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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

No. 2018AP2220-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

ADAM W. VICE,

Defendant-Respondent.

PETITION FOR REVIEW AND APPENDIX

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The State of Wisconsin petitions this Court to review the court of appeals' decision in *State v. Vice*, No. 2018AP2220-CR, 2020 WL 2529218 (Wis. Ct. App. May 19, 2020) (recommended for publication). In that decision, the court of appeals affirmed the circuit court's order granting Defendant-Respondent Adam W. Vice's motion to suppress his confession. The court of appeals determined that Vice's confession during a post-polygraph interview was involuntary.

ISSUE PRESENTED FOR REVIEW

Neither Vice's personal characteristics nor the circumstances surrounding his post-polygraph interview led the court of appeals to conclude that his confession to sexually assaulting a four-year-old girl was involuntary. Rather, a combination of two factors regarding police's use of Vice's polygraph results tipped the scales in Vice's favor: (1) police repeatedly referenced the results, and (2) police did not inform Vice that the results would be inadmissible in court.

Did the court of appeals err by giving undue weight to these factors in assessing the voluntariness of Vice's confession? Stated otherwise, under the totality of the circumstances, was Vice's confession voluntary?

STATEMENT OF CRITERIA SUPPORTING REVIEW

1. A real and significant question of federal or state constitutional law is presented. Wis. Stat. § (Rule) 809.62(1r)(a). This case asks this Court to address how law enforcement's use of polygraph results affects the voluntariness of incriminating statements. The Supreme Court has said that the use of polygraph results in questioning is *not* inherently coercive. *Wyrick v. Fields*, 459 U.S. 42, 48 (1982). This Court has concluded that an isolated reference to a polygraph result during a post-polygraph interview does not render the interview coercive. *See State v.*

Davis, 2008 WI 71, ¶ 41, 310 Wis. 2d 583, 751 N.W.2d 332 (2008). But it has not addressed the impact of *repeated* references to a failed polygraph examination, typically made in response to the suspect's claim that he did not remember the crime he was accused of committing.

Further, the court of appeals here cautioned 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." (Pet-App. 135.) Remarkably, the court offered no precedent backing its blanket instruction—it relied on the *absence* of precedent instead. Nor did the court explain why its blanket instruction was justified when officers have license to misrepresent or fabricate evidence in other contexts. *See State v. Lemoine*, 2013 WI 5, ¶ 32, 345 Wis. 2d 171, 827 N.W.2d 589. This Court must address whether an *omission* by law enforcement can contribute to a finding of coercive conduct, and whether the court of appeals' blanket instruction disregards the totality-of-the-circumstances approach toward determining voluntariness.

2. A decision by this Court will help develop or clarify the law and the question presented is a question of law of the type that is likely to recur unless resolved by this Court. Wis. Stat. § (Rule) 809.62(1r)(c)3.

This Court has established a two-step test to determine the admissibility of statements made following a polygraph examination. *See Davis*, 310 Wis. 2d 583, ¶ 2. The first step asks whether the post-polygraph statements are so closely associated with the polygraph examination that the examination and statements are one event, not two discrete events. *Id.* Five factors help answer this question, including whether police referred to the polygraph results when obtaining the defendant's statement. *Id.* ¶ 23. The second

step asks whether the defendant's statements are voluntary. *Id.* ¶ 2.

The court of appeals' decision in this case is the first published opinion to apply *Davis*'s two-step test since *Davis* was decided in 2008. The bench, bar, and law enforcement will benefit from clarification from this Court on the requirements for admitting statements following a polygraph examination. The protracted history of this case confirms as much.

Over the course of two appeals, the parties have disputed the significance of police's repeated references to Vice's failed polygraph examination in obtaining his confession. Initially, Vice argued that the references *automatically* rendered his confession involuntary, citing to *Davis* and *State v. Johnson*, 193 Wis. 2d 382, 388–89, 535 N.W.2d 441 (Ct. App. 1995), for support. The circuit court apparently agreed and suppressed Vice's confession. The court of appeals reversed and remanded, reasoning that no precedent supported the circuit court's decision.

