

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

COREY RAMONE FRAZIER,

Defendant-Appellee.

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FOR PUBLICATION

March 7, 2006

9:00 a.m.

No. 256986

Genesee Circuit Court

LC No. 95-052613-FC

Official Reported Version

Before: Cooper, P.J., and Talbot and Fort Hood, JJ.

COOPER, P.J.

The prosecution appeals, by leave granted, the July 28, 2004, order of the trial court granting defendant's pretrial motions to exclude certain evidence during his new trial. Specifically, the court prohibited the prosecution from using for impeachment purposes statements made by defendant should defendant waive his Fifth Amendment privilege and take the stand in his own defense. The United States District Court for the Eastern District of Michigan previously found that these statements were elicited in violation of defendant's Sixth Amendment right to counsel.<sup>1</sup> The trial court also prohibited the prosecution from presenting the testimony of two witnesses whose identity was procured from those inadmissible statements, absent a showing that these witnesses were, in fact, discovered from an independent source. We affirm in part and reverse in part.

**I. Factual and Procedural Background**

In 1996, defendant was convicted following a jury trial of two counts of felony murder,<sup>2</sup> two counts of possession of a firearm during the commission of a felony (felony-firearm),<sup>3</sup> and one count of armed robbery.<sup>4</sup> Defendant's convictions arose from the 1995 murders of James

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<sup>1</sup> After defendant exhausted his state appellate relief, he successfully petitioned the federal district court for a writ of habeas corpus.

<sup>2</sup> MCL 750.316.

<sup>3</sup> MCL 750.227b.

<sup>4</sup> MCL 750.529.

Goff and Aaron McColgan. Kenneth Haywood implicated defendant in the crime. Mr. Haywood told investigating officers that he drove defendant and codefendant, Idell Cleveland,<sup>5</sup> to Mr. McColgan's home on the night of the murders. Mr. Haywood waited in his car while defendant and Mr. Cleveland went inside. Through the open windows of the house, Mr. Haywood heard Mr. Cleveland say, "Get on the floor." Mr. Haywood then heard two gunshots, whereupon he fled the scene alone. He went to the police station the following day, after reading of the murders in a local newspaper.

Based on the information provided by Mr. Haywood, officers executed a search warrant at defendant's home three days after the murders. Thereafter, defendant's mother retained an attorney to represent her son. The attorney advised defendant to speak with the police in an attempt to negotiate a plea bargain, and accompanied his client when he surrendered to the authorities. Two days later, and following his arraignment, defendant gave three statements to the police detailing his involvement in the crime. Although initially denying any knowledge of Mr. Cleveland's plans, defendant ultimately admitted that he knew that Mr. Cleveland was armed and intended to rob Mr. Goff and Mr. McColgan.<sup>6</sup> Defendant also admitted that Mr. Cleveland gave him two \$50 bills following the robbery. Defendant told officers that two men operating a street sweeper gave him a ride home following the shootings. The prosecution located these witnesses, Anthony Wright and Wilbert Mack, who testified that defendant indicated that he had been at a party and could not find a ride home. They further testified that defendant asked them if they had change for a \$50 bill.

In his first appeal, defendant alleged that counsel was ineffective for advising him to speak to the police absent an official offer to enter into a plea agreement. This Court originally affirmed defendant's convictions.<sup>7</sup> Upon receiving information from the defendant that the challenged interrogations occurred following arraignment, however, the panel reconsidered and remanded for a *Ginther*<sup>8</sup> hearing.<sup>9</sup> At that hearing, defense counsel testified that he remained

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<sup>5</sup> This Court affirmed Mr. Cleveland's convictions of two counts of first-degree murder, MCL 750.316; two counts of felony-firearm, MCL 750.227b; and one count of armed robbery, MCL 750.529. *People v Cleveland*, unpublished opinion of the Court of Appeals, issued June 17, 1997 (Docket No. 194236).

