SUPREME COURT OF NEW JERSEY
DOCKET NO. A-73-17 (080574)

STATE OF NEW JERSEY, Plaintiff-Appellant, **v.** **RAFAEL CAMEY,** Defendant-Respondent.	CRIMINAL ACTION **ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION** App. Div. Docket No. A-4376-16 Sat Below: Hon. Mitchel E. Ostrer, J.A.D Hon. Mary Gibbons Whipple, J.A.D.

BRIEF AND APPENDIX OF *AMICUS CURIAE* THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

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SUMMARY OF ARGUMENT

The inevitable discovery doctrine allows for the admission of unlawfully seized evidence when the State can show that evidence inevitably would have been discovered lawfully had the investigation continued. The doctrine therefore asks judges to imagine the proper result of a police investigation that they know actually resulted in some unconstitutionality. Because the inevitable discovery doctrine requires judges to predict an "inevitable" but never realized result, this Court has recognized its application can be "sometimes problematical." The Court has also identified "difficulties . . . with respect to the possibility that unguarded applications of the rule will encourage unconstitutional shortcuts." *State v. Sugar*, 100 N.J. 214, 237 (1985).

The present case is a perfect example of the State's attempt to take an unconstitutional shortcut, and of the proper functioning of the trial court and the Superior Court, Appellate Division in preventing such unguarded applications of the doctrine. The investigation here is replete with constitutional violations, but the one at issue involves the following: Knowing Defendant understood little-to-no English, police obtained Defendant's signature on a buccal swab consent form written in English, without translation or explanation, without notification of his right to refuse consent, while he was unlawfully detained, and after he

first said “No, no, no exactly.” The State does not dispute that the consent and search that followed were invalid. Rather, it looks to the inevitable discovery doctrine for rescue, arguing that, had the police not performed the buccal swab unconstitutionally, they would have sought and obtained a search warrant to perform it constitutionally. The inevitable discovery doctrine does not allow for such stretches of the truth, or the imagination.

First, the doctrine requires courts to consider what the officer “would” have done, not hypothetically what he plausibly could have done within the universe of possibilities. That analysis requires a showing that the officer had taken some affirmative step toward the inevitable result, not merely that he can claim afterward a subjective intent to take those steps – or worse, that the State can claim some speculative intent for him. (Point I, A). The analysis is fact intensive and requires deference to the trial court’s credibility determinations, for which evidence of officer misconduct is relevant. (Point I, B).

Second, the doctrine requires the “proper, specific and normal procedures” that would have been pursued, and that inevitably would have resulted in the discovery of the same evidence, to be independent from the unconstitutional action. In other words, the claimed inevitability cannot be the counter-factual scenario that has been logically foreclosed by the police action already taken. (Point II, A). To hold otherwise, especially

in the present case, would be to vitiate the warrant requirement. If the State can claim police would have sought a warrant whenever a consent search turns out to be invalid, the exclusionary rule will not only lose its deterrent effect: such an expansion of the inevitable discovery doctrine would also render meaningless, and unenforceable, the protections of the warrant requirement more broadly. (Point II, B).

The inevitable discovery doctrine is not a magic wand that allows police to transform a past unlawful action into a lawful one. The trial court's refusal to turn a blind eye to police misconduct and its rejection of a post-hoc legal justification for clearly unconstitutional behavior is commendable and upholds the spirit and purpose of the exclusionary rule. The Appellate Division was right to agree. This Court should affirm those well-reasoned decisions and take this opportunity to clarify New Jersey's restrictive approach to the inevitable discovery doctrine, lest it become the exception that swallows the rule.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus adopts the facts and procedural history outlined by the Appellate Division in *State v. Camey*, No. A-4376-16, 2017 N.J. Super. Unpub. LEXIS 3185 (App. Div. Dec. 28, 2017), and recounts the following facts for clarity:

In September 2013, the Passaic Police Department received a report of a dead body near the riverbank. They interviewed a

witness who said she last saw the victim with a "violent Mexican male." Based on interviews with the same witness, whose testimony was inconsistent with another woman's, the police eventually identified Defendant as a suspect. Defendant speaks Spanish and attended only two years of primary school in Guatemala, not Mexico. *Id.* at *2.

