[6] Inevitability is only a reasonable conclusion when (absent the illegality) the evidence would have been discovered by separate and preexisting investigation,[7] or, routine procedures would have guided the investigation to the evidence.[8] The trial court's finding that "the officers would have re-attempted contact with the guardian and [legally] discovered the body pursuant to routine

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[5] *Nix v. Williams*, 467 U.S. 431, 444 n.5 (1984).

[6] *Roy v. State*, 62 A.3d 1183, 1189 (Del. 2012).

[7] *United States v. Owens*, 782 F.2d 146, 152–53 (10th Cir.1986) (refusing to apply doctrine without independent, untainted investigation that inevitably would uncover same evidence); *United States v. Cherry*, 759 F.2d 1196, 1205–06 (5th Cir.1985) ("for the exception to apply, the prosecution must demonstrate . . . the government was actively pursuing a substantial alternate line of investigation at the time of the constitutional violation"); *United States v. Satterfield*, 743 F.2d 827, 846 (11th Cir.1984) ("the illegality can be cured only if the police possessed and were pursuing a lawful means of discovery at the time the illegality occurred").

[8] *United States v. Andrade*, 784 F.2d 1431, 1433 (9th Cir.1986) (evidence would inevitably been discovered by routine inventory search); *United States v. Seals*, 987 F.2d 1102, 1107–08 (5th Cir. 1993) (same); *United States v. Perea*, 986 F.2d 633, 644 (2d Cir.1993) (same); *United States v. George*, 971 F.2d 1113, 1121–22 (4th Cir.1992) (same). This Court has not explicitly adopted this requirement. *See Cook v. State*, 374 A.2d 264, 268 (Del. 1977) (applying exception where "record indicates . . . inventory search . . . was a routine procedure."); *DeShields v. State*, 534 A.2d 630, 638 (Del. 1987) (applying doctrine where "officers testified that it was routine police practice to extensively search the general area in a homicide case").

police procedures," (Exhibit A at *5) has no support in this record which contains no evidence of such procedures.

a. *Police would not have inevitably discovered the illegally seized evidence as the result of some future emergency.*

The trial court easily rejected the State's position that the initial warrantless entry was justified by the emergency doctrine but speculated that "a future check of the home that would have quickly been necessitated because the children required a guardian to care for them, together with an increasing concern for Ms. Hill's own welfare." Exhibit A at *5. This speculation falls significantly short of the State's burden. To correctly apply the inevitable discovery doctrine to the emergency doctrine, the State must establish by a preponderance of the evidence that, *inevitably*, police *would have* entered the home to address an immediate need for the protection of life or property.[9] Here, the State failed to meet its burden at all levels.

i. There would not have been reasonable grounds to support an immediate need to enter the home to protect the children's lives.

As the trial court found, at the time police illegally invaded Garnett's home, the children were safe and there was no indication that the need to locate a guardian constituted an "emergency." Exhibit A at *5. However, the court determined that, over time, finding a guardian would become "increasingly paramount to the investigation and to the children's welfare." Exhibit A at *6. That is not the standard.

[9] *Guererri v. State*, 922 A.2d 403, 406 (Del. 2007).

If the children were not in danger at the time of the illegal entry (as the trial court found), there is no reason to believe they would have been at some later time. They would have remained safe in police custody (A66), or better yet, in the care of their aunt. The trial court's concern about the need to "fill their own 'state-obligated responsibilities' (such as attending school)" is not immediate, does not require entry into the house, and is not "protection of life or property."

The court's alternative justification, the children "require[d] the person they consider[ed] their 'mother' . . . for nourishment," is not supported by the record and presumes debatable conceptions of child rearing. There is no record suggestion that the children were not receiving nourishment (in fact, they had been fed (A108)), and no rationale for the position that only their mother could provide it. Any concerns for their nourishment (although the record contains none) would have been adequately and more quickly addressed by means other than entering the home, for example by the victim services representative tasked with "[p]rovid[ing] them with what they need." A68—69.

ii. There would not have been reasonable grounds to support an immediate need to enter the home to protect Ms. Hill's life.