<sup>6</sup> A panel of this Court previously indicated that "defendant admitted that he supplied codefendant with the murder weapon and knew of codefendant's intent to rob the victims." *People v Frazier (After Remand)*, unpublished opinion of the Court of Appeals, issued April 21, 2000 (Docket No. 193891) (*Frazier III*), slip op at 6 n 2. This description of defendant's statement is inaccurate. Defendant stated that he knew that Mr. Cleveland intended to rob Mr. Goff and Mr. McColgan "when he told me to get his gun." Defendant never indicated that he provided the murder weapon.

<sup>7</sup> *People v Frazier*, unpublished opinion of the Court of Appeals, issued February 27, 1998 (Docket No. 193891) (*Frazier I*) (vacated by an order entered May 6, 1998).

<sup>8</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

with defendant while he waived his *Miranda*<sup>10</sup> rights and agreed to speak with the police. However, counsel admitted that he did not accompany his client into the interrogations, as he was uncertain whether the officers would have allowed him to be present. Despite counsel's abandonment of his client, the trial court denied defendant's motion for a new trial and this Court affirmed.<sup>11</sup> Defendant then filed an application for leave to appeal with the Michigan Supreme Court, which was denied.<sup>12</sup>

The defendant subsequently filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan. Defendant alleged for the first time in that petition that defense counsel's abandonment during the police interrogations violated his Sixth Amendment right to counsel under *United States v Cronin*.<sup>13</sup> The federal district court agreed and granted defendant's writ.<sup>14</sup> The district court found that defendant was completely deprived of the assistance of counsel during a critical stage of the proceedings—the police interrogations following his arraignment.<sup>15</sup> Accordingly, the district court found:

The absence of counsel during the interrogations tainted the whole trial process, as evidenced by the use of Petitioner's statements at trial. Allowing the State to retry Petitioner with the use of the statements made during the tainted interrogations would lead only to yet another tainted trial. Therefore, the only appropriate remedy is to not allow use of the tainted statements, should the State decide to initiate a new trial in this matter.<sup>16</sup>

Thereafter, the prosecution re-arraigned defendant in November of 2003.<sup>17</sup> Prior to trial, defendant filed a motion to prevent the prosecution from making *any* use of his statements to the police, even for impeachment purposes. Defendant also sought to prevent the prosecution from introducing the testimony of Mr. Wright and Mr. Mack, as knowledge of their identity was only

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<sup>9</sup> *People v Frazier (On Rehearing)*, unpublished opinion of the Court of the Appeals, issued August 7, 1998 (Docket No. 193891) (*Frazier II*). The panel also vacated defendant's conviction of armed robbery on double jeopardy grounds.

<sup>10</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

<sup>11</sup> *Frazier III, supra*. The panel focused solely on counsel's strategic decision to seek a plea bargain for his client.

<sup>12</sup> *People v Frazier*, 464 Mich 851 (2001) (*Frazier IV*) (Kelly and Cavanagh, JJ., dissenting).

<sup>13</sup> *United States v Cronin*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

<sup>14</sup> *Frazier v Berghius*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued August 6, 2003 (Docket No. 02-CV-71741-DT) (*Frazier V*).

<sup>15</sup> *Id.* at 12-13.

<sup>16</sup> *Id.* at 13-14.

<sup>17</sup> In the current trial, the prosecution charged defendant with two counts of open murder (rather than felony murder), MCL 750.316; two counts of felony-firearm, MCL 750.227b; and one count of armed robbery, MCL 750.529.

procured from defendant's inadmissible statements. The trial court excluded both the statements and any evidence derived therefrom.<sup>18</sup> Based solely on the federal district court's order, the trial court determined that allowing the prosecution to use the statements for impeachment purposes would taint defendant's retrial. The trial court also granted defendant's motion to exclude the testimony of Mr. Mack and Mr. Wright as "fruits" of those improper statements. The court noted, however, that these witnesses could be called at trial, "if the People can provide a foundation that the discovery of these witnesses came from a different source." This Court subsequently granted the prosecution's motion for leave to appeal.<sup>19</sup>