In October, police interviewed Defendant at the station house without first obtaining a knowing waiver of his *Miranda* rights. The police informed him they were going to perform a buccal swab to take his DNA and provided him with a consent form, to which he responded, "No, no, no exactly. There is no problem. I don't know who . . . said that. Who because I cannot be in the street." *Id.* at *3. Defendant subsequently signed the form, which was written in English and was not translated or otherwise explained to him. Defendant was also not informed of his right to refuse. *Id.*

Police took Defendant's DNA in October 2013. They entered the specimen information into the police computer a full month later and did not take it to the lab until mid-January 2014. *Id.* In April 2014, police again interviewed Defendant without obtaining a knowing waiver of *Miranda.* In June, police received DNA results from the victim's body which matched Defendant's DNA. Police

interviewed Defendant a third time that same day, again without a proper *Miranda* waiver. *Id.* at *4-5.

The Honorable Marilyn C. Clark, J.S.C., suppressed the DNA evidence obtained through the buccal swab as the product of an unlawful detention and invalid consent. She also suppressed the statements Defendant made during his three interviews, finding the police performed an unlawful detention each time they brought Defendant to the station without probable cause and without a warrant. She found the *Miranda* warnings performed to be ineffective, "because defendant did not understand his rights and did not make a knowing and voluntary waiver." *Id.* at *5-6. As summarized by the Appellate Division, Judge Clark "found the police conduct 'offensive to due process,' and demonstrated blatant disregard for the most basic of constitutional safeguards." *Id.* at *5.

The State subsequently moved to admit Defendant's DNA under a theory of inevitable discovery, arguing that if Defendant had not consented to the buccal swab, Detective Sergeant Bordamonte would have eventually sought and obtained a search warrant for it.[1] At a hearing on inevitable discovery, Bordamonte also

[1] Although the Appellate Division did not clarify Bordamonte's role in the buccal swab, Judge Clark's decision on the issue of inevitable discovery, as read from the bench on April 26, 2017, addressed it. Judge Clark noted that Bordamonte was not present when Defendant signed the consent form, although he was the State's only witness at the hearing, acted as the lead detective in the

testified that the months-long delay in sending the evidence to the lab for DNA testing was because they had "'other investigations' and he intended to take the swab to the lab when he had 'downtime.'" *Id.* at *6.

Judge Clark rejected this argument, as well as the State's motion to compel Defendant to provide a buccal swab. She also considered Defendant's motion to admit personnel records from an Internal Affairs (IA) investigation, which "established Bordamonte's prior violations of police department rules, including instances of bias against perceived undocumented immigrants and generally unprofessional conduct, including alleged

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investigation, and was involved in the other hours-long interviews. Tr. 4:25, 33:1 to 48:22. Although Bordamonte did not himself obtain the invalid consent, Judge Clark found that "Bordamonte knew or should have known that the consent form was not read to Mr. Camey or even appropriately explained to him[,]" because the encounter was captured on video. Tr. 68:6-11. Judge Clark continued:

> [If Bordamonte] did not watch this 20-minute video, then he should have, if only to actually observe the demeanor and answers that Mr. Camey considered to be a suspect gave. [Bordamonte] wrote in S-14 on Page 9 that, quote, "a consent to search form was presented to Mr. Camey. Having understood and having no objection DNA swabs were collected by Det. Jay Barbieri (phonetic)," close quote. This description was certainly not accurate. While none of this evidence will be before a jury it is part of the reason for my conclusion that the personnel records are relevant.
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> [Tr. 68:11-22.]

instances of dishonestly to his superiors." *Id.* at *6. Judge Clark considered these records – and Bordamonte's minimization of them on the stand – in assessing Bordamonte's credibility and in concluding she was "not convinced [Bordamonte] would have applied for a search warrant for [defendant's] DNA." *Id.* at *7. She also found the records admissible at trial with proper limiting instructions. *Id.* at 8.

The Appellate Division affirmed, finding the trial court had properly applied the inevitable discovery doctrine. The panel explicitly noted the State had not shown Bordamonte would have sought a search warrant, nor that one would have been issued had he done so. *Id.* at *11-12. It also "reject[ed] the assertion that the judge's consideration of Bordamonte's IA investigation is unduly prejudicial and lacks relevance or probative value." *Id.* at *13.

This Court granted the State's petition for certification. The ACLU-NJ filed a Motion for Leave to Appear as *Amicus Curiae* simultaneously with this brief. *R.* 1:13-9.

