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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-160

Lower Tribunal No. 3D12-2097

MIGUEL RODRIGUEZ,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

As authorized by Fla.R.App.P. 9.210(c), the State adopts the Statement of the Case and Facts of the Petitioner, unless corrected and/or modified below or in the Argument section.

The March 11, 2011 transcript of the motion to suppress hearing reveals that the trial court stated in its ruling that the investigation was underway once Officer Garfinkle responded to the defendant's house after he'd been called in by the bondspeople and told they discovered a growhouse[1] at the defendant's house. (R.281). The trial court stated that the bondspeople saw the marijuana and they knew what marijuana looked like. (T.282). The trial court also stated that after discovering the growhouse, the bondsperson called the police and Officer Garfinkle showed up and smelled the odor of marijuana from the swale (R.44), and said that the air conditioning was running (R.45) and that is a potential sign of a grow house.(R.283). The court continued and said that the officer spoke to the bondspeople who had gone into the house and saw the marijuana in the bathroom and the hydroponics lab. (R.42,283). Officer Garfinkle saw the marijuana in the bathroom and behind the bathroom. (R.45). Officer Garfinkle called in the

[1] A growhouse is another name for a marijuana hydroponics grow lab. Jardines v. State, 9 So.3d 1,3 (Fla. 2008).

detectives headed up by Detective Perez. (T.283). Detective Perez said he smelled the marijuana from the front porch. (R.283).

The trial court referred to the quote from Moody v. State, 842 So.2d 754, 759 (Fla. 2003) which explained that the case must be in such a posture that the facts already in the possession of the police would have led to this evidence notwithstanding the police misconduct and stated that in her mind all the facts the police legitimately had, would have been sufficient for a warrant. (R.284). The trial court stated that once the police were called, the investigation was already underway. (R.284). The trial court denied the motion to suppress based on the reasons set forth above. (R.291).

SUMMARY OF ARGUMENT

This Court follows the United States Supreme Court in Nix v. Williams and the federal circuit courts of appeal in applying the inevitable discovery doctrine, as does the Third District Court of Appeal in its opinion below. None of those cases require the officers to actively pursue a search warrant in order for the inevitable discovery doctrine to apply, which the petitioner suggests. In addition, most of the First and Fourth

District cases do not apply the broad holding supported by the petitioner. The few cases that do appear to have done so, have taken a mere fact that existed in earlier decisions – the existence of an application for a warrant – and elevated it to a requirement simply because it was a fact that happened to exist in earlier decisions.

ARGUMENT

THE EVIDENCE OBTAINED DURING THE SEARCH OF THE PETITIONER'S HOUSE WAS ADMISSIBLE UNDER THE INEVITABLE DISCOVERY DOCTRINE WHICH, ACCORDING TO THE UNITED STATES SUPREME COURT AND THIS COURT, APPLIES WHEN THE STATE DEMONSTRATES THAT AT THE TIME OF THE CONSTITUTIONAL VIOLATION AN INVESTIGATION WAS ALREADY UNDERWAY, OR, IN OTHER WORDS, THE CASE MUST BE IN SUCH A POSTURE THAT THE FACTS ALREADY IN THE POSSESSION OF THE POLICE WOULD HAVE LED TO THIS EVIDENCE NOTWITHSTANDING THE POLICE CONDUCT.

Nix v. Williams holds that in order for the inevitable discovery doctrine to apply, the state must prove that a lawful and independent investigation was actively underway, but does not require the state to prove that the police were in active pursuit of a search warrant.

In Nix v . Williams, 467 U.S. 431 (1984), the United States Supreme Court recognized although the exclusionary rule is needed to deter police from violations of constitutional and statutory protections, it serves no deterrent purpose to exclude tainted evidence if "it has been discovered by means wholly

independent of any constitutional violation", Nix, 467 U.S. at 442-43, and "if the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means – here the volunteer's search - then the deterrence rationale has so little basis that the evidence should be received." Nix, 467 U.S. at 444, n.5. One of the ways the United States Supreme Court protected against violation of a defendant's constitutional rights is to note that "inevitable discovery involves no speculative elements, but focuses on demonstrated historical facts." Nix, 467 U.S. at 444, n.5

In Nix, the Court held that search parties looking for the body of a 10-year old girl would have inevitably discovered the body so that even if the police had not told the defendant that several inches of snow was expected and that if the body of the little girl was found the parents should be entitled to a Christian burial for the little girl which led the defendant to show the police where the body was, the evidence of the body was admissible. The Court stated that exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial. Nix, 467 U.S. at 446. It was clear on the record that the search

parties were approaching the actual location of the girl's body and the Court was satisfied that the volunteer search teams would have resumed the search had the defendant not earlier led the police to the body after the police told him she deserved a Christian burial and the body would have been inevitably been found by the search parties. Nix 467 U.S. at 449-450.