## II. Impeachment

The prosecution first contends that the trial court improperly excluded the use of defendant's statements for impeachment purposes in the event that defendant waives his Fifth Amendment privilege against self-incrimination and takes the stand in his own defense. We review a trial court's decision to admit or exclude evidence for an abuse of discretion.<sup>20</sup> However, when the trial court's decision involves a preliminary question of law, we review the issue de novo.<sup>21</sup>

We agree with the federal district court's determination that the prosecution is prohibited from using defendant's statements elicited during the post-arraignment interrogations in its case-in-chief. "The Sixth Amendment provides that the accused in a criminal prosecution 'shall enjoy the right . . . to have the Assistance of counsel for his defence [sic].'"<sup>22</sup> The accused is guaranteed "the right to rely on counsel as a 'medium' between him and the State."<sup>23</sup> This right attaches once formal adversary proceedings are initiated against the defendant, such as at arraignment.<sup>24</sup> Generally, a defendant who alleges that he was denied the effective assistance of counsel must establish that counsel's errors affected the outcome of his trial.<sup>25</sup> However, the complete deprivation of the assistance of counsel at a critical stage of the adversary proceedings

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<sup>18</sup> The trial court also ruled upon several pretrial, evidentiary motions that are not at issue in this appeal.

<sup>19</sup> *People v Frazier*, unpublished order of the Court of Appeals, entered July 30, 2004 (Docket No. 256986).

<sup>20</sup> *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

<sup>21</sup> *Id.*

<sup>22</sup> *People v Russell*, 471 Mich 182, 187; 684 NW2d 745 (2004), quoting US Const, Am VI. See also Const 1963, art 1, § 20 (a criminal defendant "shall have the right . . . to have the assistance of counsel for his . . . defense").

<sup>23</sup> *Maine v Moulton*, 474 US 159, 176; 106 S Ct 477; 88 L Ed 2d 481 (1985).

<sup>24</sup> *Michigan v Jackson*, 475 US 625, 629-630; 106 S Ct 1404; 89 L Ed 2d 631 (1986); *Kirby v Illinois*, 406 US 682, 689; 92 S Ct 1877; 32 L Ed 2d 411 (1972).

<sup>25</sup> *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

amounts to structural error, and, therefore, prejudice is presumed.<sup>26</sup> The United States Supreme Court has repeatedly found that post-arraignment police interrogations are a critical stage of criminal proceedings at which a defendant is entitled to legal representation.<sup>27</sup> Yet, defense counsel, in this case, purposefully and unreasonably left his client to face the police interrogations alone. The prosecution did not overcome the strong presumption that defendant's subsequent waiver of his right to counsel was invalid. Accordingly, the prosecution clearly may not use defendant's statements in its case-in-chief.<sup>28</sup>

While the United States Supreme Court has repeatedly excluded statements elicited in violation of a defendant's constitutional rights from the prosecution's case-in-chief, such statements, if otherwise voluntary, are admissible for impeachment purposes. In *Walder v United States*,<sup>29</sup> the Supreme Court found that the prosecution may not rely on evidence seized in violation of the Fourth Amendment to establish a defendant's guilt. Yet, the Court found no reason to exclude such evidence for impeachment purposes.

It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. . . .

. . . Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief. Beyond that, however, there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility.<sup>[30]</sup>

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<sup>26</sup> *Cronic*, *supra* at 659; *People v Willing*, 267 Mich App 208, 224; 704 NW2d 472 (2005), citing *Russell*, *supra* at 194 n 29, and *People v Anderson (After Remand)*, 446 Mich 392, 405; 521 NW2d 538 (1994).