ARGUMENT

I. THE INEVITABLE DISCOVERY DOCTRINE REQUIRES INEVITABILITY, NOT PLAUSIBILITY.

In *State v. Sugar*, this Court made clear that the inevitable discovery exception to the exclusionary rule is a "restrictive formulation" under Article I, paragraph 7. 100 N.J. 214, 238 (1985)

(*Sugar II*). Accordingly, for the exception to apply, the State must make a three-pronged showing that:

> (1) proper, normal and specific investigatory procedures would have been pursued in order to complete the investigation of the case; (2) under all of the surrounding relevant circumstances the pursuit of those procedures would have inevitably resulted in the discovery of the evidence; and (3) the discovery of the evidence through the use of such procedures would have occurred wholly independently of the discovery of such evidence by unlawful means.
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> [*Id.* at 237 (henceforward "the *Sugar* test").]

This Court underscored that the standard of proof for the State's showing is clear and convincing evidence, "rather than the more lenient federal 'preponderance of the evidence' standard." *State v. Sugar*, 108 N.J. 151, 157 (1987) (*Sugar III*); *cf. Nix v. Williams*, 467 U.S. 431, 444 (1984) (federal standard).

Conceding that Defendant's consent and the resulting DNA evidence were invalidly obtained, the State seeks to invoke the inevitable discovery doctrine. It claims Detective Bordamonte would have pursued the proper procedure of a warrant application (*Sugar* test prong one) and upon issuance and execution of the warrant would have discovered the same DNA (prong two) through a wholly independent means (prong three).

This Court could dispose of this appeal on prong two only, since failure to meet any of the three prongs of the *Sugar* test is fatal. Even had Bordamonte applied for a search warrant, the

absence of probable cause (adeptly examined by the trial court and Defendant's submissions, *Camey*, 2017 N.J. Super. Unpub. LEXIS 3185, *12; Db 4-9) means the issuance of a search warrant is unlikely. However, because the State's assertions as to prong one have such significant civil rights implications, and risk incentivizing officers to substitute their own judgments for that of a neutral magistrate, *amicus* focuses on them here.

A. The *Sugar* Test Requires That Police "Would" Have Performed Proper Investigatory Procedures, Not Simply That They Plausibly Could Have.

The *Sugar* test requires that "proper, normal and specific investigatory procedures would have been pursued in order to complete the investigation of the case." 100 N.J. at 237. This verb choice is significant. As the Appellate Division noted, the possibility that police in this case could plausibly have applied for a search warrant is not enough: "Judge Clark correctly considered the relevant inquiry was not whether Bordamonte *could* have obtained a search warrant, but whether he *would* have." *Camey*, 2017 N.J. Super. Unpub. LEXIS 3185, *11 (emphasis in original).

The State insists it was inevitable that Bordamonte would have pursued the proper, normal and specific investigatory procedure of applying for a search warrant had he not performed an

invalid consent search. Sb 5.[2] Yet the State's insistence rests almost exclusively on his unsupported statement: "Detective Bordamonte testified that had defendant not consented to give a buccal swab, he would have sought a search warrant." *Id.* at 4. With no verifiable facts to rely on, the State grounds its claim instead on an appeal to logic and speculation:

> [T]he only logical conclusion that could have been reached is that the police would have sought to compel defendant's buccal swab through legal process. Even with the shortcomings in the investigation, it is unfathomable that law enforcement would have simply given up the pursuit of defendant's DNA if he had not consented.[3]
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> [*Id.* at 8.]

This may suggest it was plausible that Bordamonte could have applied for a search warrant, but it simply does not meet the legal standard for clear and convincing evidence, or even a lesser preponderance standard. The record shows that Bordamonte had taken

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[2] The following abbreviations are used:
"Sb" refers to the State's amended brief in support of the petition for certification.
"Db" refers to Defendant's brief to the Appellate Division.
"Tr." refers to the transcript of Judge Clark's decision on inevitable discovery, as read from the bench on April 26, 2017.