Also, in Nix, the Court stated that the inevitable discovery doctrine is closely related to the harmless error rule of Chapman v. California, 386 U.S. 18, 22 (1967). The harmless-constitutional error rule "serves a very useful purpose insofar as it blocks setting aside convictions for small errors or defects that have very little, if any, likelihood of having changed the result of the trial." The purpose of the inevitable discovery rule is to block setting aside convictions that would have been obtained anyway without the police misconduct. Nix, 467 U.S. at 444, n. 4.

The Nix analysis is contrary to the notion put forth by the petitioner in this case, that in order for the inevitable discovery doctrine to apply, the police must be actively pursuing a search warrant. In fact, that notion conflicts with the Nix analysis in which the entire point was that the inevitable discovery rule is to block setting aside convictions

that would have been obtained without the police misconduct. The requirement that the police be in active pursuit of the search warrant is completely contrary to the Nix analysis, which is similar to the harmless error rule. In the harmless error rule, it is not required that the state prove that the state or trial court took steps to avoid the error. Therefore, neither should the requirement exist that the police be in active pursuit of a search warrant.

In addition, Nix explained that the independent source doctrine[2], which allows admission of evidence that has been discovered by means wholly independent of any constitutional violation, is closely related to the inevitable discovery doctrine. Nix, 467 U.S. at 443. The Court stated that the independent source doctrine teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position than they would have been in if no police

[2] In Kastigar v United States, 406 U.S. 441 (1972) the United States Supreme Court held that in any subsequent criminal prosecution of an individual who has been granted immunity to testify before the grand jury, the prosecution must prove that the evidence proposed to be used is derived from a legitimate source wholly independent from the compelled grand jury testimony.

error or misconduct had occurred. When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation. There is a functional similarity between these two doctrines in that exclusion of evidence that would inevitably have been discovered would also put the government in a worse position, because the police would have obtained that evidence if no misconduct had taken place. Thus, while the independent source exception would not justify admission of evidence in this case, its rationale is wholly consistent with and justifies the adoption of the ultimate or inevitable discovery exception to the exclusionary rule. Nix, 467 U.S. at 443-44.

In Herring v. United States, 555 U.S. 135, 144 (2009), the United States Supreme Court explained that to trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. The exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systematic negligence. This deliberate, reckless, or grossly negligent conduct is the

opposite of legal evidence that would have been inevitably discovered.

Here, as the Third District found, probable cause existed, and substantial investigative measures were already well underway, before the time of the search, such that the inevitable discovery doctrine was correctly applied and the motion to suppress was properly denied by the trial court. Rodriguez v. State, 129 So.3d 1135, 1136 (Fla. 3d DCA 2013). The Third District laid out the facts as follows:

> Several bail bondsmen were attempting to locate one of their clients. The client, who had been charged with marijuana cultivation in a different house, had listed the address of Mr. Rodriguez's home on his application for the bond. When the bondsmen knocked on the front door of that home, Mr. Rodriguez answered. He told the bondsmen that he did not know their client and that he was alone in the home. The bondsmen requested permission to search the home to be certain their client was not hiding there, and Mr. Rodriguez consented. The bondsmen noticed a smell of marijuana in the home.
>
> Encountering a locked bedroom door, the bondsmen asked Mr. Rodriguez to open it so they could confirm that their client was not hiding there. Mr. Rodriguez unlocked the door and told the bondsmen that he was growing marijuana in the room. At that point, one of the bondsmen in the group moved outside and called the police to report what the bondsmen had observed.
>
> About thirty minutes later, a uniformed officer arrived at the home. The officer testified that Mr. Rodriguez invited him to enter. The officer saw the grow room, called the narcotics squad, and placed Mr. Rodriguez in handcuffs in the back of the officer's squad car while they waited for the narcotics detective to arrive. The bondsmen remained at that location throughout, and spoke to the lead detective when the narcotics unit arrived.

> The lead detective testified that Mr. Rodriguez signed a form consenting to a search of the home. Mr. Rodriguez testified that he only signed the consent forms because the narcotics detectives had guns and most were also wearing masks. After their search confirmed the presence of a "grow room" containing six-foot marijuana plants, lights, and 36 pounds of marijuana, the detectives arrested Mr. Rodriguez.
>
> At the hearing on the motion, the circuit court heard testimony from the lead bondsman, the police officer who first responded to the call from the bondsmen, the lead narcotics unit detective, and Mr. Rodriguez. The state did not establish that the police officer or any detective had made any efforts to obtain a search warrant before law enforcement entered the home or Mr. Rodriguez was arrested. The lead detective did, however, testify that he would have sought a warrant if Mr. Rodriguez had not consented to a search.
>
> The court denied the motion to suppress, although the court found that Mr. Rodriguez's consent to entry by the police and detectives, and his signature on the consent form were coerced. The court concluded that the inevitable discovery doctrine applied because probable cause had been established before law enforcement requested consent, and:
>
> > "Soon as the bail bondsmen calls and says, Listen I'm looking at a hydroponics lab, to me that's a trigger. If they had not gotten consent they would have gone and gotten a warrant."

Rodriguez v. State, 129 So.3d 1136-37.

