Case No. 13-264

IN THE SUPREME COURT OF THE UNITED STATES
October Term 2012

STATE OF FLORIDA,

Petitioner,

v.

RANDALL DEVINEY

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The decision sought to be reviewed is reported as Deviney v. State, 112 So. 3d 57 (Fla. 2013)(Attached as Appendix A3-63 to the State of Florida's Petition for Writ of Certiorari).

JURISDICTION

The Court has jurisdiction to consider this petition under 28 U.S.C. s. 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth and Fourteenth amendments to the United States Constitution.

STATEMENT OF THE CASE AND FACTS

Respondent rejects Petitioner's statement of "Facts Surrounding Deviney's Confession" as one-sided and incomplete and relies on the following relevant facts, as taken from the Florida Supreme Court's opinion:

> [T]he police obtained a mixture of DNA, which contained the DNA of one male and one female from the nails of [Futrell's] right hand. The police identified the female DNA as belonging to Futrell. Jennifer Miller, a DNA analyst for the Florida Department of Law Enforcement, placed the male DNA into the national database known as the CODIS system. The CODIS system identified the DNA found under Futrell's fingernails as belonging to Randall T. Deviney, a nineteen-year-old male and the defendant in this matter.
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> . . . .
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> [Detective] Ottinger located Deviney and identified himself and his partner as police officers. They advised Deviney they were investigating the murder of Futrell and asked if he would come to the station with them to discuss Futrell's murder. Deviney consented.
>
> Deviney was transported to the police station in Ottinger's car. The officers did not handcuff Deviney, who sat in the front passenger seat next to Ottinger, and the officers did not question Deviney about Futrell's murder. Ottinger's partner sat in the back seat behind Deviney. According to Ottinger, Deviney was not in custody at this time.
>
> Upon arriving at the police station, the officers directed Deviney to an interview room. He walked with the detectives and was not placed in any type of restraints. When he entered the interview room, the police informed him that he was not in custody, he was not under arrest, the door was unlocked, and he could leave at any time. He specifically asked the detectives if he was free to leave, and the detectives told him that he could. The police video-recorded the interview and provided the trial court with a DVD of

that interview.

At the beginning of the interview, Waldrup and Ottinger cordially introduced themselves to Deviney. They reiterated to Deviney that he was not under arrest, and he replied that he understood, and he knew "you all just want me to help you all." Deviney acknowledged that he understood that he was there voluntarily, that the door to the interview room was unlocked, and he could leave at any time. After Deviney stated that he understood he was free to leave, the detectives administered Miranda warnings. Deviney read his Miranda rights aloud from a form that he signed, and the two detectives signed as witnesses.

. . . .

The detectives proceeded to question Deviney about Futrell's murder and their subsequent investigation of the murder. Deviney stated he knew Futrell and that he had heard about her death. The detectives asked him if he knew who did it, to which he responded, "No, sir." The detectives asked him if he was suspicious of anyone, to which he responded, "No, sir."

. . . .

On the night of Futrell's murder, Deviney stated that he was at home, but that he left his house around 8:30 p.m., and returned home by 9:00 p.m. During that time, Deviney claimed to have stopped by his neighbor's house for a beer.

. . . .

The detectives then asked Deviney a series of questions to clarify his whereabouts on the night of the murder and his knowledge of the murder. During the questioning, Deviney stated, "I really cared about [Futrell]. Still do." He believed that whoever murdered Futrell was a "very sick person." He stated that whoever committed the murder had to know her because she "would not open her door for anybody that she didn't know," and she would not allow a stranger into her home because she was slow and weak due to her multiple sclerosis. Then, Deviney became impatient and asked if the interview was "about done" because "this aggravates me." When asked how he thought the

investigation was "going to turn out for him," Deviney responded, "I don't know."

The detectives thereafter obtained Deviney's consent to take a DNA sample. The detectives had Deviney read aloud a DNA consent form, which he signed. Part of the form stated: "I have not been threatened in any manner. I am giving this consent." The detectives then took buccal swabs from Deviney's mouth and left the room. At this time, the interrogation had lasted approximately an hour. When the detectives returned, the following exchange occurred:

> DETECTIVE: ... Randall, we have the results of the investigation and it clearly shows you're the person who killed Ms. Delores.
>
> THE DEFENDANT: No. No. Hell no. I don't see how you all see that.

