**[J-51-2019] [MO: Saylor, C.J.]**
**IN THE SUPREME COURT OF PENNSYLVANIA**
**EASTERN DISTRICT**

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| COMMONWEALTH OF PENNSYLVANIA, | : | No. 37 EAP 2018 |
| | : | |
| Appellee | : | Appeal from the Judgment of Superior |
| | : | Court entered on 06/18/2018 at No. |
| | : | 1193 EDA 2016 affirming the |
| v. | : | Judgment of Sentence entered on |
| | : | 04/15/2016 in the Court of Common |
| | : | Pleas, Criminal Division, Philadelphia |
| SCOTT BISHOP, | : | County at No. CP-51-CR-0003894- |
| | : | 2015. |
| Appellant | : | |
| | : | ARGUED: May 16, 2019 |

## DISSENTING OPINION

**JUSTICE WECHT** **DECIDED: September 26, 2019**

I disagree respectfully with the learned Majority's waiver analysis. Unlike the Majority, I would address the issue that this Court granted *allocatur* to resolve.[1] Reaching that issue, I would conclude that Article I, Section 9 of the Pennsylvania Constitution requires the suppression of physical evidence that is tainted by a *Miranda*[2] violation. Accordingly, I dissent.

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[1] By Order dated October 17, 2018, we agreed to answer the following question:

> Should not this Court conduct an independent analysis of whether the Pennsylvania Constitution extends greater protection than its federal counterpart with respect to the Fifth Amendment right against self-incrimination in the context of physical evidence recovered as a result of or during the course of an unwarned statement?

Per Curiam Order, 10/17/2018, at 1.

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

## I.

In March 2015, a state parole agent, Brandon Smith, visited the home of one of his parolees, Scott Bishop. During the visit, Agent Smith subjected Bishop to a drug test, which came back positive for methamphetamine, indicating that Bishop had violated the terms of his parole. Agent Smith handcuffed Bishop and called a supervisor in order to request police backup and seek authorization to search Bishop's home.

When Agent Smith got off the phone, he asked Bishop if there was anything illegal in the home. In response, Bishop admitted that he had a gun, which he stated was in his hallway closet. Agent Smith retrieved the firearm (a .38 caliber revolver) from the closet, along with two digital scales and some marijuana.

Agent Smith continued to search the home and another parole agent, Eric Brown, showed up to help. Agent Brown found a set of car keys on a dresser and asked Bishop where his car was. Bishop replied that it was "right out front." *Commonwealth v. Bishop*, 2018 WL 3015333, at *1 (Pa. Super. 2018). The agents then searched Bishop's vehicle and found eleven rounds of .38 caliber ammunition inside.

Bishop was charged with persons not to possess, possession of marijuana, and possession of drug paraphernalia. Before trial, Bishop moved to suppress the statements that he made to the parole agents and the physical evidence (the gun, the ammunition, the marijuana, and the scales) that the agents discovered. Among other things, Bishop argued that the parole agents violated the Fifth Amendment to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution when they questioned him without first providing him with *Miranda* warnings. Bishop sought suppression of both his incriminating statements and the physical evidence derived from those statements.

The suppression court agreed that Agent Smith should have given Bishop *Miranda* warnings before asking if he had anything illegal in his home. Thus, the court suppressed Bishop's statement admitting that he had a firearm in the hallway closet. That said, the court declined to suppress Bishop's statement to Agent Brown that his vehicle was "right out front." The court concluded that suppression was not warranted because the question that Agent Brown asked Bishop ("Where is your car?") was "not calculated to provoke or evoke an incriminating statement" and therefore "did not amount to interrogation" for *Miranda* purposes. Trial Court Opinion, 7/21/2017, at 5.