On remand, the circuit court again determined that Vice's confession was involuntary, this time under the totality of the circumstances. But the court once more stressed the importance of police's repeated references to Vice's polygraph results.

In the decision under review here, the court of appeals agreed that the polygraph references were critical in assessing voluntariness under *Davis*. But as the dissent noted, *Davis* is less than clear on this point.

Certainly, in discussing voluntariness, *Davis* says that an "important inquiry continues to be whether the test result was referred to in order to elicit an incriminating statement." *Davis*, 310 Wis. 2d 583, ¶ 42. But the *Davis* court did not explain why, and the supporting authority it cites (*Johnson*) does not involve the voluntariness of a confession. Rather,

Johnson involves whether the polygraph examination and post-polygraph statements were totally discrete events—an inquiry that undoubtedly considers references to the polygraph results. *Johnson*, 193 Wis. 2d at 389.

Thus, review is necessary to clarify (1) whether the *Davis* court meant what it said about references to polygraph results being an *important* inquiry when assessing *voluntariness*, and (2) if so, why? Further, if it *is* important to consider references to polygraph results in assessing the voluntariness of confessions, where do courts draw the line? Assuming there is no magic number, this Court should give lower courts tools to decide how much is too much.

STATEMENT OF THE CASE

Like many confession cases, the facts necessary to determining the voluntariness of Vice's statements are extensive and condensed here for purposes of this petition. The first 12 pages of the court of appeals' opinion, attached to this petition, provide a full recitation of the facts and procedural history.

Police investigate Vice. In December 2014, police received a report that Vice had sexually assaulted a four-year-old girl. (Pet-App. 102.) Vice was a friend of the young girl's family. (Pet-App. 102.) According to the victim, Vice placed his finger into her anus and vagina and tried to lick her "privates." (Pet-App. 102–03.) The assault reportedly occurred in October 2014 at a home where Vice lived with the victim's mother and others. (Pet-App. 103.)

Washburn County Sheriff's Department investigator William Fisher later interviewed Vice at his workplace, and Vice denied any wrongdoing. (Pet-App. 103.) Vice asked if there was anything that he could do to clear his name, and Officer Fisher suggested Vice take a polygraph test. (Pet-App. 103.)

Vice consents to a polygraph test. Vice agreed to take the polygraph. (Pet-App. 103.) Officer Fisher arranged for the polygraph to occur at the Eau Claire Police Department. (Pet-App. 103.) Because Vice did not have a ride to the department, Officer Fisher drove him there. (Pet-App. 103.) During the drive, Vice sat in the front seat and was not handcuffed. (Pet-App. 103.) On the way, Officer Fisher reminded Vice that he did not have to take the test, and Vice said he wanted to clear his name. (Pet-App. 103.)

At the police department, Eau Claire Police Department Detective Ryan Lambeseder escorted Vice to the polygraph examination room. (Pet-App. 103.) Officer Fisher went to the observation room. (Pet-App. 103.) Detective Lambeseder advised Vice of his *Miranda*[1] rights, and Vice signed both a waiver-of-rights form and a polygraph examination consent form. (Pet-App. 104.) After a series of questions mainly concerning his physical condition, Vice was deemed fit to test. (Pet-App. 104.)

The polygraph examination took 1 hour and 45 minutes. (Pet-App. 104.) Vice denied any wrongdoing during the exam. (Pet-App. 104.) After the examination was over, Vice signed a form acknowledging as much. (Pet-App. 104.) He was then escorted to a different room to wait for the results. (Pet-App. 104.) The room was small, of "average temperature," and had no windows. Vice was not handcuffed. (Pet-App. 105.)

After 10 to 15 minutes, Detective Lambeseder and Officer Fisher entered the room and sat at an interview table with Vice. (Pet-App. 104–05.) The square table was pushed against one wall. (Pet-App. 105.) Vice sat in the corner of the room farthest from the door. (Pet-App. 105.) Vice would have

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

had to walk past both Detective Lambeseder and Officer Fisher to leave the room. (Pet-App. 105.)