[3] The State repeatedly frames this as Defendant's refusal to consent. Of course, consent was never validly obtained, so the proper framing is not "had there been no consent" but rather "had the police not unconstitutionally searched Defendant." This framing difference is significant in assessing credibility and the inevitability that proper procedures would have been followed, as discussed in Point I, B.

no steps to begin preparing an application for a warrant to obtain Defendant's DNA, had not sought a warrant in the twenty buccal swabs police had previously taken from homeless men as part of this investigation,[4] and did not testify that he had ever applied for a search warrant to obtain DNA in his twenty-three years as a detective. Indeed, in the one hundred homicide and one thousand street crime investigations Bordamonte had participated in over twenty-three years, he testified that he had only sought between twenty and twenty-five search warrants. *Id.* at 5; *Camey*, 217 N.J. Super. Unpub. LEXIS 3185, *7 n.3. It is possible this *could* have been Bordamonte's twenty-sixth application, but the State has offered no facts to show that he took any steps – related to Defendant or anyone else – to pursue one.[5]

Moreover, the State's suggestion that the courts should make conclusions about what an officer would do through a process of deduction ("the only logical conclusion") and by substituting

[4] Although the validity of these "consent" searches is not before the Court, they raise serious concerns about police practices. It is unclear whether there is any connection between these twenty homeless men and the criminal activity, except that they were homeless somewhere in the vicinity of the riverbank where the body was found. It is hard to imagine that the police would have similarly sought consent to take buccal swabs from twenty homeowners in the same vicinity; the State's unconcerned mention of this fact is therefore alarming.

[5] As examined in Point I, B, Judge Clark did not even find credible any claimed intention by Bordamonte to pursue a warrant, separate and apart from the dearth of facts suggesting he had begun, or would soon begin, preparing one.

their own judgment about good police work ("it is unfathomable") misses the mark entirely. First, it assumes that judicial reasoning based on constitutional process is the same reasoning officers inevitably use in the field. Were that so, few search and seizure cases would ever come before this Court or any other. Second, it invites this Court to speculate as to what an officer might or possibly could do. Such speculation is squarely prohibited by the inevitable discovery doctrine, especially as restrictively formulated by this Court in *Sugar II* and *III*. Indeed, the U.S. Supreme Court has cautioned under the more permissive preponderance standard that "inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment. . . ." *Nix*, 467 U.S. at 444 n.5.

The State's suggestion that this Court perform deductive reasoning and evaluate what is fathomable versus unfathomable simply evades *Sugar*'s directive: The State has not pointed to a single fact that proves a warrant application would have been considered, let alone submitted, had the investigation continued. This case is thus like *State v. Keaton*, where the State claimed officers would have inevitably found contraband inside a car either through impoundment or an inventory search but offered no facts to support that claim. This Court refused to admit the contraband under a theory of inevitable discovery, finding

> no evidence to suggest that the police intended to impound or inventory defendant's vehicle. That logically indicates that the State did not demonstrate that "proper, normal, and specific investigatory procedures would have been pursued in order to complete the investigation of the case." Since the State has failed to show that the police would have impounded or inventoried the vehicle, the inevitable discovery doctrine does not apply.
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> [222 N.J. 438, 451 (2015) (quoting *Sugar II*, 100 N.J. at 238).]

Similarly here, because the State has failed to show that the police would have applied for a search warrant, the inevitable discovery doctrine does not apply.

B. What an Officer "Would" Have Inevitably Done Is a Question of Fact, for Which Evidence of Officer Misconduct Is Relevant.

In assessing what an officer "would" have done, judges look to "demonstrated historical facts capable of ready verification or impeachment. . . ." *Nix*, 467 U.S. at 444 n.5. These fact determinations, made at suppression hearings, will be linked to questions of credibility by the trial court. As Judge Clark noted, "At the heart of the ruling regarding . . . inevitable discovery is whether I believe the testimony of Sgt. Bordamonte, that he would have sought a search warrant for Rafael Camey's DNA. . . ." Tr. 53:7-11. Judge Clark based her ultimate finding that he was not credible on his low number of search warrant applications during his long police history as well as his "minimization of the actions leading to and the results of the IA investigation." *Camey*,

2017 N.J. Super. Unpub. LEXIS 3185, *7. Specifically, she stated: "I have concluded that I reject Sgt. Bordamonte's credibility in several areas. If this matter goes to trial his angry and threatening remarks about illegal immigrants and other remarks to the people in that cited episode . . . are relevant to his credibility in this case, particularly because" of Defendant's immigration status. Tr. 67:16-23.