With regard to the physical evidence that Agent Smith found in Bishop's closet, the suppression court held that, because Bishop's parole violation gave Agent Smith a legal basis to search Bishop's property, the inevitable discovery doctrine applied. *Id.* at 7 (citing 61 Pa.C.S. § 6153 (authorizing searches of parolees' property when "there is reasonable suspicion to believe that the real or other property in the possession of or under the control of the offender contains contraband or other evidence of violations of the conditions of supervision")). In other words, the court believed that suppression was unwarranted because the evidence in question inevitably would have been discovered even if Bishop had not incriminated himself.

As for the ammunition found in Bishop's vehicle, the trial court also held that, even if the "Where is your car?" question constituted "interrogation" for *Miranda* purposes, the inevitable discovery doctrine applied to that evidence as well. This was so, the court explained, because the parole agents simply would have consulted law enforcement databases to determine which of the vehicles parked nearby was registered to Bishop. Trial Court Opinion at 6.

Bishop proceeded to a non-jury trial, during which the Commonwealth entered into evidence the items seized from Bishop's home and car. The trial court ultimately found

Bishop guilty of all of the offenses charged and sentenced him to three to eight years' incarceration. Bishop then appealed to the Superior Court.

In his 1925(b) statement, Bishop again argued that the ammunition recovered from his vehicle "was the fruit of an illegally obtained statement" and that its admission into evidence at trial therefore violated both the United States and Pennsylvania Constitutions. Statement of Errors Complained of on Appeal, 9/23/2016, at 2-3. Bishop also contended that:

> The suppression court and the trial court erred in failing to suppress the physical evidence recovered from [Bishop's] residence as fruit of the poisonous tree, having been recovered as the result of a statement which was itself suppressed by the lower court, made by [Bishop] while in custodial detention without having been given *Miranda* warnings.

Supplemental Statement of Errors Complained of on Appeal, 3/6/2017, at 2-3.

In response to these claims, the trial court again opined that the items that the agents found in Bishop's home and vehicle were not fruits of an illegal interrogation because "the Commonwealth proved by a preponderance of the evidence that the parole agents would have inevitably discovered the contraband in [Bishop's] home without his statement to the parole agents." Trial Court Opinion at 7.

In a unanimous, unpublished decision, the Superior Court affirmed the suppression court's ruling. Unlike the suppression court, the panel found it unnecessary to decide whether Agent Brown's question concerning Bishop's car constituted an "interrogation" for *Miranda* purposes. The panel also declined to embrace the suppression court's inevitable discovery analysis. Instead, the panel held that neither the Fifth Amendment nor Article I, Section 9 requires the suppression of physical evidence tainted by a *Miranda* violation. *See* Superior Court Op. at 7 (citing *United States v. Patane*, 542 U.S. 630 (2004) (plurality) (holding that *Miranda* does not require suppression of physical evidence that is discovered based upon an unwarned but voluntary statement) and *Commonwealth*

*v. Abbas*, 862 A.2d 606 (Pa. Super. 2004) (adopting *Patane* and finding no indication that the Pennsylvania Constitution extends greater protection than the Fifth Amendment with regard to physical evidence obtained as result of an unwarned statement)).

Bishop promptly filed a petition for allowance of appeal, challenging the Superior Court's conclusion that Article I, Section 9 of the Pennsylvania Constitution does not require the suppression of physical evidence obtained in violation of *Miranda*. More specifically, Bishop urged this Court to overturn the Superior Court's decision in *Abbas*, which purported to adopt the United States Supreme Court's plurality decision in *Patane* as a matter of Pennsylvania constitutional law. *See* Petition for Allowance of Appeal, 7/18/2018, at 6-7.

We granted *allocatur*, agreeing to consider whether Article I, Section 9 of the Pennsylvania Constitution requires the suppression of physical evidence that is tainted by a *Miranda* violation.

