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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP2220 CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner

v.

ADAM W. VICE,

Defendant-Respondent

RESPONSE TO STATE'S PETITION FOR REVIEW

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I. Table of Contents.

II. Table of Authorities.

Cases

Statutes

III. Statement of Issues Presented for Review.

The issues presented in this appeal were:

> Was Vice's confession, elicited during a post-polygraph interview, voluntarily given?
>
> Was Vice's post-polygraph interview a totally discrete event from his polygraph examination?

On the first issue the circuit court held that Vice's confession had not been voluntarily given, and suppressed statements made by Vice during a post-polygraph interview. (Decision, ¶¶36-40; Pet.-App. 115). The Court of Appeals affirmed. (Decision, ¶81; Pet.-App. 15-17).

The circuit court, did not rule on the second issue, concluding that it was compelled to accept an earlier decision of the Court of Appeals holding that Vice's first trial counsel had conceded that Vice's post-polygraph interview had been a totally discrete event from his polygraph interview. (Decision, ¶34; Pet.-App. 114). Nevertheless, the circuit court felt that Vice's original trial counsel may have prematurely conceded the issue and stated that there was "at least a viable argument that the polygraph was not a distinct or discrete event from the interview." The circuit court therefore made factual findings in the event "the Court of Appeals is willing or able to reconsider" the issue. (Decision, ¶35; Pet.-App. 114-15). The Court of Appeals, exercising its discretion to reconsider the issue, held that Vice's post-polygraph interview was a totally discrete event from his polygraph examination, and rejected Vice's arguments that suppression was warranted under the "discrete events" prong of the ***Davis***[1] analysis. (Decision, ¶¶46-53; Pet.-App. 119-22).

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[1] ***State v. Davis***, 2008 WI 71, 310 Wis.2d 583, 751 N.W.2d 322.

IV. Statement Regarding Rule 809.62 Criteria.

Mr. Vice does not believe this is an appropriate case for this Court to exercise its discretion to review a decision of the Court of Appeals. The State asserts this case meets two of the possible criteria listed in section 809.62(1r), namely, that "a real and significant question of federal or state constitutional law is presented," § 809.62(1r)(a), Wis. Stats.; and that "a decision by the supreme court will help develop, clarify or harmonize the law, and ... the question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court." § 809.62(1r)(c)(3), Wis. Stats.

While this appeal involves the suppression of a confession, and therefore is based upon constitutional law, the question presented is factual in nature, and does not require the interpretation or development of constitutional law, but rather an application of existing law to the unique factual circumstances of this case.

This decision is quite narrow. In fact, what is remarkable about the decision are the number statements by the Court of Appeal concerning what it was not holding. The Court of Appeals did not hold that "standing alone" repeated references to polygraph results will render a post-polygraph confession involuntary. (Decision, ¶¶64 and 81; Pet.-App. 127-28 and 135). Nor did the Court hold "that police officers have an absolute duty to inform a defendant during a post-polygraph interview that polygraph tests are not infallible." (Decision, ¶63 fn. 7; Pet.-App. 127). Nor did the Court issue, as the State asserts, a "blanket instruction to law enforcement" that they must inform a suspect that the results of a polygraph examination are inadmissible in court, or hold that

failure to do so will necessarily render a post-polygraph confession involuntary. (Petition, p. 18).

Indeed, the Court of Appeals made clear that its decision was based upon the totality of the "specific circumstances" in Vice's case, which included:

> (1) numerous, repeated references to the polygraph results throughout the course of the post-polygraph interview;
>
> (2) repeated assertions that those results showed Vice—who claimed not to remember the assault—did remember it;
>
> (3) the officers' failure to respond to Vice's statement that he must have assaulted the victim because the test said he did; and
>
> (4) the officers' failure to inform Vice that the test results would be inadmissible in any criminal proceedings against him.

(Decision, ¶81; Pet.-App. 135; formatting altered). Significantly, the Court wrote that "[w]hile any of these circumstances, standing alone, may have been insufficient to render Vice's confession involuntary, together they demonstrate a level of coercion sufficient to overcome Vice's ability to resist." *Id.* In short, the Court of Appeals clearly wrote that none of the four circumstances it listed would, "standing alone," render a confession involuntary. It was only in the aggregate that these specific circumstance rendered Vice's confession involuntary. This demonstrates that this was a decision being driven by the specific facts of this case, and did not constitute an expansion of existing law.

The State does not point to any decision with which the Court of Appeal's opinion is in direct conflict, or even a decision that is placed in doubt by the decision in Vice's case. That is because Vice's decision did not create new law, it simply applied the unique facts and circumstance in this case to existing law. There is no need to "develop, clarify or harmonize the law," because the law is already developed and clear, and the decision in *Vice* does nothing to disrupt the law's existing harmony.

Moreover, the facts in Vice's case were quite unusual and extreme. One hopes that law enforcement does not, as an ordinary and accepted interrogation tactic, try to induce a suspect into believing that a machine has detected a repressed memory, then use that belief to convince the suspect that he must have committed the crime, despite his lack of memory of the incident, because the machine said he did. How likely is that fact pattern to "recur unless resolved by the supreme court" ? One would hope we will never again see a case in Wisconsin quite like Adam Vice's.