The interview was video recorded. (Pet-App. 105.) Detective Lambeseder immediately asked Vice how he thought he did on the exam. (Pet-App. 105.) Vice said he did not know, but that he knew was "telling the truth" when he was "telling the truth." (Pet-App. 105.) Detective Lambeseder informed Vice that he failed the exam. (Pet-App. 105.) He said that on the questions regarding the victim, it was very clear that Vice was not telling the truth. (Pet-App. 105.)

Vice confesses to sexually assaulting the victim. The conversation that followed lasted approximately 45 minutes. (Pet-App. 116.) For roughly the first eight minutes, Vice said that he did not remember assaulting the victim. (Pet-App. 106.) During that time, Detective Lambeseder and Officer Fisher repeatedly said that the polygraph examination showed that Vice remembered the assault. (Pet-App. 106.) They also stressed that Vice should tell the truth so they could assess what kind of guy he was—one who assaults children, or one who made a mistake. (Pet-App. 106.)

After seven or eight references to Vice's polygraph results within the first eight minutes of the interview, Vice confessed to sexually assaulting the victim. (Pet-App. 107.) However, when asked to provide details, he continued to deny having any memory of the assault. (Pet-App. 107.) Detective Lambeseder and Officer Fisher continued to insist that Vice remembered the assault. (Pet-App. 107.) At one point, Vice said, "I'll admit that I must have did it because obviously the test says that I did it, but I don't physically remember." (Pet-App. 107.) Neither Detective Lambeseder nor Officer Fisher responded to Vice's comment. (Pet-App. 107.)

Office Fisher continued to ask Vice to tell the truth. (Pet-App. 108.) Vice responded that he did not know if he "took off [the victim's] clothes, if [the victim] was in her

underwear, if [he] tried licking her over her pants or her underwear, if [he] actually touched her, or if [he] took off [his] pants." (Pet-App. 108.) Detective Lambeseder asked Vice if direct questions about the assault might help him remember, and Vice suggested it would. (Pet-App. 108.)

Officer Fisher then asked Vice whether he placed his fingers directly on the victim's vagina, and Vice said yes. (Pet-App. 108.) Unprompted, Vice indicated what he did with his finger. (Pet-App. 109.) When asked when this occurred, Vice said, "It had to be October." (Pet-App. 109.) As for where it took place, Vice said "downstairs in the big living room when she was on the bed. She was on the right-hand side." (Pet-App. 109.)

In response to further direct questioning from Detective Lambeseder and Officer Fisher, Vice said:

> (1) he knew 'for a fact' that he did not pull down his pants and take out his penis; (2) he tried to lick the victim's crotch, but he 'couldn't through her pants'; (3) he took off the victim's pants, but he did not try to lick her crotch over her underwear; (4) he stuck his hand inside the victim's underwear; and (5) he did not remember touching the victim's buttocks, but he may have done so incidentally when he was 'trying to get [his] hand down her front side.'

(Pet-App. 109–10.) Though he initially denied it, Vice admitted to touching the victim "out of 'sexual excitement' or a '[d]esperation-type thing.'" (Pet-App. 110.)

Officer Fisher referenced the polygraph examination again, telling Vice, "We know the techniques people use, you know, to try, you know, not remembering or it was their fault." (Pet-App. 110.) Vice suggested the possibility that he could not remember the assault because he had been drinking. (Pet-App. 110.) Officer Fisher said that Vice remembered the assault, and Vice said, "Vaguely." (Pet-App. 110.) Detective Lambeseder interjected, "It's clear to you

because you . . . showed you did on the test, okay?" (Pet-App. 110.) Vice responded, "Vaguely." (Pet-App. 110.) Officer Fisher told Vice he knew what happened because he had just described some events. (Pet-App. 110.) Vice said, "That is—that is literally all I can remember." (Pet-App. 110.)

