RECEIVED
11-16-2012
CLERK OF SUPREME COURT
OF WISCONSIN

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2010AP2809-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MATTHEW A. LONKOSKI,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District III,
Affirming a Judgment of Conviction
Entered in the Oneida County Circuit Court,
the Honorable Mark. A. Mangerson, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

TABLE OF CONTENTS

CASES CITED

ISSUES PRESENTED

I. Matthew Lonkoski was being interrogated in an interview room at the Sheriff's Department when he asked for a lawyer. Less than thirty seconds later, Mr. Lonkoski was informed that he was under arrest, and the interrogation then continued after a break of a few minutes. Was Mr. Lonkoski's request for a lawyer a valid invocation of his ***Miranda*** right to counsel, either because he was actually undergoing custodial interrogation when he made the request, or because custodial interrogation was imminent or impending?

The circuit court initially determined that Mr. Lonkoski had invoked ***Miranda***, but later reversed itself.

The court of appeals did not decide this question.

II. As described above, after Mr. Lonkoski asked for a lawyer, he asked whether he was under arrest. One of the interrogating officers replied "You are now" and Mr. Lonkoski immediately agreed to continue the interrogation. Did the state show that it was Mr. Lonkoski, rather than the officers, who reinitiated the conversation, as ***Edwards v. Arizona*** requires?

The circuit court held that Mr. Lonkoski did not reinitiate the conversation.

The court of appeals held that Mr. Lonkoski did reinitiate the conversation.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication are customary for cases decided by this court.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

On the morning of May 4, 2009, Peyton L., aged approximately ten months, was found "purple and not breathing" by her parents, Matthew Lonkoski and Amanda Bodoh. (1:1). Medical personnel and law enforcement responded to the 911 call, and Peyton was declared dead at the scene. (1:1; 14:7). The following day, a Fond du Lac County medical examiner performed an autopsy. (14:15-17). Samples of Peyton's blood and urine were found to contain a "large amount" of morphine, and the urine sample also contained hydromorphone. (14:18, 21). The medical examiner concluded that Peyton had died of morphine toxicity. (14:22).

On May 22, an Oneida County Sheriff's detective asked Ms. Bodoh to come to the department for an interview. (26:7-8). Mr. Lonkoski accompanied her. (26:8). After speaking with Ms. Bodoh, the officers sent her to another room and brought Mr. Lonkoski into the interview room. (26:9). The interviewing officers were Detective Sara Gardner and Lieutenant Jim Wood. (26:5-6, 9). To get to the room, Mr. Lonkoski had to be escorted by Detective Gardner from the lobby, through a locked door, down a hallway, and into the interview room. (26:10-11). Once Mr. Lonkoski reached the room, the door was closed. (71:00:01:16).

The officers began to interrogate Mr. Lonkoski. The interrogation was video-recorded. (26:11). The circuit court reviewed this video before the suppression hearing and again afterward in reaching its initial decision to suppress the confession. (26:3; 60:2; App. 110).[1] What follows is undersigned counsel's transcription of relevant portions of the interview as depicted by the video.

(Beginning at 00:01:07):

> Lt. Wood: You want to have a seat over there? Do you know Sara?
>
> Mr. Lonkoski: Yes.
>
> Det. Gardner: Yeah very well. How are you?
>
> Mr. Lonkoski: Very good. How have you been?
>
> Det. Gardner: Well, better than you from what I hear's been going on.
>
> Lt. Wood: Matt I'll, I'll close the door. You're not under arrest. You understand that you guys came here by yourself and we want to talk to you about Peyton and Peyton's death and, um, let you know about some of the, ah, findings from the autopsy and everything. I mean you're, you're the father, right?

---

[1] A copy of the video is included in the record on appeal and in this brief's appendix. (71; App. 147). The state also submitted a partial transcript of the video as an attachment to its brief in opposition to Mr. Lonkoski's suppression motion. (21:11-18; App. 139-146). Consistent with the circuit court's discussion, times noted are from the beginning of the video; i.e. the times reflected on the video player's timer while viewing the video, rather than the actual time of day of the interview, which is displayed in the lower left-hand portion of the video image. The times noted should be the same for the video copy in the appendix.

Mr. Lonkoski: Mm hmm. (Affirmative).

Lt. Wood: Are you okay talking to us?

Mr. Lonkoski: Yeah.

Lt. Wood: Okay, I've got the door closed just cause I don't want other people to hear and stuff okay? Um, what what has gone on since Peyton's death with you? How are you doin'?

At this point, the conversation turns to difficulties in Mr. Lonkoski's relationship with Ms. Bodoh. Beginning at 00:03:27:

Det. Wood: Did she talk to you a little bit about there was some things that she heard you'd been saying?

Mr. Lonkoski: Yes ... I went to, um, Monster Mart and the cashier heard a rumor that she supposedly suffocated her, and I'm like, I don't believe that one bit. I'm like, what?

For approximately the next twenty minutes, the officers ask Mr. Lonkoski for information regarding the events leading up to Peyton's death. Then, at 00:27:04, comes the exchange that is the basis of this appeal:

Lt. Wood: What should happen to somebody that did something to Peyton?

Mr. Lonkoski: Did Amanda do something to my daughter?

Lt. Wood: I didn't say Amanda did. Something happened to Peyton though that wasn't good.

Mr. Lonkoski: Well…

Lt. Wood: What should happen to a person?

Mr. Lonkoski: It all depends on what the situation is.

Lt. Wood: I mean mis … sometimes mistakes are .. right? I mean that's possible.

Mr. Lonkoski: Yeah, um.

Lt. Wood: So is there room to forgive?

Mr. Lonkoski: There's – Oh wow, oh wow.

Lt. Wood: What do you think happened?

Mr. Lonkoski: I don't know what happened, I wasn't at the apartment.

Lt. Wood: Knowing, knowing um Matt, that doctors and, and all the technology that's out there today, and, and we know, we know a lot now what happened to Peyton. Now I'm looking to you to find out how much of will you tell me?

(00:28:00)

Mr. Lonkoski: What? I'm sorry, the last bit I did not hear you a bit. I'm – this is just shocking.

Lt. Wood: Something bad happened to Peyton, and the doctors know exactly what it is, and I'm looking for you who loves your child, this is your baby right?

Mr. Lonkoski: Yes.

Lt. Wood: And you're telling me that there's a little room for forgiveness for people?

Mr. Lonkoski: Ah, oh wow. What, and I, um, if they intentionally did it I would put them in prison.

Lt. Wood: Okay. What if it wasn't intentional, what if it was some of … just maybe poor parenting skills or something or…

Mr. Lonkoski: Are you telling me that rumor I heard was true?

Lt. Wood: What rumor?

Mr. Lonkoski: That I told you from the person that told me at the gas station.

Lt. Wood: No, no. The autopsy shows that Peyton died of an overdose.

Mr. Lonkoski: An overdose? Of what?

Lt. Wood: Now that's – I'd like for you to try and help me out a little bit.

(00:29:00)

Mr. Lonkoski: All I know is when I got back to the apartment, Amanda told me she gave, um, Peyton baby Tylenol. The bottle of baby Tylenol you guys seen when you guys went into the apartment was on top of the…

Lt. Wood: Not the baby Tylenol, I know. It's morphine.

Mr. Lonkoski: What?

Lt. Wood: Morphine.

Mr. Lonkoski: What?

Lt. Wood: Morphine.

Mr. Lonkoski: Oh my god.

Lt. Wood: What did you say to Peyton when you said goodbye to her that day out when I was out there and you went out to the truck before they took her away … what'd you say to her?

Mr. Lonkoski: I said that I love her and I would be by her soon.

Lt. Wood: And that you were sorry?

Mr. Lonkoski: Sorry for her passing away.

Lt. Wood: There's, there's more to it. And that's, and again Matt, it this is a very hard thing. A hard thing for you as a, as a pop, and, and, this is your baby, but you gotta, you got to dig deep inside yourself now. The autopsy knows what happened. We know what happened. What I need from you is I need you to look up and look in your heart and look up at Peyton and say, say okay, I can deal with it. I can, I can talk open…

Mr. Lonkoski: Are you accusing me of giving my daughter morphine?

Det. Gardner: Matt, Matt, look at me. Every time you and I have talked, okay, and we go back a long way, all right, there's been some rough stuff that you and I have dealt with…

(00:30:30)

Mr. Lonkoski: I want a lawyer. I want a lawyer now. This is bullshit.

Lt. Wood: Okay.

Mr. Lonkoski: I would never do that to my kid, ever. I wasn't even at the apartment at all except at night. Why are you guys accusing me?

Lt. Wood: I didn't accuse you.

Det. Gardner: We were just asking.

Mr. Lonkoski: There is this is is is is is is is is insane.

Lt. Wood: I have to stop talking to you though 'cause you said you wanted a lawyer.

Mr. Lonkoski: Am I under arrest?

Lt. Wood: You are now.

Mr. Lonkoski: Then I'll talk to you without a lawyer… I, I don't want to go to jail, I didn't do anything to my daughter, I would not lie to you guys – this is in fact life or death.

Lt. Wood: Well, now you, now you complicate things.

Mr. Lonkoski: I just, I just want to leave here and go by my mom now because this is in- this is, this is insane.

Det. Gardner: Matt we can't, we can't talk to you just because you don't want to go to jail okay some things that we wanted to talk to you about were like Jim said – we know what happened to Peyton – we need to know a couple of the gaps to fill the gaps.

Mr. Lonkoski: All right…

Det. Gardner: (Unintelligible).

Mr. Lonkoski: Ask those gaps.

Det. Gardner: That's what we want you to talk to us about.

Mr. Lonkoski: Ask those gaps.

Det. Gardner: But I don't want you to feel like we're accusing you.

Mr. Lonkoski: All right. I will calm down.

Det. Gardner: I don't – you don't have to talk to us – okay.

> Mr. Lonkoski: Can can I can we go smoke a can I smoke a cigarette when we do this?
>
> Lt. Wood: What we're gonna do is – I'm gonna come back and, and again you have to be careful what you say…
>
> Mr. Lonkoski: (Unintelligible).
>
> Lt. Wood: If you want an attorney – you can have an attorney – we're gonna quit – what I'll do is I'll come back to you – go have a cigarette with Sara.
>
> Mr. Lonkoski: Okay thank you.
>
> Lt. Wood: Okay and I need to get more of the story.
>
> Mr. Lonkoski: I will tell you everything I promise on my dead daughter's life and my (unintelligible) right now.
>
> Lt. Wood: What I'm, what I'm gonna do is I'm gonna come back and I'll read you a ***Miranda*** card which is I'll read you your rights…

Mr. Lonkoski was eventually escorted from the room to smoke a cigarette and to use the bathroom. (71:00:34:07, 00:39:50). During Mr. Lonkoski's absence from the room, Lt. Wood can be heard on the telephone talking to a lawyer in the district attorney's office about whether it is permissible to continue the interrogation.

When Mr. Lonkoski, Det. Gardner, and Lt. Wood returned to the room, Lt. Wood read the ***Miranda*** rights to Mr. Lonkoski, and Mr. Lonkoski agreed to answer further questions. (71:00:41:57). The two officers interrogated Mr. Lonkoski over approximately two more hours that day. (71). Mr. Lonkoski eventually made incriminating statements.

Mr. Lonkoski was held in jail for the next four days, and was interrogated again. (1:2). During the second interrogation, Mr. Lonkoski made further incriminating statements, telling the officers that Peyton had picked up and ingested a morphine tablet that he had placed on a coffee table. (1:2-3).

Mr. Lonkoski was charged with first-degree reckless homicide. (1:1). He moved to suppress his statements and all evidence derived therefrom. (20:1).

After the parties filed briefs on the motion, (21; 22), the court held an evidentiary hearing. (26). The court heard argument and scheduled another hearing to announce its decision. (26:18-32, 34).

At the decision hearing, held January 19, 2010, the court ruled that because Mr. Lonkoski had requested an attorney and the interrogation had not ceased, all statements made after the request were inadmissible under ***Edwards v. Arizona***, 451 U.S. 477 (1981). (60:5-7; App. 113-15).[2]

Mr. Lonkoski submitted an order to effectuate the court's decision, to which the state objected. The state complained that the order stated that Mr. Lonkoski had been in custody at the time of his request for counsel, while the trial court had not explicitly made such a finding. (25; 31). Mr. Lonkoski responded with a brief arguing that he was in custody at the time of the request. (33). The state also filed a motion for reconsideration, arguing that the court had erred in holding that the officers were required to "cease" their interrogation after Mr. Lonkoski asked for counsel, because

[2] This transcript appears twice in the record as compiled, as items 23 and 60.

he had immediately reinitiated conversation with the officers. (35; 36).

On February 15, 2010, the court announced that it was reversing its earlier decision. It held that because Mr. Lonkoski had been told he was in custody a few seconds after he asked for an attorney, this request did not suffice to invoke his right to counsel. (61:10-11; App. 126-27). The court also held that Mr. Lonkoski did not "clearly claim" his right to counsel because he immediately afterward signaled that he wished to keep talking to the officers. (61:11-12; App. 127-28).

Eventually, Mr. Lonkoski pleaded guilty to reduced charges: one count of recklessly causing great bodily harm to a child, and one count of child neglect resulting in death. (62:4). The court sentenced him to 5 years of initial confinement and 5 years of extended supervision on the first count, and 12 years of initial confinement and 5 years of extended supervision on the second. (46; App. 137).

Mr. Lonkoski appealed, asserting that he had validly invoked his ***Miranda*** right to counsel and that the officers' response to that invocation amounted to further interrogation. The court of appeals affirmed. It declined to decide whether Mr. Lonkoski's request for a lawyer had been an effective invocation of his ***Miranda*** right, instead holding that there had been a "clear break" in the interrogation and that Mr. Lonkoski had reinitiated the conversation before voluntarily waiving his ***Miranda*** rights. ***State v. Lonkoski***, No. 2010AP2809-CR, 2012 WL 130505 (Wis. Ct. App. Jan. 18, 2012) (unpublished), ¶¶4, 7-10; (App. 105-07). Mr. Lonkoski petitioned for review, and this court granted the petition. Order of October 17, 2012, ***Lonkoski***, No. 2010AP2809-CR.

ARGUMENT

I. Standard of Review and Summary of Argument.

It is the state's burden to show by a preponderance of the evidence that a confession is voluntary. ***State v. Jerrell C.J.***, 2005 WI 105, ¶17, 283 Wis. 2d 145, 699 N.W.2d 110. The burden also rests with the state to show police compliance with ***Miranda***, including on the issue of whether custodial interrogation occurred. ***State v. Armstrong***, 223 Wis. 2d 331, 347-51, 588 N.W.2d 606 (1999).

Whether a defendant's ***Miranda*** rights were violated presents a question of constitutional fact. This court upholds the trial court's factual findings unless clearly erroneous, but independently applies the constitutional standard to the facts found. *See* ***State v. Karow***, 154 Wis. 2d 375, 385, 453 N.W.2d 181 (Ct. App. 1990). The facts relevant to this appeal are not in dispute. As such, whether the police acted in accord with the constitution is a question of law for de novo review. ***State v. Cunningham***, 144 Wis. 2d 272, 282, 423 N.W.2d 862 (1988).