Judge Clark's credibility determinations properly considered Bordamonte's past history of misconduct, as revealed in the internal affairs records, because they were relevant to his treatment of Defendant in this case. The Appellate Division was correct to reject the State's objection that such consideration is unduly prejudicial and lacks relevance or probative value.[6] *Camey*, 2017 N.J. Super. Unpub. LEXIS 3185, *13. Indeed, to the extent such records are prejudicial against an officer's credibility, such judgment is well placed: the trial court was right to have called out xenophobic and flagrant constitutional violations and

[6] The Appellate Division clarified that Bordamonte's records may only be used at trial as provided under *N.J.R.E.* 404(b) or otherwise allowed in the rules of evidence, with limiting instructions to the jury where necessary. *Camey*, 2017 N.J. Super Unpub. LEXIS 3185, *13. Because this issue comes before the Court only as it relates to Judge Clark's credibility determinations, *amicus* does not address the admissibility of the records at trial. *Amicus* adds simply that the Confrontation Clause also requires disclosure of police personnel records "where a defendant advances some factual predicate making it reasonably likely that information in the file could affect the officer's credibility." *State v. Harris*, 316 N.J. Super. 384, 387 (App. Div. 1998).

abuse of authority. Such opinions demonstrate how the judiciary contributes to police accountability.

The State complains that Judge Clark's "misgivings about Bordamonte's credibility do not logically support the judge's rejection of the inevitable discovery rule here. In sum, it is submitted that the Appellate Division erred in summarily accepting the trial court's conclusions regarding the consequences of Bordamonte's lack of credibility." Sb 9. To the contrary, Bordamonte's lack of credibility is a perfectly logical reason to reject the State's claim of inevitable discovery, when that claim rests solely on Bordamonte's testimony. Moreover, the Appellate Division did not accept it summarily. Instead, the panel reviewed Judge Clark's reasoning in detail before concluding she did not abuse her discretion. That the panel acknowledged it could not substitute its own credibility determinations for the trial court's is not summary acceptance; it is jurisprudentially required deference. *Camey*, 2017 N.J. Super. Unpub. LEXIS 3185, *12 (citing *State v. Locurto*, 157 N.J. 463, 472-75 (1999).

This case demonstrates the need for police accountability. The deterrence and accountability purposes of the exclusionary rule are one way in which unlawful police conduct has consequences in our legal system. But when there are patterns of such illegality, including as shown through internal affairs investigations, records of such patterns should be permissibly

considered at evidentiary hearings, as supremely relevant to the officer's credibility. The Appellate Division did not err in refusing to disturb Judge Clark's sound determination that Bordamonte was not credible.

II. THE INEVITABLE DISCOVERY DOCTRINE DOES NOT PERMIT POLICE TO CLAIM THEY WOULD HAVE INEVITABLY ACTED CONSTITUIONALLY HAD THEY NOT IN FACT ACTED UNCONSTITUTIONALLY.

By claiming police would have inevitably searched pursuant to a warrant had they not first searched pursuant to invalid consent, the State asks the inevitable discovery doctrine to do more than it can. The doctrine must be reserved for circumstances in which the State can show an independent source of the evidence, whose inevitability is not logically foreclosed by the decision to do the unconstitutional action.

If accepted, the State's distortion of the doctrine in this case would disincentive police from ever seeking a warrant even when they have probable cause to search, because it would be more expedient first to claim consent and then to rely on inevitable discovery if the consent were found invalid. The assurances of *Sugar* prong one – that inevitably be more than plausibility – are thus necessary but not sufficient: If allowed to claim inevitable discovery through a warrant they had not prepared, all police officers whose department routinely seeks warrants – or who themselves have a history of so doing – could claim they too would have in this case. Admitting evidence under these circumstances

would deter officers not from unlawful searches and seizures as the exclusionary rule does, but instead from pursuing regular warrant application procedures.

This Court has recognized the power imbalance inherent in the inevitable discovery doctrine:

> In a case in which the State seeks to rely on the inevitable discovery exception, it is because the police have already violated the law. Evidence has been obtained unlawfully; a defendant's constitutional rights have been denied. The State itself is directly responsible for the loss of the opportunity lawfully to obtain evidence; the State has created a situation in which it is impossible to be certain as to what would have happened if no illegal conduct had occurred. Moreover, the State itself is in possession of all relevant evidence bearing upon its ability to have otherwise lawfully discovered the evidence. Finally, the defendant is at a gross disadvantage; defendant's constitutional rights were in fact abridged, and, he is in possession of no independent evidence concerning whether the evidence that had been seized unlawfully would have otherwise been discovered through lawful means."
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> [*Sugar*, 100 N.J. at 239.]