Later in the interview, Vice again described having "vague memories of doing the things" he said he did. (Pet-App. 111.) He described it as being "like a dream" or like "déjà vu." (Pet-App. 111.) He reaffirmed sexually assaulting the victim, including touching her buttocks over her underwear while his other hand was inside her underwear. (Pet-App. 111.) He also reaffirmed that he tried to lick her vagina, and when he was unsuccessful, he removed her pants. (Pet-App. 111.)

After the interview, Officer Fisher did not arrest Vice; he drove him home. (State's Br. 16.) Vice again sat in the front seat of Officer Fisher's car. (State's Br. 16.)

Officer Fisher referred Vice's case to the District Attorney's Office. (State's Br. 16.) The State charged Vice with first-degree sexual assault (contact) of a child under thirteen. (State's Br. 16.)

Vice moves to suppress his confession. Vice moved to suppression his confession, contending that it was involuntary. (State's Br. 16.)

Additional facts surfaced at the suppression hearing, where Officer Fisher, Detective Lambeseder, and Vice testified. Among them: (1) Officer Fisher said that Vice was not in custody before, during, or after the polygraph examination and interview, (2) neither officer told Vice that he was free to leave during the interview, though the form Vice signed after completing the polygraph test and before the interview so informed him, (3) neither officer told Vice that the polygraph test would be inadmissible in court, (4) both officers also said they spoke to Vice in a nonconfrontational

tone, (5) neither officer yelled at Vice, and neither made any threats, promises, or inducements, (6) Vice testified that he had a high school education and a history of taking special education classes, and (7) Vice also stated that he had been diagnosed with "ADHD, depression, [and] anxiety." (State's Br. 17–18.)

The circuit court granted Vice's suppression motion, appearing to reason that police's references to Vice's polygraph results automatically rendered his confession involuntary under *Davis* and *Johnson*. (Pet-App. 112.)

The first appeal. The State appealed the circuit court's decision, and the court of appeals reversed and remanded for further factfinding. The court of appeals first held Vice to his concession at the circuit court that the polygraph examination and post-polygraph interview were totally discrete events. (Pet-App. 114.) Next, the court of appeals determined that the circuit court erred if it ruled that Vice's confession was involuntary solely based on the repeated references to the polygraph results. (Pet-App. 114.) Such a conclusion, the court of appeals said, was not supported by case law. (State's Br. 19.) The court of appeals instructed the circuit court to make factual findings to support a totality-of-the-circumstances analysis. (Pet-App. 113.)

On remand, the circuit court concluded that Vice's confession was involuntary under the totality of the circumstances. (Pet-App. 115.) It again stressed police's repeated references to Vice's polygraph results in rendering its decision. (Pet-App. 115–17.) The court also found it significant that the officers did not tell Vice the polygraph results would be inadmissible in court. (Pet-App. 116.)

The instant appeal. Again, the State appealed. (Pet-App. 117.) The State argued that Vice conceded the discreteness issue but that the polygraph examination and post-polygraph interview were totally discrete events

anyway. (Pet-App. 118.) Applying *Davis*'s first step for determining the admissibility of statements made following a polygraph examination, the court of appeals agreed with the State on the merits of this issue. (Pet-App. 119–22.)

But in a "close case," the court of appeals determined that Vice's confession was involuntary. (Pet-App. 123, 135.) The court of appeals first noted that in "many ways," the circumstances of Vice's confession were like those presented in *Davis*, where this Court held that the defendant's confession was voluntary. (Pet-App. 123.) Like in *Davis*, the court of appeals here reasoned that "neither Vice's personal characteristics nor the circumstances surrounding the interview convince us that Vice's confession was involuntary." (Pet-App. 125.) It noted that Vice had a high-school education, that the interview lasted only 45 minutes, that Vice voluntarily went to the police station and voluntarily participated in the polygraph examination, that Vice was neither restrained during the interview nor informed he was under arrest, that the officers spoke in a nonconfrontational tone and did not yell or threaten Vice, and that Vice was able to understand and respond to all the officers' questions. (Pet-App. 125.)

However, a combination of two factors caused the court of appeals to suppress Vice's confession on voluntariness grounds.