<sup>27</sup> *Jackson*, *supra* at 629-630; *Brewer v Williams*, 430 US 387, 400-401; 97 S Ct 1232; 51 L Ed 2d 424 (1977), citing *Massiah v United States*, 377 US 201; 84 S Ct 1199; 12 L Ed 2d 246 (1964).

<sup>28</sup> See *Michigan v Harvey*, 494 US 344, 349; 110 S Ct 1176; 108 L Ed 2d 293 (1990), citing *Jackson*, *supra* ("[O]nce a criminal defendant invokes his Sixth Amendment right to counsel, a subsequent waiver of that right—even if voluntary, knowing, and intelligent under traditional standards—is presumed invalid if secured pursuant to police-initiated conversation," and may not be admitted as substantive evidence in the prosecutor's case-in-chief).

<sup>29</sup> *Walder v United States*, 347 US 62, 64-65; 74 S Ct 354; 98 L Ed 503 (1954).

<sup>30</sup> *Id.* at 65.

The United States Supreme Court has similarly found that statements improperly elicited during a custodial interrogation after a defendant invokes the right to counsel may be used for impeachment purposes.<sup>31</sup>

Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. . . . Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process. . . .

The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.<sup>[32]</sup>

More recently, in *Michigan v Harvey*,<sup>33</sup> the United States Supreme Court specifically determined that statements improperly elicited in violation of a defendant's Sixth Amendment right to counsel could be used to impeach his or her testimony on the stand. The Court acknowledged that, as waivers of a defendant's Sixth Amendment right to counsel are presumptively invalid, evidence obtained following such a waiver is inadmissible to establish a defendant's guilt.<sup>34</sup> "The prosecution must not be allowed to build its case against a criminal defendant with evidence acquired in contravention of constitutional guarantees and their corresponding judicially created protections. But use of statements so obtained for impeachment purposes is a different matter."<sup>35</sup> The Court reasoned that the exclusion of "reliable and probative evidence for *all* purposes" was only necessary when "derived from *involuntary* statements."<sup>36</sup>

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<sup>31</sup> *Oregon v Hass*, 420 US 714; 95 S Ct 1215; 43 L Ed 2d 570 (1975); *Harris v New York*, 401 US 222; 91 S Ct 643; 28 L Ed 2d 1 (1971). We note that previous opinions of the Supreme Court appeared to consider *Miranda* to be merely a "prophylactic" protection of a defendant's Fifth Amendment rights. The Supreme Court has since made clear that the protections in *Miranda* are themselves constitutionally based. *Dickerson v United States*, 530 US 428; 120 S Ct 2326; 147 L Ed 2d 405 (2000).

<sup>32</sup> *Harris, supra* at 225-226.

<sup>33</sup> *Harvey, supra*.

<sup>34</sup> *Id.* at 349.

<sup>35</sup> *Id.* at 351.

<sup>36</sup> *Id.*, citing *New Jersey v Portash*, 440 US 450, 459; 99 S Ct 1292; 59 L Ed 2d 501 (1979). See also *People v Stacy*, 193 Mich App 19, 24-25; 484 NW2d 675 (1992), quoting *People v Paintman*, 139 Mich App 161, 169-170; 361 NW2d 755 (1984) ("[S]tatements taken in violation of a defendant's right to counsel, if voluntary, may be used for impeachment purposes although they could not have been used in the prosecutor's case-in-chief.").

Nothing on the record suggests that defendant's statements during these post-arraignment interrogations were involuntary. This Court has found that "[a] confession is involuntary if obtained by any sort of threat or violence, by any promises, express or implied, or by the exertion of any improper influence."<sup>37</sup> The United States Supreme Court has further found "that coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause . . . ."<sup>38</sup> Defendant was advised of his *Miranda* rights in the presence of counsel and signed a waiver form. Defendant does not contend, nor is there any indication on the record, that any police officer intimidated, coerced, or used any other improper method to secure defendant's statements.<sup>39</sup> Neither the caselaw of this state,<sup>40</sup> nor that from the United States Supreme Court, requires the total exclusion of otherwise voluntary statements elicited in violation of a defendant's Sixth Amendment right to counsel. The exclusion of these statements for impeachment purposes was unwarranted under these circumstances. Accordingly, we reverse that part of the trial court's order granting defendant's motion on this ground.

