No. 25-5499

IN THE
Supreme Court of the United States

TIMOTHY ALEXANDER, PETITIONER,

v.

NEW YORK, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The State of New York has not disputed that Mr. Alexander's right to remain silent was violated no less than twenty-five times. It has not disputed that this violation was intentional and exploited his concern for his wife and children to obtain a confession. And it is undisputed that it was only after those violations that the State knew where to look—and initiated an investigation—for critical pieces of physical evidence used to convict him. It is also undisputed that Mr. Alexander would not have been convicted without that evidence.

The only dispute the State musters is, without explanation, that Mr. Alexander's case does not implicate a split of authority about whether an "independent line of investigation is required for the inevitable discovery exception [to the exclusionary rule] to apply." *United States v. Kennedy*, 61 F.3d 494, 498 (6th Cir. 1995) (noting split of authority on such a question). The State relies exclusively on the purported existence of "procedures" that would have, if followed, resulted in the discovery of the evidence in question. BIO at i, 3, 5, 9, 10, 19 (invoking "normal procedure" as an independent basis for discovery). That reliance points up, rather than diminishes, the split of authorities raised in Mr. Alexander's petition: does the "inevitable discovery" exception to the exclusionary rule require an ongoing, active investigation or at least an independent source of the information as six circuits have held, or can abstract processes provide an exception to the exclusionary rule, as four circuits have held. The Court should grant review and reverse.

DISCUSSION

I. THE QUESTION PRESENTED IMPLICATES AN IMPORTANT QUESTION

This case presents an important question that has divided the circuits: "[w]hether an independent line of investigation is required for the inevitable discovery exception" to the exclusionary rule to apply. *United States v. Kennedy*, 61 F.3d 494, 498 (6th Cir. 1995). The State has made no effort to explain why there is no split of authority on this key question, instead claiming, without explication, that "a review of the case law indicates there is no conflict in the decisions of the circuit courts." BIO at 6.

In fact, there is at least a three-way split, as identified in Mr. Alexander's Petition. Pet. at 23–24. Four circuits require an "active investigation" into a source independent of the illegally obtained information to be underway to allow admission of evidence that would otherwise be the fruit of the poisonous tree. *See United States v. Eng*, 971 F.2d 854, 859 (2d Cir. 1992) (emphasizing that "inevitable discovery" requires reference to "*demonstrated historical facts*" known to the government independent from the illegality and processes must be underway on that basis for government to avail itself of the inevitable discovery doctrine (emphasis added)); *id.* at 862 (explaining government must show "active an ongoing investigation" prior to the illegality for doctrine to apply); *see also United States v. Virden*, 488 U.S. 1317, 1322 (11th Cir. 2007) ("This circuit also requires the prosecution to show that 'the lawful means which made the discovery inevitable were being *actively pursued* prior

to the occurrence of the illegal conduct.'" quoting *Jefferson v. Fountain*, 382 F.3d 1286, 1296 (11th Cir. 2004) *overruled on other grounds United States v. Watkins*, 10 F.4th 1179, 1181 (11th Cir. 2021); *United States v. Cherry*, 759 F.2d 1196, 1204–05 (5th Cir. 1985) (requiring "active pursuit of an alternative line of investigation" for doctrine to apply); *United States v. Conner*, 127 F.3d 663, 668 (8th Cir. 1997) (requiring government to provide "concrete evidence that the police explored [an] alternative investigatory approach"). That is, for the government to use evidence against a defendant whose Fourth or Fifth Amendment rights have been violated, the government must how that the evidence was obtained independent of the violation pursuant to an investigation that was underway *prior to* the violation in question.

Two circuits require there to be a concrete independent source to leading to the otherwise tainted evidence such that it is not the "fruit of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). Those circuits allow proof, for example, that a witness other than the defendant would have provided the information contained in an illegally obtained confession, even if that evidence was not already in the government's possession at the time it illegally obtained the evidence. *See United States v. Boatwright*, 822 F.2d 862, 864–65 (1987); *see also United States v. Thomas*, 955 F.2d 207, 211 (4th Cir. 1992) (applying *Boatwright*).