Miranda v. Arizona, 384 U.S. 436 (1966), imposes two sets of constitutionally-derived rules on custodial interrogations. An interrogating law enforcement officer must provide the suspect with prescribed information about his or her rights and the potential consequences of forgoing them – the famous ***Miranda*** warnings. ***Id.*** at 444. ***Miranda*** also requires officers to honor the invocation of those rights – that is, to cease (or not to commence) interrogation if a suspect asserts the right to remain silent or the right to counsel. ***Id.*** at 445.

Mr. Lonkoski unambiguously asked for an attorney after about a half-hour of questioning. The first issue in this case is whether that request was an effective invocation of the ***Miranda*** right to counsel.

A person undergoing custodial interrogation may assert his ***Miranda*** rights. Custodial interrogation has two components: custody and interrogation. There is no dispute that Mr. Lonkoski was being interrogated when he asked for an attorney, but the state submits that he was not in custody at that time.

The state errs. Mr. Lonkoski was in custody when he requested a lawyer. Though he went to the sheriff's department voluntarily, by the time of his request for counsel the interrogators had conveyed to him that they knew, and could prove, that he was responsible for Peyton's death. Under the circumstances it was apparent to everyone, including Mr. Lonkoski, that he was not going to be allowed to leave the station.

Further, even if Mr. Lonkoski was not in custody at the instant he asked for a lawyer, a person need not be actually undergoing custodial interrogation to invoke the ***Miranda*** counsel right. A person may also do so when custodial interrogation is imminent or impending. Assuming for the sake of argument that Mr. Lonkoski was not actually undergoing custodial interrogation at the moment of his request, custodial interrogation was imminent.

The second issue in the case is whether the officers responded lawfully to Mr. Lonkoski's assertion of his ***Miranda*** right to counsel. ***Miranda*** states that on a suspect's invocation of the right to counsel, all interrogation must cease; ***Edwards*** held that interrogation may occur afterward only where the suspect, rather than the police, reinitiates conversation and voluntarily waives the ***Miranda*** rights.

Here, the officers did not respond to Mr. Lonkoski's request for a lawyer by ceasing interrogation. Rather, they placed him under arrest in a manner suggesting that this arrest was the result of his request for a lawyer. The gambit worked; Mr. Lonkoski withdrew his request and agreed to keep talking. This is exactly what ***Edwards*** prohibits, and the violation negates any claim of reinitiation by the defendant.

II. Mr. Lonkoski's Clear Request for a Lawyer When He Was Either Undergoing Custodial Interrogation or Facing Imminent Custodial Interrogation Was a Valid Invocation of His ***Miranda*** Right to Counsel.

In ***Miranda***, the Supreme Court announced that before any custodial interrogation of a suspect, the interrogating officers must inform the suspect of the rights to silence and to counsel, as well as the fact that any statements given may be used against the suspect in court. 384 U.S. at 467-73. The court went on:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. … If the

> individual states that he wants an attorney, the interrogation must cease until an attorney is present.

Id. at 473-74.[3]

As the above quotation demonstrates, a suspect actually undergoing custodial interrogation may invoke the right to counsel. There is no dispute that Mr. Lonkoski was undergoing interrogation when he asked for a lawyer, but the state has maintained that he was not in custody.

A suspect is in custody when "a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave" and where there was either a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." ***Thompson v. Keohane***, 516 U.S. 99, 112 (1995) (citations omitted). This determination is made by examining the totality of the circumstances. See ***State v. Gruen***, 218 Wis. 2d 581, 593, 582 N.W.2d 728 (Ct. App. 1998).

The circumstances in this case include the following. Mr. Lonkoski was in a room in a part of the Sheriff's Department inaccessible to the public. (26:10-11). The door to this room was closed. (71:00:01:16). In the room along with Mr. Lonkoski were two Sheriff's officers. (26:5-6, 9). As the video shows, this room was small enough for three people to render it crowded. (71).

Mr. Lonkoski was clearly not in custody at the beginning of the interview. Lt. Wood informed him upon

---

3 The Court later clarified that the request for counsel need not come after the giving of warnings to be effective, as the above passage might suggest. A request for counsel may be made before or during the reading of the ***Miranda*** rights. ***Smith v. Illinois***, 469 U.S. 91, 97 n.6 (1984).

meeting him that he was not under arrest; obviously this is a pertinent fact bearing on whether a person would consider him- or herself to be in custody. (71:00:01:18). Further, the initial interrogation consisted of, as the circuit court noted, "open-ended," non-accusatory questions. (61:4-5; App. 120-21). However, the first few minutes of the interview are not the relevant time period; the question is whether Mr. Lonkoski was in custody when he asked for a lawyer.

By this time, things had changed. Beginning in the twenty-eighth minute of the video, Lt. Wood began to suggest that some person was responsible – possibly criminally responsible – for Peyton's death. (71:00:27:04). He intimated that somebody "did something" to her. (71:00:27:04). He suggested that there were two possibilities for what this something was – either an "intentional" act or "poor parenting." (71:00:28:25). Mr. Lonkoski clearly grasped the import of the word "parenting," since he then asked Lt. Wood whether Amanda had smothered Peyton. (71:00:28:40). Lt. Wood denied this, and informed Mr. Lonkoski that Peyton had died of an overdose of morphine. (71:00:29:10). He then noted that Mr. Lonkoski had told Peyton that he was "sorry" when her body was being taken away. (71:00:29:40). He pointedly rejected Mr. Lonkoski's explanation that he was simply sorry that she had died. (71:00:29:45). He told Mr. Lonkoski that he knew what had happened to Peyton, and simply needed Mr. Lonkoski to "dig deep" inside himself and "talk open." (71:00:29:58). At this point Mr. Lonkoski grasped the obvious implication of the Lieutenant's suddenly sharpened questions: "Are you accusing me of giving my daughter morphine?" (71:00:30:18). Neither officer denied this, at which point Mr. Lonkoski made his request for counsel. (71:00:30:29).

As several courts have noted, where a person is being questioned by police officers, the knowledge that these officers suspect him or her of a serious crime is a significant factor suggesting custody. *See, e.g.*, ***Jackson v. State***, 528 S.E.2d 232, 235 (Ga. 2000) ("A reasonable person in Jackson's position, having just confessed to involvement in a crime in the presence of law enforcement officers would, from that time forward, perceive himself to be in custody, and expect that his future freedom of action would be significantly curtailed."); ***Mansfield v. State***, 758 So. 2d 636, 644 (Fla. 2000) (custody where, inter alia, defendant "was confronted with evidence strongly suggesting his guilt, and he was asked questions that made it readily apparent that the detectives considered him the prime, if not the only, suspect."); ***Ramirez v. State***, 739 So. 2d 568, 574 (Fla. 1999) (reasonable person would have believed he was in custody while being questioned at police station where, inter alia, "all of the questions indicated that the detectives considered him a suspect."); ***United States v. Jacobs***, 431 F.3d 99, 105 (3rd Cir. 2005) (custody where, inter alia, officer communicated to defendant that he thought she was guilty).

Although Mr. Lonkoski came to the Sheriff's Department voluntarily, by the time he asked for an attorney after a half-hour of questioning, he had been made aware that the officers suspected him in Peyton's death. Further, Lt. Wood had intimated that, by virtue of the autopsy and "all the technology that's out there today," the officers already knew what happened to Peyton and simply wanted to "find out how much" Mr. Lonkoski would tell them. (71:00:27:49). The question of whether Mr. Lonkoski was in custody at this moment boils down to whether a reasonable person in Mr. Lonkoski's position – that is, one who is (1) at the Sheriff's Department (2) being interrogated by two officers in a small room who (3) are suggesting that they

know that he killed his daughter – would reasonably believe that he was free to terminate the encounter and leave the situation. Of course he would not. He would believe he was under arrest. He might even ask, "Am I under arrest?" as Mr. Lonkoski did.

The state argued below that Mr. Lonkoski's custody did not commence until his question was answered – "You are now" – a few seconds after he asked for a lawyer. Court of Appeals Respondent's Brief at 11. That Lt. Wood confirmed the fact of custody at that instant does not mean that the fact did not exist 30 seconds earlier. Nothing about the situation had changed in that time – except that Mr. Lonkoski had invoked his right to counsel.

Further, even if Mr. Lonkoski was not in custody at the very instant that he asked for a lawyer, this does not mean that he could not invoke ***Miranda***. The ***Miranda*** right to counsel is "specific to custodial interrogation." ***State v. Hambly***, 2008 WI 10, 307 Wis. 2d 98, ¶22, 745 N.W.2d 48. That is, it is specifically a right to an attorney "in dealing with custodial interrogation." ***McNeil v. Wisconsin***, 501 U.S. 171, 178 (1991). However, a suspect is not helpless to *invoke* the right until the very moment that custodial interrogation begins. In fact, ***Miranda*** itself noted that a "pre-interrogation request for a lawyer … affirmatively secures [the] right to have one." ***Miranda***, 384 U.S. at 470.

In ***McNeil***, the Court addressed whether a defendant who had requested an attorney at a preliminary hearing in a criminal matter (thus invoking his Sixth Amendment right to counsel) had, in so doing, also invoked his Fifth-Amendment ***Miranda*** right to counsel, such that he could not lawfully be interrogated about an unrelated matter. ***McNeil***, 501 U.S. at 174-75. In holding that he had not, the Court noted that it had

> never held that a person can invoke his ***Miranda*** rights anticipatorily, in a context other than "custodial interrogation" – which a preliminary hearing will not always, or even usually, involve. If the ***Miranda*** right to counsel can be invoked at a preliminary hearing, it could be argued, there is no logical reason why it could not be invoked by a letter prior to arrest, or indeed even prior to identification as a suspect. Most rights must be asserted when the government seeks to take the action they protect against. The fact that we have allowed the ***Miranda*** right to counsel, once asserted, to be effective with respect to future custodial interrogation does not necessarily mean that we will allow it to be asserted initially outside the context of custodial interrogation, with similar future effect.

Id. at 188 n.3.

McNeil did not elaborate on what might comprise the "context" of custodial interrogation. Lower courts that have examined the question since ***McNeil*** have generally held that a suspect may invoke the ***Miranda*** counsel right when custodial interrogation is "imminent." *See*, *e.g.*, ***United States v. LaGrone***, 43 F.3d 332; ***Alston v. Redman***, 34 F.3d 1237, 1240-41, 1245 (3rd Cir. 1994) (ineffective invocation where suspect signed a form declining to answer questions three days before interrogation); ***United States v. Kelsey***, 951 F.2d 1196, 1198-99, (10th Cir. 1991) (effective invocation where no interrogation was occurring at the time but it was "clear … that the police intended to question Kelsey at some point at his home"); ***United States v. Grimes***, 142 F.3d 1342, 1348 (11th Cir. 1998) ("***Miranda*** rights may be invoked only during custodial interrogation or when interrogation is imminent.").

This court addressed the issue in ***Hambly***, 307 Wis. 2d 98. The precise issue in ***Hambly*** was whether a defendant,

concededly in custody, had effectively invoked his counsel right when he asked to speak with an attorney while being escorted to a squad car. ***Id.***, ¶¶9, 16. Although the defendant was not under custodial interrogation at the time he requested counsel, all six participating justices agreed that his request triggered ***Miranda***. ***Id.***, ¶3. The justices split, 3-3, on the reasoning behind this result. One bloc would have held that a suspect may invoke the ***Miranda*** right to counsel *any* time he or she is in custody, regardless of whether an interrogation is "imminent or impending." ***Id.***, ¶¶4, 106. The other concluded that it was not necessary to decide whether an in-custody request for counsel would be effective where no interrogation was "imminent or impending," because the request in the case at bar would satisfy either standard. ***Id.***, ¶33.

In ***Hambly***, then, even if it could not agree as to whether custody alone would suffice, the entire court accepted the premise that a suspect in custody may invoke the ***Miranda*** counsel right where interrogation is "imminent or impending."

In this case, even if, as the state maintains, Mr. Lonkoski was not in custody when he asked for a lawyer – and hence not undergoing custodial interrogation – custodial interrogation was certainly "imminent or impending." Only a few moments after Mr. Lonkoski's request, he was told he was under arrest and interrogated for two more hours.

Indeed, the state does not dispute that custodial interrogation was "imminent or impending" at the time Mr. Lonkoski asked for a lawyer. *See* Court of Appeals Respondent's Brief at 7-8. Instead, the state submits that the "imminent or impending" analysis applies only where it is

interrogation, rather than custody, that is absent but forthcoming. ***Id.***

It is true that ***Hambly*** addressed the inverse factual situation from the one presented here: that is, a person presently in *custody* but is facing imminent *interrogation*. However, the policy justifying that case's result – that a suspect not presently undergoing custodial interrogation may, in some instances, invoke the ***Miranda*** rights – applies with equal force whether the missing element is interrogation or custody.

First, all of ***Miranda***'s prescriptions, including the right to counsel, are designed to protect the citizen not from police compulsion in general, but specifically from the compulsion *to speak*. ***Miranda***, 384 U.S. at 461. The two elements that give rise to that compulsion are custody, which puts the citizen in the control of the police, and interrogation, by which the police may use that control to obtain the information that they seek. ***Id.*** Where, as here, a citizen is being interrogated by the police, and becomes aware that he is about to be in custody (if he is not already), the compulsion with which ***Miranda*** is concerned is very much present. It is, in the words of ***Hambly***, "the type of coercive atmosphere that generates the need for application of the ***Edwards*** rule." 307 Wis. 2d 98, ¶44 (citation omitted).

Second, as ***Hambly*** also noted, the right ***Miranda*** provides is a right to "the assistance of an attorney *in dealing with custodial interrogation by the police*." 307 Wis. 2d 98, ¶21, *citing* ***McNeil***, 501 U.S. at 178 (emphasis in original). ***Hambly*** went on: "The timing of the request for counsel may help determine whether the request is for the assistance of an attorney in dealing with custodial interrogation by the police." 307 Wis. 2d 98, ¶21. Thus, the ***McNeil*** defendant's request

for an attorney to assist him in the courtroom in one case was not, factually, a request for an attorney's assistance in a later unrelated police interrogation. 501 U.S. at 177-78. Mr. Lonkoski, on the other hand, asked for an attorney while being interrogated at the Sheriff's department, in response to the accusations that gave rise to this case. Given the timing, there can be little doubt that this was a request for "the assistance of an attorney in dealing with custodial interrogation." ***Hambly***, 307 Wis. 2d 98, ¶21.

Finally, if the law were otherwise, the police would have a powerful tactic to overcome a citizen's assertion of rights. An officer having an ostensibly voluntary discussion with a suspect could respond to any request for the assistance of an attorney by immediately arresting the person (as happened here) and then simply continuing the interrogation. Though the officer would then have to read the ***Miranda*** rights after the arrest, the person could hardly be expected to believe that he or she truly had the right to counsel at this point; after all, he or she has just asked for a lawyer and had the request denied.

In sum, even if Mr. Lonkoski was not actually undergoing custodial interrogation at the moment he asked for a lawyer, he was, at minimum, facing imminent custodial interrogation. To hold that the police may lawfully deny such a request simply because it comes a few seconds too soon would elevate form over substance, and would allow precisely the sort of police compulsion that ***Miranda*** seeks to prevent. Mr. Lonkoski's request for counsel, whether it came just before or just after custody commenced, was a valid invocation of his ***Miranda*** right. The police were bound not to engage in further interrogation of Mr. Lonkoski without a lawyer present.

III. Mr. Lonkoski's Request to Continue Talking With the Detectives Was a Product of Their Post-Request Interrogation, and Hence Not a Valid "Reinitiation" Under ***Edwards***.