The trial court's findings make clear that before the illegal entry, there was not even an "indication" that Hill was "in danger." Exhibit A at *4. Similarly, police recognized that the fact that nobody answered the door at 6:00 a.m. might just mean the mom was sleeping or using the bathroom. A111. In fact, the children said she

was sleeping and there was no sign Garnett had been in a struggle. A101. Nonetheless, the trial court concluded that, if the illegality had not occurred, there *inevitably* would have been reasonable grounds suggesting Hill was suffering from a life-threatening injury that required immediate entry into the home. To reach this decision, the court made a giant leap from two pieces of evidence that would have been found through independent preexisting investigations: a blood stain on Garnett's sock, and Garnett's request that one of the kids hide various items.

An officer observed the blood stain before Garnett entered a cell. This observation, dictated by "standard procedure" led to concern that Garnett was injured. A140. No officer indicated the blood suggested Garnett was involved in a struggle, or that the blood might have belonged to someone else. And, neither the trial court, nor any of the State's witnesses explained how Garnett's request to hide a seemingly random group of items would cause one to infer Hill was suffering from a life-threatening injury. In fact, when they did eventually obtain a warrant, police did not even mention the hidden items in the affidavit. A15—19.

iii. Even if the emergency doctrine *could have* justified entering the home, the State did not prove that police *would have* done so.

The court's approach was too speculative to establish police inevitably *would have* entered the home through a legitimate use of the emergency doctrine. It relies entirely on individuals' assertions of what they would have done and is devoid of

the type of historical facts *Nix* made clear are required.[10] "[S]peculation based on the court's view of what would have followed based on 'best practices' or . . . reasonably thorough police work" is inadequate.[11]

No witness suggested there was a past practice, or policy which, if followed, would have required such action,[12] and there was no separate investigation moving in that direction. The trial court's conclusion rests on Sergeant Lynch's "suggest[ion] . . . that but for Patrolman Starke's action" she would have "returned to the home at a later time." Exhibit A at *4. But Lynch's testimony comes nowhere close to establishing she would have inevitably entered. A111—12. Most importantly, Lynch did not say she would have *entered* the home; only that she would have returned. It is more than plausible that, as she did the first time, she would have just knocked. A111. Second, Lynch's assertion about her personal plan lacks the type of certainty typically associated with inevitable discovery counterfactuals.

[10] *Nix*, 467 U.S. at 444, n.5 ("involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment.")
[11] *United States v. Carrion-Soto*, 493 F. App'x 340, 342 (3d Cir. 2012).
[12] The trial court's description of Det. Mullaney's testimony as describing "investigative procedures for finding out information about where the children lived and who their guardian was" (Exhibit A n.38) refers to Mullaney's personal practice, not the type of procedure which courts look to in an inevitable discovery analysis. A182 ("personally I rely on our school resource officers.")

b. *Police would not have inevitably sought and obtained a warrant for the home.*

i. Applying for a warrant is not inevitable unless the process is initiated before the illegal search.

Without citation to legal authority, the trial court erroneously concluded that if police had not entered illegally, they would have inevitably applied for warrant. However, many courts, including those in our state,[13] have refused to find that a warrant would inevitably have been pursued, without evidence of a routine of seeking search warrants in comparable circumstances, or that the warrant process had already begun at the time of the illegality.[14]

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[13] *State v. Harris*, 642 A.2d 1242, 1251 (Del. Super. Ct. 1993) (holding testimony that officer "would have obtained a search warrant" had defendant not consented, did not establish inevitable pursuit of warrant where "State [failed to] show . . . police officers were in the process of preparing a search warrant for the location in question at the time"); *State v. Preston*, 2016 WL 5903002, at *5 (Del. Super. Ct. Sept. 27, 2016) (finding police would inevitably have pursued warrant where officer "testified he was already working on warrant when" illegal entry occurred); *State v. Lambert*, 2015 WL 3897810, at *7 (Del. Super. Ct. June 22, 2015), *aff'd*, 149 A.3d 227 (Del. 2016) (applying doctrine where illegal search occurred while there were "two pending search warrants.")

