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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14–160

MIGUEL RODRIGUEZ,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

INITIAL BRIEF OF PETITIONER ON THE MERITS

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

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INTRODUCTION

Petitioner, Miguel Rodriguez, was the appellant in the Third District Court of Appeal and the defendant in the Circuit Court. Respondent, the State of Florida, was the appellee in the Third District Court of Appeal and the prosecution in the Circuit Court. In this brief, the symbol "R" will refer to the record on appeal. All emphasis is supplied unless indicated otherwise.

STATEMENT OF THE CASE AND FACTS

Miguel Rodriguez was charged with trafficking cannabis. (R. 11–13). Prior to trial, the defense moved to suppress drug evidence seized during a warrantless search of Mr. Rodriguez's home on the ground that the officers illegally coerced Mr. Rodriguez to consent to the search. (R. 19–23). The trial court agreed that Mr. Rodriguez's consent was involuntary and coerced. (R. 286). The State maintained that the evidence was nevertheless admissible under the inevitable discovery doctrine because the officers had probable cause and could have obtained a warrant to search the home if they had sought one. (R. 25–31). A hearing on the motion was held during which the following evidence was introduced:

Bail bondsman Carlos Santie, along with five or six other bondsmen, were looking for an individual named Jose Labrada who they believed could be found at Mr. Rodriguez's home. (R. 56–59). Mr. Rodriguez allowed them to enter the home to confirm that Labrada was not there, at which time they discovered a marijuana grow room and called the police. (R. 58, 60–65). Officer Garfinkel of the Hialeah Police Department arrived shortly thereafter. (R. 41–43). Garfinkel claimed that Mr. Rodriguez invited him in, but Mr. Rodriguez testified that he never invited Garfinkel or any of the bondsmen into his home; they simply entered on their own. (R. 44, 90–92, 101–02). Once inside, Garfinkel saw the marijuana, asked everyone

to leave the house, put Mr. Rodriguez in handcuffs in the back of his police car, and called the narcotics squad to the home. (R. 41–46, 48–51, 53 66).

The narcotics unit, led by Detective Ariel Perez, arrived at Mr. Rodriguez's home approximately forty minutes later. (R. 49, 68–69, 83). The entire unit was wearing black raid jackets with "police" written in yellow lettering and black masks that only exposed their eyes. (R. 84–87). Mr. Rodriguez remained handcuffed in the back of Garfinkel's vehicle while Detective Perez spoke with Garfinkel and the bondsmen. (R. 70–72, 85).

Perez, who was wearing the black raid jacket and the black mask that concealed all but his eyes, then asked Mr. Rodriguez for permission to search his residence while all the officers remained on the scene, and Mr. Rodriguez consented. (R. 73, 84–87). Perez then removed Mr. Rodriguez's handcuffs and asked him to sign a form consenting to the search of his home. (R. 73–76, 84–85). Mr. Rodriguez explained that he signed the form because he felt as though he had no choice but to comply with the officers' requests. (R. 92, 94, 99). Perez claimed at the suppression hearing that he would have gotten a search warrant if Mr. Rodriguez had not consented, but Rodriguez signed the consent form, and thus none of the several officers present attempted to obtain a warrant. (R. 77, 85–86). After obtaining Mr. Rodriguez's consent, Perez and another officer entered the

residence with Mr. Rodriguez and seized eight marijuana plants, weighing thirty-six pounds total, as well as equipment used to grow marijuana. (R. 77–78).

At the conclusion of the testimony, the court heard arguments on the motion, which focused on the issue of whether the evidence was admissible under the inevitable discovery doctrine. (R. 104, 108). The State argued that the doctrine applied because there was probable cause to obtain a search warrant, and because Perez testified that he would have obtained a warrant if Mr. Rodriguez had not consented. (R. 109–10). The defense argued that the inevitable discovery doctrine did not apply because the officers were not attempting to get a warrant at the time of the unconstitutional search. (R. 249, 280–82, 286). The defense also noted that applying the doctrine to a case like this would allow officers to avoid going through the warrant process and having a neutral and detached a magistrate decide whether there was probable cause to support the issuance of a warrant. (R. 286). While the judge seemed to agree that there would be no repercussions for officers who failed to obtain a warrant under similar circumstances and suggested that these officers acted inappropriately in failing to obtain a warrant, the judge nonetheless denied Mr. Rodriguez's motion to suppress. (R. 291). In doing so, the judge reasoned that the inevitable discovery doctrine was applicable because the officers had probable cause to obtain a warrant and a warrant would have issued had the officers sought one. (R. 115–16, 284–90).

Before trial was set to begin, the defense renewed its argument on the inevitable discovery issue and provided the court with recent case law to support its argument that officers must be in the process of obtaining a warrant at the time of the illegal police conduct for the doctrine to apply. (R. 247–49). Based on these cases, the judge realized that her initial ruling on the inevitable discovery issue may have been incorrect and allowed Mr. Rodriguez to plead guilty, reserving the right to appeal the denial of his motion to suppress. (R. 258, 260). Mr. Rodriguez was adjudicated guilty and was sentenced to eighteen months state prison followed by two years reporting probation. (R. 183, 186, 190, 199, 263–64, 271).