**II.**

Today's Majority holds that Bishop's claim is waived, for two reasons. First, the Majority finds waiver because Bishop "did not distinguish between the Fifth Amendment and Article I, Section 9 before the suppression court." Majority Opinion at 11. Second, the Majority holds that Bishop waived his claim because he failed to argue before the Superior Court that Article I, Section 9 of the Pennsylvania Constitution should be interpreted more expansively than the Fifth Amendment to the United States Constitution. *Id.* at 11-12.

The Majority's conclusion flows from its adoption of a brand-new issue-preservation regime, which it borrows from the New Mexico Supreme Court. *See id.* at 10 (quoting *State v. Gomez*, 932 P.2d 1, 8-9 (N.M. 1997)). Under that framework, when

no precedential decision has construed the state constitutional provision at issue to provide more protection than its federal counterpart, the litigant:

> must assert *in the trial court* that the state constitutional provision at issue should be interpreted more expansively than the federal counterpart and provide reasons for interpreting the state provision differently from the federal provision. This will enable the trial court to tailor proceedings and to effectuate an appropriate ruling on the issue.

*Gomez*, 932 P.2d at 8 (footnote omitted; emphasis in original).

In adopting this New Mexico approach, the Majority explains that "the 'claim' to be preserved, in departure scenarios, is a claim that an analogue provision of the state constitution operates differently than its federal counterpart." Majority Opinion at 11 n.8. In practice, this means that Pennsylvania courts will decline to enforce independent Pennsylvania constitutional rights (many of which pre-date their federal counterparts)[3] unless the defendant offers the trial court "some analysis," Majority Opinion at 11-12 n.9, distinguishing the state constitutional provision from a related federal one. This holding, which the Majority couches creatively as "an apt refinement of our present jurisprudence," finds no support whatsoever in Pennsylvania law.[4]

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[3] *See League of Women Voters v. Commonwealth*, 178 A.3d 737, 741 (Pa. 2018) ("The people of this Commonwealth should never lose sight of the fact that, in its protection of essential rights, our founding document is the ancestor, not the offspring, of the federal Constitution."); KEN GORMLEY, THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES 2 (2004) ("Many lawyers and judges are unaware that the Pennsylvania Constitution, drafted in the midst of Revolution in 1776, is twelve years older than the federal Constitution.").

[4] The Majority cites *Commonwealth v. Lagenella*, 83 A.3d 94, 99 n.3 (Pa. 2013), in support of today's novel holding, but the *Lagenella* Court made no such pronouncement. Rather, it simply declined to find that Article 1, Section 8 afforded an appellant greater protection than the Fourth Amendment given that the appellant had failed to argue *in his appellate brief* that the two provisions differed in any way. *Lagenella*, 83 A.3d at 99 n.3 ("Although Appellant refers to the Fourth Amendment and Article 1, Section 8 collectively throughout his brief, he offers no argument as to how Article 1, Section 8 affords him greater protection than the Fourth Amendment. Thus, for purposes of this appeal, we find the Fourth Amendment and Article I, Section 8 to be coextensive.").

The Majority does not explain what benefit it sees in adopting New Mexico's rule in order to analyze preservation of claims under Pennsylvania's Constitution. Today's decision is sure to inject even more arbitrariness and uncertainty into this Court's already erratic waiver jurisprudence. For one thing, the threshold question under the *Gomez* rubric—whether the state constitutional provision at issue has been interpreted differently than its federal analog—often will not have a clear-cut answer. For example, some decisions from this Court have interpreted Article I, Section 9 to provide protections that the Fifth Amendment does not. *See Commonwealth v. Molina*, 104 A.3d 430, 444 (Pa. 2014) (plurality) (acknowledging that "this Court has taken inconsistent stances in determining whether the right against self-incrimination under [Article I,] Section 9 exceeds the protections of the Fifth Amendment"); *accord Commonwealth v. Triplett*, 341 A.2d 62 (Pa. 1975) (holding that Article I, Section 9, unlike the Fifth Amendment, bars the use at trial of a suppressed but voluntary statement for impeachment purposes), *superseded by constitutional amendment*, PA CONST. art. 1, § 9. Yet there are conflicting decisions, which hold that Article I, Section 9 "affords no greater protections against self-incrimination than the Fifth Amendment to the United States Constitution." *Commonwealth v. Cooley*, 118 A.3d 370, 375 n.8 (Pa. 2015).