First, the officers referenced Vice's polygraph results "at least eleven times during the forty-five-minute post-polygraph interview." (Pet-App. 126.) On this point, the court of appeals distinguished *Davis*, where Davis was briefly told that his polygraph results indicated that he was being deceptive. (Pet-App. 126.) The court of appeals then referenced *Davis*'s language that "[a]n important inquiry continues to be whether the test result was referred to in order to elicit an incriminating statement." (Pet-App. 126–27

(quoting *Davis*, 310 Wis. 2d 583, ¶ 42).) Reasoning that "[r]egardless of the authority cited by the *Davis* court, its statement was specific, and we are not free to disregard clear precedent," the court of appeals considered the repeated references to the polygraph results a crucial factor for assessing voluntariness. (Pet-App. 127 n.6.) The references were especially problematic, the court of appeals opined, because the officers told Vice numerous times that the results showed that he remembered the assault. (Pet-App. 127.) The court of appeals also found an *omission* significant in this context: the officers "did not respond to Vice's statement that because he failed the polygraph test, he must have sexually assaulted the victim." (Pet-App. 127.)

The second factor that contributed to suppression was that the officers did not inform Vice "that the polygraph results would be inadmissible in any criminal proceedings against him." (Pet-App. 128.) The court of appeals reasoned that this *omission* constituted coercive behavior, especially because Vice had been given *Miranda* warnings before the post-polygraph interview (though there is no direct evidence that Vice understood the warnings to mean that the polygraph results could be used against him at trial). (Pet-App. 128.) The majority brushed off the dissent's criticism that no authority appeared to support the proposition that an omission by law enforcement can contribute to a finding of coercive conduct. (Pet-App. 129 n.9.)

Ultimately, the court of appeals stressed that its finding of "unduly coercive" conduct on the part of law enforcement was "in large part based on the nature of polygraph evidence, the reliability of which has long be questioned by Wisconsin courts." (Pet-App. 131–32.)

Judge Hruz dissented, finding that "no coercion or other improper conduct occurred." (Pet-App. 137.) He compared the police conduct at issue in this case to the more egregious

police conduct found constitutionally impermissible under Supreme Court precedent. (Pet-App. 138.) Judge Hruz acknowledged that "subtle pressures" may be coercive if they "exceeded the defendant's ability to resist." (Pet-App. 138.) But he noted that under Wisconsin precedent, that principle only appears to apply where the defendant had compromised mental or physical conditions, which is not this case. (Pet-App. 138–39.)

Regarding the significance of the officers' repeated references to the failed polygraph examination, Judge Hruz found the *Davis* court's "important inquiry" language "extremely vague." (Pet-App. 140 n.3.) He also suggested that it was legally unsupported. (Pet-App. 140 n.3.) Even accepting *Davis*'s "important inquiry" language, Judge Hruz reasoned that the references to the failed polygraph examination, when viewed in context, did not tip the scales in Vice's favor. (Pet-App. 141–43.)

Finally, regarding the other factor the court of appeals found significant—the officers' failure to inform Vice that the polygraph result would be inadmissible in court—Judge Hruz struggled with the notion that "law enforcement's *not* advising a defendant of a rule of trial admissibility contributes to a conclusion of coercion." (Pet-App. 143.) As noted, he said that he was unaware of any authority to support the proposition that an omission can constitute coercive conduct. (Pet-App. 142.) Judge Hruz also emphasized that there was no evidence in the record to show that Vice believed that the polygraph results could be used against him in court. (Pet-App. 143.) He therefore questioned the majority's "filling of factual gaps in the record with suppositions." (Pet-App. 143.)

The State petitions this Court for review.

ARGUMENT

This Court should grant review to address how law enforcement's use of polygraph results affects the voluntariness of incriminating statements and to clarify *Davis*'s two-step test for admissibility.