Therefore, under Nix, the Third District properly applied the inevitable discovery doctrine and properly affirmed the trial court denial of the motion to suppress under the doctrine.

This Court's major holdings do not require the officers to be in the process of applying for a warrant in order for the inevitable discovery doctrine to apply.

Not only has this Court never imposed such a requirement argued by the petitioner, but, this Court's prior opinions are clearly to the contrary – they are open ended and consider all relevant facts – and several of them found inevitable discovery even though there was no prior application for a warrant.

In Moody v. State, 842 So.2d at 759, this Court did not apply any mandated prerequisites to determine whether the evidence would inevitably be discovered. Rather, this Court merely looked to the totality of relevant circumstances and concluded that it would not. This was based on the facts that no investigation of Moody had been initiated for anything prior to the illegal steps; the police had no reason to suspect Moody of any involvement in the murder; and it was entirely speculative whether the police would otherwise have obtained search warrants and discovered the evidence.

The same holds true in Fitzpatrick v. State, 900 So.2d 495 (Fla. 2005), where this Court again looked at the totality of the relevant circumstances to determine whether the DNA evidence would inevitably have been discovered but for any misconduct, and the Court concluded that it would. The relevant factors there were

that the police had previously initiated an investigation of Fitzpatrick prior to requesting a blood sample. The police had previously considered him a suspect; and thus, "requesting a blood sample from Fitzpatrick or obtaining it through a warrant would have been a normal investigative measure that would have occurred regardless of any police impropriety." What is especially significant in Fitzpatrick is that the prior pursuit of a warrant was most definitely not a requirement; not only had one not been sought in Fitzpatrick, but this Court spoke of it as an alternative – either the police would have requested a blood sample during the normal course of the investigation or they would have sought a warrant. In light of Fitzpatrick, any decision of either the First or Fourth District, which even remotely suggests, let alone holds, that a warrant must previously have been sought, is clearly contrary to this Court's own precedent.

The same holds true in this Court's analysis in Craig v. State, 510 So.2d 867 (Fla. 1987). There, the interrogation of the defendant was illegal, and resulted in information, from the defendant, regarding the location and existence of physical evidence, including the bodies of the victims. This Court looked to the totality of the facts to conclude that the bodies would inevitably have been discovered, notwithstanding the illegal

interrogation. This was based on the fact of the extensive, ongoing investigation, notwithstanding that there was no prior request for a search warrant.

The same points are seen in Maulden v. State, 617 So.2d 298 (Fla. 1993). An illegal arrest, due to the absence of a valid arrest warrant, did not affect the discovery and search of a truck, including evidence found on its front seat; there was no preexisting application for a warrant to search the truck. Again, without applying any rigid formula, the Court simply looked at all relevant facts.

Once again, in Jennings v. State, 512 So.2d 169, 171-72 (Fla. 1987), this Court applied the totality of circumstances approach. After the defendant confessed, the state obtained photos of the defendant's genitals, to show abrasions that were relevant. This Court assumed that the fruit of the poisonous tree doctrine applied, as the confession was obtained in violation of Miranda[3]. This Court further found that it was inevitable that the photos would have been obtained. The defendant was already one of several suspects in an ongoing investigation, and probable cause for an arrest of the defendant existed without the confession.

[3] Miranda v. Arizona, 384 U.S. 436 (1966).

There was no request for a warrant for photographing the defendant's genitals.

It is therefore clear that this Court has repeatedly applied the totality of the circumstances approach, not mandating the requirement of any particular fact; and has repeatedly applied the inevitable discovery doctrine even where there had not been a prior request for a search warrant.

> Most of the First and Fourth District cases do not support the broad holding that there is a requirement that the officers must actively be pursuing a search warrant, and the few that do appear to have taken a mere fact that existed in earlier decisions – the existence of an application for a warrant - and elevated it to a requirement simply because it was a fact that happened to exist in earlier decisions.

The petitioner relies on a series of First and Fourth District Court of Appeal decisions for the proposition that Nix requires that the officers must actively be pursuing a search warrant at the time of the unconstitutional search in order for the inevitable discovery doctrine to apply. See, Thomas v. State, 127 So.3d 658 (Fla. 1st DCA 2013), King v. State, 79 So.3d 236 (Fla. 1st DCA 2012), McDonnell v. State, 981 So.2d 585 (Fla. 1st DCA 2008), Rowell v. State, 83 So.3d 990 (Fla. 4th DCA 2012), and Conner v. State, 701 So.2d 441 (Fla. 4th DCA 1997). A review of these cases compels the conclusion that most of them do not support such a broad holding; and the few that do appear to have

carelessly taken a mere fact that happened to exist in earlier cases, i.e., the existence of an application for a warrant – and elevated that mere fact to a requirement, simply because it was a fact that happened to exist in earlier decisions.