The detectives briefly discussed their investigation, and that, based on the information and evidence they had gathered during it, they considered him a suspect. They also noted Deviney's admission that someone she knew must have done it, and that they found his DNA, which was already in the system, on her. Deviney continued to deny involvement in the murder of Futrell. The following discussion then occurred:

> THE DEFENDANT: How much better can I explain, I did not do this.
>
> DETECTIVE: Listen, listen to me. That's not the question. You did do it. Randall—
>
> THE DEFENDANT: I'm done. I'm done.
>
> DETECTIVE: What does that mean?
>
> THE DEFENDANT: I'm done.
>
> DETECTIVE: What does that mean, I'm done?
>
> THE DEFENDANT: I'm done. I'm ready to go home and I did not do this and if I did do it, I want you all to show me that I did do it.
>
> DETECTIVE: We told you, Randall.

THE DEFENDANT: I didn't do it.

DETECTIVE: Why would your DNA be on her?

THE DEFENDANT: My DNA wasn't on her.

DETECTIVE: Oh, it is. Little old lady.

DETECTIVE: ... You cared about this lady, Randall.

THE DEFENDANT: I'm done. I'm ready to go home. Can I leave?

DETECTIVE: No.

THE DEFENDANT: Why? I didn't do this shit, you all.

DETECTIVE: You did. You did. Randall, you did. You murdered this lady.

THE DEFENDANT: No, I didn't.

DETECTIVE: No, Randall, you sit.

DETECTIVE: You cannot go.

THE DEFENDANT: I didn't kill this lady, you all.

DETECTIVE: You're not leaving.

THE DEFENDANT: Yes, I am. I didn't kill this lady. Why can't I go? Why?

DETECTIVE: We'll be back in just a minute.

THE DEFENDANT: I'm ready to go.

DETECTIVE: You're not going. You're not going.

THE DEFENDANT: Why, sir?

....

DETECTIVE: Here's—here's why. You're a suspect in a homicide investigation right now.

THE DEFENDANT: You all said I could leave

whenever I wanted to.

DETECTIVE: That was before. Now we're legally detaining you. Okay? You cannot leave. You're not free to go. Okay? You have a seat and we'll be back in to talk with you in a little bit.

THE DEFENDANT: Can I talk to my girlfriend?

DETECTIVE: No. You are a suspect in a homicide. Okay. You cannot go. Still under investigation. Do you have anything else in you—on you? Give me your watch, too. Your bracelet.

THE DEFENDANT: I think I'll hold onto this until I get over there.

DETECTIVE: It's not an option anymore. You're in our custody.

....

THE DEFENDANT: I didn't do nothing.

DETECTIVE: Yes, you did.

DETECTIVE: Just have a seat and relax. We'll be right back.

THE DEFENDANT: Can I go?

DETECTIVE: No.

THE DEFENDANT: Why?

DETECTIVE: I just explained it to you.

DETECTIVE: Listen, we can't talk to you. Okay. We can't talk to you. Okay. Randall, sit down.

THE DEFENDANT: Why can't I leave?

DETECTIVE: Sit down. You're being detained.

THE DEFENDANT: For what?

DETECTIVE: A murder investigation.

THE DEFENDANT: I did not kill this lady.

DETECTIVE: Sit down, bro. You're not going anywhere.

DETECTIVE: If you force us to sit you down, we'll have to do that. Okay. I don't want to do that.

DETECTIVE: You don't want to do that.

DETECTIVE: So have a seat. We'll be right back with you.

DETECTIVE: Please have a seat, Randall. Thank you.

(Emphasis added.)

The DVD video of this interrogation reveals that, during the above-quoted segment of the interview, Deviney stood out of his chair and attempted to leave. At that moment, the detectives stood in front of Deviney and informed him that he could not leave and that they were legally detaining him. The detectives then frisked Deviney but did not physically restrain him in any way. After the detectives detained and frisked Deviney, Deviney again tried to leave the interview room. The detectives once again informed him that he could not leave. When he asked why, they reiterated that they had now legally detained him as a suspect in a homicide investigation. Deviney became angry and more vehemently tried to leave the interview room. He did not touch the detectives. The detectives warned him that if he did not sit down, they would physically restrain him. Deviney returned to his chair without physical restraint (although ita appears that one of the detectives placed his hand out to stop Deviney and, while doing so, softly touched Deviney's chest).

Deviney v. State, 112 So. 3d 57, 63-66 (Fla. 2013).

The detectives did not re-administer Miranda warnings, nor did they cease questioning. Instead, the interrogation continued and, upon repeated questioning, Deviney confessed to Futrell's murder to both the police and his mother.

Id. at 78.