A. A post-polygraph confession is admissible when it is made during a totally discrete event and is voluntarily given.

The admissibility of polygraph statements turns on the timing of such statements. Statements made *during* polygraph testing are inadmissible under Wis. Stat. § 905.065(1)–(2). *See also Davis*, 310 Wis. 2d 583, ¶ 44 (explaining that statements made during honesty testing are excluded because the "state legislature has generally precluded such a scenario under the plain language of Wis. Stat. § 905.065"). Statements made *after* polygraph testing are admissible if they satisfy *Davis*.

As noted, *Davis* established a two-step test for admissibility.[2] First, the post-polygraph confession must be made during a "totally discrete event." *Davis*, 310 Wis. 2d 583, ¶ 23. Stated differently, the confession cannot be "so closely associated" with the polygraph test that the test and subsequent interview are "one event" rather than two. *Id.* at ¶¶ 23, 2.

"Whether a statement is considered part of the test or a totally discrete event is largely dependent upon whether" the polygraph test "is over at the time the statement is given and the defendant knows the analysis is over." *Davis*, 310 Wis. 2d

[2] Although *Davis* concerned a voice stress analysis, not a polygraph test, its principles "are equally applicable." *State v. Davis*, 2008 WI 71, ¶ 20, 310 Wis. 2d 583, 751 N.W.2d 332 (stating that "no reason" existed to treat polygraph testing and voice stress analysis differently since both were methods of "honesty testing").

583, ¶ 23. To make that determination, courts rely on five factors: (1) "whether the defendant was told the test was over"; (2) "whether any time passed between the [test] and the defendant's statement"; (3) "whether the officer conducting the [test] differed from the officer who took the statement"; (4) whether the location where the [test] was conducted differed from where the statement was given"; and (5) "*whether the [polygraph test] was referred to when obtaining a statement from the defendant*." *Id.* (emphasis added).

Second, the confession must "survive constitutional due process considerations of voluntariness." *Davis*, 310 Wis. 2d 583, ¶ 2. Put simply, the confession must satisfy "ordinary principles of voluntariness." *Id.* ¶ 21.

"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 upon the defendant by representatives of the State exceeded the defendant's ability to resist." *Davis*, 310 Wis. 2d 583, ¶ 36 (quoting *State v. Hoppe*, 2003 WI 43, ¶ 36, 261 Wis. 2d 294, 661 N.W.2d 407).

Voluntariness is thus determined by applying a "totality of circumstances" analysis. *Davis*, 310 Wis. 2d 583, ¶ 37. The court balances "the personal characteristics of the defendant" against "the possible pressures that law enforcement could impose." *Id.* Possible characteristics include the defendant's "age, education, intelligence, physical or emotional condition, and [his] prior experience with law enforcement." *Id.* Possible pressures "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.*

Importantly, "[c]oercive or improper police conduct is a necessary prerequisite for a finding of involuntariness." *Hoppe*, 261 Wis. 2d 294, ¶ 37. When no "coercive police conduct" is "causally related to the confession," there is no basis to conclude that a confession is involuntary and thus no basis to conclude that due process is violated. *Colorado v. Connelly*, 479 U.S. 157, 164 (1986).

B. Under ordinary principles of voluntariness, what, if anything, makes the use of polygraph results to elicit a confession unduly coercive police conduct?

1. Is an *important* factor whether the officer referred to the polygraph results in order to elicit an incriminating response? If so, why?

In *Davis*, Davis argued that the officer's relaying to him that he failed the voice-stress-analysis test undermined his will to resist the accusation of child sexual assault. *Davis*, 310 Wis. 2d 583, ¶¶ 4, 41. This Court disagreed, noting that in "a very brief amount of time, Davis was told that the analysis indicated Davis was being deceptive, he was asked a question regarding his truthfulness, he was asked if he wanted to talk, and Davis said that he wished to speak with Detective Swanson." *Id.* ¶ 41.