The above opinions start with Conner, where the court simply noted in passing that the facts in the case included the fact that the officers were in the process of obtaining a warrant. The Fourth District held that the contents of a safe, as to which the police had obtained invalid consent for a search, would inevitably have been discovered because the officers had probable cause for such a search. While the Fourth District noted that one of the relevant facts was that the officers had already sought such a warrant, the Fourth District did not hold that the prior pursuit of a warrant was a prerequisite, it merely noted it as one of the relevant facts in the particular case.

McDonnell is the next case in the above series. An officer had left to obtain a warrant of the defendant's house, regarding the theft from an ATM machine, but before the warrant was obtained, the defendant consented to the search and the efforts to obtain a warrant were halted. The First District reviewed the several federal appellate court decisions regarding the

application of the inevitable discovery doctrine, and noted what it called the "focus" of the federal cases: "whether the police made an effort to get a warrant prior to the illegal search and whether strong probable cause existed for the search warrant." As in Conner, the facts of McDonnell were such that an officer was in the process of obtaining a warrant, so the court did not have any cause to determine whether the absence of such an effort would, in and of itself, preclude the inevitable discovery doctrine from applying, in the face of compelling evidence of probable cause. The prior application for a warrant was merely one of the facts of the case; not a mandated prerequisite.

Rowell, from the Fourth District, is one of the few cases that does appear to make the application for a warrant a requirement. Officers were dispatched to an apartment complex in response to a "shots fired" call. Upon arrival, the victim told the police that the defendant shot at him from the second floor. The officers located a shell casing on the first floor, detained the defendant, and set up a perimeter around the entire apartment complex. The officers then conducted a protective sweep of the defendant's apartment and found a gun on the kitchen counter. Later, the officers obtained consent to search

from the defendant's girlfriend. The officers had not previously sought to obtain a warrant, even though one officer testified that they had sufficient grounds and ample time to do so.

After rejecting the validity of the protective sweep that resulted in the discovery of the items seized, the Fourth District rejected the application of the inevitable discovery because the officers had not made any showing that an effort to obtain a warrant had actively been pursued prior to the start of the search. What is significant about Rowell is its analysis. The Fourth District noted that the prior Conner and McDonnell decisions, where warrants had not previously been obtained, and essentially concluded that since warrants had not been obtained in those cases, the prior application of a warrant must be a prerequisite. As noted above, Conner and McDonnell clearly do not stand for that proposition, as those courts were not confronted with the facts or occasion to determine whether the inevitable discovery doctrine applied when a warrant had not previously been sought.

The Fourth District, in Rowell, also reviewed the Eleventh Circuit Court of Appeals' decision in United States v. Virden, 488 F. 3d 1317, 1322 (11th Cir. 2007), which will be addressed at

greater length in the ensuing review of federal appellate court decisions. At this point, it is sufficient to note that the Eleventh Circuit, as one element of inevitable discovery analysis, required that the prosecution show that "'the lawful means which made discovery inevitable were being *actively pursued* prior to the occurrence of the illegal conduct.'" 488 F. 3d at 1322, quoting Jefferson v. Fountain, 382 F. 3d 1286, 1296 (11th Cir. 2004). The active pursuit of lawful means is distinctly broader than the pursuit of a warrant. And, as will be detailed in the ensuing discussion of federal appellate court decisions, other federal appellate courts do not even agree with the existence of this requirement, as they look only to the totality of the circumstances in any given case, as this Court has repeatedly done in its own application of Nix.

Relying on Rowell, 83 So.3d at 996, the Petitioner makes the argument that the absence of a requirement that a warrant previously have been sought would render the requirement of a search warrant meaningless. That is clearly not the case. Any officer, proceeding on the basis of a perceived exception to the warrant requirement, always does so with the knowledge that an error in the officer's assessment could render the results of the search invalid and excluded. No officer could ever assume

that absent valid consent or any other warrant exception that courts subsequently analyzing the same facts will conclude that probable cause existed or that a warrant would or could, in fact, have been obtained. A high level of speculation and doubt on the part of the officer will always remain as to whether an erroneous perception as to the validity and voluntariness of consent will yield to the inevitable discovery doctrine. Only a warrant will provide an officer with the high level of certainty that officers need so that the ensuing search will be beyond challenge. Indeed, the good faith doctrine of United States v. Leon, 468 U.S. 897, 913-14 (1984), provides any officer obtaining a warrant with a high level of protection regarding the outcome of a search that will never exist when an officer acts on the basis of a perceived exception to the requirement for a warrant.

Continuing with the district court of appeal decisions upon which the Petitioner relies, in King, an officer was dispatched to the defendant's home in response to a domestic disturbance call and took a safe from the home to his patrol car and pried it open and found a gun. The First District concluded that the trial court erred in ruling that the gun was admissible under the inevitable discovery doctrine because the officer testified

that he did not attempt to get a warrant and the state presented no evidence suggesting that he did. King merely relied on and reiterated McDonnell as the basis for its holding, and the flawed analysis from McDonnell similarly infects King. Likewise, Thomas merely relied on McDonnell and suffers from the same problems.