Miranda held that when a valid request for counsel is made, "the interrogation must cease until an attorney is present." 384 U.S. at 474. In ***Edwards***, the Court expanded on this statement:

> [W]e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused … having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

451 U.S. at 484-85 (1981).

Thus, under ***Edwards***, where a person has invoked the ***Miranda*** counsel right, the police are barred from any further interrogation while the person remains in custody. The only exception to this rule occurs where the state can show, first, that the defendant, rather than the police, "initiate[d] further communication, exchanges, or conversations," and second, that after initiating communication, the defendant made a knowing, voluntary and intelligent waiver of the right to counsel. *See* ***id.*** at 483-85; ***Hambly***, 2008 WI 10, ¶¶69-70.

Here, after Mr. Lonkoski asked for an attorney, the police engaged in custodial interrogation of Mr. Lonkoski

without a lawyer present. Mr. Lonkoski's statements must accordingly be suppressed unless the state can show first, that it was Mr. Lonkoski, rather than the police, that reinitiated conversation, and second, that after reinitiating the conversation, Mr. Lonkoski knowingly, voluntarily and intelligently waived his ***Miranda*** rights. *See* ***Edwards***, 451 U.S. at 483-85, ***Hambly***, 307 Wis. 2d 98, ¶¶69-70. Mr. Lonkoski did not reinitiate the interrogation, for the simple reason that it never ceased after his request for counsel.

"Interrogation," in the ***Miranda*** context, includes explicit questioning by law enforcement officers, but is not limited to questioning. Interrogation also includes the "functional equivalent" of questioning – that is, any words or actions on the part of the police that they should know are reasonably likely to elicit an incriminating response from the subject. ***Rhode Island v. Innis***, 446 U.S. 291, 301 (1980); ***State v. Hambly***, 2008 WI 10, ¶46, 307 Wis. 2d 98, 745 N.W.2d 48. As will be shown below, Lt. Wood's response to Mr. Lonkoski's request for an attorney – which conveyed that Mr. Lonkoski was under arrest because of his assertion of his rights – was likely to (and did) elicit an incriminating response. Lt. Wood's statement was the functional equivalent of interrogation, and it – rather than Mr. Lonkoski – initiated the subsequent conversation.

After Mr. Lonkoski asked for an attorney, the officers responded that they could no longer talk to him, because he had asked for a lawyer. However, when Mr. Lonkoski then asked whether he was under arrest, Lt. Wood replied "You are now." (71:00:30:55).

In the context of the discussion immediately preceding it, Lt. Wood's statement can only be read to mean that

Mr. Lonkoski was under arrest *because* he had requested an attorney and thereby terminated the conversation. It is plain that Mr. Lonkoski took it this way, since his next remark was "*Then* I'll talk to you without a lawyer." (71:00:30:55) (emphasis added). Mr. Lonkoski plainly believed that if he continued to talk with the officers, he might avoid being jailed. This is obvious from reading the words on the cold page, but viewing the video itself makes it clearer still. And though the officers later stated that they could not talk to Mr. Lonkoski simply because he wanted to avoid jail, they never suggested that his belief that he could avoid jail only by talking to them was incorrect.[4]

Lt. Wood's statement that Mr. Lonkoski was under arrest "now" was the functional equivalent of interrogation. Lt. Wood should reasonably have known that suggesting to Mr. Lonkoski that his request for counsel meant that he was under arrest would likely elicit incriminating responses (and a waiver of the right to counsel). Further, though it is not necessary under ***Innis*** to show Lt. Wood's subjective motivation, on viewing the video it is difficult to avoid the conclusion that Lt. Wood's statement "You are now" was a deliberate *attempt* to get Mr. Lonkoski to keep talking. And,

---

[4] For this reason, the court of appeals' statement that Det. Gardner "disclaimed any linkage between Lonkoski's invocation of his right to counsel and his arrest" is incorrect. ***Lonkoski***, No. 2010AP2809-CR, ¶9. Det. Gardner told Mr. Lonkoski, after he had requested counsel and been arrested, that "we can't talk to you just because you don't want to go to jail." ***Id.*** Det. Gardner's statement appears to be an attempt to comply with ***Edwards*** by honoring Mr. Lonkoski's request for counsel, even after he stated that he would speak with the officers. Nothing about her statement suggests that Mr. Lonkoski's request for an attorney was not, in fact, the reason that he was being arrested.

in fact, the attempt succeeded – Mr. Lonkoski did indeed agree to speak to Lt. Wood without a lawyer.

In ***Collazo v. Estelle***, 940 F.2d 411 (9th Cir. 1991), the court addressed a similar set of facts. There, after the defendant requested counsel, one of the interrogating officers told him that things "might be worse" for him if he talked with a lawyer. ***Id.*** at 413. After a three-hour break, the defendant requested to speak with the officers again and made incriminating statements. ***Id.***

The court held the statements inadmissible. Noting that the officer's statement "attempted to impose a penalty" on the exercise of the defendant's right to counsel, the court held that it constituted interrogation. ***Id.*** at 417. Because this interrogation came in direct response to the suspect's assertion of his right to counsel, the court called it a "textbook violation" of ***Edwards***. ***Id.*** at 417-18. Even the officers' cessation of questioning and the three-hour break were not enough to render the defendant's request to speak with them a voluntary reinitiation under ***Edwards***, because the officer's statement was a "primary motivating factor in [the suspect's] about-face and decision to talk without counsel." ***Id.*** at 422. The court went on:

> This case is not an example of the situation envisioned in ***Edwards*** when the Court carved out an exception for those suspects who "initiate" further discussion. Although the words and even the actions that could normally be construed as "initiation" were present at the outset of the second encounter, an analysis of the substance of the entire transaction - rather than the isolated form of the second encounter - demonstrates that Collazo did not "initiate" further conversation as that term is used in ***Edwards*** …. As demonstrated, Collazo's words and actions in calling back the officers and in "waiving" his rights were nothing less than the

> delayed product of Officer Destro's admonitory adventure three hours previously, and hence were "initiated" by the police, not by Collazo.

Id. at 423 (citation omitted).

Here as in ***Collazo***, it would defy the very purpose of ***Miranda*** and ***Edwards*** to hold that Mr. Lonkoski reinitiated the conversation after his request for counsel. His agreement to talk without a lawyer was a direct response to Lt. Wood's post-invocation pressure tactic. There was no cessation of the interrogation, and hence no reinitiation by Mr. Lonkoski. *See also* ***United States v. Gomez***, 927 F.2d 1530, 1539 (11th Cir. 1991) ("[I]nitiation only becomes an issue if the agents follow ***Edwards*** and cease interrogation upon a request for counsel. Once the agents have, as here, violated ***Edwards***, no claim that the accused "initiated" more conversation will be heard."). [5]

---

[5] The court of appeals pointed to the interval *after* Lt. Wood's "you are now" and Mr. Lonkoski's agreement to continue the interrogation and opined that they created a "clear break in the discussion." ***Lonkoski***, No. 2010AP2809-CR, ¶7. This "break" is not relevant because the question, under ***Edwards***, is whether the police or Mr. Lonkoski reinitiated the conversation leading to his confession. If, as Mr. Lonkoski argues, it was Lt. Wood's continuing interrogation of Mr. Lonkoski that caused him to agree to keep talking, the fact that there was a subsequent pause does not change the fact that it was Lt. Wood, and not Mr. Lonkoski, who initiated the conversation. In ***Collazo***, three hours passed between "Officer Destro's admonitory adventure" and the interrogation sought to be suppressed. 940 F.2d at 414, 423. Nevertheless, the interrogation was a "product" of that improper admonition.

Nor may an officer who has already secured a suspect's agreement to talk purge any ***Edwards*** violation by asking, as Lt. Wood did, "And you are initiating that you want us to talk to you?" ***Lonkoski***,

For the same reason, the state's reliance on ***Hambly*** is unavailing. The state cited ***Hambly*** for the proposition that there is no particular amount of time that must pass before a suspect may be found to have reinitiated interrogation after a request for counsel. *See* Court of Appeals Respondent's Brief at 19-20; ***Hambly*** 307 Wis. 2d 98, ¶77. Be this as it may, it is equally clear that there must be *some* break in interrogation – specifically, it must cease immediately upon a request for counsel. It would be nonsensical to speak of "reinitiation" of an interrogation that did not cease. This is the core holding of ***Edwards***, and ***Hambly*** is not to the contrary. In ***Hambly***, the officers refrained from interrogating the suspect after he had asked for an attorney. 307 Wis. 2d 98, ¶¶10-11. He then reinitiated the conversation without any prompting from the officer. ***Id.*** Here, by contrast, Mr. Lonkoski's agreement to talk without an attorney was a direct response to Lt. Wood's continued interrogation.

Because the continued interrogation of Mr. Lonkoski violated the rule of ***Edwards***, the statements he made during the interrogation should have been suppressed. Further, the subsequent interrogations of Mr. Lonkoski should also have been suppressed, for three separate reasons. First, the state put forth no evidence that Mr. Lonkoski "reinitiated" these subsequent interrogations, nor that he knowingly, voluntarily and intelligently waived his ***Miranda*** rights after doing so. Second, under ***Gomez***, a refusal to honor a request for counsel cannot be "cured" even by a suspect's reinitiation of the conversation. 927 F.2d at 1539. Finally, this court has held that all evidence derived from violations of the ***Miranda*** right to counsel is inadmissible as the fruit of the poisonous tree.

No. 2010AP2809-CR, ¶7. The recitation of a legal conclusion does not alter the facts that led to Mr. Lonkoski's decision to talk.

State v. Harris, 199 Wis. 2d 227, 248, 544 N.W.2d 545 (1996).

CONCLUSION

Because the sheriff's officers engaged in a custodial interrogation of Mr. Lonkoski after he invoked his ***Miranda*** right to counsel, Mr. Lonkoski respectfully requests that this court vacate his conviction and sentence and remand to the circuit court with directions that his statements during this and subsequent interrogations, as well as all evidence derived therefrom, be suppressed.

Dated this 16th day of November, 2012.

Respectfully submitted,

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 6,803 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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

Dated this 16th day of November, 2012.

Signed:

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

A P P E N D I X

I N D E X
T O
A P P E N D I X

Page

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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

Dated this 16th day of November, 2012.

Signed:

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkel@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

APPENDIX

INDEX
TO
APPENDIX

Page

COURT OF APPEALS
DECISION
DATED AND FILED

January 18, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2809-CR

Cir. Ct. No. 2009CF80

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW A. LONKOSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Oneida County: MARK A. MANGERSON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Matthew Lonkoski appeals a judgment convicting him of child abuse-recklessly causing great harm, and neglecting a child resulting in the child's death. After the circuit court denied Lonkoski's motion to suppress

statements he made to police, Lonkoski pled guilty to these offenses and, pursuant to WIS. STAT. § 971.31(10) (2009-10),[1] he challenges the order denying suppression. He argues that questioning continued after he unambiguously asked for an attorney and that all statements he made after that request should have been suppressed. Because we conclude that Lonkoski initiated the further conversation with police, effectively waiving his right to counsel, we reject his argument and affirm the judgment.

¶2 Lonkoski's ten-month-old daughter, Peyton, was found dead by her parents, Lonkoski and Amanda Bodoh. The autopsy determined that Peyton's blood and urine contained a large amount of morphine and hydromorphone, resulting in her death. Detectives asked Bodoh to come to the sheriff's department for an interview. Lonkoski drove her to the interview and waited in the lobby while Bodoh was interviewed. After speaking with Bodoh the officers sent her to another room and brought Lonkoski into the interview room. Detective Sara Gardner and lieutenant Jim Wood interviewed Lonkoski. The interrogation was video-recorded.

¶3 Wood informed Lonkoski that he was not under arrest and stated that he closed the door to the interview room so other people could not hear the interview. Lonkoski indicated that he believed the officers were investigating rumors that Bodoh had suffocated the baby. The officers eventually informed Lonkoski that Peyton died of an overdose of morphine. When Wood noted that Lonkoski had said he was "sorry" when they took Peyton away, Lonkoski

[1] All references to the Wisconsin Statutes are to the 2009-10 version.

explained that he was "sorry for her passing away." At that point the following conversation ensued:

> Lt. Wood: There's, there's more to it. And that's, and again Matt, it this is a very hard thing. A hard thing for you as a, as a pop, and, and, this is your baby, but you gotta, you got to dig deep inside yourself now. The autopsy knows what happened. We know what happened. What I need from you is I need you to look up and look in your heart and look up at Peyton and say, say okay, I can deal with it. I can, I can talk open ....
>
> Mr. Lonkoski: Are you accusing me of giving my daughter morphine?
>
> Det. Gardner: Matt, Matt, look at me. Every time you and I have talked, okay, and we go back a long way, all right, there's been some rough stuff that you and I have dealt with ....
>
> Mr. Lonkoski: I want a lawyer. I want a lawyer now. This is bullshit.
>
> Lt. Wood: Okay.
>
> Mr. Lonkoski: I would never do that to my kid, ever. I wasn't even at the apartment at all except at night. Why are you guys accusing me?
>
> Lt. Wood: I didn't accuse you.
>
> Det. Gardner: We were just asking.
>
> Mr. Lonkoski: There is this is is is is is is is is insane.
>
> Lt. Wood: I have to stop talking to you though 'cause you said you wanted a lawyer.
>
> Mr. Lonkoski: Am I under arrest?
>
> Lt. Wood: You are now.
>
> Mr. Lonkoski: Then I'll talk to you without a lawyer ... I, I don't want to go to jail, I didn't do anything to my daughter, I would not lie to you guys – this is in fact life or death.
>
> Lt. Wood: Well, now you, now you complicate things.

Mr. Lonkoski: I just, I just want to leave here and go by my mom now because this is in- this is, this is insane.

Det. Gardner: Matt we can't, we can't talk to you just because you don't want to go to jail okay some things that we wanted to talk to you about were like Jim said – we know what happened to Peyton – we need to know a couple of the gaps to fill the gaps.

Mr. Lonkoski: All right ....

Det. Gardner: (Unintelligible).

Mr. Lonkoski: Ask those gaps.

Det. Gardner: That's what we want you to talk to us about.

Mr. Lonkoski: Ask those gaps.

Det. Gardner: But I don't want you to feel like we're accusing you.

Mr. Lonkoski: All right. I will calm down.

Det. Gardner: I don't – you don't have to talk to us – okay.

Mr. Lonkoski: Can can I can we go smoke a can I smoke a cigarette when we do this?

Lt. Wood: What we're gonna do is – I'm gonna come back and, and again you have to be careful what you say ....

Mr. Lonkoski: (Unintelligible).

Lt. Wood: If you want an attorney – you can have an attorney – we're gonna quit – what I'll do is I'll come back to you – go have a cigarette with Sara.

Mr. Lonkoski: Okay thank you.

Lt. Wood: Okay and I need to get more of the story.

Mr. Lonkoski: I will tell you everything I promise on my dead daughter's life and my (unintelligible) right now.

> Lt. Wood: What I'm, what I'm gonna do is I'm gonna come back and I'll read you a ***Miranda***[2]card which is I'll read you your rights ....

¶4 Lonkoski was eventually escorted from the room to smoke a cigarette and use the bathroom. When Lonkoski, Gardner and Wood returned to the room, Wood read Lonkoski his ***Miranda*** rights and Lonkoski agreed to answer further questions. Over approximately two additional hours of interview, Lonkoski made incriminating statements. He was again interrogated four days later and made more incriminating statements. Lonkoski sought suppression of all of these statements on the ground that, upon his request for an attorney, the interrogation had to cease and all subsequent statements were inadmissible. He contends that he was in custody for ***Miranda*** purposes at the time he requested counsel because his arrest was "imminent." We need not decide whether Lonkoski properly invoked his right to counsel because he later initiated further conversation with the police, effectively waiving that right.