[14] *United States v. Smith*, 575 F. Supp. 3d 542, 556 (E.D. Pa. 2021); *Mobley v. State*, 834 S.E.2d 785, 799 (Ga. 2019) ("actually obtain[ing] a warrant" inadequate unless effort began before illegality); *Brierley v. City*, 390 P.3d 269, 277 (Utah 2016) (rejecting theory that same officers who illegally entered home "would have obtained the warrant before entering if they had not done the exact opposite"); *Rodriguez v. State*, 187 So. 3d 841, 849 (Fla. 2015) (limiting doctrine to where police "actually were in pursuit of" a warrant); *United States v. Richardson*, 2007 WL 2823336, at *4 (W.D. Pa. Sept. 26, 2007) (declining to apply doctrine where process to obtain warrant began after illegality); *People v. Diaz*, 53 P.3d 1171, 1176 (Colo. 2002) ("police must have been pursuing another lawful means of discovery at the time the illegality occurred"); *United States v. Allen*, 159 F.3d 832, 841 (4th Cir. 1998) ("probable cause . . . without any evidence that the police would have acted

In our case, where the warrant was not even contemplated at the time of the illegal entry, there was no basis to find it would inevitably have been pursued. The officers involved in the illegal search would not have applied for a warrant. A270. The possibility that, absent the illegal search, a warrant would have been pursued comes from Det. Mullaney; but Mullaney was only contacted as a result of the illegal entry and testified *if* he were contacted (and was unsure if he would have been), and *if* whomever did so "explained the entire situation," his personal decision would have been to seek a warrant. A267—270. In any case, Det. Mullaney's claims about his personal next steps do not carry the certainty of an established procedure, or pre-existing investigation.

ii. Had police applied for a warrant, it would not have been granted.

Detective Mullaney conceded that he could only speculate as to what would have been in the hypothetical warrant application. A272—73. Further, the trial court's assumption that the claim that Garnett asked M.S. to hide items would have been used in the application is inconsistent with the fact that it was not included in the one police actually submitted. A15—19. This leaves the content of the

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to obtain a warrant, does not trigger the inevitable discovery doctrine any more than probable cause . . . renders a warrantless search valid"); *United States v. Conner*, 127 F.3d 663, 667 (8th Cir. 1997) (requiring active pursuit of "substantial, alternative line of investigation"); *United States v. Cherry*, 759 F.2d 1196, 1205–06 (5th Cir.1985) (declining to apply doctrine where police were not actively pursuing warrant at time of illegality); *United States v. Satterfield*, 743 F.2d 827, 846 (11th Cir.1984) (requiring independent line of investigation at time of illegality).

application too speculative for any inevitability. And regardless of what was in the application, it simply would not satisfy the probable cause and nexus requirements to search a home. Tellingly, the lower court did not explain how the requirements would have been met, identify what evidence police would have been looking for, or what crime they would have been investigating.

But even if a magistrate *could* have granted a warrant, that is inadequate; the question is whether a magistrate *would* have.[15] And that question, especially without testimony from a magistrate, falls into what one commentator describes as an "[e]specially dubious [category of] the 'inevitable discovery' doctrine [] grounded in predictions about what persons other than the police would have done."[16] Magistrates have discretion in ruling on warrant applications,[17] and this application would certainly not have the "overwhelming probable cause"[18] necessary to assume it would be granted. Even Det. Mullaney, who presumably has significant experience in applying for warrants (A172), was unsure if this hypothetical warrant would have

[15] *United States v. Elder*, 466 F.3d 1090, 1091 (7th Cir. 2006) ("When a warrant is *sure to issue* (if sought)").
[16] W. LaFave, 6 SEARCH & SEIZURE § 11.4(a) (6th ed.); *United States v. Stokes*, 733 F.3d 438, 447 (2d Cir. 2013) ("an assessment of the actions that might have been taken by third parties . . . is inherently speculative.")
[17] *Rybicki v. State*, 119 A.3d 663, 668 (Del. 2015); 11 *Del C.* § 2307(a) ("*may* direct a warrant") (emphasis added).
[18] *United States v. Cabassa*, 62 F.3d 470, 473 (2d Cir. 1995) (finding approval of warrant not inevitable when probable cause was not "overwhelming").

been approved. A273. And finally, there is always the "possibility that a magistrate judge would have required a stronger showing of probable cause."[19]

iii. Inevitable discovery should not be applied when police could have legally accessed the home with a warrant, but did so without one.

Even if there were a basis to find a warrant would inevitably have been obtained, applying the inevitable discovery doctrine is inconsistent with the most basic point of the warrant requirement: judicial approval *before* entering the home. Accordingly, the Ninth Circuit has stated that applying the doctrine where "officers had probable cause and could have inevitably obtained a warrant would completely obviate the warrant requirement."[20] Numerous other courts have similarly discouraged applying the doctrine to warrantless home searches which could have been (but were not) conducted pursuant to a lawful warrant.[21]

In this case, the (supposed) probable cause for the hypothetical warrant was collectively possessed at the time police illegally accessed the home. Exhibit B at *2

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[19] *Id.* at 474.