As an "alternative ground for supporting the Court of Appeals result," Vice would also argue that his post-polygraph interview was not a totally discrete event from his polygraph examination. *See,* § 809.62(3)(d), Wis. Stats. While the Court of Appeals held that the two events were totally discrete in Vice's case, Vice intends to defend the Court of Appeals' ultimate result and outcome by asserting that Vice's post-polygraph interview, in addition to being involuntarily given, was not a totally discrete event from his polygraph examination. *See,* § 809.62(3m)(b)1, Wis. Stats. ("A petition for cross-review is not necessary to enable an opposing party to defend the court of appeals' ultimate result or outcome based on any ground, whether or not that ground was ruled upon by the lower courts, as long as the supreme court's acceptance of that ground would not change the result or outcome below").

The analysis of whether a post-polygraph interview was a totally discrete event from his polygraph examination, is a threshold determination that must be made before examining the issue of whether the confession was voluntarily given. ***State v. Davis,*** 2008 WI 71, ¶2, 310 Wis. 2d 583, 751 N.W.2d 332. Consequently, the issue for which the

State seeks review may never be reached by this Court. Should this Court agree with Vice that his post-polygraph interview was not a totally discrete event from his polygraph examination, then there will be no opportunity to develop, clarify, or harmonize the law on the issue for which the State seeks review. In such an event, any discussion by this Court on the issue of the voluntariness of Vice's confession would be mere *obiter dicta*. Vice believes this Court will never reach the issue for which the State seeks review, and that weighs against this Court's accepting the State's petition to review this case. Alternatively, should this Court accept this case for review, then Vice would request that this Court also address the issue of whether Vice's post-polygraph interview was a totally discrete event from his polygraph examination.

V. Statement of the Facts and Case.

The Court of Appeals' decision provides a detailed and accurate statement of the facts and procedural background to this case. (Decision, ¶¶4-40; Pet.-App. 105-11). Vice understands that length considerations will often require counsel, when petitioning for review, to "condense" the facts set forth in a decision. (Petition, p. 4). Nevertheless, Vice believes a "condensed" recounting will not truly convey what the officers were cooking up during Vice's post-polygraph interview. Vice would therefore draw this Court's attention to the Court of Appeals' recounting of the post-polygraph interview, to get a true flavor of what happened during Vice's post-polygraph interview. (Decision, ¶¶11-26; Pet.-App. 105-11).

VI. Argument.

A. The issue concerning the voluntariness of Vice's confession was factual in nature.

1. The Court of Appeals decision did not create new law, but rather, applied existing law to the specific circumstances of Vice's case.

The law with regard to the voluntariness of a confession is actually quite clear and well established. "A defendant's statements are voluntary if they are the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist." ***State v. Hoppe***, 2003 WI 43, ¶36, 261 Wis.2d 294, 661 N.W.2d 407. The courts must "inquire whether the statements were the result of coercion or otherwise improper conduct by law enforcement." *Id.* at ¶ 37. "If neither coercion nor other improper conduct was used to secure the statement, it is deemed voluntary." *Id.*

The courts apply a "totality of the circumstances standard to determine whether a statement was made voluntarily." *Id.* The courts "must balance the personal characteristics of the defendant, such as age, education, intelligence, physical or emotional condition, and prior experience with law enforcement, with the possible pressures that law enforcement could impose. ... Possible pressures to consider include the length of questioning, general conditions or circumstances in which the statement was taken, whether any excessive physical or psychological pressure was used, and whether any inducements, threats, methods, or strategies were utilized in order to elicit a statement from the defendant." *Id.* at ¶¶38-39.

Moreover, in cases where the statement was elicited following a polygraph examination, "[a]n important inquiry [in determining voluntariness] continues to be whether the test result was referred to in order to elicit an incriminating statement." ***State v. Davis***, 2008 WI 71, ¶42, 310 Wis.2d 583, 751 N.W.2d 322; *See also,* ***People v. Sickley***, 448 N.E.2d 612, 114 Ill.App.3d 167 (1983) ("the alleged failure of the defendant to pass the polygraph examination was an event, if not the event, used by the examiner to confront the defendant and to coerce his cooperation").

In Vice's case the Court of Appeals unquestionably applied a totality of the circumstances standard to determine whether Vice's confession was made voluntarily. The Court wrote:

> Critically, we do not hold that a confession made during a post-polygraph interview must be suppressed any time law enforcement refers to the polygraph results during the interview. Instead, we conclude Vice's confession was involuntary under the specific circumstances of this case, which included:
>
> (1) numerous, repeated references to the polygraph results throughout the course of the post-polygraph interview;
>
> (2) repeated assertions that those results showed Vice—who claimed not to remember the assault—did remember it;
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> (3) the officers' failure to respond to Vice's statement that he must have assaulted the victim because the test said he did; and
>
> (4) the officers' failure to inform Vice that the test results would be inadmissible in any criminal proceedings against him.
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> While any of these circumstances, standing alone, may have been insufficient to render Vice's confession involuntary, together they demonstrate a level of coercion sufficient to overcome Vice's ability to resist.

(Decision, ¶81; Pet.-App. 135; formatting altered). Of the cumulative effect exerted by these circumstance the Court wrote that "we do not view the tactics employed here as merely 'subtle' psychological pressures.

Instead, we conclude these strategies would exceed most any defendant's ability to resist, regardless of whether he or she was physically or mentally compromised." (Decision, ¶72; Pet.-App. 131). And the circuit court found, as a matter of historical fact, Vice *had* been mentally and physically compromised by the tactics used by the investigators, stating that Vice appeared "distraught with the news that he failed [the polygraph examination], nearly crying at times. The [circuit] court also noted that Vice 'got to the point that he was apparently physically sick and indicated that [to the officers].' Based on those factors, the [circuit] court stated it was 'satisfied that it does appear that to one extent or another, his physical state at times appeared to be compromised to a certain degree.' " (Decision, ¶38; Pet.-App. 116).