On appeal to the Florida Supreme Court, Deviney argued that his repeated assertions that he was "done" and his statement, "I'm done, I'm ready to go home, can I leave?," followed by his conduct in attempting to leave constituted a clear invocation of his right to end the questioning.

The Florida Supreme Court agreed. Citing Davis v. United States, 512 U.S. 452 (1994) (Davis), the Florida Supreme Court observed that "law enforcement need only cease questioning upon an unequivocal invocation to terminate the interrogation," Deviney, 112 So. 3d at 74, and that the suspect must express a desire to end the questioning "in such a manner that a reasonable officer under the circumstances would understand that the suspect has invoked his or her right to end questioning." Id. Applying these principles to Deviney's statements and conduct under the totality of the circumstances, the court held as follows:

> At the time of Deviney's interrogation, he was a nineteen-year-old, high school graduate of limited abilities. Deviney was persistently learning disabled. While in school, he was enrolled in special education programs from kindergarten through high school. One such program was named Child Find, which is a program that helps children with speech and writing learning disabilities. The high school diploma he earned was a "special diploma," meaning that he earned it by completing a special education program that included a work-study. The record indicates that he obtained employment in menial jobs after graduation.
>
> At the onset of Deviney's interview, the police informed him that he was not in custody, he was not under arrest, the door was unlocked, and he could leave

at any time. He specifically asked whether he could "get up and leave whenever I want." The detectives responded with, "You can leave. The door is unlocked." The police then administered the *Miranda* warnings to Deviney. He read the warnings aloud from a consent form that he, along with the two detectives, signed. The detectives then began questioning him about Futrell's murder. Deviney initially denied any knowledge with regard to who committed the murder. In response to questioning, he described his whereabouts on the night of the murder, averring that he spent it at or near his home. After approximately one hour of questioning, the detectives obtained Deviney's consent to take a DNA sample and temporarily left the room.

Upon reentering, the detectives stated that they found his DNA on Futrell and that they believed he murdered her. At that moment, Deviney stated, "you all I'm ready to go." Although Deviney seemed to express a desire to end questioning with this statement, he followed it with, "I don't see how you all think I did that." This subsequent statement by Deviney indicated that he wished to continue to engage the police about the case in an attempt to discover the evidence they had against him. Thus, by continuing to engage the police, Deviney's initial invocation of his right to remain silent was equivocal, as a reasonable officer could believe that, under the circumstances, Deviney wanted to further engage the police and not end his interrogation.

The interrogation continued, and the police reiterated the strength of the DNA evidence they had against Deviney and implored him to confess. The following sequence then took place:

THE DEFENDANT: How much better can I explain, I did not do this.

DETECTIVE: Listen, listen to me. That's not the question. You did do it. Randall—

THE DEFENDANT: I'm done. I'm done.

DETECTIVE: What does that mean?

THE DEFENDANT: *I'm done.*

DETECTIVE: *What does that mean. I'm done*?

THE DEFENDANT: *I'm done. I'm ready to go home and I did not do this and if I did do it I want you all to show me that I did do it.*

....

DETECTIVE: ... You cared about this lady, Randall.

THE DEFENDANT: *I'm done. I'm ready to go home. Can I leave*?

DETECTIVE: *No.*

(emphasis added.)

Deviney's *six references* to the fact that he was "done" with questioning represented an unequivocal invocation of his right to remain silent and end questioning. However, these unequivocal statements to end questioning are argued by the State to be equivocal because Deviney, after saying, "I'm done," *immediately* stated, "[I]f I did do it, I want you all to show me that I did do it." More specifically, it is argued that a reasonable officer under the circumstances might perceive the subsequent "show me" statement to mean that Deviney did not want to end his interrogation, and that he wished to continue his dialogue with the police in an attempt to learn about the evidence they had against him.

However, Deviney dispelled any such argument by a subsequent reiteration of his wish to end the interrogation, "*I'm done.* I'm ready to go home. Can I leave?" (emphasis added.) After this statement, Deviney further indicated his desire to end questioning by standing and attempting to leave the interrogation room. This conduct demonstrated an obvious desire by Deviney to leave the interrogation room for the purpose of *ending questioning.* The detectives responded by informing him that he was no longer free to leave because they were now formally taking him into custody and legally detaining him for the murder of Futrell. The detectives subsequently frisked Deviney, after which he stood and, more vehemently, attempted to end questioning by leaving the interview room. The detectives, however, blocked his exit and, with the

threat of physical restraint, compelled him to sit down and remain in his seat. The detectives did not re-administer *Miranda* warnings, nor did they cease questioning. . . .