The Majority's nonresponsive retort to this critique is that "uncertainty in the law generally implicates a need for better development in order to provide the courts with beneficial advocacy[.]" Majority Opinion at 17. That ignores my point: today's decision adopting the *Gomez* rubric muddies, rather than clarifies, our issue preservation rules. From now on, litigants will argue about whether the constitutional claim at issue falls within *Gomez*' first category of claims (which can be preserved simply by citing the relevant constitutional provision) or *Gomez*' second category of claims (which require "some analysis" supporting the claim for departure). *See id.* at 10. In many cases, both sides

will be able to cite precedent from this Court supporting their position. *Compare Leonard v. Thornburgh*, 489 A.2d 1349, 1351 (Pa. 1985) ("[A]llegations of violations of the equal protection clause, and of the Uniformity Clause, are to be analyzed in the same manner."), *with Hosp. & Healthsystem Ass'n of Pa. v. Commonwealth*, 77 A.3d 587, 606 n.26 (Pa. 2013) ("In some contexts the Uniformity Clause has been recognized as reflecting more stringent limitations [than the Fourteenth Amendment's Equal Protection Clause]."), *and Commonwealth v. Real Property & Improvements Commonly Known As 5444 Spruce Street*, 832 A.2d 396, 399 (Pa. 2003) ("This Court has held that Article I, Section 13 of the Pennsylvania Constitution is coextensive with the Eighth Amendment." (footnote omitted)), *with Commonwealth v. Batts*, 66 A.3d 286, 298 n.5 (Pa. 2013) (holding that Article I, Section 13 is coextensive with the Eighth Amendment except when it is not).

Eagle-eyed readers also will note that the Majority leaves itself plenty of wiggle room to ignore today's newly invented issue-preservation rule whenever it pleases. *See* Majority Opinion at 12 ("We also deem it appropriate, *in our discretion*, to enforce the waiver here." (emphasis added)). Indeed, today's decision—like many of this Court's waiver decisions—is a paragon of judicial doublespeak. The Majority tells us, for instance, that an appellant need not engage in a "*complete* analysis" of his state constitutional claim (*id.* at 11 n.9 (italics added)), but that he must engage in "*some* analysis" and "provide reasons for interpreting the state provision differently from the federal provision." *Id.* at 10, 11-12 n.9 (quoting *Gomez*, 932 P.2d at 8). Similarly abstruse is the Majority's suggestion that it would never apply a new rule "to the detriment of a litigant who has had no previous notice of it" (*id.* at 6), only to do exactly that a mere five pages later. *Id.* at 11 n.8 (proclaiming that today's decision adopting New Mexico law should not "come as a surprise to the counseled appellant"). In short, the Majority's implementation of the *Gomez* framework adds even more uncertainty for litigants

wondering what exactly they must do or say to preserve a claim under the Pennsylvania Constitution to this Court's satisfaction. I suppose the takeaway here is: "It depends."

Adding an additional layer of gloss on top of today's newly manufactured issue preservation rule, the Majority accepts that its already-amorphous "some analysis" requirement "can be truncated in futility scenarios (*i.e*., where the reviewing court is bound by a contrary ruling of a higher court)." *Id.* at 10, 11-12 n.9. But the Majority ignores the fact that Bishop himself was in a "futility scenario" when he litigated his suppression motion given that the trial court had no choice but to follow *Commonwealth v. Abbas*, 862 A.2d 606 (Pa. Super. 2004). In *Abbas*, the Superior Court explained that:

> Currently, there is no precedent in this Commonwealth indicating that the Pennsylvania Constitution extends greater protection than its federal counterpart with respect to the Fifth Amendment right against self-incrimination in the context of physical evidence obtained as a result of or during the course of an unwarned statement. We find *Patane* instructive here. Accordingly, until our Supreme Court has the occasion to conduct an independent analysis, we are persuaded by the reasoning in *Patane*.