This is not a case where law enforcement merely informed the suspect at the end of a polygraph examination that he had failed the test. *See e.g.,* ***State v. Greer***, 2003 WI App 112, ¶16, 265 Wis.2d 463, 666 N.W.2d 518. Here the detectives, and in particular the polygraph examiner; made repeated references to the results of the polygraph examination in order to convince Vice that his memory could not be trusted. (Decision, ¶¶13, 14, 17, 18, 19, 24, 25; Pet.-App. 105-08, 110-11). They convinced Vice he had blocked memories which caused his body to react in such a way that he failed the examination. (Decision, ¶25; Pet.-App. 110-11). When Vice told the detectives that he had no memory of committing this crime, the examiner told him that "You do remember doing it, otherwise you wouldn't react the way you did on the exam." (Decision, ¶13; Pet.-App. 106). They continued that refrain throughout the entire interview. (Decision, ¶¶14, 17, 18, 19, 24, 25; Pet.-App. 106-08, 110-11). At one point, Vice told the officers that "I would

tell you if I knew, but I ... I'll admit that I must have did it because obviously the test says that I did it, but I don't physically remember." (Decision, ¶17; Pet.-App. 107). "The detectives did not respond to Vice's statement that because he had failed the polygraph test, he must have sexually assaulted the victim." *Id.* "In addition to those repeated references [to the polygraph examination results], ..., the officers never informed Vice—who had little experience with law enforcement—that the polygraph results would be inadmissible in any criminal proceedings against him." (Decision, ¶64; Pet.-App. 127-28). In fact, the ***Miranda*** warning, and the Polygraph Examination Consent form, that Vice received before his polygraph examination would lead one to believe that evidence of the polygraph examination was admissible.[2] (Decision, ¶65; Pet.-App. 128). "[E]ven the State concede[d] that the form 'could have been clearer about which statements could and could not be used against Vice in court.' " *Id.*

The Court listed four specific circumstances which "together ... demonstrate a level of coercion sufficient to overcome Vice's ability to resist." (Decision, ¶81; Pet.-App. 135). For some reason, the State has condensed these four circumstances into "two factors [which] caused the court of appeals to suppress Vice's confession on voluntariness." (Petition p. 10-11). Vice, however, counts four, and assumes that the Court of Appeals felt that each circumstance was sufficiently unique and specific that they merited individual enumeration. Again, the Court of Appeals clearly wrote that none of the four circumstances it listed would, "standing alone," would render a confession involuntary. It was only in

[2] Paragraph two of the Polygraph Examination Consent form stated, among other things, that "I fully realize that: I am not required to take this examination, I may remain silent the entire time I am here, [and] *anything I say can be used against me in a court of law* ...." (R.10:2)

the aggregate that the four specific circumstance listed by the Court rendered Vice's confession involuntary. (Decision, ¶81; Pet.-App. 135). That tells us this decision was being driven by the facts. This is not a decision laden with statutory construction or interpretation of case law. Vice's case does not require the development, clarification, or harmonizing of case law concerning constitutional voluntariness; that is because this case is primarily factual in nature.

The Court of Appeals' decision is quite narrow. Indeed, what is remarkable about the decision are the number statements by the Court concerning what it was not holding. The Court of Appeals did not hold that repeated references to polygraph results will, in and of themselves, render a post-polygraph confession involuntary. (Decision, ¶¶64 and 81; Pet.-App. 127-28 and 135). Nor did the Court hold "that police officers have an absolute duty to inform a defendant during a post-polygraph interview that polygraph tests are not infallible." (Decision, ¶63 fn. 7; Pet.-App. 127). Again, the Court of Appeals held that none of the circumstances it enumerated, "standing alone," would render a confession involuntary. (Decision, ¶81; Pet.-App. 135).

The State, picking up on a suggestion from the dissent,[3] argues that this Court should accept review because the first enumerated circumstance, the investigators' repeated references to the polygraph examination results during the post-polygraph interview, was derived from "murky" origins. (Petition p. 15-16). The waters clear, however, once one goes to the source. In ***Davis***, this Court wrote that:

> Merely because one is administered a voice stress analysis or polygraph test does not render a subsequent statement per se coercive. The proper inquiry is not only whether a test

[3] *See*, Decision ¶63 fn. 6 and ¶88 fn. 3; Pet.-App. 127 and 140.

> was taken, but rather, whether a subsequent statement was given at a distinct event and whether law enforcement used coercive means to obtain the statement. An important inquiry continues to be whether the test result was referred to in order to elicit an incriminating statement. *See* ***Johnson,*** 193 Wis.2d at 389, 535 N.W.2d 441.

D***avis***, 2008 WI 71, ¶ 42 (emphasis added). It is actually the citation which offends the State, for ***Johnson***[4] was not strictly speaking a voluntariness case, but rather concerned the discreteness issue.[5] Be that as it may, there is no question that ***Davis*** was a voluntariness case, and the "important inquiry" sentence, with its offending citation, is found in that portion of the opinion which dealt with the voluntariness of Davis' confession. ***Davis***, 2008 WI 71, ¶42 of ¶¶35-42. The Court of Appeal wrote that the "statement was specific, and we are not free to disregard clear precedent." (Decision, ¶63 fn. 6; Pet.-App. 127). And Vice would note that the State has not asserted that ***Davis*** is a decision which "due to the passage of time or changing circumstances" is "ripe for reexamination." *See,* § 809.62(1r)(e), Wis. Stats

The State further complains that "other courts do *not* appear to consider a reference to a polygraph result an important factor in assessing voluntariness." (Petition p. 17). Not so. What the State continues to ignore is that the officers in Vice's case didn't just refer to the polygraph examination results during the post-polygraph interview; they incorporated the results into their interrogation strategy in order to

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[4] ***State v. Johnson***, 193 Wis.2d 382, 388, 535 N.W.2d 441, 442–443 (Ct.App.1995).