Deviney's "I'm done" statements, along with his attempts to end questioning by leaving the interrogation room, were a clear and vociferous invocation of his right to remain silent. However, upon formally taking Deviney into custody after his attempt to leave, the detectives failed to re-administer *Miranda* warnings. This was despite the fact that the interrogation had now become custodial, as the detectives informed Deviney for the first time that he was not free to leave, and that he was legally detained and in their custody. More importantly, the detectives failed to scrupulously honor the prior *Miranda* warnings they provided to Deviney at the onset of the interrogation by continuing to question him despite his six "I'm done" statements and conduct that clearly and convincingly evinced an unequivocal desire and intent to invoke his right to remain silent and end questioning. Instead, the detectives kept Deviney in the police interrogation room, which is innately intimidating, and persisted in their repeated attempts to elicit incriminating statements from Deviney—a young individual of limited abilities and education. This atmosphere of compulsion wore down the unfettered exercise of Deviney's free will, leading him to confess to both the police and his mother.

. . . .

Accordingly, given the totality of the circumstances and the communications and conduct by Deviney within those circumstances, we conclude that Deviney unequivocally invoked his right to remain silent and end the interrogation. By continuing questioning after that unequivocal request, the detectives violated that right, causing an involuntary confession by Deviney.

112 So. 3d at 76-79.

REASONS FOR DENYING THE WRIT

I. CERTIORARI REVIEW OF WHETHER DEVINEY INVOKED HIS RIGHT TO SILENCE IS NOT WARRANTED BECAUSE THE FLORIDA SUPREME COURT'S DECISION DOES NOT CONFLICT WITH THIS OR ANY OTHER COURT'S DECISIONS, THIS CASE INVOLVES A FACT-BOUND ANALYSIS THAT WILL HAVE NO REACH BEYOND THESE PARTICULAR FACTS AND CIRCUMSTANCES, AND THE DECISION IS OBJECTIVELY REASONABLE.

The State argues that this case merits this Court's review because it presents a recurring situation and because the Florida Supreme Court's decision conflicts with this Court's decisions in Davis v. United States, 512 U.S. 452 (1994)(Davis) and Berghuis v. Thompkins, 560 U.S. 370, 130 S.Ct. 2250 (2010)(Thompkins), as well as with decisions of federal and state appellate courts.

This case does not present a recurring situation. There are endless variations in the facts and circumstances relative to determinations of whether a suspect has unequivocally invoked the right to silence. Accordingly, such situations generally are not readily or usefully reduced to a neat legal rule. Here, for example, the State paints with far too broad a brush in characterizing the relevant facts as involving a suspect's desire to "go home." Deviney did not say simply that he wanted to "go home." He told the detectives multiple times that he was "done," followed those statements with, "I'm done. I'm ready to go home, can I leave?," and then stood up and attempted to leave the room. In addition, Deviney's statements and conduct occurred in the context of an interrogation conducted after the detectives had

told him the door was unlocked and he could leave at any time. This case does not involve a recurring situation but turns solely upon an analysis of the particular facts involved. Accordingly, this case will not provide any useful precedent for lower court cases.

Nor does the Florida Supreme Court's decision conflict with this Court's decisions in Davis and Thompkins. Indeed, the State of Florida has conceded that the decision "does not directly 'conflict[] with [a] relevant decision[] of this Court.'" See Petition for Certiorari at 28-29. Having conceded the absence of any conflict, the State argues that the Florida Supreme Court "disregarded" the reasonable officer standard enunciated in Davis and Thompkins. See id. at 28. The above-quoted portions of the opinion make clear, however, that the Florida Supreme Court reasonably applied the principles of Davis and Thompkins, including the reasonable officer standard. See supra, pages 7-11; Deviney, 112 So. 3d 76-79.

This case also does not conflict with any of the other decisions cited by the State in its Petition for Certiorari at 33-42, as each of those cases turns upon its facts, which are distinguishable from the facts here. In Moore v. Dugger, 856 F.2d 129 (11th Cir. 1988), for example, the defendant had already confessed to the crime when he agreed to give a taped confession. At the beginning of the taped confession, the defendant asked,