On appeal, the Third District Court of Appeal affirmed the trial court's ruling. *Rodriguez v. State*, 129 So. 3d 1135 (Fla. 3d DCA 2013). The court recognized that the First and Fourth District Courts of Appeal, as well as the Eleventh Circuit Court of Appeals, require that officers be in the process of obtaining a warrant at the time of an unconstitutional search for the inevitable discovery doctrine to apply. *Id.* Nonetheless, the Third District Court of Appeal found that this requirement is not an "indispensable element" of the doctrine. *Id.* at 1137. The court then cited to several federal circuit court decisions which, contrary to the decisions of the Eleventh Circuit, do not require the State to prove that officers were actively pursuing a warrant at the time of an unconstitutional search to admit evidence under the inevitable discovery doctrine. *Id.* at 1137–38. Finally,

the court cited to this Court's decisions in *Moody v. State*, 842 So. 2d 754 (Fla. 2003), *cert. denied*, 540 U.S. 939 (2003) and *Fitzpatrick v. State*, 900 So. 2d 495 (Fla. 2005), and stated that in neither of those cases did this Court require a showing that officers were in the process of obtaining a search warrant at the time of the unconstitutional police conduct. *Rodriguez*, 129 So. 3d at 1138. A notice invoking this Court's discretionary jurisdiction based on express and direct conflict of decisions was timely filed. This Court accepted jurisdiction on May 22, 2014, and directed that oral argument would be set by separate order.

SUMMARY OF THE ARGUMENT

The inevitable discovery doctrine permits the admission of evidence obtained as a result of unconstitutional police conduct if the State can prove that the evidence would have inevitably been discovered by lawful means. When the United States Supreme Court first adopted the doctrine, it explained that the doctrine is not based on speculation, but rather on demonstrated historical facts capable of verification. The Court applied the doctrine to a case in which a search party was actively looking for a missing girl's body at the time of the police misconduct that ultimately led to the discovery of the body. The Court concluded that the State had proven that, absent the police misconduct, the body would have been found by searchers that were close to the body at the time of the misconduct. The Court gave no indication that it would have applied the doctrine absent evidence of the active search and its proximity to the victim's body.

Every Florida court, with the exception of the Third District Court of Appeal in this case, that has applied the inevitable discovery doctrine has required proof of an active and independent investigation. When the police misconduct is the warrantless search of one's home, Florida courts require the State to show that officers were actively pursuing a search warrant at the time of the warrantless search. The Third District recognized this but nevertheless held that the inevitable

discovery doctrine was applicable to this case, despite the fact that none of the officers had attempted to obtain a warrant to search Mr. Rodriguez's home.

Applying the inevitable discovery doctrine as the majority of Florida courts have encourages officers to adhere to the warrant requirement and fulfills the purpose of the exclusionary rule by deterring police from taking shortcuts to obtain evidence in violation of citizens' Fourth Amendment rights. Conversely, applying the doctrine whenever officers have probable cause and could have obtained a warrant but failed to do so, as the Third District Court of Appeal has, would eviscerate the warrant requirement and give police officers the unfettered power to search one's home once they decide they have probable cause to do so, without any oversight from a neutral and detached magistrate.

Here, because the officers were not actively pursuing a search warrant when they searched Mr. Rodriguez's home without valid consent, and because the Third District's interpretation and application of the inevitable discovery doctrine in this case does great harm to the Fourth Amendment, this Court should reverse the decision of that court.

ARGUMENT

THE EVIDENCE OBTAINED DURING THE WARRANTLESS SEARCH OF MR. RODRIGUEZ'S HOME WAS NOT ADMISSIBLE UNDER THE INEVITABLE DISCOVERY DOCTRINE, AS THE DOCTRINE ONLY APPLIES WHEN THE STATE PROVES THAT THE EVIDENCE WOULD HAVE BEEN DISCOVERED PURSUANT TO A LAWFUL AND INDEPENDENT INVESTIGATION THAT WAS ACTIVELY UNDERWAY AT THE TIME OF THE UNCONSTITUTIONAL POLICE CONDUCT, AND HERE, THE OFFICERS WERE NOT IN THE PROCESS OF OBTAINING A WARRANT WHEN THEY SEARCHED MR. RODRIGUEZ'S ABSENT VALID CONSENT.

The inevitable discovery doctrine, adopted by the United States Supreme Court in *Nix v. Williams*, 467 U.S. 431 (1984), allows the State to avoid exclusion of evidence obtained unlawfully if the State can prove that the evidence would have been obtained lawfully absent the police misconduct. Every Florida Court other than the Third District Court of Appeal that has addressed this issue has held that when the police misconduct is the warrantless search of one's home, the inevitable discovery doctrine requires the State to prove that officers were actively pursuing a search warrant at the time of the illegal search. Applying the doctrine only upon proof of active and independent pursuit deters unlawful police conduct, and encourages officers to abide by the Fourth Amendment warrant requirement. However, under the approach taken by the Third District Court of Appeal in the present case, application of the doctrine would do away with the warrant requirement, as there would be no incentive for an officer to obtain a warrant once

he himself determines he has probable cause to search one's home. Here, because the State failed to prove that the officers were actively pursuing a search warrant when they searched Mr. Rodriguez's home without valid consent, the trial court erred in ruling that the evidence found pursuant to the warrantless search was admissible under the inevitable discovery doctrine.

A.

The United States Supreme Court's adoption of the inevitable discovery doctrine in *Nix v. Williams* and its application of the doctrine to the facts of that case demonstrate that the doctrine is only applicable when the State proves that a lawful and independent investigation was actively underway at the time of the unconstitutional police conduct.