This Court should not further empower officers to dispose of the warrant requirement altogether by claiming inevitable discovery.

A. *Sugar*'s Requirement of Independence Means the Inevitable Discovery Must Not Be Logically Foreclosed by the Unlawful Action.

For inevitable discovery to be meaningful, the lawful process which "would have" – in the doctrine's hypothetical – resulted in inevitable discovery must be separate from the unlawful process

actually pursued. Prong three of the *Sugar* test requires that "the discovery of the evidence through the use of [lawful] procedures would have occurred wholly independently of the discovery of such evidence by unlawful means." 100 N.J. at 237. Most obviously, this means that the police cannot rely on the unconstitutional action, or the fruit of the poisonous tree. *State v. Shaw*, 213 N.J. 398, 421 (2012). But it also means that the lawful procedure would have provided an independent source of the otherwise tainted evidence. In that sense, the independent source doctrine is conceptually equivalent to an inevitable discovery that actually happened, and vice versa.

Sugar II acknowledged this equivalency, noting the inevitable discovery doctrine "involves proof of hypothetical independent sources of obtaining the evidence[.]" 100 N.J. at 237; *see also State v. Holland*, 176 N.J. 344, 361 (relying on analytical similarities between the two doctrines and applying *Sugar*'s "restrictive formulation" to independent source). The U.S. Supreme Court has further explained, "The inevitable discovery doctrine, with its distinct requirements, is in reality an extrapolation from the independent source doctrine: *Since* the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered." *Murray v. United States,* 487 U.S. 533, 539 (1988) (emphasis in original).

Logically then, *Sugar*'s requirement of independence means the proper procedure cannot be the equal-and-opposite of the unconstitutional one. Just as an independent source that actually happened could not be logically foreclosed (or made factually impossible) by the unlawful action that was taken first, so too can the hypothetical lawful procedure under the inevitable discovery theory not be something made impossible by the unlawful action. *Sugar* asks what would have been done "in order to complete the investigation," 100 N.J. at 237, therefore imagining what would have happened had police continued to search for the evidence. That answer is not the same as what would have happened if the police had taken the opposite action from the unconstitutional one. Put otherwise, the inevitable discovery doctrine imagines hitting play on a video that was paused, where the end of the film is the independent source theory's application; it does not let the State erase an outtake and record a different scene.

Justice Breyer's explanation of this distinction fits precisely on the facts of this case:

> That rule [of inevitable discovery] does not refer to discovery that would have taken place if the police behavior in question had (contrary to fact) been lawful. The doctrine does not treat as critical what *hypothetically could* have happened had the police acted lawfully in the first place. Rather, "independent" or "inevitable" discovery refers to discovery that did occur or that would have occurred (1) *despite* (not simply *in the absence of*) the unlawful behavior and (2)

> *independently* of that unlawful behavior. The government cannot, for example, avoid suppression of evidence seized without a warrant (or pursuant to a defective warrant) simply by showing that it could have obtained a valid warrant had it sought one.
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> [*Hudson v. Michigan*, 547 U.S. 586, 616 (2006) (Breyer, J., dissenting)(emphasis in original).][7]

An independent discovery "*despite* (not simply *in the absence of*) the unlawful behavior" is exactly what happened in the seminal inevitable discovery cases. In *Sugar*, this Court found the shallow grave, the odor of decomposition, the new owners' eventual work in the yard and their exploring dog would have all independently resulted in discovery of the body, independent of the officers'

[7] It is worth noting that *Hudson*'s majority did not cast its conclusion as an inevitable discovery opinion, although its reasoning relied on those cases and has been understood to contort the doctrine, as Justice Breyer notes in dissent. To the extent *Hudson* walks back the requirement of inevitability, not plausibility, this Court should not follow course. First, this Court has not adopted *Hudson's* majority ruling that the exclusionary rule does not apply to knock-and-announce violations. *State v. Rockford*, 213 N.J. 424, 453 (2013); *see also State v. Rodriguez*, 399 N.J. Super. 192, 205 (App. Div. 2008) ("we think the majority opinion in *Hudson* should not be followed since Justice Breyer's dissenting opinion appears far more in tune with the manner in which our courts have interpreted and applied the similar provisions of the state constitution."). Second, *Hudson* relies on the "good faith" exception to the warrant requirement, and this Court has explicitly found there is no such exception under Article I, paragraph 7. *State v. Novembrino,* 105 N.J. 95 (1987). Finally, as in other areas of search and seizure jurisprudence, this Court has taken a more "restrictive" view of the inevitable discovery doctrine than the U.S. Supreme Court. *Sugar III*, 108 N.J. at 157 (requiring clear and convincing evidence).