*Abbas*, 862 A.2d at 609-610 (footnotes omitted); *accord Commonwealth v. Thevenin*, 948 A.2d 859, 861 (Pa. Super. 2008) (noting that, "[i]n *Abbas*, a panel of our Court applied the lessons of *Patane* to Pennsylvania law"); *Commonwealth v. Jones*, 193 A.3d 957, 966 (Pa. Super. 2018) (same).

The Superior Court's holding in *Abbas* notwithstanding, the Majority claims that Bishop, in theory, could have prevailed below if the suppression court had "undertaken its own independent research akin to an *Edmunds* analysis to determine whether Article I, Section 9 should be regarded as affording broader protection than its Fifth Amendment counterpart." Majority Opinion at 15. This is so, the Majority tells us, because the appellant in *Abbas* did not explicitly argue that Article I, Section 9 provides more protection than the Fifth Amendment, and "[i]t would be untenable for a court to decide an important

state constitutional question as a precedential matter in the absence of any argumentation and without any analytical treatment on its own part of the departure question beyond an expression of agreement with the analysis of the Supreme Court of the United States tethered to the federal constitution." *Id.* at 12 n.10. Perhaps that is a fair criticism of the *Abbas* Court's decision. But the simple fact remains that the suppression court, unlike the Majority, has no authority to declare that published Superior Court precedent is "untenable." *Id.*

The upshot of all of this is that, even under the Majority's newfangled "infrastructure," Bishop was not required to offer the suppression court a "complete analysis," or even "some analysis," of his departure claim; instead, a "truncated presentation" would have sufficed. All of these phrases, of course, are entirely meaningless, which is why today's decision—whether by design or by accident—makes an *Edmunds* analysis a *de facto* prerequisite for preserving departure claims. *See id.* at 165 ("[T]he most straightforward course for counsel is to follow the template indicated in *Edmunds*, and counsel who do so certainly have safe haven. (internal citation omitted)); *but see Commonwealth v. Arroyo*, 723 A.2d 162, 166 n.6 (Pa. 1999) ("[A]n appellant's failure to engage in an *Edmunds* analysis does not result in waiver of a state constitutional claim."). The Majority's message to the criminal defense bar is clear in its lack of clarity: Do what we have said you need not do or else we, in our "considered judgment," might find your analysis too "scant" or too "truncated" to warrant our attention. Majority Opinion at 11-12 n.9, 16, 17.

This is no rule. It is only muddle and confusion. But perhaps the greatest flaw in the Majority's decision is what it omits. The Majority concludes that, "because [Bishop] did not distinguish between the Fifth Amendment and Article I, Section 9 before the suppression court, his claim favoring departure is waived." *Id.* at 11. This ignores the

precise nature of Bishop's "claim favoring departure" and its evolution before arriving at this Court. In the suppression court, the parties' arguments mainly concerned whether the agents were even required to provide Bishop with *Miranda* warnings in the first place (*i.e.*, whether the agents' questions constituted an "interrogation" for *Miranda* purposes) and, if so, whether the physical evidence inevitably would have been discovered absent the *Miranda* violation. Consistent with this framing, the suppression court held that the question that Agent Brown asked Bishop ("Where is your car?") "did not amount to interrogation" for *Miranda* purposes. Trial Court Opinion at 5. Alternatively, concluded the suppression court, if *Miranda* warnings were required, then the parole agents would have found the items in Bishop's vehicle "pursuant to the inevitable discovery doctrine." *Id.* at 6. In other words, by relying upon the inevitable discovery doctrine, the suppression court seemed to assume that physical evidence discovered as a result of a *Miranda* violation ordinarily must be suppressed.