Paragraph 42 is where things get a bit murky. This Court reaffirmed, "Merely because one is administered a voice stress analysis or polygraph test does not render a subsequent statement per se coercive." *Davis*, 310 Wis. 2d 583, ¶ 42. This Court then reiterated its two-step test for admissibility: "The proper inquiry is not only whether a test 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." *Id.* It continued, "An *important* inquiry continues to be whether the test result was

referred to in order to elicit an incriminating statement." *Id.* (emphasis added). This Court cited to *Johnson* for support. *Id.* It then noted that Davis did not make incriminating statements to the officer who referenced his failed test results. *Id.* This Court concluded, "No coercive measures were used to elicit the statement." *Id.*

The Davis court's "important inquiry" language is not entirely clear because the supporting authority it cites—*Johnson*, 193 Wis. 2d at 389—"is a discussion concerning the discreteness issue, not voluntariness." (Pet-App. 140 n.3.) Indeed, *Johnson* does not even address the voluntariness of a post-polygraph confession. *Johnson*, 193 Wis. 2d at 390 (noting that Johnson did not dispute the voluntariness of his statements). Since the *Davis* court did not otherwise support its "important inquiry" language, a question arises as to whether it meant what it said about a reference to a test result being relevant to the issue of *voluntariness*.

Of course, questions of voluntariness are decided based on the totality of the circumstances. *Hoppe*, 261 Wis. 2d 294, ¶ 38. So, it is entirely possible that the *Davis* court intended for courts to consider a reference to a polygraph result in assessing voluntariness. But without any explanation as to why this would be an *important* factor—say, on a par with physical mistreatment during a confession, *see State v. Schlise*, 86 Wis. 2d 26, 44, 271 N.W.2d 619 (1978)—a second question arises as to whether the bench and bar are simply giving undue weight to this language. Perhaps the *Davis* court merely meant to say that a reference to a polygraph result is one of several factors to "be weighed and considered" in assessing voluntariness, just as it is when assessing discreteness. *Davis*, 310 Wis. 2d 583, ¶ 23.

Finally, even if *Davis* meant to instruct courts to *heavily* weigh police references to polygraph results in assessing the voluntariness of confessions, review is still warranted to

explain why. As noted, the Supreme Court has rejected the notion "that the use of polygraph 'results' in questioning . . . is inherently coercive." *Fields*, 459 U.S. at 48. Further, this Court has said that "the confrontation of the defendant with the information against him, whatever that may be, does not amount to the utilization of overwhelming force or psychology." *Turner v. State*, 76 Wis. 2d 1, 22, 250 N.W.2d 706 (1977). It should also matter that the suspect voluntarily took the polygraph test. *McAdoo v. State*, 65 Wis. 2d 596, 608, 223 N.W.2d 521 (1974) ("[A] polygraph can hardly be considered 'a strategy of the police officers,' [when] it [is] administered to the defendant upon his request.").

Also, even if the reliability of polygraph evidence "has long been questioned" (Pet-App. 131–32), a misrepresentation or "lie that relates to a suspect's connection to the crime is the least likely to render a confession involuntary." *Lemoine*, 345 Wis. 2d 171, ¶ 32 (quoting *State v. Triggs*, 2003 WI App 91, ¶ 19, 264 Wis. 2d 861, 663 N.W.2d 396). This is because "inflating evidence" of a suspect's guilt interferes "little, if at all," with his free will and deliberate choice of whether to confess, as it does not "lead him to consider anything beyond his own beliefs regarding his actual guilt or innocence." *Id.* If that is the case, why is a reference to a polygraph result—which may or may not be accurate—so important in assessing voluntariness?

Moreover, other courts do *not* appear to consider a reference to a polygraph result an important factor in assessing voluntariness. *See, e.g.*, *Johnson v. Pollard*, 559 F.3d 746, 753–55 (7th Cir. 2009) (informing the suspect that he failed the polygraph test did not make the confession coercive or involuntary); *State v. Cloutier*, 110 A.3d 10, 17 (N.H. 2015) ("The use of polygraph results in questioning . . . is not inherently coercive, but merely a factor to be considered in examining the circumstances surrounding the

confession."); *State v. Damron*, 151 S.W.3d 510, 518 (Tenn. 2004) ("Confronting a suspect with polygraph results ordinarily is not coercive or unreasonable."); *State v. Marini*, 638 A.2d 507, 512–13 (R.I. 1994) (collecting cases) ("[C]onfessions prompted by polygraph results are not automatically rendered involuntary. . . . Rather, the totality of the circumstances must be examined . . . .").