¶5 When a suspect invokes his right to counsel, "the interrogation must cease until an attorney is present." ***Miranda v. Arizona***, 384 U.S. 436, 473-74 (1966). When an accused has invoked his right to counsel, validity of waiver of that right is not established by showing only that the accused responded to further police-initiated custodial interrogation even if he has been advised of his rights. ***Edwards v. Arizona***, 451 U.S. 477, 484 (1981). However, further interrogation is permitted when the State shows that the accused, rather than the police, initiated further communication, exchanges or conversations and that, after initiating communication, the accused made a knowing, voluntary and intelligent waiver of

[2] ***Miranda v. Arizona***, 384 U.S. 436, 473-74 (1966).

the right to counsel. *Id.* at 483-85; *State v. Hambly*, 2008 WI 10, ¶¶69-70, 308 Wis. 2d 98, 745 N.W.2d 48.

¶6 Lonkoski argues that his waiver of the right to counsel was not voluntary because it was brought about by continued interrogation and that the interrogation never ceased after he invoked his right to counsel. He contends that Wood's statement that he was under arrest "now" was the functional equivalent of interrogation, meant to illicit an incriminating response and a waiver of the right to counsel. He compares Wood's statements to those in *Collazo v. Estelle*, 940 F.2d 411, 413, (9th Cir. 1991), where, after the defendant requested counsel, one of the interrogating officers told him that things "might be worse" for him if he talked with a lawyer. The *Collazo* court held the statements inadmissible because the officer's statement "attempted to impose a penalty" on the exercise of the defendant's right to counsel. *Id.* at 417.

¶7 Contrary to Lonkoski's argument, the transcript of the interrogation shows a clear break in the discussion after Lonkoski requested counsel. Wood specifically said "We're gonna quit" and "I don't want to talk to you at this point. Let's take a little break." They then took a cigarette and bathroom break before resuming the interview, creating a clear break in the interview process after Lonkoski invoked his right to counsel. When they returned from the breaks Wood asked, "And you are initiating that you want us to talk to you?" Lonkoski responded, "Yes." Wood then read Lonkoski his *Miranda* rights.

¶8 After Lonkoski said he wanted a lawyer, neither Wood nor Gardner asked any further questions until Lonkoski reinitiated the interview. They merely explained that they were not accusing him. They explained that they could not continue the interview if the only motivation for Lonkoski to waive his right to

counsel was to avoid jail. The officers' declaratory statements did not call for any response. Their responses to his questions are not interrogation because they did not call for a response and were not designed to illicit an incriminating response. ***Rhode Island v. Innis***, 446 U.S. 291, 301-02 (1980); *see also* ***United States v. Briggs***, 273 F.3d 737, 740 (7th Cir. 2001); ***United States v. Conley***, 156 F.3d 78, 83 (1st Cir. 1998); ***United States v. Benton***, 996 F.2d 642, 643-44 (3rd Cir. 1993); ***United States v. Taylor***, 985 F.2d 3, 6 (1st Cir. 1993); ***United States v. Jackson***, 863 F.2d 1168, 1172 (4th Cir. 1989). The officers' statements that they must stop talking to Lonkoski because he invoked his right to counsel did not constitute the functional equivalent of interrogation. *See* ***State v. Hampton***, 2010 WI App 169, 330 Wis. 2d 531, ¶¶10-14, 793 N.W.2d 901.

¶9 Lonkoski argues that the statement, "You are now" conveyed that he was under arrest *because* he asked for an attorney rather than merely after he asked for one. Wood's statement did not make that connection, and Gardner soon after disclaimed any linkage between Lonkoski's invocation of his right to counsel and his arrest when he explained, "we can't talk to you just because you don't want to go to jail," correcting any misimpression Lonkoski may have had about the linkage. The statement "You are now[]" merely placed Lonkoski under arrest, which does not constitute further interrogation. ***Innis***, 446 U.S. at 301.

¶10 The record shows that Lonkoski voluntarily, knowingly and intelligently waived his ***Miranda*** rights. *See* ***Hambly***, 308 Wis. 2d 98, ¶¶70, 91. Lonkoski reinitiated the dialog after having his ***Miranda*** rights read to him and after Gardner reiterated that Lonkoski did not have to talk to the detectives. The record shows no intimidation, coercion or deception and no threats, promises or concessions by the police related to Lonkoski's decision to proceed with or without counsel.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

STATE OF WISCONSIN CIRCUIT COURT ONEIDA COUNTY

****

STATE OF WISCONSIN,

Plaintiff,

Case Number
09-CF-80

-vs-

MATTHEW A. LONKOSKI,

Defendant.

****

Pursuant to notice the above-entitled matter came on for a Motion Hearing in Circuit Court for Oneida County at the Courthouse in the City of Rhinelander, Wisconsin, on the 19th day of January, 2010, commencing at 3:30 o'clock p.m., with the Honorable Mark A. Mangerson, Circuit Judge, presiding.

APPEARANCES:

The State of Wisconsin appeared by Oneida County District Attorney Michael Bloom.

The Defendant appeared in person in custody and with counsel, Henry Schultz, Attorney at Law, Rhinelander, Wisconsin.

PAULA J. ANDERSON RPR
Oneida County Branch II Court Reporter
P.O. Box 400
Rhinelander, WI 54501

THE COURT: This is State versus Matthew A. Lontcoski. It's Case Number 09-CF-80. Mr. Lonkoski appears in person in custody and with his attorney, Henry Schultz; the state appears by District Attorney Michael Bloom.

I previously heard arguments on a defense motion to suppress, and adjourned to today's date so I could more carefully review the video of Mr. Lonkoski's interrogation and so I could view some cases that were cited by the defense. I've had occasion to do that. I read or viewed the video very carefully over the long weekend, and I am ready to rule, although if counsel wish to make any last minute comments or observations that they may have missed the last time, I'll listen to those. Mr. Schultz, first on your motion.

MR. SCHULTZ: Judge, both of us submitted briefs. I'm assuming the court had a chance to look at those.

THE COURT: I've read those as well.

MR. SCHULTZ: I think if the court has the briefs, from my point of view, I don't need to add anything at this time.

THE COURT: Mr. Bloom, anything further?

MR. BLOOM: I would concur.

THE COURT: Well, first of all, let me note for the record what I observed before Mr. Lonkoski claimed his Fifth Amendment right to counsel being present during questioning.

The interrogation technique used by the two deputies was rather standard. They would give Mr. Lonkoski some information, enough to focus his attention on a concept, and then they would attempt to draw information from him telling them either that he had some sort of a morale duty to do it or telling him that they needed his assistance in gathering the information. It was kind of a tag team effort, and I don't mean that in a derogatory sense, in that one deputy, Deputy Wood, would leave the interview and then Deputy Gardner would pick up on the interview and they would trade places and continuously feed him a little bit more information to try to prompt him into filling in the gaps, as they call it.

There was certainly nothing improper about the interrogation technique. They weren't brow-beating him. It was a persistent type of search for any information that he had, and to some extent, it was effective. I would not grant a motion to suppress based on the Goodchild line of cases. He wasn't a deprived of anything. In fact, on at least one occasion they let him go out for a cigarette.

I'm not critical of the deputies at all in regard to the manner in which the interrogation was conducted. At one point in the interrogation, about three hours and -- no.

MR. BLOOM: 30 minutes.

THE COURT: At 30 minutes and 29 seconds, Mr.

Lonkoski clearly asserted his right to counsel. Then he nearly immediately swung the other way and seemed to be waiving his right to counsel. At 30 minutes and 29 seconds, he said I want a lawyer. I want a lawyer now. This is bull shit. Deputy Wood then said okay. Lonkoski then said -- Mr. Lonkoski said I would never do that to my kid ever. I wasn't even at the apartment at all except that night. Why are you guys accusing me? Deputy Wood said I didn't accuse you. Deputy Gardner says we were asking. Then Mr. Lonkoski says this is insane. There are a few things I missed because they were talking over each other, a few words, but they were of no consequence. Deputy Wood said I have to stop talking to you though because you said you wanted a lawyer. Mr. Lonkoski: Am I under arrest? Mr. Wood: You are now. Mr. Lonkoski: I'll talk to you without a lawyer. I don't want to go to jail. I didn't do anything to my daughter. I would not lie to you guys. This is exact life or death. Deputy Wood: Now you complicate things. Mr. Lonkoski: I just wanted to -- I just want to leave here and go by my mom's now because this is insane. Deputy Gardner: Matt, we can't talk to you just because you don't want to go to jail. The thing we want to talk to you about were, like Jim said, we know what happened to Peyton. We need a couple of gaps to fill in the gaps. Mr. Lonkoski: Okay. Ask those gaps. Ask those gaps. Deputy Gardner: I don't want you to feel like we're

accusing you. You don't have to talk to us.

Then they go on with some more discussion. They take a break. They come back into the interrogation room, and they do what I would call an extraordinarily good advice of Mr. Lonkoski's Miranda rights, and they obtain a waiver of those rights.

The law that I read that is most directly on point is State versus Wegner at 118 Wis 2d 419. I'll skip the other cites. State versus Harris at 199 Wis 2d, 227. These are older cases. Wegner is a Court of Appeals case from 1984 and Harris is a Supreme Court case from 1996. Both of those cases, of course, cite the seminal case in this area of Edwards versus Arizona at 451 U.S. 477, 101 Supreme Court 1880, a 1981 U.S. Supreme Court case.

All cases that I read stand for the same proposition, and that is when a defendant claims the Fifth Amendment privilege to have an attorney present during questioning, all questioning must cease and he must be afforded the opportunity to exercise that right. He must be put in contact with an attorney or given the means to contact counsel.

Wegner is a variation on the theme in that in Wegner the police started a reinterrogation the following day, and started the following day with a new advice of rights. I believe Harris is another variation on the theme

which isn't all that significant because in Harris, Justice Geske, I believe, found that the error that occurred was harmless error even though it was constitutional harmless error.

The only time that the police don't have to be concerned or the deputies don't have to be concerned after there is a claim of the right to counsel is that -- is when the defendant reinitiates the discussion, that is, when they stop their interrogation and then presumably some time passes and then after thinking it through, a defendant tells the jailer that the defendant wants to talk to the deputies again and reinitiates the conversation. Then, of course, there has to be advice of rights and effective understanding and waiver of those rights.

In this scenario I just read, we never really had a ceasing of the interrogation like Edwards requires. In fact, there was some additional discussion. There was a question by the defendant whether he was under arrest. When he was formally arrested and told you are now, he then immediately says he wants to talk without a lawyer obviously impressed by the fact that he is now going to be detained. He said I'll talk to you without a lawyer. I don't want to go to jail. It seems that his motivation is fear that he is going to truly be detained for an indefinite period of time, but there was never any break in the discussion between the officers

and the defendant and, of course, as I indicated when I started this ruling, the discussion between them with some interspersed questions was the technique they were using. So there wasn't really any break in the technique here. He said he didn't -- he said he wanted a lawyer. He claimed he would never do anything to his child. There was some discussion. He asked if he was under arrest. He was told he was under arrest. Then he volunteered to talk without a lawyer and then the discussion occurred. The officers never backed off here like they're supposed to back off quitting the interrogation, quitting the discussion all together, until the defendant has a chance to contact counsel.

So it wasn't a matter here of the defendant not reinitiating as much as it was the interrogation procedure never ending. They never really stopped the interrogation. It's true after some discussion and his volunteering to talk to them that they took a break, but nothing here was initiated by the defendant. It was a continuation of the interrogation.

So I'm finding that there has been an Edwards versus Arizona violation, and I'm suppressing from use at trial everything after his first line of invocation of his right to counsel when he said 30 minutes, 29 seconds into the interview I want a lawyer.

If you will submit an order, I'll sign it.

MR. SCHULTZ: I'll have that to you shortly. Thank you, judge.

THE COURT: We are adjourned.

* * * * * * * * *

STATE OF WISCONSIN CIRCUIT COURT ONEIDA COUNTY
BRANCH 2

STATE OF WISCONSIN,

Plaintiff,

-vs- CASE NO. 09-CF-80

MATTHEW A. LONKOSKI

Defendant.

DATE: FEBRUARY 15, 2010

BEFORE: HONORABLE MARK MANGERSON
Circuit Court Judge

APPEARANCES: State of Wisconsin appearing
By Michael Bloom,
District Attorney
for Oneida County.

Defendant appearing in person,
Matthew Lonkoski;
Attorney at Law,
By Henry Schultz
Appeared for the defendant.

TRANSCRIPT OF PROCEEDINGS

Reported by: Sherri E. Apel
Official Court Reporter

February 15, 2010 **8:30 a.m.**

THE COURT: This is State of Wisconsin versus Matthew Lonkoski. The defendant is here with his attorney, Henry Schultz. The state appears by District Attorney, Michael Bloom.

I previously ruled on this case that the statements of Mr. Lonkoski should be suppressed because he claimed his right to counsel contemporaneously with the announcement that he was under arrest. I saw no distinction whatsoever in the technicality that he said he wanted an attorney twice within about ten seconds of him being told he was under arrest, with the formal arrest coming after the claim to the right to counsel.

When I ruled from the bench I made no findings in regard to whether he was in custody at the time the statement was made. He said twice that he wanted an attorney. Mr. Schultz admitted findings in an order for my signature after the last hearing. The state objected to those findings indicating that, in fact, I had never made the findings that he was in custody at the time he requested counsel, and that's true.

So, counsel and I had a brief conference in chambers, and I indicated to counsel that I thought I needed to take another look at the custody issue because case law is clear. In order to trigger Edwards v. Arizona

is clear. In order to trigger Edwards v. Arizona requirements, the subject has to be in custody and formal.

I did take another look at the cases that were submitted. I reread the briefs, and I certainly did review the transcripts of what Mr. Lonkoski and the officers said. I took notes, looked at parts of the DVD that was submitted, and it is clear that in determining whether or not a defendant is in custody is not just a matter of counting the factors, the court is supposed to do a weighing of all the factors to determine whether a reasonable person in the defendant's situation would believe that he was not free to go. That is, he was detained. It is an objective standard.

I wrote a number of factors down on the sheet here to consider, and I think when I looked at the totality of the circumstances Mr. Lonkoski was not in custody at the time that he claimed his right to counsel. The claim of the right to counsel appears about 30 minutes into the interview. Deputy Gardner is saying, "Matt, look at me. We go back a long way. All right. There has been some rough stuff that you and I have dealt with." Mr. Lonkoski says, "I want a lawyer, I want a lawyer now. This is bullshit." Deputy Wood then says, "Okay."

There is some additional conversation within a matter of 10 or 15 seconds of him saying he wants a lawyer. He then asks if he is under arrest. He is told by Officer

Wood that he is. Officer Wood says, "You are now." Then there is an immediate waiver of the right to counsel, or at least some equivocating language before the defendant said, "I want a lawyer. I want a lawyer."

Now, I note a number of things. First of all, the officers were not dealing with someone unfamiliar to formal interrogation. The video clearly shows that the defendant had previously been in custody and had previously been questioned by Officer Gardner while the defendant was in a locked portion of the jail. The portion of the jail he was in is a typical interrogation setting. It is locked to ingress by individuals, but there is no indication that it was locked for egress. That is, that the defendant could simply walk out.