To the extent that Bishop did not adequately develop his "departure claim" before the suppression court, it is important to remember why that might be. Bishop was not actually asking the suppression court to hold that Article I, Section 9 provides more protection to defendants as it relates to the inevitable discovery doctrine or as to what constitutes "interrogation" for *Miranda* purposes. The crux of Bishop's argument before this Court—that we should reject the *Patane* rule for purposes of Article I, Section 9 of the Pennsylvania Constitution—necessarily arose only *after* the Superior Court affirmed the suppression court on an *alternative* basis and held that physical evidence discovered as a result of a *Miranda* violation is not subject to suppression under Article I, Section 9. *See Bishop*, 2018 WL 3015333, at *4 (Pa. Super. 2018). Once the Superior Court made that pronouncement, Bishop challenged it at the first available opportunity. *See* Petition for Allowance of Appeal, 7/18/2018, at 5-11.

The *Gomez* test that today's Majority brings to us from New Mexico does not account for this unique scenario. Bishop is forever barred from obtaining meaningful appellate review in this Court simply because the Superior Court invoked the right-for-any-reason doctrine. Bishop cannot ask this Court to review the suppression court's rationale (because the Superior Court's decision rendered it moot) nor can he seek review of the Superior Court's rationale (because he did not preemptively and clairvoyantly challenge it in the suppression court). In effect, Bishop gets no review from this Court. His claim falls between two stools.

In sum, the waiver rule that the Majority adopts today has no basis in Pennsylvania law, does not account for the unique circumstances of this case, adds nothing of value to our issue preservation jurisprudence, and is sure to be applied (or not applied) in an arbitrary and ad-hoc fashion. I would instead hold that Bishop adequately preserved his claim when he argued, at the first available opportunity after the Superior Court rendered its decision, that Article I, Section 9 of the Pennsylvania Constitution mandates the suppression of physical evidence derived from a *Miranda* violation.

**III.**

Turning to the merits of this appeal, I would conclude that Article I, Section 9 of the Pennsylvania Constitution, unlike the Fifth Amendment to the United States Constitution, requires that physical evidence tainted by a *Miranda* violation must be suppressed. To explain why I believe that a departure from federal constitutional standards is warranted here, I will begin with a discussion of the United States Supreme Court's relevant Fifth Amendment precedent.

In a series of decisions spanning several decades, the Supreme Court has declined to hold that *Miranda* violations trigger the fruit of the poisonous tree doctrine. This means that, while a defendant's unwarned statement must be suppressed per

*Miranda*, any subsequent statements or derivative physical evidence can be admitted at trial so long as the defendant's confession was voluntary.

The first of these decisions is *Michigan v. Tucker*, 417 U.S. 433 (1974). In that case, the police were investigating an assault that left the victim unable to identify her attacker. The police eventually arrested the victim's neighbor, Thomas Tucker, and took him to the police station for questioning. The officers advised Tucker that he had the right to an attorney and that any statements he made could be used against him, but they failed to inform Tucker that he would be provided with an attorney free of charge if he could not afford to retain one himself.

Tucker spoke with the police and offered an alibi. He claimed that he was with a man named Robert Henderson when the victim was attacked. The police then contacted Henderson, who confirmed that he was with Tucker on the day of the crime. But Henderson told the police that he and Tucker had parted ways well before the assault took place. Henderson also claimed that, on the day after the crime, Tucker had scratches on his face, which he told Henderson were inflicted by "some woman [who] lived the next block over." *Tucker*, 417 U.S. at 437.

Before trial, Tucker moved to suppress Henderson's testimony. Tucker argued that, since he had not been advised of his full *Miranda* rights when he revealed Henderson's identity, his Fifth Amendment right against compulsory self-incrimination had been violated. The trial court denied the motion, Henderson testified at Tucker's trial, and Tucker was convicted.