[5] ***Davis*** was apparently referring to the following sentence in ***Johnson***: "From the hearing testimony, it is evident that the police officer questioning Johnson after the polygraph examination did not refer to polygraph charts or tell Johnson he had failed the polygraph test to elicit inculpatory statements." ***Johnson***, 193 Wis.2d at 389.

convince Vice that his memory, or rather lack thereof, could not be trusted. By this tactic they were able to convince Vice that: "I must have did it because obviously the test says that I did it." (Decision, ¶17; Pet.-App. 107). Interrogation tactics like those in *Vice* have been widely condemned. In ***State v. Craig***, 262 Mont. 240, 241, 864 P.2d 1240 (Mont., 1993), the Montana Supreme Court suppressed a confession when both the examiner and investigating detective who interrogated Craig kept telling him that "that the machine is proof that he lied." The court wrote, "[r]egardless of its acceptability among the police, it is not acceptable to this Court for the police to use the results of a polygraph examination to tell a defendant that he lied in order to extract a confession." *Id.* at 242. In ***People v. Leonard***, 59 A.D.2d 1, 397 N.Y.S.2d 386, 392 (N.Y. App. Div., 1977), a confession was found to be involuntary and suppressed when the police told the defendant that "the truth was know by God, the defendant, and the polygraph machine, and that the polygraph machine proved he was lying." *See also,* ***State v. Davis***, 381 N.W.2d 86 (Minn. App., 1986) (confession suppressed when, among other things, suspect was told that the polygraph was "foolproof"); and ***Martinez v. State***, 545 So. 2d 466 (Fla. 4th DCA, 1989) (polygraph examiner told accused that it was "impossible" that he was being truthful). In ***State v. Sawyer***, 561 So.2d 278, 289-90 (Fla. 2d DCA, 1990), in what was a particularly egregious case of coercion, the court focused special attention on the polygraph examiner's having told Sawyer that the polygraph machine was detecting repressed or hidden memories; and with the detectives' suggestion that Sawyer visualize the commission of the crime. Much like Vice, Sawyer was told by his polygraph examiner that his physiological responses were evidence of

memories. He was told that his "heart was talking to him, his conscience; Sawyer's belief in his own innocence was useless." *Id.* at 290. And much like Vice, Sawyer was encouraged to visualize himself committing the crime. Sawyer was told to "disregard his reliance on his own senses of what happened on the night of the killing, accept the blackout theory, and 'picture' what could have happened. Sawyer also accepted [the detective's] suggestion that he imagine or 'picture' what it would have been like to do the killing, which he does not recall because of a blackout." *Id.* at 289. These same elements can be found in Vice's case: assertions that the machine detected repressed memories, attempts to visualize the alleged crime, and a belief that the lack of memory may be due to alcohol. (Decision, ¶¶17, 20, and 24; Pet.-App. 107-10). *See also*, ***State v. Valero***, 285 P.3d 1014, 1018 (Idaho App., 2012) ("on more than one occasion, the detective conveyed to Valero that, from the polygraph, there was no question what Valero had done and, in essence, that the polygraph was determinative of his guilt. The coercive nature of this misrepresentation can be seen one last time as Valero attempted to deny the accusations, stating 'I never would touch her but if that thing [the polygraph] says I did....' To which the detective responded 'Well, you did'").

The State also repeatedly complains that officers "have license to misrepresent or fabricate evidence in other contexts," the implied suggestion being what's the big deal here? Petition p. 17 and 19; *citing*, ***State v. Lemoine***, 2013 WI 5, 345 Wis.2d 171, 827 N.W.2d 589, and ***United States v. Rutledge,*** 900 F.2d 1127 (1990). The big deal can be found in ***Rutledge,*** where the Seventh Circuit, wrote: "[t]he police are allowed to play on a suspect's ignorance, his anxieties, his fears, and his uncertainties; they just are not allowed to magnify those fears,

uncertainties, and so forth to the point where rational decision becomes impossible." ***Rutledge,*** 900 F.2d at 1130 (emphasis added). But that is just the point. In Vice's case, the detectives *did* magnify Vice's ignorance, anxieties, fears and uncertainties to the point that a rational decision became impossible. When Vice says, "obviously somehow in my subconscious I remember and I'm just trying to block it out and it won't come out," Vice did not come up with that idea on his own, the detectives planted that thought in his mind. (Decision, ¶17; Pet.-App. 107).