For the above reasons, clarification is needed on the role that references to polygraph results play in assessing the voluntariness of confessions.

2. Is the officer's informing the suspect that polygraph results are inadmissible in court a critical factor? If so, why?

As noted, the court of appeals here found it significant that the officers did not tell Vice "that the polygraph results would be inadmissible in any criminal proceedings against him." (Pet-App. 128.) So much so, in fact, 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." (Pet-App. 135.)

The court of appeals was not concerned about the lack of precedent supporting the notion that an omission can contribute to a finding of coercive police conduct. (Pet-App. 129 n.9.)[3] Notably, the Seventh Circuit has rejected this idea. *See United States v. Montgomery*, 555 F.3d 623, 631–32 (7th Cir. 2009). In *Montgomery*, the defendant argued that his

[3] As noted, the court of appeals relied on a *second* omission to justify its finding of unduly coercive police conduct in this case. In discussing the officers' repeated references to Vice's polygraph results, the court noted that the officers "did not respond to Vice's statement that because he failed the polygraph test, he must have sexually assaulted the victim." (Pet-App. 127.)

confession was involuntary in part because the officers did not inform him that his interview would terminate if he requested a lawyer. *Id.* at 631. The Seventh Circuit disagreed, reasoning that although the officers did not "fully apprise[ ] Montgomery of the legal landscape," such an omission was "not inherently coercive behavior on the part of police." *Id.* at 632.

Further, the court of appeals here did not explain why officers must inform suspects of this rule of trial admissibility when they have license to misrepresent or fabricate evidence in other contexts. *See Lemoine*, 345 Wis. 2d 171, ¶ 32; *see also United States v. Rutledge*, 900 F.2d 1127, 1130 (7th Cir. 1990) ("The policeman is not a fiduciary of the suspect. The 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.").

Finally, the court of appeals' blanket instruction to law enforcement contravenes the totality-of-the-circumstances approach toward determining voluntariness. This Court has made clear that "evaluating whether police conduct is coercive is dependent on the personal characteristics of the defendant." *Hoppe*, 261 Wis. 2d 294, ¶ 58. In other words, "police coercion and a defendant's personal characteristics are interdependent concepts." *Id.* Telling 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" removes the defendant's personal characteristics from the equation. (Pet-App. 135.) Why is that justified?

The court of appeals' opinion creates more questions than it answers. Review is warranted.

CONCLUSION

This Court should grant the State's petition for review.

Dated this 18th day of June 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. § 809.62(4) for a petition for review produced with a proportional serif font. The length of this petition is 5,564 words.

Dated this 18th day of June 2020.

KARA LYNN JANSON
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.62(4)(b)

I hereby certify that:

I have submitted an electronic copy of this petition for review, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.62(4)(b) and 809.19(12).

I further certify that:

This electronic petition for review is identical in content and format to the printed form of the petition for review filed as of this date.

A copy of this certificate has been served with the paper copies of this petition for review filed with the court and served on all opposing parties.

Dated this 18th day of June 2020.

KARA LYNN JANSON
Assistant Attorney General

Index to the Appendix
State of Wisconsin v. Adam W. Vice
Case No. 2018AP2220-CR

APPENDIX CERTIFICATION

I hereby certify that filed with this petition for review, either as a separate document or as a part of this petition, is an appendix that complies with Wis. Stat. § 809.62(2)(f) and that contains, at a minimum: (1) a table of contents; (2) the decision and opinion of the court of appeals; (3) the findings or opinion of the circuit court necessary for an understanding of the petition; and (4) portions of the record necessary for an understanding of the petition.

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 names 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.

Dated this 18th day of June 2020.

KARA LYNN JANSON
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.62(4)(b)

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. §§ (Rules) 809.62(4)(b) and 809.19(13).

I further certify that:

This electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 18th day of June 2020.

KARAY LYNN JANSON
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