On appeal to the Supreme Court, Tucker argued that evidence derived solely from statements that he made without full *Miranda* warnings should be excluded from evidence as fruit of the poisonous tree. The Supreme Court rejected this argument, holding that the testimony of a witness who has been identified through an unwarned confession is

admissible. The High Court embraced this narrow view of the exclusionary rule by reasoning that a violation of *Miranda* is not a violation of the Fifth Amendment itself, since the Self-Incrimination Clause only prevents compelled statements from being used against the accused at trial. *See Tucker*, 417 U.S. at 445-46 (explaining that "the police conduct at issue here did not abridge respondent's constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege"). From there, the Court explained that, because the purpose of the exclusionary rule is to "compel respect for the constitutional guaranty" by "removing the incentive to disregard it," *id.* at 446, and because *Miranda* is not itself a constitutional right, there is no constitutional violation that can be deterred by suppressing evidence obtained following a *Miranda* violation.

The most recent United States Supreme Court decision in this area, and the one upon which our Superior Court relied below, is *United States v. Patane*, 542 U.S. 630 (2004). In that case, the police were investigating whether the defendant had violated a restraining order that prohibited him from contacting his ex-girlfriend. During the investigation, the police learned from the Bureau of Alcohol, Tobacco, Firearms, and Explosives that the defendant (who was a convicted felon) likely possessed a .40 Glock pistol. Two officers went to the defendant's home and arrested him for violating the restraining order. One of the officers tried to read the defendant *Miranda* warnings, but got no further than "you have the right to remain silent" before the defendant interjected and asserted that he knew his rights. After that, neither officer attempted to complete the warnings.

When one of the officers asked the defendant about the Glock, he initially responded "I am not sure I should tell you anything about the Glock because I don't want you to take it away from me." *Patane*, 542 U.S. at 635. The officer persisted in his

questioning, and the defendant eventually confessed that the firearm was in his bedroom. The officer then retrieved the firearm, which the prosecution sought to enter into evidence at the defendant's subsequent trial.

Although *Tucker*'s rationale—that *Miranda* is not the Constitution and the exclusionary rule only exists to deter *constitutional* violations—would seem to allow Patane's gun to be used against him at trial, the state of the law had evolved post-*Tucker*. Four years prior to *Patane*, in *Dickerson v. United States*, 530 U.S. 428 (2000), the Supreme Court held that "*Miranda* announced a constitutional rule." *Id.* at 444. So when Patane's appeal made its way to the Court of Appeals, that court, relying on *Dickerson*, held: (1) that the taking of unwarned statements violates a suspect's constitutional rights; and (2) that the deterrence rationale underlying the exclusionary rule thus requires the suppression of fruits of unwarned statements. *United States v. Patane*, 304 F.3d 1013, 1026-27 (10th Cir. 2002).

The Supreme Court ultimately reversed, though in a fractured plurality opinion. Five justices agreed that the Self-Incrimination Clause of the Fifth Amendment "is not implicated by the admission into evidence of the physical fruit of a voluntary statement." *Patane*, 542 U.S. at 636. Writing for a three-Justice plurality, Justice Thomas explained that *Dickerson*'s "re-constitutionalization" of *Miranda* did not change the fact that "a mere failure to give *Miranda* warnings does not, by itself, violate a suspect's constitutional rights or even the *Miranda* rule."[5] *Id.* at 641.

I am not persuaded by the *Patane* plurality's reasoning, and I would not permit it to govern our own jurisprudence under Article I, Section 9 of Pennsylvania's Constitution.

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[5] Justices Kennedy and O'Connor concurred in the judgment of the Court, but found it "unnecessary to decide whether the detective's failure to give Patane the full *Miranda* warnings should be characterized as a violation of the *Miranda* rule itself" or whether there is any unconstitutional conduct to deter "so long as the unwarned statements are not later introduced at trial." *Patane*, 542 U.S. at 645 (Kennedy, J., concurring).