earlier illegal entry onto the property.[8] 108 N.J. at 157-58, 161. Similarly, in *Nix*, the U.S. Supreme Court found there was a 200-person search party that was already meticulously canvassing the area and approaching the site of the body at the time the police were brought to it. 467 U.S. at 448-49. The question is thus not what would have happened had the police not gone unlawfully to the property, but rather, in spite of that entry, would there be some independent source that would provide the same evidence anyway? In other words, assuming the investigation had not stopped when they found the body, would the independent procedures taken to complete the investigation brought them back to it? The answer in both *Sugar* and *Nix* is yes.

But the answer is no in the present case, because the search warrant application would not have occurred *despite* the unlawful buccal swab. It could only have occurred *in the absence of* it, and that is the counter-factual scenario that the doctrine does not permit.

[8] *Sugar III* does not require the State to "establish the exclusive path leading to the discovery. It need only present facts sufficient to persuade the court, by a clear and convincing standard, that the [evidence] would be discovered. It may do this by demonstrating that such discovery would occur in one or in several ways." 108 N.J. at 158–59. But in the present case, the exclusive way the State claims – the warrant application – is logically foreclosed by the police's decision to search without a warrant pursuant to invalid consent.

B. Admitting the Evidence in This Case Under the Inevitable Discovery Doctrine Would Vitiate the Warrant Requirement.

It is significant that Defendant in this case did not refuse consent, but rather that the police illegally obtained it. Excusing an invalid consent search when police claim they would have sought a warrant would relieve officers of the warrant requirement altogether, so long as they have probable cause and could claim afterward that they would have applied for one. Such permission to dispose of the warrant requirement and incentivize police to claim consent, valid or otherwise, with little repercussion is particularly concerning in this case – where DNA evidence from a buccal swab has no chance of disappearance or alteration and where the trial court "found the police conduct 'offensive to due process,' and demonstrated blatant disregard for the most basic of constitutional safeguards." *Camey*, 2017 N.J. Super. Unpub. LEXIS 3185, *5 (quoting Judge Clark).

Bordamonte's assertion that he would have obtained a search warrant had the police not performed an invalid consent search is akin to police conducting a warrantless search of a home without exigency but asserting they could have obtained a warrant beforehand. The Appellate Division has explicitly rejected an inevitable discovery theory on those facts. In *State v. Lashley*, 353 N.J. Super. 405 (App. Div. 2002), the panel accepted the State's proofs as to probable cause but found the post-hoc claim

of an inevitable warrant application unavailing. The panel reasoned that admitting the evidence in that case would undo the protections of the warrant requirement:

> If we were to uphold the denial of the motion to suppress in this case, the police could decide to enter a home without a warrant, and without both probable cause and exigent circumstances, in order to "secure" the evidence, whenever they believe they have probable cause to obtain a search warrant. This rationale is inconsistent with basic principles which flow from our Supreme Court's interpretation of *N.J. Const.* art. I, par. 7, if not the Fourth Amendment, in a State that does not recognize the "good faith" exception to the warrant requirement, and requires both probable cause and exigent circumstances for a warrantless search of an automobile.
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> [*Id.* at 409 (internal citations omitted).]

Similarly, in *State v. Premone,* 348 N.J. Super. 505 (App. Div. 2002), police performed a warrantless search of the defendant's bag but claimed that if they had sought a search warrant, it would have inevitably been granted and the contents inevitably discovered. The Appellate Division disagreed, adopting the trial court's reasoning:

> To me [the *Sugar* test] means what it says, independent investigation. It doesn't mean . . . simply that they could have obtained the information by applying for and securing a search warrant. . . . Otherwise, . . . you wouldn't need a search warrant simply because you could say, "I could have gotten a search warrant," . . . which seems to be a circular type argument.
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> [*Id.* at 510 (alterations in original).]