The warrant requirement protects one's right to be free from unreasonable searches and seizures, as it "ensures that the inferences to support a search are 'drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'" *Riley v. California*, 134 S. Ct. 2473, 2482 (2014) (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)). When searches are conducted without a warrant and outside of a recognized exception to the warrant requirement, the exclusionary rule mandates that the evidence obtained pursuant to that search be excluded. *See United States v. Calandra*, 414 U.S. 338, 347 (1974) ("The exclusionary rule was adopted to effectuate the Fourth Amendment right of all citizens 'to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" (quoting

U.S. CONST. amend. IV)); *see also* Art. 1, §12, Fla. Const.; *Wong Sun v. United States*, 371 U.S. 471 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920); *Weeks v. United States*, 232 U.S. 383 (1914). However, a court may admit evidence obtained pursuant to a warrantless search if the State can show that the evidence would have inevitably been discovered in the course of a legitimate, independent, and ongoing investigation.

The United States Supreme Court first adopted the inevitable discovery doctrine in *Nix v. Williams*, 467 U.S. 431 (1984). In *Nix*, an officer's "Christian burial" speech in violation of the defendant's Sixth Amendment rights caused the defendant to lead the police to the location of a missing girl's body. *Nix*, 467 U.S. at 434–36. The *Nix* Court considered whether evidence of the body was nevertheless properly admitted during the defendant's trial, on the ground that it would inevitably have been discovered despite police misconduct by a search party that was actively looking for the body at the time of the constitutional violation. *Id.* at 434. The United States Supreme Court began its analysis by observing that the exclusionary rule "is needed to deter police from violations of constitutional and statutory protections." *Id.* at 442–43. Nonetheless, the Court recognized that it serves no deterrent purpose to exclude tainted evidence if it "has been discovered by means wholly independent of any constitutional violation." *Id.* at 443. In

formally adopting the inevitable discovery exception, the Court announced that "[i]f the prosecution can establish by a preponderance of the evidence that 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." *Id.* at 444. The Court noted that "inevitable discovery involves ***no speculative elements*** but focuses on ***demonstrated historical facts*** capable of ready verification or impeachment . . . ." *Id.* at 444, n. 5.

An analysis of *Nix* demonstrates that the inevitable discovery doctrine, which the Court specifically derived from the independent source doctrine, only applies to situations where a lawful and independent investigation is being actively pursued at the time of the constitutional violation.[1] Prior to *Nix*, the Court had adopted the independent source doctrine, whereby lawfully discovered evidence is admissible if it is obtained through a process unconnected with, and untainted by, any prior illegal search that also led to discovery of the same evidence. *Silverthorne Lumber Co.*, 251 U.S. 385, 392 (1920). The *Nix* Court viewed the inevitable discovery doctrine as an extension of the independent source doctrine,

[1] *See* Sarah DeLoach, *Keeping the Faith with the Independent Source Foundations of Inevitable Discovery: Why Courts Should Follow Justice Breyer's Active and Independent Pursuit Approach from Hudson v. Michigan*, 83 MISS. L.J. 1179, 1199 (2014) (explaining that because an active and independent pursuit in the form of a search team was approaching the evidence at the time officers violated the defendant's right to counsel, the Court did not have to expressly define the active and independent pursuit requirements).

and stated that the two doctrines are functionally similar: Just as it serves no purpose to exclude evidence found through a wholly legal and independent source, it also serves no purpose to exclude evidence that would inevitably have been discovered through such a source. *See Nix*, 467 U.S. at 443–44; Wayne R. LaFave, Search & Seizure § 11.4(a) (5th ed. 2012) (stating that inevitable discovery doctrine is a variation of the independent source doctrine). Thus, an independent source is an indispensable requirement for both doctrines to apply.

Moreover, *Nix* makes clear that the independent investigation must be actively underway at the time of the police misconduct for the doctrine to apply.[2] The Court emphasized several facts demonstrating that the search party was on the verge of discovering the girl's body at the time the police found the body in violation of defendant's right to counsel. *Nix*, 467 U.S. at 448–49. The Court noted that one search team was only two and one-half miles away from where the body was ultimately discovered, and there was testimony that it would have only taken an additional three to five hours to discover the body if the search had continued. *Id.* at 449. Furthermore, the body was found in a culvert, which was an

[2] *See* R. Bradley Lamberth, *The Inevitable Discovery Doctrine: Procedural Safeguards to Ensure Inevitably*, 40 BAYLOR L. REV. 129, 141–42 (1988) ("While the majority did not expressly say discovery could only be deemed inevitable if the legal means of obtaining the evidence were in progress at the time the evidence was illegally discovered, ***it certainly considered the progress and ongoing nature of the search a significant factor in demonstrating the inevitability of discovery***.").

area that the search teams had specifically been directed to search. *Id.* After detailing how the search team was actively looking for the girl's body when the police learned where the body was in violation of the defendant's constitutional rights, the Court concluded that "***[o]n this record it is clear that the search parties were approaching the actual location of the body,*** and we are satisfied . . . that the volunteer search teams would have resumed the search had Williams not led the police to the body ***and the body inevitably would have been found***." *Id.* at 449–50. Thus, it is apparent that the Court intended that active pursuit be necessary for application of the inevitable discovery doctrine. *See* Sarah DeLoach, *Keeping the Faith with the Independent Source Foundations of Inevitable Discovery: Why Courts Should Follow Justice Breyer's Active and Independent Pursuit Approach from Hudson v. Michigan*, 83 MISS. L.J. 1179, 1204 (2014) (stating that *Nix's* "perfect facts" did not create any need for speculation by the Court because they clearly met an active pursuit standard); R. Bradley Lamberth, *The Inevitable Discovery Doctrine: Procedural Safeguards to Ensure Inevitably*, 40 BAYLOR L. REV. 129, 147 (1988) ("[T]he Court's discussion in *Williams* gave no indication that the Court would have adopted the inevitable discovery doctrine absent a showing of the proximity of the ongoing search to the victim's body.").