Similarly, while law enforcement may have some "license" to lie, and frequently does, those lies *are* relevant to the voluntariness analysis. In ***Frazier v. Cupp***, 394 U.S. 731, 739 (1969), the Supreme Court wrote, "[t]he fact that the police misrepresented the statements that Rawls had made is, *while relevant*, is insufficient in our view to make this otherwise voluntary confession inadmissible. These cases must be decided by viewing the 'totality of the circumstances.' " (emphasis added). This case is often thought to be an endorsement for lying by law enforcement. It is not. The case is only an acknowledgement that the analysis does not end with proof of the lie. It is widely recognized that falsehoods which are "reasonably likely to produce an untrue statement" can render a confession inadmissible. *See*, ***People v. Scott***, 52 Cal. 4th 452, 129 Cal. Rptr. 3d 91, 257 P.3d 703, 727 (2011) ("The use of deceptive statements during an interrogation does not invalidate a confession as involuntary unless the deception is of a type reasonably likely to produce an untrue statement"); ***Creager v. State,*** 952 S.W.2d 852, 856 (Tex.Crim.App.1997) (Trickery or deception does not make a statement involuntary unless the method is calculated to produce an untruthful confession or was offensive to due process); ***Walker v. State***, 194 So. 3d

253, 273 (Ala. Crim. App. 2015) (same); ***State v. Baylor***, 423 N.J. Super. 578, 34 A.3d 801, 807 (App. Div. 2011) (same); ***Goodwin v. State***, 373 Ark. 53, 281 S.W.3d 258, 265 (2008) ("a misrepresentation of fact does not render a statement involuntary so long as the means employed are not calculated to procure an untrue statement and the confession is otherwise freely and voluntarily made with an understanding by the accused of his constitutional rights."); ***Daniel v. State***, 285 Ga. 406, 677 S.E.2d 120, 124 (2009) (same); ***State v. McKinney***, 153 N.C. App. 369, 570 S.E.2d 238, 242 (2002) ("Totality of circumstances must be viewed in determining whether confession was given voluntarily and understandingly, one of which may be whether means employed were calculated to procure an untrue confession"); (emphasis added to preceding quotes).

The interrogation tactics adopted by the officers in Vice's case were particularly insidious. They were tactics reasonably likely to produce a false confession because they caused Vice to question his own lack of memory. A polygraph test cannot ascertain guilt or innocence. (*See,* Decision, ¶¶73-80; Pet.-App. 131-35). A polygraph cannot read minds or tell if a person remembers or forgets some particular event. *Id.* When the polygraph examiner said that he could see in the polygraph results memories that Vice was blocking out, that was complete nonsense. *Id.* Nonsense that Vice unfortunately believed. At every step in Vice's interrogation the detectives were seeking a confession, and not simply trying to solve a crime. It is apparent in their methods, statements, and behavior, that their only goal was to get Vice to confess to a crime.

When it is shown that the undeviating intent of the officers is to extract a confession from the defendant, the confession obtained must be

examined with "the most careful scrutiny." ***Spano v. New York***, 360 U.S. 315, 324 (1959). Both the circuit court and the Court of Appeals looked into the facts in Vice's case and concluded that under the totality of the circumstances, the coercive interrogation tactics used by the officers overwhelmed Vice's ability to resist. The Court of Appeal went further and wrote that "we do not view the tactics employed here as merely 'subtle' psychological pressures. Instead, we conclude these strategies would exceed most any defendant's ability to resist, regardless of whether he or she was physically or mentally compromised." (Decision, ¶72; Pet.-App. 131). The State strains hard to find a reason why this case presents an important issue of law for this Court to decide, but ultimately, this case is really about the facts. The circuit court and the Court of Appeal merely applied the totality of factual circumstances in Vice's case to existing law. This Court should let the decision stand.

2. The Court of Appeals did not issue a "blanket instruction to law enforcement" that they must inform suspects that the results of a polygraph examination are inadmissible in court.

The Court of Appeal, rested its opinion upon the totality of circumstances, and identified four specific circumstances in Vice's case which taken together rendered Vice's confession involuntary. (Decision, ¶81; Pet.-App. 135). The Court took great pains to stress that "standing alone," none of these factors would likely have been sufficient to render Vice's confession involuntary. *Id.* (*See also,* Decision, ¶¶62, 64, 66; Pet.-App. 126-29). It was only in the aggregate that these circumstances rendered Vice's confession involuntary.

The Court then wrote "[i]n particular, we caution law enforcement officers that if they plan to rely on polygraph results in order to elicit a

defendant's confession, they need to inform the defendant that those results are inadmissible in court." (Decision, ¶81; Pet.-App. 135; emphasis added). The State makes much of this sentence, asserting that the Court issued a "blanket instruction to law enforcement: if [officers] plan to rely on polygraph results in order to elicit a defendant's confession, they need to inform the defendant that those results are inadmissible in court." (Petition, p. 18). By using the term "blanket instruction," the State seems to be suggesting that this statement constituted some sort of mandatory injunction on law enforcement to inform the defendant that the results of a polygraph examination are inadmissible in court, and that failure to do so will render a post-polygraph confession involuntary. The State reads too much into the statement, the Court of Appeals never said any such thing.

The Court's statement, when read in its entirety, makes clear that this comment was purely cautionary advice ("we caution law enforcement officers"), and did not impose a mandatory duty upon law enforcement to provide any particular warning, or hold that failure to inform a suspect that polygraph results are inadmissible in court will necessarily render a confession involuntary. (Decision, ¶81; Pet.-App. 135). To interpret the Court's statement as a "blanket instruction" requires the reader to ignore all that proceeded it in paragraph 81. As stated previously, the Court went to great pains to stress that none of the circumstances it identified, including "the officers' failure to inform Vice that the test results would be inadmissible in any criminal proceedings against him," would likely, "standing alone," have been sufficient to render Vice's confession involuntary. *Id.* To the extent the Court cautioned that there is a "need to inform" the defendant that the

results of a polygraph examination are inadmissible in court, that need would only arise "if they plan to rely on polygraph results in order to elicit a defendant's confession." *Id.* It was only in the aggregate that the specific circumstances identified by the Court rendered Vice's interview coercive, and his confession involuntary. As a practical matter, informing future suspects that the results of a polygraph examination are inadmissible in court would obviously reduce the coercive nature of the interview, and decrease the likelihood that a future confession will be found involuntary. But the Court's decision makes clear that failure to provide such information will not, "standing alone," render a confession inadmissible. The Court's statement was good advice, it was not a "blanket instruction."