"When will you all let me go home?" Under these circumstances, the 11th Circuit concluded the defendant, who had an I.Q. of 62, was not asserting a desire to end the questioning but was asking for information about when, in the future, he would be allowed to leave. See also Delap v. Dugger, 890 F.2d 285, 290-93 (11th Cir. 1989)(concluding that defendant's statements about how much longer he would be answering questions and that his wife was expecting him home and he wanted to go related to how much longer the interview would last, not whether he wished to terminate or delay questioning). The State's own synopses of the remaining cases-federal and state-allegedly in conflict with the present case also are factually distinguishable. None involves an accused who, after being told he could leave at any time, told police five times that he was "done" with the interview, then said, "I'm done. I'm ready to go home. Can I leave?," and then stood up and attempted to leave the room. In contrast to the cases relied on by the State, Deviney's statements and conduct do not give rise to "reasonable competing inferences." See State v. Saeger, 2010 WL 3155264 (Wis. App. 2010). The only reasonable inference that could be drawn from Deviney's statements and conduct is that he was expressing a desire to end the interrogation. That Deviney might have been "requesting another venue" for the interrogation, see Petition for Certiorari at 31, is ludicrous.

The Florida Supreme Court's decision does not conflict with any decisions of this Court or other federal or state courts. This case will not develop Fifth Amendment law and will not provide any useful precedent for lower courts. The decision below turns upon its own facts and will affect few others than the litigants. The decision below also was right.

II. CERTIORARI REVIEW OF WHETHER DEVINEY'S CONFESSION TO HIS MOTHER SHOULD HAVE BEEN SUPPRESSED IS NOT WARRANTED BECAUSE THE DECISION BELOW DOES NOT CONFLICT WITH FEDERAL LAW AND IS REASONABLE.

The State of Florida asserts that the Florida Supreme Court's determination that Deviney's confession to his mother also should have been suppressed conflicts with this Court's fruit of the poisonous tree jurisprudence. The State has cited no case in support of this assertion, however. The three cases cited by the State do not even address the same issue. In U.S. v. Patana, 542 U.S. 630 (2004), the Court held the failure to give the suspect Miranda warnings did not require suppression of *physical* fruits of unwarned but *voluntary* statements. In contrast, the present case involves *testimonial* fruits of a *coerced* statement. In Missouri v. Seibert, 542 U.S. 600 (2004), the Court held that Miranda warnings given mid-interrogation, after the defendant gave an unwarned confession, were ineffective, and thus the defendant's confession repeated after warnings were given, was inadmissible at trial. Seibert is factually distinguishable and thus has no relevance to the present case. This Court's decision in Colorado v. Connelly, 479 U.S. 157 (1986), also is factually and legally distinguishable. In Connelly, the Court held that while a defendant's mental condition may be a factor in determining voluntariness, coercive police conduct is a necessary predicate to finding a defendant's confession is not voluntary under the due process clause.

Connelly does not address a fruits issue.

The Florida Supreme Court's opinion represents a reasonable application of this Court's fruits jurisprudence. The "fruit of the poisonous tree" doctrine forbids the use of evidence in court if it is the product or fruit of a search or seizure or interrogation carried out in violation of constitutional rights. See Wong Sun v. United States, 371 U.S. 471 (1963). The issue is "'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" Id. at 488 (internal citation omitted). In deciding this issue, courts consider the time elapsed between the illegality and the acquisition of the evidence, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct. Here, after Deviney confessed, one of the detectives asked if he had told his mother about it. When Deviney said, "no," the detective asked, "What's she gonna do when I tell her?" The detectives left Deviney alone briefly, then spoke to him again when he knocked on the door and requested a blanket. Deviney asked if they had called his family yet, and was told, "yeah, we called them and their [sic] coming down. Okay? We're gonna talk to you mom here." Deviney asked if he would be able to see her. Shortly after this conversation, Deviney's mother

was brought into the cell. She told him what he was being charged with and asked him questions about the murder, indicating that she knew details of his confession to police. The record shows that the police called Deviney's mother to come to the station, made her aware of his earlier confession, placed her in the same interrogation room and recorded her conversation with Deviney. Under these facts, the Florida Supreme Court's conclusion that the second confession was tainted by the prior illegality is a reasonable application of this Court's fruits jurisprudence.

CONCLUSION

For the foregoing reasons, Respondent asks this Court to deny the State of Florida's petition for writ of certiorari.

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CERTIFICATE OF SERVICE

I, DAVID A. DAVIS, a member of the Bar of the Supreme Court of the United States and counsel of record for RANDALL DEVINEY, the Respondent, hereby certify that on the 26th day of September, 2013, pursuant to Supreme Court Rule 28, I served a single copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Florida:

On the State of Florida, The Petitioner, by U.S. Mail to Stephen White, Assistant Attorney General, The Capitol, PL-01, Tallahassee, Florida, 323099-1050.

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