Justice Stevens' concurrence discussed the active pursuit requirement, stating that "[a]n inevitable discovery finding is based on objective evidence

concerning the scope of the ***ongoing investigation*** which can be objectively verified or impeached." *Id.* at 457, n. 8 (Stevens, J., concurring). Justice Stevens further explained that the majority correctly concluded that the doctrine was applicable to *Nix* because the State "adduced evidence demonstrating that ***at the time of the constitutional violation an investigation was already under way which, in the natural and probable course of events, would have soon discovered the body.***" *Id.* at 457. Justice Brennan's dissent is even more unequivocal than Justice Stevens' concurrence; according to Justice Brennan, the majority concluded "that unconstitutionally obtained evidence may be admitted at trial if it inevitably would have been discovered in the same condition ***by an independent line of investigation that was already being pursued when the constitutional violation occurred.***" *Id.* at 459 (Brennan, J., dissenting).[3] Finally, Justice Breyer's dissent in a more recent case recognizes that inevitable discovery requires an active an independent investigation. *Hudson v. Michigan*, 547 U.S. 586, 616 (2006) (Breyer,

[3] Justice Brennan's dissent was not based on his belief that the majority erred in adopting the doctrine, but rather based on his belief that the government should have to satisfy a heightened burden of proof before it is allowed to rely on the doctrine. *Nix v. Williams*, 467 U.S. 431, 459 (Brennan, J., dissenting). Justice Brennan stated that "the inevitable discovery exception necessarily implicates a hypothetical finding that differs in kind from the factual finding that precedes application of the independent source rule," and "[t]o ensure that this hypothetical finding 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 before concluding that the government had met its burden of proof on this issue." *Id.*

J., dissenting) (explaining that inevitable discovery doctrine "does not treat as critical what *hypothetically could* have happened had the police acted lawfully in the first place," but that the doctrine refers to discovery that "would have occurred (1) *despite* (not simply *in the absence of*) of the unlawful behavior and (2) *independently* of that unlawful behavior. The government cannot, for example, avoid suppression of evidence seized without a warrant . . . simply by showing that it could have obtained a valid warrant had it sought one.") (emphasis in original). Thus, the United States Supreme Court has made it clear that application of the inevitable discovery doctrine requires proof that a lawful and independent investigation was being actively pursued at the time of the unconstitutional police conduct.

B.

All Florida courts, with the exception of the *Rodriguez* court, require proof of active and independent pursuit in order for the inevitable discovery doctrine to apply, as do several federal circuit courts, because applying the doctrine where the police could have obtained a warrant but simply failed to do so would eviscerate the Fourth Amendment warrant requirement.

1.

Florida courts require proof of active and independent pursuit.

Several Florida decisions have interpreted the *Nix* inevitable discovery rule in the context of warrantless searches of homes. With the exception of the Third District Court of Appeal, these courts all hold that the inevitable discovery doctrine

may avoid suppression of evidence found during an illegal and warrantless home search only when the State can establish that officers were actively and independently pursuing a search warrant at the time of the unconstitutional search. *See, e.g.*, *Thomas v. State*, 127 So. 3d 658 (Fla. 1st DCA 2013); *Rowell v. State*, 83 So. 3d 990 (Fla. 4th DCA 2012); *King v. State*, 79 So. 3d 236 (Fla. 1st DCA 2012); *McDonnell v. State*, 981 So. 2d 585 (Fla. 1st DCA 2008), *rev. denied*, 993 So. 2d 513 (Fla. 2008); *Conner v. State*, 701 So. 2d 441 (Fla. 4th DCA 1997). In these cases, officers had probable cause and ample time to obtain search warrants but failed to do so and instead obtained the evidence in violation of the defendants' Fourth Amendment rights. *Thomas*, 127 So. 3d at 666–67, n. 12; *Rowell*, 83 So. 3d at 996; *King*, 79 So. 3d at 238–39. The courts refused to apply the doctrine to admit the unconstitutionally obtained evidence. *Id.* In doing so, the courts made the following observations: (1) "[a] private home is an area where a person enjoys the highest reasonable expectation of privacy under the Fourth Amendment"; (2) the inevitable discovery doctrine as set forth in *Nix* requires "the prosecution to show that lawful means which made discovery inevitable were being actively pursued prior to the occurrence of the illegal conduct"; (3) this requirement is particularly important because any other rule would effectively eviscerate the exclusionary rule; and (4) application of the inevitable discovery rule under circumstances

where officers have probable cause and could obtain a warrant but simply fail to do so would nullify the Fourth Amendment warrant requirement. *Id.*