B. This Court will never reach the issues for which the State seeks review because Vice's post-polygraph interview was not a totally discrete event from his polygraph examination

The law with regard to polygraph evidence is one of unconditional inadmissibility. ***State v. Dean***, 103 Wis.2d 228, 307 N.W.2d 628 (1981). While "the results of polygraph examinations are not admissible in criminal proceedings, ... persons accused of a crime can take them voluntarily in an effort to lift the cloud of suspicion. Anything that a defendant says during what is considered to be part of the polygraph examination is not admissible." ***Greer***, 2003 WI App 112, ¶9. (citations omitted). Statements that a defendant makes after the polygraph examination is over, however, may be admissible. ***Johnson***, 193 Wis.2d at 442–443.

This Court has created a two-step analysis for cases in which a confession is made during a post-polygraph interview. ***Davis***, 2008 WI 71, ¶2. "When a statement is so closely associated with the voice stress [or polygraph] analysis that the analysis and statement are one event rather than two events, the statement must be suppressed." *Id.* If the statement survives this first test, then, "as is the case with any statement, the statement must also survive constitutional due process considerations of voluntariness." *Id.*

Of the first test, this Court has written that "the touchstone of admissibility is whether the interviews eliciting the statements are `found to be totally discrete from the examination which precedes them.'" ***Davis***, 2008 WI 71, ¶29, *citing* ***Greer,*** 2003 WI App 112, ¶10, *citing* ***State v. Schlise,*** 86 Wis.2d 26, 42, 271 N.W.2d 619 (1978). This "discrete events" test is a threshold consideration, if the post-polygraph

interview is not a totally discrete event from the polygraph examination the analysis stops there, and you do not proceed to the voluntariness test.

To make this determination, whether the two events are "totally discrete" from one another, Wisconsin courts have created a five-factor test. "This test has its origins in ***McAdoo v. State***,[6] but in ***State v. Schlise*** the factors were more clearly articulated." ***Davis***, 2008 WI 71, ¶24 (footnotes omitted). These factors are:

> (1) whether the defendant was told the test was over;
>
> (2) whether any time passed between the analysis and the defendant's statement;
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> (3) whether the officer conducting the analysis differed from the officer who took the statement;
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> (4) whether the location where the analysis was conducted differed from where the statement was given; and
>
> (5) whether the voice stress analysis [or polygraph examination] was referred to when obtaining a statement from the defendant.

Davis, 2008 WI 71, ¶23 (formatting altered). This test was shaped by the specific facts in ***McAdoo***, ***Schlise***, ***Johnson***, and ***Greer,*** and were discussed at length in ***Davis***. *Id*. at ¶¶25-30. These cases are worth reviewing here.

"In ***McAdoo***, the defendant challenged the admission of his statement asserting that it was not given voluntarily because it was given immediately after a polygraph examination." ***Davis***, 2008 WI 71, ¶25. This Court "concluded that 'the polygraph can hardly be considered a strategy of the police officers since it was administered to the defendant upon his request,' and the statement was given after the test was over and the defendant knew the test was over." *Id*. This Court noted the following facts:

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[6] ***McAdoo v. State***, 65 Wis.2d 596, 223 N.W.2d 521 (1974)

> The defendant underwent the first series of polygraph testing at 10:45 a.m., a lunch break was taken, and a second round of testing began at 2:00 p.m. *Id*. at 603, 223 N.W.2d 521. At 2:25 p.m., the defendant decided to discontinue the testing. *Id*. Due to that request, the testing equipment was removed from the defendant, turned off, and taken away. Id. After the examination's conclusion, the examiner proceeded to continue with questions. *Id*. The defendant "freely answered and talked for about forty-five minutes." *Id*. During the course of this discussion, the defendant admitted guilt. *Id*. The court concluded that, under Goodchild, the defendant's statement was voluntary and therefore admissible.

Id. citations to ***McAdoo****, supra.*

On the other hand, in ***Schlise***, this Court excluded statements which were made during a post-polygraph examination. ***Davis***, 2008 WI 71, ¶26. Pertinent facts in this decision were that:

> ... no evidence existed to suggest that the defendant was informed or was aware that the polygraph examination had ended. *Id*. While the defendant was not still connected to the machine, the court determined that this was not conclusive because the defendant was not connected to the machine during a pre-testing interview and that interview was considered part of the polygraph examination. *Id*. The officer used and referenced the charts and tracings generated from the polygraph examination. *Id*. at 43, 271 N.W.2d 619. The court found that even the polygraph examiner thought that the "post-polygraph" examination was a continuation of the test. *Id*. The examiner considered the subsequent interview to be the second part of a unified procedure. *Id*. Based on those facts, the court concluded that the post-mechanical interview was so closely associated with the mechanical testing, "both as to time and content," that it must be considered one event. *Id*.

Davis, 2008 WI 71, ¶27 (emphasis added), citations to ***Schlise****, supra.*

In ***Johnson***, the Court of Appeals found that statements from a post-polygraph interview were admissible. ***Davis***, 2008 WI 71, ¶28. Pertinent to this conclusion were the following facts:

> The court reasoned that the defendant was no longer attached to the equipment, was interviewed in a separate room from where the examination took place, and the police officer did not refer back to the polygraph examination or tell the defendant that he failed the test during post-examination questioning in order to elicit an incriminating statement. *Id*. While the court of appeals acknowledged the short

> amount of time between the examination and interview, it nonetheless concluded that a distinct break occurred between the two events. *Id.*

Id.