[20] *United States v. Young*, 573 F.3d 711, 723 (9th Cir. 2009).

[21] *State v. Handtmann*, 437 N.W.2d 830, 838 (N.D. 1989) ("State's assertion that it would have obtained a lawful search warrant based upon the information subsequently discovered would emasculate the requirement for a search warrant"); *State v. Sugar*, 495 A.2d 90, 104 n.3 (N.J. 1985) ("the exception should not be applied to circumvent the warrant requirement"); *Elder*, 466 F.3d at 1091 (noting in dicta "[i]f probable cause . . . [without] applying for a warrant were enough to invoke the inevitable-discovery doctrine, that would [effectively] limit[] the exclusionary rule to searches conducted without probable cause").

(finding all information possessed by law enforcement at 6:42). Nonetheless, they entered without a warrant. Even more problematic, when Detectives Mullaney and Matthews went into the home they were simply unwilling to wait for the application process to run its course. According to Det. Matthews, who oversaw evidence collection at the home:

> *we didn't know how long it would take for a search warrant to be obtained . . . We wanted to try and preserve it through photography just so in the event that it takes several hours to take get a search warrant . . . they would be able to even rely on our photos to better understand the injuries to the victim*. A161.

The efficiency of an investigation does not justify a warrantless search.[22] Even courts that apply inevitable discovery to warrantless home searches decline to do so when, as occurred here, law enforcement deliberately violate their constitutional constraints because they don't want to wait.[23]

[22] *See United States v. Chadwick*, 433 U.S. 1, 6–11 (1977) ("the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law").

[23] *See e.g. United States v. Baires-Reyes*, 750 F. App'x 548, 550 (9th Cir. 2018) ("[T]he inevitable discovery exception does not apply when officers have probable cause to apply for a warrant but simply fail to do so."); *United States v. Johnson*, 22 F.3d 674, 683 (6th Cir.1994) ("to hold that simply because the police could have obtained a warrant, it was therefore inevitable that they would have done so would mean that there is inevitable discovery and no warrant requirement whenever there is probable cause").

II. The trial court abused its discretion by finding Garnett's confession was not a fruit of the illegal home search and would have inevitably been made even without the search, when, the interrogation was influenced by the search, there was no evidence as to why Garnett confessed and, but for the illegal search, he would likely not have been interrogated.

Question Presented

Whether the trial court abused its discretion by finding Garnett's confession was not a fruit of the illegal home search and would inevitably have been made even without the search, when, the interrogation was influenced by the illegal search, there was no evidence as to why he confessed, and, but for the illegal search, he would likely not have been interrogated? A35—48.

Scope of Review

This Court reviews the denial of a motion to suppress evidence for abuse of discretion.[24] This Court reviews alleged constitutional violations *de novo.*[25]

Merits of Argument

Garnett maintained that his confession was a fruit the illegal entry into his home which must be suppressed. The trial court denied his motion by erroneously finding (1) the confession was sufficiently attenuated from the illegality such that it was not a "fruit of the poisonous tree;" and, (2) even if the confession were a fruit

[24] *Smith v. State*, 887 A.2d 470, 472 (Del. 2005).
[25] *Wheeler v. State*, 135 A.3d 282, 295 (Del. 2016).

of the initial illegality, had the illegality not occurred, Garnett would still have inevitably confessed.

a. *The trial court should not have, and this Court has never, applied the inevitable discovery doctrine to a defendant's illegally obtained statements.*

In *United States v. Vasquez De Reyes*, the Third Circuit recognized that, unlike physical evidence, which "absent its removal will remain where left until discovered . . . a statement not yet made is, by its very nature, evanescent and ephemeral. Should the conditions under which it was made change, even but a little, there could be no assurance the statement would be the same."[26] As a result of this concern, the Third Circuit and numerous jurisdictions generally rejects the idea of an inevitably made statements.[27]

The trial court rejected this position, not because it disputed the Third Circuit's rationale, but because it misunderstood this Court's holding in *Norman v. State*. Exhibit B at *5. Contrary to the trial court's understanding, *Norman* is not