*Miranda*'s raison d'être is to counteract certain inherently coercive methods of police interrogation. *See Miranda*, 384 U.S. at 455 ("[T]he very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals."). We accomplish exactly the opposite result if we exclude only the incriminating statements that police obtain when they withhold *Miranda* warnings while simultaneously permitting the use of any evidence that those same statements bring to light. As Justice Souter put it in his dissent in *Patane*: "[t]here is no way to read this case except as an unjustifiable invitation to law enforcement officers to flout *Miranda* when there may be physical evidence to be gained." *Patane*, 542 U.S. at 647 (Souter, J., dissenting).

Critical to the *Patane* plurality's conclusion was its view that an exclusionary rule should exist only when it will deter police officers from violating the Constitution. *Patane*, 542 U.S. at 630; *see United States v. Janis*, 428 U.S. 433, 454 (1976) ("If the exclusionary rule does not result in appreciable deterrence, then, clearly, its use . . . is unwarranted."). Critically, that narrow deterrence-focused understanding of the exclusionary rule is *not* one that this Court shares as a matter of Pennsylvania constitutional law. In the Article I, Section 8 context, for example, we repeatedly have explained that, unlike the Fourth Amendment's exclusionary rule, the primary purpose of our own exclusionary rule is to protect the underlying constitutional right, not simply to deter police misconduct. *Commonwealth v. Arter*, 151 A.3d 149, 167 (Pa. 2016); *Commonwealth v. Edmunds*, 586 A.2d 887, 899 (Pa. 1991) ("[W]e disagree with [the United States Supreme] Court's suggestion . . . that we in Pennsylvania have been employing the exclusionary rule all these years to deter police corruption. We flatly reject this notion.").

Given this Court's recognition that the exclusionary rule is essential to protect the individual rights enumerated in our own Pennsylvania Constitution, and because I have serious misgivings about embracing a rule that would reward police misconduct, I would

hold that physical evidence tainted[6] by a *Miranda* violation must be suppressed as fruit of the poisonous tree under Article I, Section 9 of the Pennsylvania Constitution. The Majority's failure to resolve this important constitutional issue today is regrettable. I remain optimistic that, in a future case, this Court will join the many jurisdictions that have rejected the *Patane* plurality's analysis as flawed and unpersuasive.[7]

I respectfully dissent.

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[6] *See Commonwealth v. Fulton*, 179 A.3d 475, 489-90 (Pa. 2018) (explaining that illegally obtained evidence can be used against the defendant at trial only if it is "gained from an independent source" or if it "would inevitably have been discovered without reference to the police error or misconduct").

[7] *Swinomish Indian Tribal Cmty. v. Willup*, 2008 WL 9438062, at *3 (Swinomish Tribal Ct. 2008) ("If the remedy of exclusion is to have any meaningful effect, evidence obtained following [*Miranda*] violations must be excluded."); *State v. Peterson*, 923 A.2d 585, 592 (Vt. 2007) ("The approach of *Patane* . . . would create an incentive to violate *Miranda.* We see no justification for a such a retrenchment in these circumstances."); *State v. Farris*, 849 N.E.2d 985, 996 (2006) ("We believe that to hold otherwise would encourage law-enforcement officers to withhold *Miranda* warnings and would thus weaken Section 10, Article I of the Ohio Constitution."); *Commonwealth v. Martin*, 827 N.E.2d 198, 206 (Mass. 2005) (calling it a "wiser course," to enforce a "bright-line rule that ensures rather than undermines the protection of the important rights and interests embodied" in the Massachusetts Constitution); *State v. Knapp*, 700 N.W.2d 899, 918-19 (Wis. 2005) ("The rule argued for by the State would minimize the seriousness of the police misconduct producing the evidentiary fruits, breed contempt for the law, and encourage the type of conduct that *Miranda* was designed to prevent[.]").