In ***Greer***, the Court of Appeals found that statements from a post-polygraph interview were admissible. ***Davis***, 2008 WI 71, ¶29. Pertinent to this conclusion were the following facts:

> ... the court of appeals found that prior to his confession, the defendant was told orally and in writing that the polygraph examination was over, and he was disconnected from the equipment, moved to another room, and one hour elapsed between the polygraph examination and the start of interrogation. *Id.*, ¶14. In addition, one police officer conducted the polygraph examination and a different officer conducted the post-examination interview. *Id.* Based on these facts, the court of appeals concluded that the examination and interview were two totally discrete events, and therefore, suppression was not required. *Id.*, ¶¶14–16.

Id. citations to ***Greer*** (emphasis added; footnote omitted).

And in ***Davis***, this Court found that a voice stress analysis, and statements made during a post-analysis interview, were totally discrete events. ***Davis***, 2008 WI 71, ¶30. Pertinent to this conclusion were the following facts:

> Two different officers were involved—one conducted the examination and the other conducted the interview. Before any statement was made, Detective Buenning stated, "I'm finished here," closed up his laptop, and left the room with all the voice stress analysis equipment. The interviewing officer did not refer to the polygraph examination or its results during the interview, and the examination and interview took place in different rooms.

Id. at ¶31. This Court rejected Davis' argument that the examiner's informing Davis that he failed the examination just prior to the post-polygraph interview rendered the examination and post-examination interview effectively one event. *Id.* at ¶32. The pertinent facts here were:

> First, while Detective Swanson was present in the "family room" when Davis indicated he wanted to talk, precedent clearly holds that the same

> officer may conduct both the examination and the interview so long as the two events are separate. See ***McAdoo***, 65 Wis.2d at 603, 608–09, 223 N.W.2d 521; ***Johnson***, 193 Wis.2d at 386, 388, 535 N.W.2d 441. Therefore, even though Detective Swanson was present in the "family room" when Davis said he wanted to talk, this does not preclude the subsequently made statement from being admitted. Second, Davis only agreed to give a statement when he was in the "family room" with both detectives, he did not begin giving a statement until he returned from the "family room" to the original interview room and five minutes had passed. Therefore, there is no concern that Davis began giving a statement to both detectives when he was confronted with his untruthfulness and as a result locked himself into a particular set of facts that he could not change once he began giving a statement to Detective Swanson**.** Third, so long as the examination and interview are two totally discrete events, "letting the defendant know that he or she did not pass the examination, or letting the defendant so conclude, does not negate that the examination and the post-examination interview are, as phrased by Schlise, 'totally discrete' events rather than 'one event.' " ***Greer***, 265 Wis.2d 463, ¶ 16, 666 N.W.2d 518. Fourth, at no time during the interview did Detective Swanson relate back to or rely on the voice stress evaluation or its results.

Davis, 2008 WI 71, ¶ 32-33 (emphasis added).

The Court of Appeals considered, and rejected, Vice's argument that the polygraph examination and post-polygraph interview were not discrete events. (Decision, ¶¶46-53; Pet.-App. 119-22). However, in doing so, Vice believes the Court of Appeals gave insufficient weight to the fifth factor, that is, whether the results of the polygraph examination were "referred to when obtaining a statement from the defendant." ***Davis***, 2008 WI 71, ¶23. Regarding the fifth factor the Court of Appeals in *Vice* wrote:

> Fifth, it is true that Fisher and Lambeseder referred to the polygraph examination repeatedly during the post-polygraph interview. However, we have previously stated that
>
> > as long as there is both a sufficient temporal separation and a sufficient spatial demarcation between the examination and the post-examination interview, and the defendant is told that the polygraph test is over, letting the defendant know that he or she did not pass the examination, or letting the defendant so conclude, does not negate that the

> examination and the post-examination interview are ... "totally discrete" events rather than "one event."
>
> ***Greer,*** 265 Wis. 2d 463, ¶16 (citation omitted).

(Decision, ¶52; Pet.-App. 122).

But in ***Schlise*** this Court spoke not only of the temporal and spacial separation, but also referenced the "close association" of the polygraph examination and post-polygraph interview, "both as to time and content," such "that it must be considered one event." *Id*. ***Davis***, 2008 WI 71, ¶27, *quoting,* ***Schlise,*** 86 Wis.2d at 44-45. The Court of Appeals has overlooked the need for separation as to "content," as well as space and time.

In ***Davis,*** the Court made a specific point of the fact that "at no time during the interview did Detective Swanson relate back to or rely on the voice stress evaluation or its results." ***Davis***, 2008 WI 71, ¶ 33. Similarly, in ***Johnson*** it was significant that "the police officer did not refer back to the polygraph examination or tell the defendant that he failed the test during post-examination questioning in order to elicit an incriminating statement." ***Johnson***, 193 Wis.2d at 389. Only in ***Schlise*** do we have a situation in which a polygraph examiner participates in the post-examination interview and makes frequent references to the polygraph examination and results, and in ***Schlise*** the post-examination statements were suppressed. ***Davis***, 2008 WI 71, ¶ 27.

This case does differs from the other cases which have preceded it, in that, while Adam Vice may have been told that the polygraph examination was over, the polygraph examiner then proceeded to attend the post-polygraph interview, and in the course of that interview he made repeated and constant references to the polygraph examination and its results, and he did so as an integral and essential part of his

interrogation strategy. In doing so, the post-polygraph interview lost all "content" separation from the polygraph examination.