Additionally, there is no evidence that Mr. Lonkoski knew or thought he was locked in, in any respect. Although the interrogation took place largely with the door closed, there were clearly times when the door was opened and he could in fact have walked out.

He was offered a number of things during the 30 minutes and especially the few minutes after he claimed his right to counsel. He was offered to go to the bathroom, and he was allowed to smoke. The interrogation, in my estimation, also indicated a lack of custody. The questions to Mr. Lonkoski, up until the point he claimed his right to

counsel, were rather open ended questions.

They called for a narrative by him. They were not accusatory. They were not leading questions. He was given facts and then it was suggested to him that he comment on things or tell the officers what they already knew. As interrogations go, the interrogation was relatively short before he claimed his right to counsel, almost exactly after 30 minutes.

The defendant was not physically restrained in any respect. He showed up for the questioning on his own free will with the child's mother. He was not handcuffed. There was no indication that he was restrained in any respect. He was told on more than one occasion that he was not under arrest. He was not moved from one place to another. The entire questioning took place in one simple setting. The factors that would indicate custody would be only that first of all, this was an interrogation within a jail.

Secondly, it was an important investigation. It was a homicide investigation.

Although, up until the point that the defendant decided he was the focus of the investigation, there wasn't a clear indication that the officers were looking for a homicide defendant. The search in the questioning was for cause of death and what Mr. Lonkoski may have known at the time concerning how the child died. It only became a focused

investigation in the last two or three minutes before he claimed the right to counsel and the focus was on morphine and Mr. Lonkoski's potential contact with morphine.

So, on balance, there are factors that weigh heavily in the court is information not only as to number, but the significance of the factors that would indicate that objectively, a reasonable person would not think he was in custody. In fact, something very telling is, after Mr. Lonkoski said he wanted a lawyer, he asked if he was under arrest. If he believed he was under arrest I suspect he would not be asking that question point blank.

So, although those factors indicate to me that he was not in custody at the time, he claimed his right to counsel. Now having said that, I go back to my prior ruling where I found the claim of right to counsel. Although it came before his formal arrest, I thought Edwards v. Arizona applied because it was contemporaneous and I thought standing on technicality in a situation like that was not appropriate.

I was very concerned about this sequence in the transcript. Everybody has read this, but I think I need to put it on record again. This is about 30 minutes and 20 or 30 seconds into the interview. I just read the line by Deputy Gardner. Mr. Lonkoski says, "I want a lawyer. I want a lawyer now. This is bullshit." Officer Wood says,

ever. I was not at the apartment at all except at night. Why are you guys accusing me?" Officer Wood says, "I did not accuse you." Officer Gardner says, "We were asking you." Mr. Lonkoski says, "This is insane." Officer Wood says, "I have to stop talking to you though because you said you wanted a lawyer." Mr. Lonkoski says, "Am I under arrest?" Officer Wood says, "You are now." Mr. Lonkoski says, "Then I will talk to you without a lawyer. I do not want to go to jail. I did not do anything to my daughter. I would not lie to you guys. This is in fact, life or death." Officer Wood says,

"Well, now you have complicated things." Mr Lonkoski says, "I just want to leave here and go by my mom now because this is insane." Officer Gardner says, "Matt, we cannot talk to you just because you don't want to go to jail. Okay? Some things that we wanted to talk to you about were like Jim said, we know what happened to Payton.

We need to know a couple of the gaps. We need to fill in the gaps." Mr. Lonkoski says, "All right. Ask those gaps." Officer Gardner says, "That is what we want you to talk to us about." Mr. Lonkoski says, "Ask those gaps." Officer Gardner says, "But I do not want you to feel like we are accusing you." Mr. Lonkoski says, "All right. I will calm down." Officer Gardner says, "You do not have to talk to us, okay?" Mr. Lonkoski says, "Can we go smoke?

us, okay?" Mr. Lonkoski says, "Can we go smoke? Can I smoke a cigarette when we do this?" Officer Wood says, "What we are going to do is, I am going to come back, and again, you have to be careful with what you say," Officer Wood says, "If you want an attorney we will get an attorney. I will come back to you. Go have a cigarette with Sara."

Mr. Lonkoski says, "Okay. Thank you." Officer Wood says, "Okay. I will need to get more of the story." Mr. Lonkoski says, "I will tell you everything. I promise on my dead daughter's life." Officer Wood says, "What I am going to do is -- I am going to come back and I will read you a Miranda card which is -- I will read you your rights."

Then there is other conversation with the officers. They are not asking any specific questions, but Mr. Lonkoski is volunteering information and then they took a break. Mr. Lonkoski stayed in custody. He was accompanied, apparently, outside with Officer Gardner and an Officer Brad -- somebody. Mr. Lonkoski had a cigarette and used the bathroom. When he comes back from the cigarette break Officer Wood has talked to the district attorney and apparently was thinking Edwards v. Arizona. In fact, you could hear in the background of the DVD half of the conversation as Deputy Wood spoke with the district attorney. You could hear Deputy Wood tell the district attorney what happened. He was responding to advice from

the district attorney.

When they get back to the interrogation room Mr. Lonkoski first says, "Yes, I will talk to you guys. I have nothing to hide." Let me back up. Mr. Lonkoski is already in the room -- no, excuse me. Deputy Wood and Mr. Lonkoski enter the room together and Deputy Wood says, "Okay. We will start over here." Mr. Lonkoski says, "All righty." Deputy Wood says, "I was going to get a notebook." Officer Gardner says, "Let me find one. I will be right back."

Deputy Wood says, "Did you get a cigarette in?" Mr. Lonkoski says, "Yeah. It is the first time it ever helped me calm down right away." Deputy Wood says, "Okay." Mr. Lonkoski says, "Did you talk to your district attorney?" Deputy Wood says, "Yup." And Mr. Lonkoski says, "Is that fine to go on with it?" Deputy Wood says, "And the first question for you, Matt is, do you want to talk to us?"

Then Deputy Gardner enters the room. Mr. Lonkoski says, "Yes. I will talk to you guys. I have nothing to hide." Officer Wood quite tellingly says, "And you are initiating that you want us to talk to you?" Mr. Lonkoski says, "Yes."

Obviously, Deputy Wood and the district attorney talked about Edwards v. Arizona and his advice to the deputy was to make sure that the defendant was initiating the carrying on of the conversation.

I am convinced having reread the case law that technicalities are important because clearly the Edwards v. Arizona requirement that all interrogations seize is triggered only when the defendant claims it is his right to counsel and the claim has to be clear and unequivocal.

Typically, we look at the situation from the perspective of what the officer is doing that compels a defendant who claimed his right to an attorney to change his mind. That is why we have the separation rule when there is a claim of a right to counsel while someone is in custody.

The defendant is supposed to be removed, all questioning stops, and the idea is that he will have time to ponder the situation.

On his own initiative, without any influence from officers he decides to resume the questioning. If a defendant on his own volition decides that he wants to resume the questioning according to Edwards v. Arizona the police shouldn't be -- or the deputy shouldn't be restrained from pursuing more information because it's nothing they are doing at that time to compel the defendant to give his rights or continue to exercise his rights.

We don't have an Edwards v. Arizona case here, first of all because the claim of a right to counsel as I have just found happened when the defendant was not in custody. I understand fully that it was a claim within 20

or 30 seconds of when he was obviously formally arrested, but that technicality is important. The claim to counsel happened when he wasn't in custody. Then what else happened from what I read, it's clear to me; and I am looking at this quite objectively, that the defendant didn't clearly claim his right to counsel.

The reason he didn't clearly claim his right to counsel under the fifth amendment is because he said, "I want a lawyer. I want a lawyer now. This is bullshit." There is some miscellaneous conversation about, "we're not accusing you," he says "am I under arrest?" Deputy Woods says, "I have to stop talking to you though because you said you wanted a lawyer."

Mr. Lonkoski says, "Am I under arrest?" Deputy Woods says, "you are now," Mr. Lonkoski says, "Then I will talk to you without a lawyer. I don't want to go to jail. I didn't do anything to my daughter. I would not lie to you guys."

There is nothing that the officer did which caused the defendant of his own volition to change his mind so he says he wants a lawyer. He's told they are going to have to stop talking to him. He ask asks if he's under arrest. He's told he's under arrest and then he changes his mind on his own waiving his right to liberty against his right to counsel with absolutely

influence at that point by the deputies.

Then he apparently wants to exercise his right to remain silent. He says, "I just want to leave here and go by mom now because this is -- this is -- this is insane."

The officer's say they're not going to talk to him. Deputy Wood starts talking about going to talk to the district attorney and the defendant is asserting that he wants to talk to them.

So again, it's a claim of a right followed immediately with claims that he wants to talk to them. So these are clear implications of his rights by any stretch of the imagination.

What we do when we suppress evidence is we punish law enforcement officers for oppressive conduct that overcomes the will of a defendant or blatantly ignores the -- a series of rights by a defendant, and we do that we punish officers because we don't want them to get into the routine of ignoring important rights. The idea is if they lose evidence the next time maybe they will be a little bit more careful how they regard a claim of rights.

I don't see conduct here by the officers that justifies punishment of that sort. Again, this happened in the mind of the defendant. He was weighing

things himself without any input and giving mixed signals. The officers then back off. They take a break. The defendant is allowed to go to the bathroom and have a cigarette and Officer Wood confers with counsel about how to proceed without violating the defendant's right and losing potentially significant information.

If there's ever an occasion that officers are acting appropriately it's when they get in a situation like this which is you unique and I haven't read a case yet that's directly on track with the facts here. When they get a situation that's unique they stop and they consult with a prosecutor, consult with counsel. We don't want to deter that. I think just the way in which the statements were made and the sequence has put everybody on edge, but if we apply the rules as case law indicate and require custody before a claim to counsel is necessary.

Then we look at what actually happened here. This shouldn't be suppressed and I am reversing myself.

MR. SCHULTZ: Judge, could I be heard briefly?

THE COURT: You may make a record, but I am not going to change my mind.

MR. SCHULTZ: Your Honor, I received a brief

from Mr. Bloom last week, I believe it was filed during the time I was out of state. I didn't get a chance to look at it until the weekend. It addresses the issue of the need for a period of time between the conversation of the right to counsel and the re-initiation of conversation. I have not had a complete opportunity to research all of the points he's raised, but I do wish to for the record -- provide the court with a case, United States v. Robinson. It's a Seven Circuit decision from October of the last year.

THE COURT: Is it on initiation?

MR. SCHULTZ: Yes.

THE COURT: Well I will, as a finding of fact find that there was not the Edwards v. Arizona break that that case anticipated because Edwards v. Arizona as I indicated, anticipates that the defendant is placed back in his or her cell and there's no contact with that defendant and then the defendant on his own initiative contacts the police and says, "look, I thought this over I want to speak with you," we didn't have that situation here. There wasn't a break. They kept him in custody at all times was with one or two deputies. Sure, they left the room but he remained in custody and the immediate presence of law enforcement officers that I don't think is the type of break that

type of break that Edwards v. Arizona anticipated.

Secondly, no, I don't believe he reinitiated the conversation, not within the meaning of Edwards v. Arizona where you reach out you contact the officers and you say, I want to speak with you. There was a break in the questioning with the stated intention that we will be back to talk to you to fill in the gaps. We're going to take a break now and contact the district attorney and talk to the district attorney.

Then there was continuing conversation as they left the room and when they come back into the room they're in the middle of a conversation, and then they get right back into the questioning.

There wasn't either the break that Edwards anticipates or the time of re-initiation that Edwards anticipated. You don't reinitiate a conversation merely because you say something not in response to a question as suggested by the state. I don't think this is an Edwards v. Arizona case.

MR. SCHULTZ: Your Honor, one of the reasons I wanted the court to look at the Robinson case had to do with the conversation that immediately comes from the statement that, "you are now," in response to the question about arrest.

On Page 4 of the print out that I have given

you, on the left hand column, middle of the page. There's a discussion of the fact that officers are not supposed to say or do anything that is reasonably likely to initiate an incriminating response, even if it's a direct question.

In this case, if you look at the -- at no time, in a matter of seconds he was told, "You are now under arrest." Once he had asked for a lawyer and the officer says to him, "We know what happened and we need you to fill in the gaps," I believe that those statements are, if not direct questions, statements designed to illicit an incriminating response.

Therefore, this was going to be my point, in the initiation on the part of Mr. Lonkoski, and I am using that term loosely, would be of no effect because the officers were the ones in combination that continued the conversation.

Really, I am basically now echoing your original ruling. I think this case summits that the break -- break is meaning that officers say or do something that is designed to elicit an incriminating response.

THE COURT: The defendant claims his right to counsel. He asks if he's under arrest. They he tell them he is. Then things like the officer suggested do

get complicated because out of no where they're telling him what they would like to do, fill in the blanks.

They're saying we need to respect your right to counsel, we're not going to talk to you. I just don't think this is an Edwards v. Arizona case at all.

MR. SCHULTZ: The other point I wanted to make had to do with the state's citation of Hanley the State Supreme Court in 2008 Wisconsin 10 it is generally cited for the proposition that a break is not required.

I don't believe that's what it says. It says whether a suspect initiates indication or dialogue does not depend solely on the time lines between the right to counsel and the suspect's beginning and explaining with law enforcement.

Although the lapse of time is a factor to consider, when you look at that quote carefully our Supreme Court is telling us that there has to be some time between the two. There has to be a break of some kind, and there wasn't in this case. Again, I understand the court has already ruled, but I thought it was important that I put that position on the record.

The second thing that I have, judge, is a request that was made in my brief of January -- April

4th, in that regard the issue of the Miranda Waiver was not addressed by the court in its original ruling because the court probably didn't feel the need to do that in light of the original suppression order.

The request that we have is to find that the Miranda Waiver was invalid because of the way that the officers responded to Mr. Lonkoski asked for counsel and told him he was under arrest after he had asked for a lawyer. The instruction that follows the court is already placed on the record.

He is telling them he will talk without a lawyer because he doesn't want to go to jail. And as the court has also noted, later on in the conversation he asks to leave. There is nothing in the Miranda Waiver process that is on the record at this point that diminishes or dilutes, if you will, what was said earlier.

In other words, Mr. Lonkoski was a reasonable person in his position. He thought that the only way to get out there was to waive the right to an attorney and when they asked him to do that later on during the Miranda Waiver process he agreed.

The quote from Hanley that's in my brief that's very important, the Supreme Court version, a Miranda is voluntary. It is their choice rather than

voluntary. It is their choice rather than intimidation, coercion, or deposition.

There was nothing done by the officers to mitigate what I believe was an improper conversation, and as the court knows it is a totally of the circumstances analysis not a hyper technical piece, bypass assessment the court should rule that Miranda Waiver was involuntary on that basis.

THE COURT: I would be more concerned if the transcript that I decided -- that the defendant's claim of his rights were rather ambiguous because he claimed he didn't do anything and then in the next breath he would say he wanted to talk to the officers.

If there was some indication that the officers extracted the waiver through some sort of tactic or method, but that just isn't true.

It's clear that it's the defendant who is thinking that he has to talk to the officers to avoid continued incarceration, and because of that he needs to waive his right to counsel. There's nothing the officers did to instill that belief in him. It's totally his own volition.

What they do at that point is they start backing off and they say, "Look we want to talk to you, you said you wanted an attorney. We're going to take a

come back and come back to talk to you about your rights."