In the above cases, the First and Fourth District Courts of Appeal failed to apply the Nix test and this Court's decisions properly. As discussed above in Rodriguez, The Third District Court of Appeal stated that this Court has held that the inevitable discovery doctrine applies when the case is in such a posture that the facts already in the possession of the police would have led to the evidence notwithstanding the police conduct and that this Court has not imposed a more specific requirement that law enforcement must also be in the process of applying for a warrant in such a case. Rodriguez, 129 So.3d at 1138. The United States Supreme Court in Nix also did not impose a requirement that the officers must actively and independently pursue a search warrant at the time of the unconstitutional search in order for the inevitable discovery doctrine to apply, as the First and Fourth Districts have erroneously held. In addition, this Court has never interpreted

Nix to add an additional requirement that the officers must actively and independently pursue a search warrant at the time of the unconstitutional search in order for the inevitable discovery doctrine to apply. For this reason, the Third District properly interpreted Nix and this Court's holdings and did not require that the officers must actively and independently pursue a search warrant at the time of the unconstitutional search in order for the inevitable discovery doctrine to apply.

By adding the additional requirement that the officers must actively and independently pursue a search warrant in order for the inevitable discovery doctrine to apply, the First and Fourth Districts do not follow Nix or this Court's holdings, but instead added an extra requirement that flies in the face of the reasons for the inevitable discovery doctrine to begin with. In Nix the evidence of the missing girl's body was obtained from the suspect without a search warrant but admitted as an inevitable discovery because search parties were actively looking for the body at the time of the constitutional violation and the body would have been inevitably discovered. A requirement that the police must have been actively pursuing a search warrant in order to admit evidence of the body would have

been contrary to the purpose of the inevitable discovery doctrine. As in Nix, exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial. The Third District opinion should be affirmed.

The opinion in the instant case in the court below succinctly outlined its reasons for affirming the trial court order which applied the inevitable discovery doctrine. It summarized this Court's major holdings on the issue of when the inevitable discovery doctrine applies and stated that:

> The Supreme Court of Florida has also provided guidance regarding the inevitable discovery doctrine exception to the exclusionary rule. Relying on the United States Supreme Court's explanation of the exception in Nix v. Williams, the Supreme Court of Florida has held that the inevitable discovery doctrine will apply if the State demonstrates "that at the time of the constitutional violation an investigation was already underway." Moody v. State, 842 So.2d at 759(quoting Nix, 467 U.S. at 457). "In other words, the case must be in such a posture that the facts already in the possession of the police would have led to this evidence notwithstanding the police conduct." Fitzpatrick v. State, 900 So.2d at 514. The Third District stated that this Court has not imposed a more specific requirement that law enforcement must also be in the process of applying for a warrant in such a case.

Rodriguez v. State, 129 So.3d at 1138.

After expressly commenting that this Court has not imposed a more specific requirement that law enforcement must also be in the process of applying for a warrant in order for the inevitable discovery doctrine to apply, the Third District then applied the facts to the law and stated that the petitioner candidly and properly acknowledged that the evidence available from the bondsmen regarding the locked grow room, the lights, and actual marijuana plant, coupled with the pre-search smell of marijuana (from outside the door) described by both the bondsmen and the first officer to respond, established probable cause for the issuance of a search warrant before any law enforcement officer requested consent. Irrespective of the later judicial determination that Mr. Rodriguez's alleged verbal consent to search and his signed consent form were non-consensual, it seems illogical for the police to have initiated the warrant process when Mr. Rodriguez had already allowed the bondsmen to enter and observe the illegal operation, and when he then signed the consent form. The Third District then stated that the independent facts provided by the bondsmen before Mr. Rodriguez was requested to consent to a search by law enforcement officers (a) triggered the investigation by the police and (b) assured that the police ultimately would have obtained the inculpatory

marijuana, lights and other grow room materials. The Court then concluded that the trial court correctly evaluated these facts, applied the inevitable discovery doctrine as articulated in Nix, Moody, and Fitzpatrick and denied the motion to suppress. Rodriguez, 129 So.3d at 1138.

Also, in State v. Jardines,[4] the Third District Court of Appeal stated that in Fitzpatrick the Florida Supreme Court explained that illegally seized evidence may still be admitted into evidence if that evidence inevitably would have been discovered by legal means:

> In Nix v. Willliams, 467 U.S. 431, 448, 104 S.Ct. 2501 (1984), The United States Supreme Court adopted the "inevitable discovery" exception to the "fruit of the poisonous tree" doctrine. Under this exception, "evidence obtained as the result of unconstitutional police procedure may still be admissible provided the evidence would ultimately have been discovered by legal means." Maulden v. State, 617 So.2d 298, 301 (Fla. 1993). In adopting the inevitable discovery doctrine, the [U.S.] Supreme Court explained, "Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial." Nix, 467 U.S. at 446, 104 S.Ct. at 2501. In making a case for inevitable

[4] The U.S. Supreme Court affirmed the quashing by the Florida Supreme Court of this decision on other grounds in Florida v. Jardines, 133 S.Ct. 1409 (2013). Although the United States Supreme Court decided that the state's use of trained police dogs to investigate the home for marijuana is a search within the meaning of the Fourth Amendment, the law concerning inevitable discovery remains.