For the reasons expressed by the Appellate Division in those cases, this Court should be wary of allowing officers to claim they could have inevitably discovered evidence through a search warrant application they had taken no steps yet to prepare.[9]

To the knowledge of *amicus*, this is the first time this Court has been asked to apply the *Sugar* test to a buccal swab consent search. In unpublished opinions, the Appellate Division has considered only a few analogous circumstances.[10] In one of them, *State v. Mota,* the facts are easily distinguishable.[11] In another, *State v. Cawley*, the panel accepted a similar argument as that put forward by the State in the present case, albeit with the lesser

[9] If such a case is upheld, it must be strictly confined to its facts, such as *State v. Johnson*, 120 N.J. 263, 289 (1990), where the police had already drafted a page and a half of the search warrant affidavit, to search defendant's room after his arrest, and the officer "suspended his typing efforts only after the defendant had consented to the search."

[10] Pursuant to *R.* 1:36-3, counsel includes these unpublished opinions in an appendix. Counsel is aware of numerous unpublished Appellate Division decisions that address the application of the inevitable discovery doctrine more broadly. Those opinions are not appended here because these three cases are not cited for any broad proposition. Rather, they are offered for the limited proposition that the Appellate Division's treatment of cases in which a buccal swab was performed unconstitutionally but the State nevertheless claimed inevitable discovery has not been extensive. Counsel is aware of no cases that are contrary to that limited proposition.

[11] In addition to a search warrant application, the State also claimed a Massachusetts prosecution and DNA left on items seized at a restaurant would have led the police to the same evidence. *State v. Mota*, No. A-1361-08, 2009 N.J. Super. Unpub. LEXIS 1670, *18 (App. Div. June 24, 2009).

standard of a *Rule* 3:5A investigative detention.[12] For all the foregoing reasons, *amicus* submits that *Cawley* was wrongly decided and should be corrected here. Finally, in *State v. Parson*, the Appellate Division found that buccal tissue obtained unlawfully in December was admissible because the defendant validly gave consent for a buccal swab in April of following year, and the evidence would obviously be the same. Significantly, the panel cautioned: "The fact that the State could have obtained a search warrant or court order to take a buccal swab is insufficient to render the December 8 test results admissible under [the inevitable discovery] doctrine." No. A-3092-12, 2014 N.J. Super. Unpub. LEXIS 1414, *7 (App. Div. June 16, 2014) (citing *Premone*, 348 N.J. Super. at 509-10).

In *State v. Holland*, in the context of the independent source doctrine, this Court expressed some reservation "when the same officer participates in an improper search and in an arguably lawful one occurring only a short time later. . . ." The Court acknowledged in those cases, "the State's burden in demonstrating the validity of the second search will be most difficult. We echo Justice Marshall's concern that unrestrained application of the

[12] *State v. Cawley*, No. A-0382-12, 2015 N.J. Super. Unpub. LEXIS 749, *13 (App. Div. Apr. 7, 2015), *cert. dismissed*, 228 N.J. 21 (2016). In the present case, the State also now argues that Bordamonte alternatively would have applied for an investigative detention under *Rule* 3:5A, but his testimony was limited to a search warrant application.

independent-source rule could 'emasculate[ ] the Warrant Clause and provide [ ] an intolerable incentive for warrantless searches.'" 176 N.J. at 362-63 (quoting *Murray,* 487 U.S. at 550 (Marshall, J., dissenting)) (alteration in *Holland*). These are essentially the facts of the present case, except that it is not remotely clear that the "second search" would have inevitably occurred. The Court's concern should thus be even greater. To admit the illegally seized evidence in this case – where there is no risk of losing the evidence, where there is an inference of bad faith and "blatant disregard for the most basic of constitutional safeguards," *Camey,* 2017 N.J. Super. Unpub. LEXIS 3185, *5, where the officer was subject to and minimized his role in a relevant internal affairs investigation, and where consent was obtained so clearly in violation of the law – would be to undermine the very purpose of the exclusionary rule and the warrant requirement's protections.

Indeed, this Court has reasoned that the exclusionary rule's deterrent rationale has "so little basis" where the State shows the evidence would have been inevitably discovered by "lawful means." *State v. Maltese*, 222 N.J. 525, 551–52 (2015). Such reasoning assumes the lawful process will be logically independent of the unlawful one (*see, supra*, Point II, A). Quite the opposite, if this Court accepts the State's argument in the present case it will not only mean the Court's reassurance in *Maltese* is misplaced;

the effect would work the other way, deterring officers from seeking warrants because they could claim those "lawful means" after the fact. An argument that so contorts these basic principles of search and seizure jurisprudence cannot be allowed to stand.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Appellate Division.

Respectfully submitted,

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