There's no reason to believe what happened before the break would still be working on the defendant when he is read his rights. He's offered the rights in writing and he reads them himself and then he says, "Sure I will talk to you." There's no indication that there's anything the officers did to make that waiver of his rights after he was advised involuntary, and that's about the best record we can make.

A defendant does things on his own and changes his mind, and finally makes a decision and there's no input by the police to compel that. It's not a Miranda violation and again, Edwards v. Arizona doesn't apply here. Let's put this on for trial. I don't have my calendar. Counsel, would you go into chambers and schedule it. We're adjourned.

Adjourned at 9:10 a.m.

STATE OF WISCONSIN CIRCUIT COURT BRANCH 2 ONEIDA COUNTY

For Official Use Only

State of Wisconsin vs. Matthew A. Lonkoski

Judgment of Conviction
Sentence to Wisconsin State Prisons and Extended Supervision
Case No.: 2009CF000080

Date of Birth: 04-13-1987

The defendant was found guilty of the following crime(s):

Ct.	Description	Violation	Plea	Severity	Date(s) Committed	Trial To	Date(s) Convicted
1	Child Abuse-Recklessly Cause Great Harm	948.03(3)(a)	Guilty	Felony G	05-04-2009		03-18-2010
2	Neglecting a Child (Consequence is Death)	948.21(1)(d)	Guilty	Felony D	05-04-2009		03-18-2010

IT IS ADJUDGED that the defendant is guilty as convicted and sentenced as follows:

Ct.	Sent. Date	Sentence	Length	Agency	Comments
1	05-21-2010	State Prison	5 YR		
2	05-21-2010	State Prison	12 YR		

Total Bifurcated Sentence Time

Confinement Period Ct.	Years	Months	Days	Comments	Extended Supervision Years	Months	Days	Total Length of Sentence Years	Months	Days
1	5	0	0		5	0	0	10	0	0
2	12	0	0		5	0	0	17	0	0

Ct.	Sent. Date	Sentence	Length	Agency	Comments
1	05-21-2010	Costs			

Sentence Concurrent With/Consecutive Information:

Ct.	Sentence	Type	Concurrent with/Consecutive To Comments
2	State Prison	Concurrent	Count 1
2	Extended Supervision	Concurrent	Count 1

Conditions of Extended Supervision:

Obligations: (Total amounts only)

Fine	Court Costs	Attorney Fees	☐ Joint and Several Restitution	Other	Mandatory Victim/Wit. Surcharge	5% Rest. Surcharge	DNA Anal. Surcharge
	40.00			16.00	170.00		500.00

Ct.	Condition	Agency/Program	Comments
1	Costs		
1	Prohibitions		No consupmtion or possession of alcohol or illegal drugs
1	Other		Supervision Fees AODA assessment and recovery Full time employment and stable residence Submit DNA sample within 10 days of sentencing No prescription medication unless authorized by a physician and follow doctor's order regarding use as well as inform agent of all prescription medications. If applicable; pays child support and/or arreages Any other condtitions/counseling deemed appropriate by PO
2	Costs		
2	Prohibitions		Same as count 1
2	Other		Same conditions as count 1

STATE OF WISCONSIN CIRCUIT COURT BRANCH 2 ONEIDA COUNTY

For Official Use Only

State of Wisconsin vs. Matthew A. Lonkoski

Judgment of Conviction
Sentence to Wisconsin State Prisons and Extended Supervision
Case No.: 2009CF000080

Date of Birth: 04-13-1987

Pursuant to §973.01(3g) and (3m) Wisconsin Statutes, the court determines the following:

The Defendant is ☐ is not ☒ eligible for the Challenge Incarceration Program.

The Defendant is ☐ is not ☒ eligible for the Earned Release Program.

IT IS ADJUDGED that **364** days sentence credit are due pursuant to § 973.155, Wisconsin Statutes

IT IS ORDERED that the Sheriff shall deliver the defendant into the custody of the Department.

BY THE COURT:

Circuit Court Judge/Clerk/Deputy Clerk

May 21, 2010
Date

Distribution:

Mark Mangerson, Judge
Michael H Bloom, District Attorney
Henry R Schultz, Defense Attorney

ONEIDA COUNTY SHERIFF'S DEPARTMENT
INTERVIEW REPORT

INTERVIEW OF:	**MATTHEW A. LONKOSKI**
DATE OF BIRTH:	**04/13/87**
ADDRESS:	**1237 WOODLAND DRIVE**
	RHINELANDER, WI 54501
TELEPHONE NUMBER:	
DATE OF INTERVIEW:	**May 22, 2009**
PLACE OF INTERVIEW:	**Oneida County Sheriff's Department**
TIME OF INTERVIEW:	**Approximately 5:12 p.m.**
INTERVIEWED BY:	**Lieutenant Jim Wood/ Detective Sara Gardner**
CASE NUMBER:	**09 SC-3782**

ML: How's Amanda?

JW: Little upset but we'll get into that. It's an upsetting thing. Why don'tca go go have a seat over there and I'll be just a minute okay.

ML: Okay.

JW: You want ta have a seat over there...do you know Sara?

ML: Yes.

SG: Yeah very well...how are you?

ML: Very good how have you been?

SG: Well better then you from what I hear been goin' on.

JW: Matt I'll I'll close the door you're not under arrest you understand that you guys came here by yourself and...we want to talk to you about Peyton and Peyton's death and um let you know about some of the a findings from the autopsy and everything I mean you're you're the father right?

ML: Mm hmm (affirmative).

JW: Are you okay talkin' to us?

ML: Yeah.

JW: Okay I've got the door closed just cause I don't want other people to hear and stuff okay um what what has gone on since Peyton's death with you how are you doin'?

ML: That I told you from the person that told me at the gas station.

JW: No no…the autopsy shows that Peyton died of an overdose.

ML: An overdose? Of what?

JW: Now that's I'd like for you to try and help me out a little bit…

ML: All I know is when I got back to the apartment…Amanda told me she gave um Peyton baby Tylenol…the bottle of baby Tylenol you guys seen when you guys went into the apartment was on top of the…

JW: Not the baby Tylenol I know…it's Morphine.

ML: What?

JW: Morphine.

ML: (Pause) What?

JW: Morphine.

ML: Oh my god…(pause).

JW: What did you say to Peyton when you said good-by to her that day out when I was out there and you went out to the truck before they took her away…what'd you say to her?

ML: I said that I love her and I would be by her soon.

JW: And that you were sorry?

ML: Sorry for her passing away.

JW: There's there's more to it…and that's and again Matt…it this is a very hard thing…a hard thing for you as a as a pop and and this is your baby…but you got ta you got to dig deep inside yourself now?..the autopsy knows what happened…we know what happened…what I need from you is I need you to look up and look in your heart and look up at Peyton and say say okay I can deal with it…I can I can talk open…

ML: Are you accusing me of giving my daughter Morphine?

SG: Matt Matt look at me...every time you and I have talked okay...and we go back a long way all right...there's been some rough stuff that you and I have dealt with...

ML: I want a lawyer...I want a lawyer now...this is bullshit.

JW: Okay.

ML: I would never do that to my kid ever I wasn't even at the apartment at all except at night...wh wh why are you guys accusing me?

JW: I didn't accuse you.

SG: We were asking.

ML: There is this is is is is is is is is insane...

JW: I have to stop talking to you though cause you said you wanted a lawyer.

ML: Am I under arrest?

JW: You are now.

ML: Then I'll talk to you without a lawyer...I I don't want to go to jail I didn't do anything to my daughter I would not lie to you guys...this is in fact life or death.

JW: Well now you now you complicate things.

ML: I just I just want to leave here and go by my mom now because this is in this is this is insane.

SG: Matt we can't we can't talk to you just because you don't want to go to jail okay some things that we wanted to talk to you about were like Jim said...we know what happened to Peyton...we need to know a couple of the gaps to fill...the gaps.

ML: All right...

SG: (Not audible)...

ML: ...ask those gaps...

SG: ...that's what we want you to talk to us about...

ML: ...ask those gaps.

SG: But I don't want you to feel like we're accusing you...

ML: All right....I will calm down.

SG: ...I don't...you don't have to talk to us...okay

ML: Can can I can we go smoke a can I smoke a cigarette when we do this?

JW: Wha what were gonna do is...I'm gonna come back and and again you have to be careful what you say...

ML: (not audible)

JW: ...if you want an attorney...you can have an attorney...we're gonna quit...what I'll do is I'll come back to you...go have a cigarette with Sara...

ML: Okay thank you.

JW: ...okay and I need to get more of the story.

ML: I will tell you everything I promise on my dead daughter's life and my (not audible) right now.

JW: What I'm what I'm gonna do is I'm gonna come back and I'll read you a Miranda card which is I'll read you your Rights...

ML: Is Amanda in jail too now?

JW: No...no...we're we're talking to the both of you...trying to get to the bottom of what happened...I'm trying to be honest with you...I don't want to talk to you right now at this point until lets lets take a little break okay...you said you want an attorney...I'm going to talk to our district attorney just to make sure he's okay that we continue talking to you...if...you're the one...(not audible).

ML: I don't want I don't want an attorney as long as...as long as oh my god I will I will tell you guys everything...

JW: ...look...

ML: ...I I don't know every I thought it was SIDS...

JW: ...okay...that's enough...I don't I don't want to talk anymore about...

ML: ...(not audible) everything I found out that Amanda told you somethin' didn't even tell you guys something...

JW: ...okay...

ML: ...and I have I have twenty five witnesses that I told about this.

JW: Then we need to know that...

ML: I will...

JW: ...but I need to stop now because when you say a lawyer dat dat makes me have to stop...I'm gonna go to the district attorney and ask him if I can continue with you...

ML: You you can continue you don't need to go do that I I give you I I...

JW: We'll take a little break though lets take a little break...and we'll start over

ML: I I need a I need wow...

JW:. ...so lets just start over okay...let me um but if I do come back in and if I can talk to you I'll read you your Rights I don't want to scare you...I'll read your Rights and say here and then you can answer yes or no I want an attorney at that point...so lets lets take a break and come back to it okay.

ML: Okay.

JW: Want you just have a seat and I'll get Sara to hook up with ya.

(Wood leaves room)

SG: Got your smokes?

ML: Yeah.

SG: All right I'm gonna bring Chad out...my partner I don't think you've ever met him but he's new to the drug unit and and this is Matt...Matt and I have known each other for a long time so hopefully...lets go out this way.

(Long pause)

ML: Enjoy your health.

SG: I know I know why don't you have a seat I'm gonna use the restroom real quick do you want some water or something?

ML: Um yeah do you mind if I use the restroom too? I need to pee.

SG: Yeah the restroom.

ML: Yeah.

SG: Chad do you want to run him to the the little one right here maybe?

CR: Sure...right this way.

SG: Just that single one there.

(Wood and Lonkoski enter room)

JW: All right.

ML: All right.

JW: Okay we'll start over...here Matt.

ML: All righty.

JW: Oh I was gonna get a notebook.

SG: Let me find that I'll be right back.

JW: Okay...did you get a cigarette in?

ML: Yeah...the first time it ever helped me calm down right away.

JW: Okay.

ML: Did you a... talk to your D A attorney...

JW: Yep and...

ML: ...is that fine to go on with it...

JW: ...an and it it the first question for you for you is Matt... do you want to talk to us?

(Gardner enters room)

ML: Yes...I will talk to you guys...I have nothing to hide.

JW: And you're you're initiating that you want us to talk to ya.

ML: Yes.

JW: Okay...what I'll do though is is a I'm gonna read your Miranda just like you see in T V...I kinda have to do that now where before you weren't you weren't in custody so to speak now you had words attorney and stuff...

ML: Mm hmm (affirmative).

JW: ...if you want to talk to us now I'll go ahead and read your Rights and then we'll go on from there...is that all right with ya?

ML: Yep that that's fine with me.

JW: Okay...you have the Right to remain silent anything you say can and will be used against you in a court of law...you have the Right to consult with a lawyer before questioning and to have a lawyer present with you during questioning if you cannot afford to hire a lawyer one will be appointed to represent you at public expense before or during questioning if you so wish...if you decide to answer questions without a lawyer present you have the Right to stop the questioning and remain silent at any time you wish and the Right to ask for and have a lawyer at any time you wish including during the questioning...I'm gonna have you look at those and can you read?

ML: Yeah.

JW: Okay why don't you just go through those and read those just so we make sure you understand.

ML: You want me to read out loud or?

JW: No you you don't have to just go ahead take your time and read read through each line so you understand that so I didn't go too quick for ya...(pause). Anything there that you don't understand or I can help you...

ML: I understand everything.

JW: ...okay and it says do you understand each of these Rights?

ML: Yes.

JW: Realizing that you have these Rights you are now willing to answer questions or make a statement?

ML: Yes.

JW: Today is five twenty-two oh nine if I can get you to sign there Matt...okay...yeah let me lets kinda start to go back to where we were and um I'll talk to you about the autopsy...the autopsy...this is from Peyton...okay this is you understand what an autopsy is right...they do they do toxicology and in Peyton's body is Morphine...okay tested positive...this is the therapeutic range which means if I went to the doctor and needed Morphine...they either it would either be a level in my body of either ten twenty thirty up to eighty...this is the concentration that's in Peyton's little body.

ML: (not audible)...is that more?

JW: This yes two hundred thirty one versus the highest therapeutic...

ML: Oh wow.

JW: ...range is eighty...so it's huge...this is this isn't an accident...

ML: This is intentional.

JW: ...this isn't somethin' that she bumped into or stuck her little hand on some old residue on the floor and its not what it is the doctors say this is something that's a chronic...has been going on for a while or was a pretty good dose at one time...there may be some question...if I...correct me if I'm wrong Sara...Morphine versus Heroin...

SG: Right there the levels in her body was either Heroin or Morphine...it was not you know like when we talked about pain pills Oxys and things like that...those would test as an opiate...the same as Heroin...but their tests shows that it was Heroin not Oxys or anything like that so there's a a difference...can I can I see that for just one second?


State v. Lonkoski
Copy of Record Entry 71
imation
CD-R
700MB, 80 min

CERTIFICATION AS TO APPENDIX

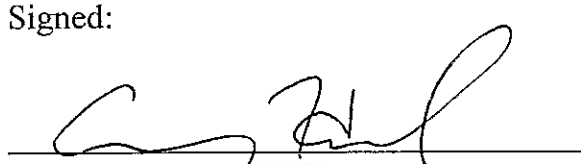
I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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

Dated this 16th day of November, 2012.

Signed:



ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkel@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

STATE OF WISCONSIN

IN SUPREME COURT

No. 2010AP2809-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW A. LONKOSKI,

DEFENDANT-APPELLANT-PETITIONER.

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT III, AFFIRMING A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT OF ONEIDA COUNTY, THE HONORABLE MARK A. MANGERSON, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

J.B. VAN HOLLEN
Attorney General

WARREN D. WEINSTEIN
Assistant Attorney General
State Bar #1013263

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9444
(608) 266-9594 (Fax)
weinsteinwd@doj.state.wi.us

TABLE OF CONTENTS

Page

CASES CITED

Page

STATE OF WISCONSIN

IN SUPREME COURT

No. 2010AP2809-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW A. LONKOSKI,

DEFENDANT-APPELLANT-PETITIONER.

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT III, AFFIRMING A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT OF ONEIDA COUNTY, THE HONORABLE MARK A. MANGERSON, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are warranted in cases before this Court.