In this case, just as in *Rowell*, *King*, and *Thomas*, the State did not introduce any evidence that the officers were making any effort to obtain a warrant at the time of the warrantless search of Mr. Rodriguez's home. Even though the officers may have had probable cause to obtain a search warrant and ample time and personnel to do so, Perez testified that he only would have initiated the warrant application process if Mr. Rodriguez had not consented to the warrantless search of his home. (R. 77, 85–86). *Rowell*, *King*, and *Thomas* hold that, under these facts, the State should not be able to rely on the inevitable discovery doctrine to avoid suppression of the evidence.[4] While the Third District Court of Appeal

[4] Courts in other states have similarly refused to apply the inevitable discovery doctrine under almost identical facts. In *State v. Harris*, 642 A.2d 1242 (Del. Super. Ct. 1993), officers searched a locked toolbox in the defendant's home pursuant to what they believed was valid consent. *Id.* at 1244–45. One officer testified at the suppression hearing that ***had he not obtained what they believed to be valid consent, he would have obtained a search warrant for the toolbox***. *Id.* at 1250. The Delaware court held that "[t]he inevitable discovery doctrine has no application to this case." *Id.* at 1251. The court explained that ***"[h]ad the State shown . . . that police officers were in the process of preparing a search warrant . . . at the time the toolbox was opened, a case for the inevitable discovery doctrine would have been made. That is a far cry from the rather self-serving statement that the police would have obtained a search warrant had they not obtained . . . consent***." *Id.*; *see also State v. Jorgensen*, 526 N.E.2d 1004 (Ind. Ct. App. 1988) (refusing to apply inevitable discovery doctrine where officers were not in the process of obtaining a warrant when they searched the defendant's home without a warrant but without her objection, and rejecting State's argument that police officers could have secured the defendant's home and obtained a warrant had the

acknowledged that these cases require proof that officers were in active pursuit of a warrant, it nonetheless refused to follow the rationale of these cases. *Rodriguez v. State*, 129 So. 3d 1135, 1137–38 (Fla. 3d DCA 2013). In doing so, the Third District departed from its sister courts' conclusion that applying the inevitable discovery doctrine where officers have taken no steps to obtain a warrant would nullify the warrant requirement of the Fourth Amendment. *See Rowell*, 83 So. 3d at 996; *King*, 79 So. 3d at 238.

This Court provided guidance on the inevitable discovery doctrine in contexts not involving warrantless home searches in *Moody v. State*, 842 So. 2d 754 (Fla. 2003), *cert. denied*, 540 U.S. 939 (2003) and *Fitzpatrick v. State*, 900 So. 2d 495 (Fla. 2005). In *Moody*, this Court refused to apply the inevitable discovery doctrine to permit the admission of evidence found during an illegal traffic stop of the defendant's car because the defendant was not the subject of an active and independent investigation prior to the illegal stop. *Moody*, 842 So. 2d at 759–60. Officers in *Moody* were investigating a murder for which they did not believe the defendant was responsible. *Id.* at 755. About a week into the murder investigation, an officer saw the defendant's vehicle driving through a high-crime area. *Id.* The officer recognized the defendant and believed that he had a suspended driver's license, so he initiated a traffic stop, confirmed the defendant's license was

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defendant not consented because, "[w]ere this the rule, no warrantless search supported by probable cause would be invalid").

suspended, and arrested him. *Id.* A routine inventory search of the defendant's car produced a handgun which was linked to the open murder investigation. *Id.* at 755–56.

This Court first concluded that the initial traffic stop of the defendant was illegal because the information the officer relied upon to justify the stop was stale. *Id.* at 759. This Court then turned its attention to the inevitable discovery doctrine, and cited *Nix* for the proposition that the State must show that an investigation was already underway at the time of the constitutional violation for the doctrine to apply. *Id.* This Court recognized that ***"'[i]nevitable discovery involves no speculative elements***,'" and that "***the State cannot argue that some possible further investigation would have revealed the evidence***." *Id.* (quoting *Nix*, 467 U.S. at 444, n. 5). Applying those principles to the facts before it, this Court stated that "the police had not initiated any investigation of Moody for the . . . murder prior to the traffic stop, and the police had no reason to suspect Moody had any involvement in the murder." *Moody*, 842 So. 2d at 759. As the police were not actively and independently investigating the defendant for the murder at the time of the illegal traffic stop, this Court concluded that the State failed to prove that the evidence would have been discovered absent the illegal stop. *Id.* at 759–60.

Shortly after *Moody*, this Court ruled that the doctrine did apply in *Fitzpatrick*, 900 So. 3d at 514. There, the defendant argued that officers illegally

coerced him to consent to a blood draw. *Id.* This Court recognized its earlier holding in *Moody* but distinguished *Fitzpatrick* on the ground that the defendant in *Fitzpatrick* was actively and independently being investigated for murder at the time of the alleged illegal blood draw, whereas the defendant in *Moody* was not. *Id.* This Court stated that even if the officers coerced the defendant into consenting, the police had already initiated an investigation of the defendant prior to requesting a blood sample, they considered him a suspect prior to the blood draw, and therefore, the inevitable discovery doctrine applied because the defendant's imminent arrest would have inevitably led to the blood draw. *Id.*

While the Third District correctly noted that neither *Moody* nor *Fitzpatrick* state that the inevitable discovery doctrine requires proof that officers were actively pursuing a search warrant at the time of the police misconduct, neither *Moody* nor *Fitzpatrick* involved warrantless home searches. Both *Moody* and *Fitzpatrick* recognize, however, that the doctrine is only applicable when the State can show that officers were actively engaged in a lawful and independent investigation at the time of the unconstitutional police conduct. Thus, the Third District was incorrect when it concluded that this Court does not recognize the active and independent pursuit requirement. *See, e.g.*, *Moody*, 842 So. 2d at 759–60; *Fitzpatrick*, 900 So. 2d at 514; *see also Lebron v. State*, 135 So. 3d 1040, 1054–55 (Fla. 2014), *cert. denied*, 122 S. Ct. 1794 (2014) (applying doctrine where

defendant argued that car he was in was illegally searched, but same car was the subject of an independent investigation for theft and therefore, would have inevitably been the subject of an inventory search leading to the independent discovery of the same evidence).[5]

2.