[26] *United States v. Vasquez De Reyes*, 149 F.3d 192, 196 (3d Cir. 1998).
[27] *People v. Thomas*, 478 N.W.2d 712, 716 (Mich. 1991) ("To conclude that a person would make the same statement under different circumstances requires, in essence, both the ability to read the defendant's mind to ascertain why he was willing to make the statement in the first place and a degree of prognostication"); *Unger v. State*, 640 P.2d 151, 159 (Alaska Ct. App. 1982) ("a confession cannot normally be considered the type of evidence that inevitably will be 'discovered'"); *State v. Lopez*, 896 P.2d 889, 910 (Haw. 1995) ("applying the 'inevitable discovery' doctrine to oral statements, including confessions . . . would amount to 'surmise and speculative inference'"); *State v. McClain*, 862 N.W.2d 717, 724 (Minn. Ct. App. 2015) ("the content of a statement, by its very nature, is speculative.").

only consistent with *Vasquez De Reyes*, it favorably cites to that case's treatment of this very issue.[28] *Norman*'s application of the doctrine is consistent with *Vasquez De Reyes* because the *Norman* Court did not address the admissibility of a defendant's statements, but of an expert's conclusion regarding that defendant's competency. Scientific conclusions hardly implicate the Third Circuit's concerns about the "evanescent and ephemeral" nature of a defendant's statements.

Applied here, it is pure speculation to conclude Garnett would inevitably have confessed in an interview under a different set of circumstances. A decision to confess is not a robotic reaction to a skilled interrogator's use of a perfectly crafted question. It is a complicated and personal decision which hinges on enumerable features of a suspect's state of mind. Det. Mullaney's testimony about what he believed police would have done absent the illegal entry is contrasted by his recognition that he had no basis to make such predictions about Garnett (A279—80); and those predictions are *exactly* what proper application of the inevitable discovery doctrine requires.

If the interview was at a different time, Garnett might have simply been in a different mood and decided he wanted an attorney or did not want to confess.[29] His

[28] *Norman v. State*, 976 A.2d 843, 859 n. 36 (Del. 2009) (citing *Vasquez De Reyes*, 149 F.3d at 194–96.

[29] The *Norman* decision was not impacted by the possibility Norman would not have cooperated if the initial illegality had not occurred, because court rules – which have

state of mind would certainly have been different if he had gotten a little more sleep, which his inability to stay awake before the interrogation (A307 at 0:25-0:45) demonstrates was an issue. Or, as Det. Mullaney conceded, he might not have waived his *Miranda* rights. A279—80.

b. *But for the illegal entry, Garnett would not have, inevitably, still been at the station if/when police decided to interrogate him.*

The trial court recognized that, to show the statement was "inevitable," the State needed to show Garnett would inevitably have been at the police station at the time of the hypothetical interrogation. The court's finding, there was a "high likelihood" he would still be in custody (Exhibit B at *6), has two problems. First, a "high likelihood" is not an inevitability. Second, the finding is inconsistent with the record which established a strong possibility that Garnett would have been released after being arraigned on criminal impersonation, and a minor domestic charge. A277—78. And even if he was unable to afford bail, as Det. Mullaney thought possible, incarceration would have substantially changed the circumstances of the interview and made it far more likely that Garnett would have retained counsel.

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no analog in Garnett's case – required Norman to cooperate or waive his mental health defenses. *Norman*, 976 A.2d at 861 (a defendant *must* submit to an evaluation") (citing Super. Ct. Crim. R. 12.2). And – again unlike Garnett's case – had Norman refused, "the end result of the Delaware trial would be the same guilty verdict." *Id.*

To support its finding that Garnett's pre-arraignment detention would have been long enough that he would still be at the station for an interview, the trial court states "Detective Mullaney stated that the children, irrespective of whether the body was found, would have likely undergone Child Advocacy Center (hereinafter "CAC") interviews that would have extended Garnett's custody." Exhibit B at *2. But Det. Mullaney did not know when Garnett would have been interviewed (A269), and his actual testimony about CAC involvement, "[i]t very well could have been," suggests it was reasonably possible, not inevitable. A106—07.