> discovery, the state must demonstrate "that at the time of the constitutional violation an investigation was already underway." Moody v. State, 842 So.2d 754, 759 (Fla. 2003) (emphasis supplied)(quoting Nix v. Williams, 467 U.S. at 457, 104 S. Ct. at 2501; *see also* Jeffries v. State, 797 So.2d 573, 578 (Fla. 2001); Maulden, 617 So.2d at 301. In other words, the case must be in such a posture that the facts already in the possession of the police would have led to this evidence notwithstanding the police misconduct. *See* Moody, 842 So.2d at 759.
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> Jardines, 9 So.3d at 8-9.

None of the federal appellate courts require that the police be "in the process of obtaining a warrant" in order to apply the inevitable discovery doctrine.

None of the federal appellate courts require that that the officers be "in the process of obtaining a warrant" in order for the inevitable discovery doctrine to apply. In addition, the petitioner cites no federal appellate court that does have the requirement.

The Third District Court of Appeal in its opinion in this case reviewed several federal appellate court decisions to find that it is far from settled that there is a requirement that the officers be in the process of obtaining a warrant in order for the inevitable discovery doctrine to apply. Rodriguez, 129 So.3d at 1137. First, it looked to the United States Court of Appeals, Seventh Circuit, which expressly rejected the requirement that the officers be in active pursuit of a search

warrant before the inevitable discovery doctrine will be applied to a warrantless search. United States v. Are, 590 F.3d 499 (7th Cir. 2009); United States v. Tejada, 524 F.3d 809 (7th Cir. 2008). The Seventh Circuit approves the inevitable discovery doctrine upon a showing that "a warrant would certainly, and not merely probably, have been issued had it been applied for." Tejada, 452 F.3d at 813.

The Seventh Circuit in United States v. Are, 590 F.3d at 507, used the rule in Tejada applying the inevitable discovery doctrine because the officers would have sought a warrant to search the bedroom, and once they had, it was virtually certain that a warrant would have been issued. *See also* United States v. Sims, 553 F.3d 580, 584 (7th Cir. 2009) in which the court affirmed the conviction approving of the inevitable discovery doctrine and calling it the "no harm, no foul doctrine." Sims, 553 F.3d at 585.

Similarly, Rodriguez, 129 So.3d at 1138, stated that the Tenth Circuit has determined that the doctrine should be applied when a court has "a high level of confidence that the warrant in fact would have been issued and that the specific evidence in question would have been obtained by lawful means." United States v. Cunningham, 413 F.3d 1199, 1203 (10th Cir.

2005)(quoting United States v. Souza, 223 F.3d 1197, 1205 (10th Cir. 2000). The Fourth Circuit has also declined to require proof of active efforts to obtain a warrant before the illegal search, provided the police prove that independent evidence available at the time of the search would have been sufficient to the issuance of a warrant. United States v. Allen, 159 F.3d 832 (4th Cir. 1998).

In United States v. Virden, 488 F.3d at 1322-23, the Eleventh Circuit held that the officers could not use the inevitable discovery doctrine to admit the drugs found in the trunk of Virden's car because they could not show that they were actively pursuing any lawful means to obtain the evidence at the time of their illegal conduct because Officer Stinson knew that the canine unit would be unavailable to meet him. In addition, there existed no probable cause to arrest Virden. The Eleventh Circuit did not require that the police be actively pursuing a search warrant, but applied the totality of the circumstance test and held that the inevitable discovery did not apply in this particular case. As quoted previously herein, the Eleventh Circuit required proof that "officers were actively pursuing any lawful means at the time of the unlawful conduct." That is not only a much broader concept than pursuit of a warrant; it is

also one which the above-noted federal courts do not require at all. The petitioner misreads Virden to require that the officers be actively pursuing a search warrant, but Virden clearly does not so hold.

The petitioner claims that in the Fifth Circuit in United States v. Cherry, 759 F.2d 1196 (5th Cir. 1985), the prosecution must establish that the police prior to the misconduct were actively pursuing the alternate line of investigation, and implied that this meant that there is a requirement that the officers be "in the process of obtaining a warrant" in order for the inevitable discovery doctrine to apply. But, Cherry clearly did not hold as the petitioner implies. In fact, Cherry indicated that the "alternative line of investigation" in Nix was the search parties who were close to finding the body at the time the defendant showed the officers the location of the child's body after they told him the parents would give the child a Christian burial. The Fifth Circuit in Cherry did not add a requirement to the Nix rule that the officers must be actively pursuing a search warrant, as the petitioner implied.