STATEMENT OF THE CASE

Matthew Lonkoski appeals his conviction for recklessly causing great harm to a child and neglecting a child resulting in death, entered on his guilty pleas (46). Prior to his pleas, Lonkoski moved to suppress statements he gave police (20).

The circuit court found Lonoski's statements to be voluntary. "There was certainly nothing improper about the interrogation technique. They weren't brow-beating him. It was a persistent type of search for any information that he had, and to some extent, it was effective. . . . He wasn't deprived of anything" (60:3). The circuit court also found at "30 minutes and 29 seconds, Mr. Lonkoski clearly asserted his right to counsel. Then he nearly immediately swung the other way and seemed to be waiving his right to counsel" (60:3-4).

Initially, after summarizing the video and transcript of the events subsequent to Lonkoski's request for a lawyer, the circuit court stated: "[W]hen a defendant claims the Fifth Amendment privilege to have an attorney present during questioning, all questioning must cease and he must be afforded the opportunity to exercise that right. He must be put in contact with an attorney or given the means to contact counsel" (60:5). The circuit court continued:

> The only time that the police don't have to be concerned or the deputies don't have to be concerned after there is a claim of the right to counsel is that — is when the defendant reinitiates the discussion, that is, when they

> stop their interrogation and then presumably some time passes and then after thinking it through a defendant tells the jailer that the defendant wants to talk to the deputies again and reinitiates the conversation. Then, of course, there has to be advice of rights and in effective understanding and waiver of those rights.
>
> In this scenario I just read, we never really had a ceasing of the interrogation like *Edwards*[1] requires. In fact, there was some additional discussion. There was a question by the defendant whether he was under arrest. When he was formally arrested and told you are now, he then immediately said he wants to talk without a lawyer obviously impressed by the fact that he is now going to be detained.
>
> * * *
>
> So it wasn't a matter here of defendant not reinitiating as much as it was the interrogation procedure never ending. They never really stopped the interrogation. It's true after some discussion and his volunteering to talk to them that they took a break, but nothing here was initiated by the defendant. It was a continuation of the interrogation.
>
> So I'm finding that there has been an *Edwards versus Arizona* violation, and I'm suppressing from use at trial everything after his first line of invocation of his right to counsel when he said 30 minutes, 29 seconds into the interview I want a lawyer.

(60:6-7).

[1] *Edwards v. Arizona*, 451 U.S. 477 (1981).

When Lonkoski's attorney submitted a proposed order to the judge for signature, the State objected (25; 31). The State also filed a motion to reconsider (29). The circuit court held a hearing on February 15, 2010 (61:1). At the beginning of that hearing, the circuit court explained:

> I previously ruled on this case that the statements of Mr. Lonkoski should be suppressed because he claimed his right to counsel contemporaneously with the announcement that he was under arrest. I saw no distinction whatsoever in the technicality that he said he wanted an attorney twice within about ten seconds of him being told he was under arrest, with the formal arrest coming after the claim to the right to counsel.
>
> When I ruled from the bench I made no findings in regard to whether he was in custody at the time the statement was made. He said twice that he wanted an attorney. Mr. Schultz admitted findings in an order for my signature after the last hearing. The state objected to those findings indicating that, in fact, I had never made the findings that he was in custody at the time he requested counsel, and that's true.
>
> So, counsel and I had a brief conference in chambers, and I indicated to counsel that I thought I needed to take another look at the custody issue because case law is clear.... In order to trigger *Edwards v. Arizona* requirements, the subject has to be in custody ....

(61:2-3). The court then concluded, "I think when I looked at the totality of the circumstances Mr. Lonkoski was not in custody at the time that he claimed his right to counsel" (61:3). The court reviewed a number of factors and stated:

> [T]hose factors indicate to me that he was not in custody at the time, he claimed his right to counsel. Now having said that, I go back to my prior ruling where I found the claim of right to counsel. Although it came before his formal arrest, I thought *Edwards v. Arizona* applied because it was contemporaneous and I thought standing on technicality in a situation like that was not appropriate.

(61:6). The court then held:

> We don't have an *Edwards v. Arizona* case here, first of all because the claim of a right to counsel as I have just found happened when the defendant was not in custody. I understand fully that it was a claim within 20 or 30 seconds of when he was obviously formally arrested, but that technicality is important. The claim to counsel happened when he wasn't in custody.

(61:10-11). The court ultimately denied Lonkoski's motion to suppress (61:13).

On appeal, Lonkoski contended that he was in custody for *Miranda*[2] purposes at the time he requested counsel because his arrest was "imminent." Since, in his view, the questioning continued after he unambiguously asked for an attorney, all statements he made after that request should have been suppressed. *State v. Lonkoski*, No. 2010AP2809-CR, slip op. ¶ 4 (Wis. Ct. App. Jan. 18, 2012). The State argued Lonkoski was not in custody when he asserted his right to counsel and the police need not honor an anticipatory attempt to invoke *Miranda*. Alternatively, if Lonkoski was in custody, he

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

initiated the further exchange with detectives. Brief of the State in the Court of Appeals. The Court of Appeals concluded that Lonkoski initiated the further conversation with police, effectively waiving his right to counsel. It did not decide whether Lonkoski was in custody. Slip op. ¶ 4. It affirmed the judgment of conviction. *Id.* ¶ 1.

STATEMENT OF FACTS

At the suppression hearing, Detective Sarah Gardner testified that she and Lieutenant Jim Wood investigated the death of infant P.L. (26:6). The child's mother, Amanda, contacted the sheriff's department requesting to speak with Detective Crowell "about black mold" (26:6-7). The day previous to Lonkoski's interview, the detectives received toxicology findings revealing P.L.'s death resulted from an overdose of morphine (14:21; 26:6). Crowell requested Amanda come to the sheriff's department (26:7-8). No one requested Lonkoski come along (26:8). Gardner and Wood interviewed Amanda before the interview with Lonkoski (26:8-9). Amanda was interviewed in the same room as Lonkoski but was taken to a break room during Lonkoski's interview (26:9).

Lonkoski drove Amanda to the sheriff's department (26:8). Lonkoski waited in the lobby (26:9). After the detectives finished their interview with Amanda, Wood went to the lobby and got him (26:9). A door, locked to entry, blocks the interview room where detectives interviewed Lonkoski from the

lobby (26:9-10, 14-15). But the door is not locked to someone exiting the interview room area (26:15). The department requires an escort beyond that door (26:10).

Lonkoski had been arrested on prior occasions (26:13). Gardner had interviewed him on many occasions (26:12). Some of Lonkoski's previous interviews had been custodial interviews (26:13). Lonkoski had used the exit door in the past (26:15). Lonkoski's interview was video recorded; the recording was admitted as an exhibit (71).

The State will refer to further facts in the argument portion of the brief.

STANDARD OF REVIEW

Appellate courts use a two-part standard of review for constitutional questions. The court upholds the circuit court's findings of historical or evidentiary fact unless they are clearly erroneous. It reviews independently the application of constitutional principles to the facts found. *State v. Forbush*, 2011 WI 25, ¶ 10, 332 Wis. 2d 620, 796 N.W.2d 741.

ARGUMENT

I. THIS COURT SHOULD DECLINE LONKOSKI'S INVITATION TO ADOPT AN "IMMINENT CUSTODY" RULE.

A. BACKGROUND LAW AND SUMMARY OF THE STATE'S POSITION.

In *Miranda v. Arizona*, 384 U.S. 436, (1966), the United States Supreme Court held that:

> the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.

Id. at 444. *Miranda* defined "custodial interrogation" to mean "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.*

"[A]n individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation . . . ." *Id.* at 471. The Court provided these warnings to counter-balance the inherently coercive nature of custodial interrogation. Once an individual in custody invokes his right to counsel, interrogation "must cease until an attorney is present"; at that point,

"the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning." *Id.* at 474. *See also Minnick v. Mississippi*, 498 U.S. 146, 150 (1990).

In *Edwards v. Arizona*, 451 U.S. 477, 484-85, (1981), the Court held that an accused who has expressed a desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available unless the accused himself/herself initiates further communication, exchanges, or conversations with the police. Without this initiation "a valid waiver of … right[s] cannot be established by showing only that [the accused] responded to further police-initiated custodial interrogation even if he has been advised of his rights." *Id.* at 484.

In *State v. Hambly*, 2008 WI 10, 307 Wis. 2d 98, 745 N.W.2d 48, this court held that in order for the State to establish that a suspect validly waived his or her Fifth Amendment *Miranda* right to counsel after effectively invoking it, the State must: (1) show as a preliminary matter the suspect initiated further communication, exchanges, or conversations with the police; and (2) the suspect voluntarily, knowingly, and intelligently waived counsel. *Id.* ¶¶ 68-70. *Accord, State v. Stevens*, 2012 WI 97, ¶ 54, 343 Wis. 2d 157, 822 N.W.2d 79.

Lonkoski argues the lower courts erred in refusing to suppress his two inculpatory statements to detectives. He reasons that he was "in custody" when he demanded a lawyer even though he had not been formally arrested. He invites this court to adopt an "imminent custody"

rule. He claims to have been "in custody" because custody was "imminent." In his view, since the police did not honor his request by ceasing their interview, the first statement should have been suppressed under *Miranda* and *Edwards*. Even though Lonkoski signed a waiver of his *Miranda* rights, he reasons that waiver was ineffective under *Edwards*. The second statement should also have been suppressed on the same grounds.

As the State will more fully develop below, Lonkoski's invitation to adopt an "imminent custody" rule is contrary to the United States Supreme Court's *Miranda* cases. It also conflicts with *Hambly* and the holdings of the Court of Appeals. Lastly, it finds no theoretical support in the *Miranda* rationale and presents an insurmountable practical problem.

B. UNITED STATES SUPREME COURT CASES PRECLUDE AN IMMINENT CUSTODY RULE.

As noted above, *Miranda* defines custodial interrogation as "questioning initiated by law enforcement officers *after* a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444 (emphasis added). Cases following *Miranda* make two things clear: (1) "freedom of action in any significant way" means more than freedom to terminate the interview and leave; and (2) "imminent custody" would untether custody from *Miranda's* rational.

In *Beckwith v. United States*, 425 U.S. 341 (1976), two Internal Revenue Service Intelligence Division agents interviewed Beckwith in his home.

The agents were investigating a possible criminal tax fraud case. *Id.* at 342-43. The Court observed "[i]n subsequent decisions [after *Miranda*] the Court specifically stressed that it was the Custodial nature of the interrogation which triggered the necessity for adherence to the specific requirements of its *Miranda* holding. *Id.* at 346 (citing *Orozco v. Texas* 394 U.S. 324 (1969) (involving questioning in a suspect's home after he had been arrested and was no longer free to go where he pleased); and *Mathis v. United States*, 391 U.S. 1 (1968) (involving questioning about federal tax fraud in a state jail by federal agents). Beckwith argued that he was the "focus" of a criminal investigation and that the agents' interview placed him under "psychological restraints." The Court rejected this argument. It held, "*Miranda* implicitly defined 'focus,' for its purposes, as 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" *Beckwith*, 425 U.S. at 347 (quoting *Miranda*, 384 U.S. at 444).

In *Oregon v. Mathiason*, 429 U.S. 492 (1977), a police officer tried to contact Mathiason after a home owner speculated he burglarized her house. Mathiason was on parole. The officer left his card at Mathiason's apartment indicating he wanted to "discuss something" with him. Mathiason called the officer and arranged a meeting at the State Patrol office. At the station house, the officer met Mathiason in the hallway and told him he was not under arrest. The interview took place behind a closed door. The officer further advised Mathiason that his truthfulness would possibly be considered by the

district attorney or judge. He then falsely stated police had found Mathiason's fingerprints at the scene. *Id*. at 493. After referencing the *Miranda's* definition of custodial interrogation, the Court found "no indication that the questioning took place in a context where [Mathiason's] freedom to depart was a restricted in any way." *Id.* at 495. The Court observed, "[s]uch a noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a 'coercive environment.'" *Id.*

In *California v. Beheler*, 463 U.S. 1121 (1983), Danny Wilbanks killed Peggy Dean when she refused to surrender her hashish to Wilbanks, Beheler and several acquaintances. Beheler called police and told them Wilbanks had killed Dean. Later that evening, Beheler voluntarily agreed to accompany police to the station house. Police specifically told him he was not under arrest. At the station house, Beheler agreed to talk to police. Police did not advise him of his *Miranda* rights. The interview lasted approximately thirty minutes. Beheler was permitted to leave but was arrested five days later in connection with the Dean murder. After being advised of his *Miranda* rights, he waived them and gave a second confession. *Id*. at 1122.

The Court again began by quoting the meaning of "custodial interrogation" from *Miranda*. *Id*. at 1123. It then held it to be "beyond doubt that Beheler was neither taken into custody nor significantly deprived of his freedom of action.

Indeed, Beheler's freedom was not restricted in any way whatsoever." *Beheler*, 436 U.S. at 1123.

In *Stansbury v. California*, 511 U.S. 318 (1994), a ten-year-old girl disappeared from a playground. The next morning, Zimmerman observed a large man emerge from a turquoise American sedan and throw something into a flood control channel. Police discovered the girl's body in the channel. From other witnesses police discovered the girl had talked to two ice cream truck drivers, one being Stansbury. Police initially focused on the other driver. However, three plainclothes officers went to Stansbury's trailer home and requested he accompany them to the police station as a witness. Stansbury agreed and road to the station in the front seat of a police car.

Two officers questioned Stansbury about his whereabouts and activities on the day the girl disappeared. Neither officer advised Stansbury of his *Miranda* rights. Stansbury admitted speaking to the victim after which he claimed he went home. He told the officers that about midnight he left his trailer home in his housemate's turquoise American-made car. This detail aroused the officers' suspicions since the housemate's car matched Zimmerman's description of the car he had observed. When Stansbury admitted to prior convictions for rape, kidnapping, and child molestation, the questioning officers terminated the interview and different officers advised Stansbury of his *Miranda* rights. Stansbury declined to make any further statements and requested an attorney. At that point he was arrested. *Id* at 319-21.

Stansbury filed a motion to suppress his statements which the trial court denied holding he was not "in custody" and not entitled to *Miranda* warnings until he mentioned the turquoise car. *Id.* at 321. The Court again began by quoting its definition of "custodial interrogation." As important to this case, the court observed,

> An officer's obligation to administer *Miranda* warnings attaches, however, only where there has been such a restriction on a person's freedom as to render him in custody.... In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but the ultimate inquiry is simply whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.

Id. at 322 (internal quotation marks and citations omitted).

More recently, in *Montejo v. Louisiana*, 556 U.S. 778 (2009), the Supreme Court considered the viability of the rule announced in *Michigan v. Jackson*, 475 U.S. 625 (1986). According to the majority of the *Montejo* Court, "*Jackson* represented a 'wholesale importation of the *Edwards* rule into the Sixth Amendment.'" *Montejo*, 556 U.S. at 787 (citing *Texas v. Cobb,* 532 U.S. 162, 175 (2001)). The *Montejo* court observed,

> Montejo also correctly observes that the *Miranda-Edwards* regime is narrower than *Jackson* in one respect: The former applies only in the context of custodial interrogation. *If the defendant is not in custody then those decisions do not apply*; nor do they govern other, noninterrogative types of interactions

> between the defendant and the State (like pretrial lineups).

Id. at 795 (emphasis added).