Det. Mullaney did not identify an established procedure for determining when a CAC interview is conducted, and the equivocal description he did provide highlights the speculative nature of the court's findings: "CAC's are done as a result of the totality of the situation and direction from the Attorney General's office." A282. Neither Det. Mullaney, nor the trial court can know the "totality of the situation" in the hypothetical where the illegal entry did not occur; and there is no record evidence about the necessary "direction from the Attorney General's office" because nobody from that office testified, and the State did not identify an AG policy as to when CAC interviews are recommended. Finally, even if the kids were sent to the CAC, Det. Mullaney admitted it might not "stop Mr. Garnett from being booked and arraigned." A255—78.

c. ***Regardless of how long Garnett remained at the station, but for the illegal entry, officers might not have interviewed him.***

At the time of the illegal entry, there was no plan to interview Garnett. Further, his confession to the criminal impersonation, and the fact that the domestic incident at Wawa was on video and witnessed by an uninvolved third party, leaves little purpose in interviewing him about anything other than what was found in the illegal search. No witness identified a policy which dictates which arrestees are interviewed or testified that Garnett would have been interviewed if the illegal entry had not occurred.[30] Finally, the interviewer himself acknowledged that the goal of the interview was to find out about what happened at the house:

> *I'm more interested in what led up to there, obviously coming to the Wawa. Obviously, we went out to the house. I just want you to tell me what happened*. A307, 6:31-6:53.

d. ***But for the illegal entry, the interview questions would have been different.***

If an interview were to have occurred without the illegal entry, its questions and statements would have been different than those which prompted the confession. The language of the question at issue (italicized above) clearly pulls from police's determination that something significant happened at the house and caused Garnett

[30] *See Reed v. State*, 89 A.3d 477 (2014) (noting State's concession that judge's finding that drugs would have been discovered during search incident to arrest was erroneous because record did not show standard procedure to arrest drivers for violation at issue).

to take the kids to the Wawa; a determination which hinges on the illegal entry. This is no surprise because Det. Mullaney conceded that the interrogation was informed by the investigation (A274), and the information obtained from the illegal search was the most significant evidence in that investigation.[31]

Det. Mullaney did not need to identify what they found in the home to take advantage of the illegal entry. The obvious rationale for telling Garnett that they went to the home was to elicit a response about what occurred at the home. Police do not, without a reason, fill in suspects on their investigative steps. When asked during cross-examination, Det. Mullaney was unable to provide any other explanation. A276—77.

[31] Even *United States v. Mohammed*, the authority the trial court relied on as a contrast to *Vasquez De Reyes*, required a level of certainty far beyond what this record provides to establish the interrogator's questions would not have changed. In *Mohammed*, as in our case, the defendant argued that (but for an illegality) certain incriminating statements would not have inevitably been made. The *Mohammed* Court found otherwise, not because the interrogator claimed his questions were not influenced by the illegality, but because the questions were scripted on a "gun arrest questionnaire that they use with anyone that's arrested with a handgun." 512 F. App'x 583, 590 (6th Cir. 2013).

III. The trial court erred by holding the Delaware Constitution incorporates the inevitable discovery doctrine as described in *Nix v. Williams*.

Question Presented

Whether the Delaware Constitution incorporates the inevitable discovery doctrine as described in *Nix v. Williams*? A25.

Scope of Review

This Court reviews alleged constitutional violations *de novo.*[32]

Merits of Argument

The Fourth Amendment to the Federal Constitution guarantees the people the right to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Art. I, § 6 of the Delaware Constitution guarantees that the people "shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures." "[T]he United States Constitution establishes a minimum, the least protection that a State may provide to its citizens . . . It does not establish a maximum."[33]

The first step in a "state constitutional analysis . . . is the determination whether, as a general matter, the state constitutional provision . . . [at issue] provides

[32] *Wheeler v. State,* 135 A.3d 282, 295 (Del. 2016).
[33] *See Sanders v. State,* 585 A.2d 117, 145 (1990).

different and broader protection than a similar federal constitutional provision."[34] Art. I, § 6 of the Delaware Constitution satisfies this step,[35] and this Court has identified numerous circumstances in which those broader protections apply.[36]

The second step is "whether that broader protection is properly applied to the [challenged] police conduct;"[37] in this case, *Hix*'s inevitable discovery rule.[38] To do so this Court will consider the following non-exclusive criteria: "textual language, legislative history, preexisting state law, structural differences, matters of particular state interest or local concern, state traditions, and public attitudes."[39]

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[34] *Juliano v. State*, 254 A.3d 369, 379 (Del. 2020).
[35] *Id.* at 380.
[36] *Jones v. State*, 745 A.2d 856, 864–69 (Del. 1999) (distinguishing Delaware and Federal Constitutions and finding that, in former, a seizure occurs without force or submission to authority); *Dorsey v. State*, 761 A.2d 807, 820 (Del. 2000) (rejecting *Leon*'s good faith exception under the Federal Constitution).
[37] *Juliano*, 254 A.3d at 379.
[38] *Nix v. Williams*, 467 U.S. 431 (1984).
[39] *Mathis v. State*, 907 A.2d 145 (Del. 2006).

a. *Textual language and legislative history*.