Several federal courts require proof of active and independent pursuit.

Like the majority of Florida courts, several federal circuit courts also require proof of active pursuit if the State wishes to rely on the inevitable discovery doctrine. In *United States v. Cherry*, 759 F.2d 1196 (5th Cir. 1985), *cert. denied*, 479 U.S. 1056 (1987), for example, the Fifth Circuit stated that for evidence to be admissible under the inevitable discovery doctrine, the prosecution must establish

[5] Just as *Moody*, *Fitzpatrick*, and *Lebron* recognize the active and independent pursuit requirements of inevitable discovery in situations other than the warrantless search of a home, several other district court decisions recognize these requirements in various contexts as well. *See Elliott v. State*, 49 So. 3d 795, 800–01 (Fla. 1st DCA 2010) (applying doctrine because search teams with specially trained dogs were actively searching the victim's property for her remains when jailer obtained information about specific location of the remains in violation of defendant's *Miranda* rights); *Garrett v. State*, 946 So. 2d 1211, 1214 (Fla. 2d DCA 2006) (recognizing that *Moody* requires an ongoing or active investigation and refusing to apply doctrine to admit evidence of defendant's identity because there was no evidence that, at the time officers illegally seized defendant, they were conducting an independent investigation that would have led them to discover his identity); *Rosales v. State*, 878 So. 2d 497, 499–501 (Fla. 3d DCA 2004) (applying doctrine because at the time of invalid traffic stop, officers had probable cause to arrest defendant, had already made decision to arrest defendant, were positioned in their vehicle and were ready to make the arrest based on the already-existing probable cause, and would have done so if patrol officer had not made roadside traffic stop of defendant that led to discovery of incriminating evidence).

(1) a reasonable probability that the evidence would have been discovered by lawful means but for the police misconduct, (2) that the leads making discovery inevitable were possessed by the police at the time of the misconduct, and (3) ***that the police prior to the misconduct were actively pursuing the alternate line of investigation***. *Cherry*, 759 F.2d at 1204. The court noted that such a rule was fully consistent with *Nix* and was needed to deter unlawful police conduct:

> In *Williams*, the search was already underway in the general vicinity where the body was found when the police initiated the illegal interrogation. At the time of the police misconduct, therefore, the authorities were both actively pursuing the alternate line of investigation and in possession of a number of leads . . . ***[W]hen the police have not been in active pursuit of an alternate line of investigation . . . the general application of the inevitable discovery exception would greatly encourage the police to engage in illegal conduct because (1) the police would usually be less certain that the discovery of the evidence is "inevitable" in the absence of the illegal conduct and (2) the danger that the evidence illegally obtained may be inadmissible would be reduced. While suppression in such a case may put the prosecution in a worse position because of the police misconduct, a contrary result would cause the inevitable discovery exception to swallow the rule by allowing evidence otherwise tainted to be admitted merely because the police could have chosen to act differently and obtain the evidence by legal means.*** When the police forego legal means of investigation simply in order to obtain evidence in violation of a suspect's constitutional rights, the need to deter is paramount and requires application of the exclusionary rule.

Id. at 1204–05.

The Eleventh Circuit also "requires the prosecution to show that the lawful means which made discovery inevitable were being *actively pursued* prior to the occurrence of the illegal conduct." *United States v. Virden*, 488 F.3d 1317, 1322

(11th Cir. 2007) (internal quotation omitted) (emphasis in original). That court has explained that the active pursuit requirement is "especially important," as "[a]ny other rule would effectively eviscerate the exclusionary rule, because in most illegal search situations the government could have . . . obtained the evidence through some lawful means had they taken another course of action." *Id.* at 1322–23. The Eighth and Second Circuits concur. *Accord United States v. Conner*, 127 F.3d 663 (8th Cir. 1997); *United States v. Cabassa*, 62 F.3d 470 (2d Cir. 1995).[6]

While the Third District recognized that the Eleventh Circuit requires proof of active pursuit, it relied on cases from federal circuit courts that do not recognize the active pursuit requirement. *See, e.g.*, *United States v. Are*, 590 F.3d 499 (7th Cir. 2009), *cert. denied*, 131 S. Ct. 73 (2010); *United States v. Tejada*, 524 F.3d 809 (7th Cir. 2008); *United States v. Cunningham*, 413 F.3d 1199 (10th Cir. 2005); *United States v. Souza*, 223 F.3d 1197 (10th Cir. 2000); *United States v. Allen*, 159 F.3d 832 (4th Cir. 1998). The Third District correctly noted that these courts do not