### III. Derivative Evidence

The trial court also determined that the prosecution was precluded from introducing the testimony of Mr. Mack and of Mr. Wright, as their identities were discovered during the improper post-arraignment interrogations. However, the court ruled that the prosecution could present these witnesses if it could establish that it did, *in fact*, discover their identities from an independent source. Rather than making that determination during the motion hearing, the trial court left the prosecution to its proofs. We agree that the prosecution must make an affirmative showing to support the admission of this evidence prior to calling these witnesses. Yet, we do not agree that the prosecution must show that it *actually* discovered these witnesses through

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<sup>37</sup> *Paintman*, *supra* at 171, citing *Malloy v Hogan*, 378 US 1, 7; 84 S Ct 1489; 12 L Ed 2d 653 (1964).

<sup>38</sup> *Colorado v Connelly*, 479 US 157, 167; 107 S Ct 515; 93 L Ed 2d 473 (1986).

<sup>39</sup> See *Frazier II*, *supra* at 4-5. The panel in that case found that a detective mistakenly informed defendant that any statements made during his polygraph examination would be inadmissible in court. However, officers corrected that error prior to administering the exam. *Id.* at 5.

<sup>40</sup> We note that, prior to *Michigan v Harvey*, the Michigan Supreme Court had not made a definitive decision whether the prosecution could impeach a defendant with his prior inconsistent statements elicited in violation of his right to counsel. See *People v Esters*, 417 Mich 34; 331 NW2d 211 (1982) (in which three justices found that such statements could be used for impeachment purposes, while three others would prohibit the use of the statements for any purpose). See also *People v Gonyea*, 421 Mich 462; 365 NW2d 136 (1984) (the justices reached a similar three-three split, with Justice Cavanagh finding that the statement was inadmissible for any purpose under the facts of that case alone).

independent, legal means. Rather, the prosecution need only show that the identity of these witnesses would have inevitably been discovered through alternate means.<sup>41</sup>

The rule that the tainted "fruit" of unlawful government conduct must be suppressed began with the United States Supreme Court's opinion in *Silverthorne Lumber Co v United States*.<sup>42</sup> The exclusionary rule originally applied to tangible evidence obtained in violation of the Fourth Amendment and any incriminating evidence derived therefrom.<sup>43</sup> In *Wong Sun v United States*, the Supreme Court extended the rule to further exclude indirect evidence derived from an illegal search.<sup>44</sup> From the genesis of the exclusionary rule, however, there were exceptions. Illegally obtained evidence does not "become sacred and inaccessible"; rather, these facts, if discovered by independent means, can be placed before the jury as substantive evidence.<sup>45</sup> In *Wong Sun*, the Court noted the lessened need for exclusion when the connection between the illegally seized evidence and the underlying impropriety was attenuated.

We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."<sup>[46]</sup>

This exception to the exclusionary rule is known as the "independent source doctrine."

The United States Supreme Court has not limited the application of the exclusionary rule, or its exceptions, to violations of a defendant's Fourth Amendment right to be free from illegal searches and seizures. The Court has since applied the rule to violations of a defendant's Sixth Amendment right to counsel<sup>47</sup> and Fifth Amendment privilege against self-incrimination.<sup>48</sup> In

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<sup>41</sup> We further believe that the trial court must make this determination at a separate hearing outside the presence of the jury.

<sup>42</sup> *Silverthorne Lumber Co v United States*, 251 US 385; 40 S Ct 182; 64 L Ed 319 (1920).

<sup>43</sup> *Id.* at 392.

<sup>44</sup> *Wong Sun v United States*, 371 US 471, 484-485; 83 S Ct 407; 9 L Ed 2d 441 (1963).