Finally, New York applies the most government friendly approach among the circuits. These four circuits allow admission of the evidence absent an ongoing investigation or independent source. Instead, those circuits permit admission of

evidence upon a showing that some abstract process would have uncovered the evidence, regardless of whether that process was actually underway at the time the evidence was illegally obtained. *See United States v. Langford*, 314 F.3d 892, 895 (7th Cir. 2002); *United States v. Larsen*, 127 F.3d 984, 987 (10th Cir. 1997); *Kennedy*, 61 F.3d at 499; *United States v. Ford*, 22 F.3d 374, 378 (1st Cir. 1994). For example, if the state could conceivably obtain a valid warrant and then conducted a lawful search resulting in the discovery, then the evidence is admissible, notwithstanding any link to it being illegally obtained.

As the State recounts, the state courts' decisions hinged on this latter theory. It was only through a hypothetical "grid search" pursuant to "normal procedures" that the evidence might have been found. BIO at 5, 17; *see also* Pet. App. at 2. Thus, by the State's own account, if Mr. Alexander had been tried in the six circuits that do not allow for such speculative proof to establish an exception to the exclusionary rule, this evidence would have been excluded. As such, the decision below squarely implicates the split of authority that the circuit courts themselves have recognized. *Kennedy*, 61 F.3d 498.

It is also particularly noteworthy that New York has a rule contrary to the circuit in which it sits. *See Eng*, 971 F.2d at 862. This creates the odd situation where the government in a state prosecution can avail itself of illegally obtained evidence that the government could not rely on in a federal prosecution. *See Virginia v.*

LeBlanc, 582 U.S. 91, 96 (2017) (describing such a situation as a "legal quagmire"). The state-circuit split is an additional reason for granting review.

II. NO EXCEPTION TO THE EXCLUSIONARY RULE SHOULD HAVE APPLIED

The key evidence used against Mr. Alexander should not have been admitted under any circuit's approach. At most, the State's evidence established that a "grid search" was sometimes used and sometimes was successful. Indeed, their own evidence showed that at least on some occasions, using a grid search to locate evidence was unsuccessful. BIO at 15. Their evidence did *not* show that such a search was already underway or undertaken as a matter of course. This places the search here outside the inevitable discovery doctrine under any articulation of the rule.

Nonetheless, Mr. Alexander concedes that the resolution of his case in New York state courts hinged on whether a hypothetical investigation could have potentially uncovered the evidence. But this Court should require more. It should so so particularly where, as here, there is an undisputedly intentional and repeated violation of a defendant's right to remain silent. In such circumstances, the deterrent effect of excluding the evidence will be at its highest, warranting exclusions as a deterrent to police misconduct. *Brown v. Illinois*, 422 U.S. 590, 604 (1975).

The Court's other considerations—temporal proximity of the search to the illegally obtained evidence and the existence of an independent source of the evidence—also weigh in Mr. Alexander's favor. *Id.* Indeed, the search for the physical evidence in question was in direct response to the illegally obtained confession and occurred in immediate response to it. And the State has offered no substantial proof that existing investigation underway prior to the illegally obtained confession would have uncovered the evidence.

Furthermore, this case is wholly unlike the situation in *Nix v. Williams*, 467 U.S. 431 (1984), where there was an independent investigation already underway at the time of the illegally obtained confession. *Nix*, 467 U.S. at 449. Here, the police undertook its search for physical evidence only after and in direct response to Mr. Alexander telling them where to find it during his unlawfully obtained statement. As the state's witness put it, the officers only searched the lake where the evidence was found after learning from Mr. Alexander of that location. Pet. at 20. As such, the physical evidence the state obtained would not have been admissible under the approach adopted by at least six circuits.

It also should not have been admitted under the State's own proposed rule: where it would have been discovered pursuant to normal policy and procedure. The State established no such thing. Instead, the State only established that there was a process it sometimes used to search for known physical evidence: a grid search. But the state here neither established that it used such a process as a matter of policy

nor that the state would have known to look for the evidence in question absent the illegally obtained statements from Mr. Alexander. Thus, under the State's own rule the evidence should not have been admitted.

III. THIS COURT'S INTERVENTION IS WARRANTED NOW

The Court should grant review now. There is no reason to allow the case to percolate through post-conviction and federal habeas corpus proceedings before granting review. The primary issue before the state courts was the improper application of an exception to the exclusionary rule related to unlawfully obtained statements from the accused. Such claims are wholly unavailable in federal habeas corpus review, *Stone v. Powell*, 428 U.S. 465, 494–95 (1976), making this proceeding the only remaining venue to resolve the well-defined split of authorities. This case squarely presents the question dividing the circuits, as its resolution turned on the application of the minority rule. And the admission of the relevant evidence was critical to the outcome. If the Court is ever going to resolve this issue, it should do so here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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