In United States v. D'Andrea, 648 F.3d 1 (1st Cir. 2011), a tipster alerted the child abuse hotline identifying the defendants who had accidently sent her photos of the defendants

performing sexual acts on the female defendant's eight year old daughter. The Department of Social Services (DSS) printed out the photos and after viewing the photos an officer applied for a warrant to search the female defendant's residence. The warrant was signed and the search yielded a mobile camera containing pornographic pictures of the eight year old girl, one of which showed the male defendant performing oral sex on her. The defendants entered guilty pleas reserving the right to appeal the denial of the motion to suppress. The First Circuit held that in light of the United States Supreme Court warning in Nix that "inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment", Nix, 467 U.S. at 444, n.5, the First Circuit could not say that the present record contains all the facts necessary to enable an informed determination on the applicability of the inevitable discovery doctrine, and remanded for an evidentiary hearing. In its summary of the law of inevitable discovery, the First Circuit did not state that there is a requirement that the officers be "in the process of obtaining a warrant" in order for the inevitable discovery doctrine to apply. D'Andrea, 648 F.3d at *12.

United States v. Thomas, 955 F.2d 207 (4th Cir. 1992), citing United States v. Boatwright, 822 F.2d 862 (9th Cir. 1987), held that the inevitable discovery doctrine does not require an alternate line of investigation. It cited Boatwright for what is needed at a minimum before the exception applies: "the facts of this case do not justify a comprehensive definition of inevitable discovery. The doctrine is best developed on a case by case business. We do discern, however, an element that should be shown in most, if not every, case to which the doctrine pertains. Absent some overriding considerations not now apparent to us, the doctrine requires the fact or likelihood that makes discovery inevitably arise from circumstances other than those disclosed by the illegal search itself." Boatwright, 822 F.2d 864-65; Thomas, 955 F.3d at 210. Again, neither circuit requires the active pursuit of a search warrant.

The facts in the Sixth Circuit case of United States v. Kennedy, 61 F.3d 494 (6th. Cir. 1995) were that cocaine was found when a Detroit airlines employee looking for the owner's identification, opened a lost suitcase with a hammer and a screwdriver after an airport police officer x-rayed the suitcase which revealed a number of dense, rectangular-shaped objects. The rectangular objects were found by the Detroit airlines

employee and then a DEA agent arrived and field tested the objects finding them to be cocaine. The DEA agent arranged for a controlled delivery of the suitcase to the defendant in Miami. In Miami, the defendant came to obtain his lost suitcase, and was arrested. After a review of the case law which included Nix, the Sixth Circuit affirmed the trial court denial of a motion to suppress holding that the airlines employee undertook a private search of the suitcase for purposes entirely independent of the police, and the private search was interrupted by police involvement. If the police had not become involved, the airlines employee would have completed the private search which would have revealed the cocaine and therefore the trial court properly applied the inevitable discovery doctrine. United States v. Kennedy, 61 F.3d at 501.

In United States v. Heath, 455 F.3d 52 (2nd Cir. 2006), the Second Circuit explained that the inevitable discovery doctrine under Nix and United States v. Eng, 997 F.2d 987, 990 (2nd Cir. 1993) require the district court to determine, viewing affairs as they existed at the instant before the unlawful search, what would have happened had the unlawful search never occurred, and turns on the central question: Would the disputed evidence inevitably have been found through legal means but for the

constitutional violation? If the answer is "yes" the evidence seized will not be excluded." The Second Circuit did not add a requirement that the police be in be "in the process of obtaining a warrant.

The Eighth Circuit in United States v. Allen, 713 F.3d 382, 387 (8th Cir. 2013) applied Nix and United States v. James, 353 F.3d 606, 616-17 (8th Cir. 2003) and explained that if the government can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means, then the evidence should be received. For the exception to the exclusionary rule to apply the government must show (1) a reasonable probability that the evidence would have been discovered by lawful means in the absence of police misconduct, and (2) an active pursuit of a substantial, alternative line of investigation at the time of the constitutional violation. United States v. Conner, 127 F.3d 663, 667 (8th Cir. 1997). The Eight Circuit did not add a requirement that the police must be in the active pursuit of a search warrant. In Allen, the Eight Circuit held that the inevitable discovery doctrine applied because the items of evidence of counterfeit checks on the luggage cart would have

been found due to a police inventory search after the defendant was arrested.

The Third Circuit in United States v. Vasquez De Reyes, 149 F.3d 192 (3d Cir. 1998), citing Nix, held that a statement of defendant's putative husband and defendant's confession gained after an illegal stop should have been suppressed because the Court was simply unable to say with any certainty that the INS would have discovered anything close to the kind of conclusive evidence that Ms. De Reyes' confession and Mr. De Reyes' statements provided. To reach the necessary conclusions requires engaging in precisely the type of speculation the Court proscribed in Nix. The Third Circuit did not add an additional requirement that the police be actively engaged in pursuing a search warrant.

Citing Vazquez de Reyes and Nix, in United States v. Stabile, 633 F.3d 219 (3d Cir. 2011), the Third Circuit held that subsequent searches of the 120 GB hard drive which had child pornography videos in the Kazvid folder and ultimately all of the hard drives were illegal because the searches were not supported by valid warrants, but the inevitable discovery doctrine applies rendering suppression unnecessary. As in Vazques De Reyes, the Third Circuit did not add an additional

requirement that the police be actively engaged in pursuing a search warrant.