[6] In *Conner*, the Eighth Circuit noted that it requires the State to prove that there was a reasonable probability that the evidence would have been discovered by lawful means in the absence of the police misconduct and that the government was actively pursuing a substantial, alternative line of investigation at the time of the misconduct if it wishes to invoke the doctrine to admit evidence otherwise subject to exclusion. *United States v. Conner*, 127 F.3d 663, 667 (8th Cir. 1997). Similarly, in *Cabassa*, the Second Circuit explained that in cases in which a claim of inevitable discovery is based on the possible issuance of a warrant, the extent to which the warrant process has been completed is of great importance because it relates directly to the question of whether a warrant would have issued, as inevitable discovery "would obviously be more likely if a warrant is actually obtained." *United States v. Cabassa*, 62 F.3d 470, 473 (2d Cir. 1995).

require proof that officers were actively pursuing an independent investigation at the time of the unconstitutional conduct. *Rodriguez*, 129 So. 3d at 1137–38. But the Third District failed to recognize that several of these federal decisions refuse to apply the inevitable discovery doctrine when officers have probable cause and could obtain a warrant but simply fail to do so, which is the precise situation in this case. *See United States v. Mejia*, 69 F.3d 309, 320 (9th Cir. 1995) (stating that Ninth Circuit "has never applied the inevitable discovery exception so as to excuse the failure to obtain a search warrant where the police had probable cause but simply did not attempt to obtain a warrant," as doing so "would completely obviate the warrant requirement"); *United States v. Quinney*, 583 F.3d 891 (6th Cir. 2009) (recognizing that other Sixth Circuit cases do not require proof of an active and independent investigation, but asserting that the government cannot "circumvent the [warrant] requirement via the inevitable discovery doctrine," especially when probable cause to obtain a warrant exists but officers fail to obtain one); *United States v. Silvestri*, 787 F.2d 736, 746 (1st Cir. 1986), *cert. denied*, 487 U.S. 1233 (1988) (rejecting bright-line active pursuit rule in favor of flexible case-by-case analysis, but recognizing that active pursuit might be necessary in certain situations to satisfy the test of inevitability and independence, such as in illegal search cases where officers never obtain a warrant); *Cunningham*, 413 F.3d at 1203–04; *Souza*, 223 F.3d at 1204–05 (recognizing that active pursuit, while not a necessary

prerequisite of the doctrine, is nonetheless a factor of "great importance" that will be considered along with other factors in determining whether the doctrine is applicable).

The Seventh Circuit, however, consistently fails to give any weight to whether officers were actively pursuing a warrant at the time of an illegal and warrantless search. *See, e.g.*, *Are*, 590 F.3d at 507; *Tejada*, 524 F.3d at 812–14. The problem with this approach is that it fails to recognize that officers who engage in illegal conduct to obtain evidence will not be deterred from doing so and will ignore the warrant requirement altogether if active and independent pursuit is not required. Specifically, those cases do not recognize that "[w]ithout the active pursuit requirement . . . law enforcement officials would be greatly encouraged to engage in illegal conduct. The deterrent threat of exclusion disappears when otherwise tainted evidence is admissible merely because the police *could have* chosen an alternate legal means to obtain the evidence." Lamberth, 40 BAYLOR L. REV. at 147 (emphasis in original); *see also* DeLoach, 83 MISS. L.J. at 1209–10 (arguing that narrow interpretation of inevitable discovery is necessary to preserve deterrence rationale of exclusionary rule and that, under a broader interpretation, officers are incentivized to "seek the most expeditious method of obtaining evidence without regard to its illegality, knowing that, as long as they could have obtained the evidence legally, their efforts will not result in its suppression").

Essentially, the courts that apply the doctrine absent evidence of active pursuit are legitimizing unconstitutional police conduct instead of deterring it.

Of equal if not more importance, however, is the endangerment of the warrant requirement under the application of the doctrine by courts that do not require proof of active pursuit. "[T]he ultimate touchstone of the Fourth Amendment is reasonableness," and "[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing . . . reasonableness generally requires the obtaining of a judicial warrant." *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995). The Court has consistently declared that searches or seizures executed without prior approval by a judge or magistrate are "per se unreasonable." *Katz v. United States*, 389 U.S. 347, 357 (1967).

The warrant requirement does not prevent legitimate government searches, but rather serves as a check on the police by requiring the magistrate, and not the law enforcement officer, to make the probable cause determination. *Johnson,* 333 U.S. at 14 ("When the right of privacy must reasonably yield to the right of a search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent."); LaFave, § 4.1(a) (explaining that the Court's preference for search warrants issued by magistrates is better than having those decisions made by on-the-scene police officers because a more neutral decision

maker is involved, and the decision is made in more calm and less hurried circumstances). Yet, under the interpretation of the doctrine advanced by some courts, a probable cause determination by a magistrate is never made because it is made by the on-the-scene officer. These cases allow this on-the-scene officer, once he is satisfied that he has probable cause to search one's home, to completely forego a search warrant, search an individual's home without any sort of particularity limitations, and then allow the State to rely on the officer's assertion that he *could have* gotten a warrant to avoid application of the exclusionary rule. Applying the doctrine in such a manner will nullify the warrant requirement of the Fourth Amendment. *See* Robert M. Bloom, *Inevitable Discovery: An Exception Beyond the Fruits*, 20 AM. J. CRIM. L. 79, 96 (1992) (stating that allowing inevitable discovery to be utilized to sanctify an otherwise illegal search due to a lack of a warrant would undermine the warrant requirement, and that "[a] police officer with the requisite justification to obtain a warrant might be encouraged to avoid the chore of obtaining a search warrant when he can obtain the evidence faster and more easily by an illegal warrantless search and still have the evidence introduced by way of inevitable discovery"); Lamberth, 40 BAYLOR L. REV. at 143 (explaining that applying the rule so long as the prosecution offers proof that officers could have obtained a warrant makes a mockery of the exclusionary rule and warrant requirement); *State v. Handtmann*, 437 N.W.2d 830, 838 (N.D. 1989)

(proclaiming that the doctrine may not be applied to encourage shortcuts by law enforcement officials which eliminate a neutral and detached magistrate's probable cause determination, as the result would be at odds with the exclusionary rule's purpose of deterring police from obtaining evidence in an illegal manner).