Again, this is not a case where the detectives made a single reference to the polygraph results at the end of the polygraph examination. *E.g*. ***Greer,*** 2003 WI App 112 at ¶ 6. Here the detectives made at least eleven references to the results, during the post-polygraph interview, at a "fairly continuous" rate. (Decision, ¶35; Pet.-App. 107; and R.124:8). The last reference came at thirty-five minutes into a forty-five-minute interrogation. (R.129 VIDEO; 12:27:00-05). And these were not passing references to the results, in which the detectives were merely truthfully relaying that Vice failed the polygraph test. The polygraph results were used by the detectives as an integral part of their interrogation strategy, further helping to blur the distinction between the polygraph examination and the post-polygraph interview. And it bears noting that most of the references to the results were being made by the polygraph examiner, which is also a relevant factor under the test ("whether the officer conducting the analysis differed from the officer who took the statement"). ***Davis***, 2008 WI 71, ¶23.

Presumably, in creating the "totally discrete events" test, at least one objective of this Court was to keep evidence of the polygraph examination out of the courtroom during trial. *See,* ***Dean****, supra* (the law with regard to polygraph evidence is one of unconditional inadmissibility). However, it will be difficult, if not impossible, to admit Vice's confession into evidence while keeping out evidence that Vice had "failed" a polygraph examination. The problem here is two-fold. First, as the circuit court found, the references to the polygraph results are "fairly continuous." (R.124:8). The circuit court felt that evidence of the

polygraph results were so "intertwined" with the confession, that it is questionable whether the interview can be redacted so as to keep that particular information out. (R.122:93-94). There is a risk, as the circuit court put it, of "poisoning the jury well with this whole idea that, you know, oh, he took a polygraph and the polygraph is accurate and, therefore, he's guilty." *Id*.

Second, even if this Court were to hold that Vice's confession was voluntary, Vice would still have the opportunity to present a defense to the jury that his confession was not voluntarily given. Under ***State ex rel. Goodchild v. Burke***, 27 Wis.2d 244, 265, 133 N.W.2d 753 (1965), if a confession is held voluntary by a trial court and admitted into evidence, the issue of the confession's voluntariness may be still be presented to the jury for its consideration. However, in Vice's situation, that will necessarily require his presenting evidence concerning of the manner in which the interrogators used the polygraph results in order to elicit his confession. But ***Dean*** held that the law in Wisconsin with regard to polygraph evidence is one of unconditional inadmissibility. So it may be that Vice is barred from presenting this defense, and thus from obtaining a fair trial.[7] More to the point though, by conducting the post-polygraph interview in the manner it did, the officers in this case have managed to place Vice on the horns of a dilemma. If the confession is admitted, then Vice must choice between arguing to the jury that his confession was not voluntary, and thereby reveal that he "failed" a polygraph examination, or forgo altogether the argument that his confession was not voluntary. Law enforcement should not be allowed to structure a post-polygraph

[7] The issue has not been addressed in Wisconsin. *But see*, ***State v. Schaeffer***, 457 N.W.2d 194 (Minn., 1990) and ***People v. Melock***, 149 Ill.2d 423, 599 N.E.2d 941 (1992), for the proposition that precluding the admission of polygraph evidence when voluntariness is at issue would deny the defendant a fair trial.

interview in such a manner that a defendant cannot challenge the voluntariness of a confession without revealing that he failed a polygraph examination.

Adam Vice's argument is quite simple, while the post-polygraph interview may have started as a "totally discrete event" from the polygraph examination, the detectives through their repeated and constant references to the polygraph examination, and the manner in which the detectives made those references integral to their interrogation strategy, so muddle together the two events that they can no longer be deemed two "totally discrete events." Whatever spacial or temporal separation may have existed, Vice's post-polygraph examination was not separated from his polygraph examination in terms of content. If this Court were to accept review of this case, Vice is confident that this Court will come to the same conclusion, and never reach the issue for which the State seeks review.

VII. Conclusion.

Wherefore, Mr. Vice respectfully requests that this Court deny the State's petition for review, and allow this case to return to circuit court for further proceedings. Alternatively, if this Court should accept this case for review, then Mr. Vice would request this Court also review the issue concerning whether Mr. Vice's post-polygraph interview was a totally discrete event from his polygraph examination, and upon briefing and argument, affirm the circuit court's order suppressing Mr. Vice's statements made during his post-polygraph interview.

Respectfully submitted July 2, 2020.

Electronically signed by
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VIII. Certifications.

I certify that this petition response meets the form and length requirements of Rules 809.19(8)(b) and 809.62(4) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13-point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the petition is 7965 words.

I further certify that I personally served the State of Wisconsin, Plaintiff-Appellant-Petitioner, with a copy of this petition response the same day it was filed with this court.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Finally, I further certify that pursuant to Rule 809.19(12)(f) I have submitted an electronic copy of this petition response, excluding the appendix. The text of the electronic copy of the brief is identical in content and format to the text of the paper copy of the brief. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated July 2, 2020.

Electronically signed by
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CERTIFICATION OF MAILING

I certify that I was served the State's petition by mail, postmarked June 19, 2020, and that this petition response was deposited in the United States mail for delivery to the Clerk of the Supreme Court of Wisconsin by priority mail on July 2, 2020. I further certify that the petition response was correctly addressed and postage was pre-paid.

Date: _____

Signature: _____