The textual language of the Delaware and federal provisions, quoted above, is different. More significantly, the legislative history of the Delaware Constitution reveals that "[a] commitment to protecting the privacy of its citizens" absent in the Federal Constitution.[40]

i. **The inevitable discovery doctrine is tied to the purpose of the federal exclusionary rule and is inconsistent with that of our state analog.**

The federal inevitable discovery doctrine is, explicitly, a function of the *Nix* Court's determination that the specific purpose of the federal exclusionary rule is outweighed by the negative impacts of suppression in cases where the doctrine is properly implicated.[41] Thus, the *Nix* Court's reasoning and acceptance of the doctrine says nothing about exclusion within the Delaware Constitution because the Delaware and federal exclusionary rules serve different purposes. The "prime purpose" of the federal rule "is to deter future unlawful police conduct."[42] Whereas exclusion in the Delaware Constitution is "a remedy for a violation of a defendant's right to be free of illegal searches and seizures."[43]

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[40] *Jones*, 745 A.2d at 866.
[41] *Nix*, 467 U.S. at 444 ("[i]f the information ultimately or inevitably would have been discovered by lawful means ... then the deterrence rationale has so little basis that the evidence should be received.").
[42] *United States v. Calandra*, 414 U.S. 338, 347 (1974).
[43] *Dorsey*, 761 A.2d at 818.

ii. **Violations of Delaware Constitutional rights require remedies**.

In rejecting the Federal Constitution's good faith exception, this Court, in *State v. Dorsey*, recognized that the Delaware Constitution embodies the common-law principle "that every right, when withheld, must have a remedy.[44] "Without a constitutional remedy, a Delaware 'constitutional right' is an oxymoron that could unravel the entire fabric of protections in Delaware's two hundred and twenty-five year old Declaration of Rights."[45] The *Dorsey* Court noted this conclusion is substantiated by Article 30 of Delaware's first constitution which provided: "[n]o article of the declaration of rights and fundamental rules of this state . . . ought ever to be violated on *any pretense* whatever."[46]

Just as the good faith exception does, the inevitable discovery doctrine permits a violation without a remedy. This is clear from *Nix* itself which justified the rule NOT by finding there was no violation (as is the case with other Fourth Amendment "exceptions"), but instead, by assuming there was a violation, and declining to provide a remedy based on its balancing of the costs and benefits of exclusion.

But violations of the Delaware Constitution require a remedy. And, if there is any question as to what remedy is required, in *State v. Rickards* this Court rejected

[44] *Id.* at 816–17 (citing 3 William Blackstone, Commentaries *109).
[45] *Id.* at 821.
[46] *Id.* at 817.

the suggestion of a lesser remedy for search and seizure violations and found that "as long as the [Delaware] Constitution contains the [search and seizure] guarantees to the citizen referred to, we have no choice but to use every means at our disposal to preserve those guarantees. Since it is obvious that the exclusion of such matters from evidence is the most practical protection, we adopt that means."[47]

b. *Preexisting State Law.*

Delaware's statutory treatment of the warrant requirement suggests that the inevitable discovery doctrine should not be applied to home searches.[48] Pursuant to 11 *Del. C.* § 2301, "[n]o person shall search any . . . house . . . unless such search is authorized by and made pursuant to statute or the Constitution of the United States." There is no inevitable discovery statute in the Delaware Code, and such searches are unquestionably not "authorized or made pursuant to the Constitution of the United States;" they are, by definition, violations of the federal constitution, just not ones to which the federal exclusionary rule is applied.

c. *Numerous other states interpret their state constitution's fourth amendment analogs as providing more protection than Nix.*

To determine the extent of our constitution's protections, this Court has considered how other states interpret their state constitutions' respective fourth