Also, as discussed in United States v. Cabassa, 62 F.3d 470, 473 (2nd Cir. 1995), in cases in which a claim of inevitable discovery is based on expected issuance of a warrant, the extent to which the warrant process has been completed at the time those seeking the warrant learn of the search is of great importance. On the basis of Cabassa, district courts in the Second Circuit have held that the inevitable discovery exception to the exclusionary rule is available only where a court has a high level of confidence that each of the contingencies needed to obtain the evidence legally would be resolved in the government's favor. Inevitable discovery analysis therefore requires a court to examine each of the contingencies that would have had to have been resolved favorably to the government in order for the evidence to have been discovered legally and to assess the probability of that having occurred. United States v. Heath, 455 F.3d at 59.

In United States v. Cunningham, 413 F.3d at 1203-04, the following four factors set forth by the Second Circuit in Cabassa, were stated to assist the determination of the contingencies having occurred:

1) the extent to which the warrant process has been completed at the time those seeking the warrant learn of the search; 2) the strength of the showing of probable cause at the time the search occurred; 3) whether a warrant ultimately was obtained, albeit it after the illegal entry; 4) evidence that the law enforcement agents "jumped the gun" because they lacked confidence in their showing of probable cause and wanted to force the issue by creating a fait accompli.

The Tenth Circuit in Cunningham applied the inevitable discovery doctrine because it was convinced that without the defendant's disputed consent, the warrant to search his house would have been issued and the incriminating evidence would have been discovered.

Therefore, none of the federal appellate courts add an additional requirement to the Nix rule that there must be a pursuit of a search warrant in order for the inevitable discovery doctrine to apply. The most that some require is proof of a preexisting alternative line of inquiry, a fact which exists in this case. Others do not even require that, merely looking at the totality of the facts.

The inevitable discovery doctrine
applies to searches of growhouses

Further, the inevitable discovery doctrine explained in Nix, Moody and this Court's prior opinions applies to evidence found in a growhouse. The appellant argues that the doctrine does not apply to houses. However, it should be noted that although a private home is an area where a person enjoys the highest reasonable expectation of privacy under the Fourth Amendment, in the instant case there was no evidence on the record that the growhouse was also Rodriguez's home in which he was actually living. Rather, there was a growroom containing six-foot marijuana plants, the smell of marijuana, lights, 36 pounds of marijuana and the air conditioning was turned on very cold. Rodriguez, 129 So.3d at 1136. But, in any case, in Jardines, the Third District applied the inevitable discovery doctrine to a growhouse relying upon this Court's Fitzpatrick decision (DNA results from blood sample was properly admitted under the inevitable discovery doctrine), as well as Nix, Moody and Maulden v. State, 617 So.2d 298, 301 (Fla. 1993)(Evidence found in the defendant's truck was admissible under the inevitable discovery doctrine.) Jardines, 9 So.3d at *8 - *9. Therefore, under Florida case law, the inevitable discovery doctrine is applicable to growhouses.

The initial brief confuses this Court's requirement that the officers be actively engaged in a lawful and independent investigation with those cases which hold that the officer must be actively pursuing a search warrant at the time of the illegal search.

The petitioner argues in his initial brief that this Court's Moody and Fitzpatrick decisions recognize that the doctrine is applicable only when the state can show that the *officers were actively engaged in a lawful and independent investigation* at the time of the unconstitutional police conduct and that based on that language, the Third District in this case was incorrect when it concluded that this Court does not require the active and independent *pursuit of a search warrant.* However, this argument shows a completely erroneous understanding of the Moody, Fitzpatrick and Rodriguez opinions. As stated above, Rodriguez clearly explained that this Court has provided guidance regarding the inevitable discovery doctrine exception to the exclusionary rule and that relying on the United States Supreme Court's explanation of the exception in Nix, this Court has held that the inevitable discovery doctrine will apply if the State demonstrates "that at the time of the constitutional violation an investigation was already underway." Moody v. State, 842 So.2d 754, 759 (Fla. 2003)(quoting Nix, 467 U.S. at 457). "In other words, the case must be in such a

posture that the facts already in the possession of the police would have led to this evidence notwithstanding the police conduct." Fitzpatrick v. State, 900 at 514. In this case, the lead narcotics detective had already been talking to the bondsperson and uniformed officer who had seen the growroom. The uniformed officer had seen enough to place Rodriguez in handcuffs and put him in the back of his squad car while waiting for the narcotics detectives to arrive. This Court has never required that the officers be in the active pursuit of a search warrant in order for the inevitable discovery doctrine to apply.

CONCLUSION

Based on the foregoing, the State of Florida respectfully requests this Honorable Court affirm the Third District Court of Appeal opinion and quash any conflicting opinions of the First and Fourth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this answer brief of the respondent on the merits has been furnished by e-mail to Shannon M. Healy, at AppellateDefender@pdmiami.com this 16th day of September, 2014.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was computer generated using Courier New 12 point font.

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