To the extent that the cases advocating against an active pursuit requirement suggest that active pursuit is too rigid and imposes too much of a burden on law enforcement officers, the United States Supreme Court's recent decision in *Riley* demonstrates that this concern is meritless. There, the Chief Justice explained that "***the warrant requirement is an important working part of our machinery of government***, ***not merely an inconvenience to be somehow weighed against the claims of police efficiency***." *Riley*, 134 S. Ct. at 2493. Recent technological advances have made the process of obtaining a warrant more efficient. *Id.*; *Missouri v. McNeely*, 133 S. Ct. 1552 (2013); *see also* Donald L. Beci, *Fidelity to the Warrant Clause: Using Magistrates, Incentives, and Telecommunications Technology to Reinvigorate Fourth Amendment Jurisprudence*, 73 DENV. U. L. REV. 293, 319–20 (1996) ("Advances in electronic and telecommunications technology . . . have eliminated many of the temporal and geographic hurdles which previously prolonged the time needed to obtain a warrant."); § 933.07, Fla. Stat. (2011) (allowing for the issuance of electronic search warrants).

Not only is the argument that requiring officers to get a warrant is unduly burdensome meritless, but it is also at odds with the facts of this particular case. When the narcotics officers searched Mr. Rodriguez's home without a warrant and without valid consent, there were at least five officers present. (R. 83–84). Officer Garfinkel by admission was not a narcotics officer and was not involved in the actual seizure of the evidence from inside Mr. Rodriguez's home, but he was present when the narcotics officers arrived. (R. 46, 69–71). There is nothing in the record to suggest that it would have been unduly burdensome or impractical for Garfinkel to obtain a search warrant while the narcotics officers remained on the scene with the house secured and Mr. Rodriguez detained. While the Third District contended that it seemed "illogical for the police to have initiated the warrant process" under the facts of this case, *Rodriguez*, 129 So. 3d at 1138, what the Fourth Amendment unambiguously requires cannot be rejected because a court fails to see the logic of that requirement. Under these circumstances, the police could have pursued a warrant but simply failed to do so. The State should not be able to rely on the inevitable discovery doctrine for admission of the evidence seized without a warrant and without valid consent.

Finally, application of the doctrine absent active and independent pursuit is particularly troubling when the unconstitutional police conduct is the warrantless search of a home, as in the present case. As the Court has recently reiterated,

"when it comes to the Fourth Amendment, the home is first among equals. At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) (quoting *Silverman v. United States*, 365 U.S. 505 (1961)). This right would be of little practical value if officers could enter and search a man's home at their own discretion, based on their own probable cause determinations without any oversight from a neutral and detached magistrate. In fact, this is the very type unbridled governmental discretion the Framers sought to deter in crafting the Fourth Amendment and the warrant requirement. *See Riley*, 134 S. Ct. at 2494 ("Our cases have recognized that the Fourth Amendment was the founding generation's response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity."); Beci, 73 DENV. L. REV. at 303. Thus, application of the inevitable discovery doctrine only upon proof of active pursuit of a search warrant is necessary not only to give meaning to the exclusionary rule and preserve the warrant requirement, but also to uphold the right of a man to be free from unreasonable governmental intrusion in his home. While this application of the doctrine may "confer a windfall" upon some, *Tejada*, 524 F.3d at 813, "there is nothing new in the realization that the

Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all." *Arizona v. Hicks*, 480 U.S. 321, 329 (1987).

Here, the State failed to introduce any evidence that the officers were in the process of obtaining a warrant when they searched Mr. Rodriguez's home without a warrant and without valid consent. As the *Nix* inevitable discovery doctrine requires proof of an independent investigation that was underway at the time of the constitutional violation, and as that proof is absent in the present case, the doctrine was improperly applied to avoid the exclusionary rule. Application of the doctrine under the circumstances of this case does great harm to the exclusionary rule, the warrant requirement, and the ability of a man to be free in his home from unreasonable governmental intrusion. As such, this Court should reverse the decision of the Third District Court of Appeal.

CONCLUSION

Based on the foregoing facts, authorities, and arguments, the Petitioner respectfully requests that this Court quash the decision of the Third District Court of Appeal, and remand this case with instructions that the Petitioner's motion to suppress be granted and that he be discharged.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was emailed to the Office of the Attorney General, Criminal Division, at CrimAppMIA@MyFloridaLegal.com this 16th day of July, 2014. Undersigned counsel hereby designates, pursuant to Rule 2.516, the following e-mail addresses for the purpose of service of all documents required to be served pursuant to Rule 2.516 in this proceeding: AppellateDefender@pdmiami.com (primary E-Mail Address); SAH@pdmiami.com (Secondary E-Mail Address).

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CERTIFICATE OF TYPEFACE COMPLIANCE

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

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