[47] *Rickards v. State*, 77 A.2d 199, 204–05 (1950).
[48] As noted *infra* (nn.13—14, 20—21) other states have adopted similar approaches to the doctrine.

amendment analogs.[49] Indiana[50] and Washington[51] have entirely rejected the doctrine. New Jersey[52] and Hawaii[53] require the state to meet a higher burden of proof – clear and convincing evidence.[54] New Jersey[55] and Arizona[56] do not apply the doctrine where the initial illegal search was of a dwelling. New York restricts the doctrine's use to secondary evidence.[57] West Virginia requires that, *prior* to the violation "the leads making the discovery inevitable were possessed . . . and that the

[49] *Jones*, 745 A.2d at 864.
[50] *Chest v. State*, 922 N.E.2d 621, 625 n.6 (Ind. Ct. App. 2009) ("inevitability has not been adopted as an exception to the exclusionary rule under the Article 1, Section 11 of the Indiana Constitution").
[51] *State v. Winterstein*, 220 P.3d 1226, 1233 (Wash. 2009) ("we reject the inevitable discovery doctrine because it is incompatible with the nearly categorical exclusionary rule under article I, section 7").
[52] *State v. Robinson*, 159 A.3d 373, 386-87 (N.J. 2017) (prosecution must "prove inevitable discovery by clear and convincing evidence, a higher standard than that imposed by federal law").
[53] *State v. Silva*, 979 P.2d 1137, 1146 (Haw. Ct. App.), *aff'd*, 979 P.2d 1106 (1999).
[54] The propriety of a heightened standard was forcefully explained in J. Brennan and Marshal's dissenting opinion in *Nix* itself. 467 U.S. at 459 ("To ensure that th[e] hypothetical finding [inherent to the inevitable discovery rule] is narrowly confined to circumstances that are functionally equivalent to an independent source, and to protect fully the fundamental rights served by the exclusionary rule, I would require clear and convincing evidence.")
[55] *State v. Lashley*, 803 A.2d 139, 142 (N.J. App. Div. 2002) (holding applying doctrine to warrantless home search "is inconsistent with basic principles which flow from our Supreme Court's interpretation of N.J. Const. art. I, par. 7 . . . in a State that does not recognize the 'good faith' exception").
[56] *State v. Ault*, 724 P.2d 545, 552 (Ariz. 1986) (refusing to apply doctrine to home searches, based on art. 2, § 8 of Arizona Constitution)
[57] *People v. Stith*, 506 N.E.2d 911, 914 (N.Y. 1987) (holding, under New York Constitution, article I, section 12, the doctrine only applies to secondary evidence; not that discovered in the illegal search).

police were actively pursuing a lawful alternative line of investigation to seize the evidence."[58] Pennsylvania has not completely fleshed out its rule but has made clear that the doctrine's application is far more limited than in the federal system. For example, Pennsylvania (1) will not apply the doctrine to a warrantless home search unless the violation was "substantially unwitting . . . [and] devoid of any cognizable misconduct," and also (2) requires that the decision to seek a warrant was prompted by information independent of what was learned during the unlawful search.[59] This Court has previously referenced many of these states' interpretations of their respective constitutions – Washington, New Jersey, Hawaii, and Pennsylvania – as persuasive authority in interpreting our own.[60]

[58] *State v. Flippo,* 575 S.E.2d 170, 190–91 (W. Va. 2002) (interpreting Article III, Section 6 of West Virginia Constitution).

[59] In *Comm. v. Berkheimer*, 57 A.3d 171 (Pa.Super. 2012) (*en banc*) (reviewing Pennsylvania Supreme Court's treatment of inevitable discovery exception and concluding its applicability to Pennsylvania Constitution is severely limited); *see Commonwealth v. Mason*, 637 A.2d 251, 256 (Pa. 1993) ("If our sole purpose in applying Article I, Section 8 . . . were to deter police misconduct, we would be constrained to rule in favor of the Commonwealth . . . However, where our task is . . . to safeguard privacy and the requirement that warrants shall be issued only upon probable cause, our conclusion is different").

[60] *Jones*, 745 A.2d at 864.

CONCLUSION

Because Defendant could not have been convicted without the disputed evidence, and for the reasons and upon the authorities cited herein, Defendant's aforesaid convictions should be vacated.

Respectfully submitted,

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DATED: March 6, 2023