<sup>45</sup> *Silverthorne*, *supra* at 392. See also *United States v Ceccolini*, 435 US 268, 274; 98 S Ct 1054; 55 L Ed 2d 268 (1978), quoting *Nardone v United States*, 308 US 338, 341; 60 S Ct 266; 84 L Ed 2d 307 (1939).

<sup>46</sup> *Wong Sun*, *supra* at 487-488, quoting Maguire, Evidence of Guilt, 221 (1959).

<sup>47</sup> See *United States v Wade*, 388 US 218, 227, 240-241; 87 S Ct 1926; 18 L Ed 2d 1149 (1967) (holding that an identification based upon a pretrial lineup, conducted without the benefit of counsel, must be suppressed unless the prosecution can establish that a witness's in-court identification was based upon independent observations).

<sup>48</sup> See *Kastigar v United States*, 406 US 441, 460-461; 92 S Ct 1653; 32 L Ed 2d 212 (1972) (holding that evidence obtained in violation of a defendant's Fifth Amendment privilege against

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*Michigan v Tucker*,<sup>49</sup> however, the Supreme Court declined to extend the exclusionary rule to statements procured in violation of a defendant's right to counsel during a custodial interrogation. In *Tucker*, the defendant was advised that he had the right to counsel during his custodial interrogation, but was not advised that counsel could be appointed.<sup>50</sup> The Court found that the defendant voluntarily spoke with the police, regardless of the imperfect instruction of rights.<sup>51</sup> During the interrogation, the defendant named an alibi witness, who ultimately further incriminated the defendant.<sup>52</sup> The Court found the exclusionary rule of *Wong Sun* inapplicable in cases involving a violation of *Miranda*'s "prophylactic" protection of a defendant's Fifth Amendment rights.<sup>53</sup> The Court did exclude the defendant's statements from the prosecution's case-in-chief, however, the Court determined that, where officers act in good faith, the exclusion of illegally obtained evidence would not deter future misconduct.<sup>54</sup> The Court further declined to exclude the testimony of the defendant's "alibi" witness, as that witness was not subjected to "custodial pressures."<sup>55</sup> Accordingly, the Court found that his independent testimony was trustworthy and therefore admissible against the defendant.<sup>56</sup>

*Tucker* is inapplicable in this case, however, as defendant was clearly deprived of his Sixth Amendment right to counsel following the initiation of formal adversary proceedings. Therefore, pursuant to *Silverthorne* and *Wong Sun*, the prosecution may not present the testimony of Mr. Mack and Mr. Wright absent an exception to the exclusionary rule. While the prosecution is not required to show that it did, *in fact*, discover these witnesses through independent means, the prosecution must show that their independent discovery was inevitable.

In *United States v Ceccolini*, the Supreme Court noted that it would invoke the exclusionary rule "with much greater reluctance" where the illegally obtained, derivative evidence was live testimony.<sup>57</sup> The Court did not name the doctrine upon which it relied.

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self-incrimination must be suppressed unless the prosecution can establish that it "had an independent, legitimate source for the disputed evidence"). See also *Murphy v Waterfront Comm of New York Harbor*, 378 US 52, 79; 84 S Ct 1594; 12 L Ed 2d 678 (1964), overruled in part on other grounds *United States v Balsys*, 524 US 666; 118 S Ct 2218; 141 L Ed 2d 575 (1998).

<sup>49</sup> *Michigan v Tucker*, 417 US 433; 94 S Ct 2357; 41 L Ed 2d 182 (1974).

<sup>50</sup> *Id.* at 435. Defendant was arrested and interrogated before the United States Supreme Court issued its opinion in *Miranda v Arizona*. However, his trial occurred after that decision.

<sup>51</sup> *Id.* at 450.

<sup>52</sup> *Id.* at 436-437.

<sup>53</sup> *Id.* at 444. The Court has not extended the exclusionary rule to such situations since rendering its opinion in *Dickerson*, *supra*.

<sup>54</sup> *Tucker*, *supra* at 447-448.

<sup>55</sup> *Id.* at 449.

<sup>56</sup> *Id.*

<sup>57</sup> *Ceccolini*, *supra* at 280.

However, the Court reasoned that live witnesses are more likely to be inevitably discovered by alternate, legal means.

The greater the willingness of the witness to freely testify, the greater the likelihood that he or she will be discovered by legal means . . . . Witnesses can, and often do, come forward and offer evidence entirely of their own volition. And evaluated properly, the degree of free will necessary to dissipate the taint will very likely be found more often in the case of live-witness testimony than other kinds of evidence. The time, place and manner of the initial questioning of the witness may be such that any statements are truly the product of detached reflection and a desire to be cooperative on the part of the witness. And the illegality which led to the discovery of the witness very often will not play any meaningful part in the witness' willingness to testify.<sup>[58]</sup>

In *Nix v Williams*,<sup>59</sup> the Court specifically extended the "inevitable discovery doctrine" as an exception to the exclusionary rule. In *Nix*, officers elicited information from the defendant in the absence of counsel while being transported to another jurisdiction. The information concerned the location of his victim's body. Without defendant's statement, the body would have been discovered through independent search efforts within three to five hours.<sup>60</sup> The Court found that the exclusion of illegally obtained evidence should not place the government in a worse position than if counsel had been present during the interrogation.<sup>61</sup>

Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial. The Sixth Amendment right to counsel protects against unfairness by preserving the adversary process in which the reliability of proffered evidence may be tested in cross-examination. . . .

Nor would suppression ensure fairness on the theory that it tends to safeguard the adversary system of justice. To assure the fairness of trial proceedings, this Court has held that assistance of counsel must be available at pretrial confrontations where "the subsequent trial [cannot] cure [an otherwise] one-sided confrontation between prosecuting authorities and the uncounseled defendant." Fairness can be assured by placing the State and the accused in the same positions they would have been in had the impermissible conduct not taken place. However, if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from

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<sup>58</sup> *Id.* at 276-277.

<sup>59</sup> *Nix v Williams*, 467 US 431; 104 S Ct 2501; 81 L Ed 2d 377 (1984).

<sup>60</sup> *Id.* at 448-449.

<sup>61</sup> *Id.* at 444.

the jury in order to ensure the fairness of the trial proceedings. In that situation, the State has gained no advantage at trial and the defendant has suffered no prejudice. Indeed, suppression of the evidence would operate to undermine the adversary system by putting the State in a *worse* position than it would have occupied without any police misconduct. . . .<sup>[62]</sup>

The United States Supreme Court recently granted certiorari in *Hudson v Michigan*<sup>63</sup> to consider whether evidence discovered during an illegal search following a violation of the knock-and-announce rule could be otherwise admissible under the inevitable discovery doctrine. While both this case and *Nix* involved a violation of a defendant's Sixth Amendment right to counsel, the inevitable discovery doctrine has its roots in Fourth Amendment jurisprudence.<sup>64</sup> Therefore, the Court's decision in *Hudson* could potentially have a more far-reaching effect. However, at this time, we remain bound by *Nix* to apply the inevitable discovery doctrine.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

Fort Hood, J., concurred.

/s/ Jessica R. Cooper  
/s/ Karen M. Fort Hood

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<sup>62</sup> *Id.* at 446-447 (internal citations omitted).

<sup>63</sup> *Hudson v Michigan*, \_\_\_ US \_\_\_, 125 S Ct 2964; 162 L Ed 2d 886 (2005).

<sup>64</sup> See *Fitzpatrick v New York*, 414 US 1050, 1051; 94 S Ct 554; 38 L Ed 2d 338 (1973) (dissent by White, J.) (questioning the wisdom of extending the independent source doctrine to "hypothetical," that is, "inevitable," discoveries incident to an illegal search).