Finally, in *Maryland v. Shatzer*, ___ U.S. ___, 130 S.Ct. 1213 (2010), the court considered whether a break in custody ends the presumption of involuntariness established in *Edwards*. *Id*. at 1217. The court observed about *Edwards*: "In every case involving *Edwards*, the courts must determine whether the suspect was in custody when he requested counsel and when he later made the statements he seeks to suppress." *Id* at 1223.

These cases lead to the inevitable conclusion that without custody, *Miranda* warnings are not applicable. Lonkoski's argument that this court should adopt an "imminent custody" rule is untenable in view of the Court's requirement that custody is necessary for *Miranda* rights to attach.

It is also apparent from these cases that the Court's test for the custody component requires "restraint of freedom of movement of the degree associated with a formal arrest." *Stansbury,* 511 U.S. at 322. "Our cases make clear, . . . that the freedom-of-movement test identifies only a necessary and not a sufficient condition for *Miranda* custody." *Shatzer,* 130 S.Ct. at 1224.

Moreover, the inclusion of "restraint of freedom of movement of the degree associated with a formal arrest" in the definition of "custody," would seem to obviate the need for an "imminent custody" rule. If, as Lonkoski claims, his freedom was restricted "to the degree associated with a formal arrest" prior to his formal arrest, he was

"in custody" under *Miranda's* current, long-standing definition despite the fact that the detectives here did not communicate their decision to formally arrest him until after he requested a lawyer.

C. THIS COURT'S *HAMBLY* DECISION AND DECISIONS OF THE COURT OF APPEALS PRECLUDE AN IMMINENT CUSTODY RULE.

This Court has, like the United States Supreme Court, held that an accused must be in custody for *Miranda* rights to attach. *State v. Koput*, 142 Wis. 2d 370, 380, 418 N.W.2d 804 (1988); *State v. Armstrong*, 223 Wis. 2d 331, 344-45, 588 N.W.2d 606 (1999).

In *State v. Hassel*, 2005 WI App 80, 280 Wis. 2d 637, 696 N.W.2d 270, Hassel was not in custody at the time he asked to remain silent in response to questions from law enforcement officers. He was arrested the following day. *Id.* ¶¶ 2-3. The Court of Appeals observed that the *Miranda* safeguards apply only to custodial interrogations. Therefore, Hassel was not entitled to invoke *Miranda* during his earlier interview. *Id.* ¶ 9.

In *State v. Kramer*, 2006 WI App 133, 294 Wis. 2d 780, 720 N.W.2d 459, an incident occurred on March 7, 2003, in which Kramer shot and killed one police officer and shot at another officer over the course of a standoff after Kramer threatened a work crew attempting to trim trees on or near his property. *Id.* ¶¶ 2-3. On appeal, Kraemer contended statements he made while in

police custody following the standoff must be suppressed under *Miranda* and *Edwards* because he requested an attorney during the standoff and police subsequently questioned him in the absence of counsel. *Id.* ¶ 6. Citing *Hassel*, the *Kraemer* Court held "the *Miranda* safeguards apply only to *custodial* interrogations." *Id.* ¶ 9 (emphasis the court's).

The *Hambly* Court observed, "*Kramer* and *Hassel* govern a suspect who is not in custody during police interrogation. The cases stand for the rule that a person who is not in custody cannot anticipatorily invoke a Fifth Amendment *Miranda* right to counsel or right to remain silent." *Hambly,* 307 Wis. 2d 98, ¶ 41. The observation in *Hambly* is in keeping with *State v. Grady*, 2009 WI 47, ¶ 18, 317 Wis. 2d 344, 766 N.W.2d 729, where this Court stated, "It is true that *Miranda* necessitates the administration of the warnings only after custody, and that precustodial warnings are not required." *Id.* ¶ 18. The *Grady* court rejected a claim that *Miranda* warnings given in a non-custodial interview were per se ineffective. *Id.* ¶ 25. The *Hambly* concurring opinion differs with the majority only over whether a person who is concededly in custody can invoke *Miranda* rights prior to actual interrogation. Thus, *Hambly* adopts the position the Court of Appeals declared in *Kramer* and *Hassel.*

If this court did not adopt the Court of Appeals *Kramer* and *Hassel* conclusion in *Hambly*, it should do so now. The result reached in those cases is consistent with the decisions of courts in other jurisdictions. *See United States v. Wyatt*, 179 F.3d 532, 537 (7th Cir. 1999)("The Fifth Amendment right to counsel safeguarded by

Miranda cannot be invoked when a suspect is not in custody."); *United States v. Bautista*, 145 F.3d 1140, 1149 (10th Cir. 1998)("If Bautista was not in custody ... during the questioning, then his attempts to invoke his right to remain silent and his *Miranda* right to counsel were ineffective."); *Alston v. Redman*, 34 F.3d 1237, 1244 (3d Cir. 1994)("Because the presence of both a custodial setting and official interrogation is required to trigger the *Miranda* right-to-counsel prophylactic, absent one or the other, *Miranda* is not implicated."), *cert. denied,* 513 U.S. 1160 (1995); *United States v. Hines*, 963 F.2d 255, 256 (9th Cir. 1992)("[I]f Hines was not in custody during the first interview, the reference to his lawyer at that time cannot be considered an invocation of *Miranda* rights."); *Marr v. State*, 759 A.2d 327, 340 (Md. App. 2000)("Because appellant's purported invocation, through his attorney, occurred before appellant was in custody, it could not operate to invoke his Fifth Amendment right to counsel."); *State v. Warness*, 893 P.2d 665, 668 (Wash. App. 1995)("[T]he Fifth Amendment right to counsel cannot be invoked by a person who is not in custody."); *State v. Bradshaw*, 457 S.E.2d 456, 467 (W. Va. 1995)(holding that the defendant's attempt to invoke *Miranda* rights before being taken into custody was an "empty gesture"); *Burket v. Commonwealth*, 450 S.E.2d 124, 129-30 (Va. 1994)(Burket was not in custody therefore his statement, "I'm gonna need a lawyer" was not effective to invoke *Miranda*); *Commonwealth v. Morgan,* 610 A.2d 1013, 1016 (Pa. Super. 1992), *appeal denied*, 619 A.2d 700 (Pa. 1993)(holding that even though "the police officer took the precautionary step of reading *Miranda* rights to a non-custodial suspect," the defendant could not assert the Fifth Amendment

right to counsel outside the context of custodial interrogation).

D. AN "IMMINENT CUSTODY" RULE UNTETHERS *MIRANDA* FROM ITS THEORETICAL BASIS.

The Court has repeatedly stressed that *Miranda* warnings are necessary because "compulsion 'is inherent in custodial surroundings' and consequently, that special safeguards [a]re required in the case of 'incommunicado interrogation of individuals in a police-dominated atmosphere resulting in self-incriminating statements without full warnings of constitutional rights.'" *Beckwith*, 425 U.S. at 346 (quoting *Miranda*, 384 U.S. at 458, 445); *Stansbury*, 511 U.S. at 323. *See also Mathieson*, 429 U.S. at 495 (Being in custody is "the sort of coercive environment to which *Miranda* by its terms was made applicable and to which it is limited."). By definition, an "imminent custody" rule includes a period prior to *Miranda* custody. "Such a rule would be entirely untethered from the original rationale of [*Miranda*]." *Montejo*, 556 U.S. at 786. Since the rationale for *Miranda* warnings rests on the coercive atmosphere created by the custodial nature of the surroundings coupled with interrogation, it follows that the absence of custody also removes the coercive atmosphere.

An "imminent custody" rule is also unworkable. How would courts determine when custody is imminent? Using the subjective intentions of the police or the accused is foreclosed by *Stansbury*. "The initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views

harbored by either the interrogating officers or the person being questioned." *Stansbury*, 511 U.S. at 714. Lonkoski suggests it is perhaps when the investigation focuses on the suspect. That possibility is foreclosed by *Beckwith*. *Beckwith*, 425 U.S. at 347 (the focus for *Miranda* purposes is interrogation after custody).

What objective criteria are left to the courts? The only readily apparent criteria is the length of time between an attempt to invoke *Miranda* rights and the actual arrest. This criteria is unacceptable. It is easily manipulated by police. And it departs from an examination of the totality of the circumstances.

II. LONKOSKI WAS NOT IN CUSTODY WHEN HE DEMANDED A LAWYER.

Using the current custody standard, Lonkoski was not in custody. The circuit court correctly held that police were not required to honor his request for a lawyer by ceasing their interview.

The Fifth Amendment right to silence privileges a person not to answer official questions put to them in any proceeding civil or criminal, formal or informal, where the answer to those questions might incriminate that person in a future criminal prosecution. *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). A suspect can invoke this privilege prior to *Miranda* custody by asserting it verbally (saying: "I refuse to answer because it might incriminate me"), or by exercising it (actually remaining silent and not answering

questions). A suspect may request counsel to be present prior to *Miranda* custody by either asserting a desire for counsel or by not answering any questions and retaining counsel.

If the privilege is exercised (with or without counsel), there can be no violation unless the government places a penalty on the suspect's refusal to cooperate. *See State v. Spaeth*, 2012 WI 95, ¶ 47, 343 Wis. 2d 220, 819 N.W.2d 769. Where the person nonetheless refuses to answer, the Court has held the government could not enforce the penalty. *Turley*, 414 U.S. at 78. Where the person succumbs to a penalty inducement, the Court has held that any statement is subject to suppression in any criminal prosecution. *Garrity v. New Jersey*, 385 U.S. 493, 498-99 (1967).

The question presented in cases such as this one, where a suspect asserts the privilege but does not actually exercise it, is whether police must honor the mere assertion. The answer to that question depends on whether the suspect is subject to "custodial interrogation" within the meaning of *Miranda*. Where a suspect is "in custody," police must honor the assertion by ceasing interrogation. *Miranda,* 384 U.S. at 474. Where a suspect is not in custody, the suspect may nonetheless assert a right to silence or to have counsel present, but police are not required to honor the request. They may continue to ask questions. Stated another way, if a suspect is not subject to "custodial interrogation," police need not stop their questioning merely because the suspect asserts the right to silence or requests an attorney. A suspect not subject to "custodial interrogation" must actually exercise the right to silence by not answering questions.

The circuit court found that approximately thirty minutes into Lonkoski's interview he asserted a right to counsel (60:3-4; 61:3), but the circuit court found that Lonkoski was not in custody at that time. "I think when I looked at the totality of the circumstances Mr. Lonkoski was not in custody at the time that he claimed his right to counsel" (61:3). Therefore, the court reasoned, it constitutes an anticipatory attempt to invoke *Miranda* rights.

Whether a suspect is in custody requires two discrete inquiries: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable innocent person have felt he or she was not at liberty to terminate the interrogation and leave. *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). The circumstance must demonstrate the reasonable person's restraint of freedom of movement rose to the degree associated with a formal arrest. *Stansbury,* 511 U.S. at 322.

The circuit court made the following findings of evidentiary fact.

> Now, I note a number of things. First of all, the officers were not dealing with someone unfamiliar to formal interrogation. The video clearly shows that the defendant had previously been in custody and had previously been questioned by Officer Gardner while the defendant was in a locked portion of the jail. The portion of the jail he was in is a typical interrogation setting. It is locked to ingress by individuals, but there is no indication that it was locked for egress. That is, that the defendant could simply walk out.

Additionally, there is no evidence that Mr. Lonkoski knew or thought he was locked in, in any respect. Although the interrogation took place largely with the door closed, there were clearly times when the door was opened and he could in fact have walked out.

He was offered a number of things during the 30 minutes and especially the few minutes after he claimed his right to counsel. He was offered to go to the bathroom, and he was allowed to smoke. The interrogation, in my estimation, also indicated a lack of custody. The questions to Mr. Lonkoski, up until the point he claimed his right to counsel, were rather open ended questions.

They called for a narrative by him. They were not accusatory. They were not leading questions. He was given facts and then it was suggested to him that he comment on things or tell the officers what they already knew. As interrogations go, the interrogation was relatively short before he claimed his right to counsel, almost exactly after 30 minutes.

The defendant was not physically restrained in any respect. He showed up for the questioning on his own free will with the child's mother. He was not handcuffed. There was no indication that he was restrained in any respect. He was told on more than one occasion that he was not under arrest. He was not moved from one place to another. The entire questioning took place in one simple setting. The factors that would indicate custody would be only that first of all, this was an interrogation within a jail.

Secondly, it was an important investigation. It was a homicide investigation. Although, up until the point that the defendant decided he was the focus of the investigation, there wasn't a clear indication that the officers were looking for a

> homicide defendant. The search in the questioning was for cause of death and what Mr. Lonkoski may have known at the time concerning how the child died. It only became a focused investigation in the last two or three minutes before he claimed the right to counsel and the focus was on morphine and Mr. Lonkoski's potential contact with morphine.

(61:4-6). These findings constitute the circumstances surrounding the interview and the level of restraint. Lonkoski does not contend the circuit court's findings of evidentiary fact are clearly erroneous.

The circuit court concluded in applying the law to the above facts:

> So, on balance, there are factors that weigh heavily in the court is information not only as to number, but the significance of the factors that would indicate that objectively, a reasonable person would not think he was in custody. In fact, something very telling is, after Mr. Lonkoski said he wanted a lawyer, he asked if he was under arrest. If he believed he was under arrest I suspect he would not be asking that question point blank.
>
> So, although [*sic*] those factors indicate to me that he was not in custody at the time, he claimed his right to counsel.

(61:6).

Factors bearing on whether a suspect is in custody include the suspect's freedom to leave, the purpose, place and length of the interrogation and the degree of restraint. *State v. Gruen*, 218 Wis. 2d 581, 594, 582 N.W.2d 728 (Ct. App. 1998). When considering the degree of restraint, courts consider

whether the suspect is handcuffed; whether a weapon is drawn; whether a frisk is performed; the manner in which the defendant was restrained; whether the suspect is moved to another location; whether questioning took place in a police station; and the number of officers involved. *Id.* at 594-96. *See also Yarborough v. Alvarado*, 541 U.S. 652, 675-76 (2004) (Breyer dissenting) ("Our cases also make clear that to determine how a suspect would have "gaug [ed]" his "freedom of action," a court must carefully examine "all of the circumstances surrounding the interrogation," *Stansbury*, *supra*, at 322, 325, 114 S.Ct. 1526 (internal quotation marks omitted), including, for example, how long the interrogation lasted (brief and routine or protracted?), *see, e.g., Berkemer supra,* at 441 104 S.Ct. 3138,; how the suspect came to be questioned (voluntarily or against his will?), *see, e.g., Mathiason*, 429 U.S. at 495, 97 S.Ct. 711; where the questioning took place (at a police station or in public?), *see, e.g., Berkemer, supra*, at 438-439, 104 S.Ct. 3138; and what the officer communicated to the individual during the interrogation (That he was a suspect? That he was under arrest? That he was free to leave at will?), *see, e.g., Stansbury, supra* at 325, 114 S.Ct. 1526).

Lonkoski concedes he came to the police department voluntarily. Lonkoski's Br. at 17. He argues he was "in custody" because a reasonable person would not be free to leave when he was at the Sheriff's department, in a small room and officers were suggesting they knew he killed his daughter. Lonkoski's Br. at 17-18. He ignores the circuit court's factual finding that Wood's statement "You are now." was the point at which the detectives arrested Lonkoski (61:4).

Initially, Lonkoski points out the door between the lobby and the interview room where Lonkoski talked to the detectives was "inaccessible to the public." Lonkoski's Br. at 15. He neglects to point out, however, that the door permitted Lonkoski to exit on his own and that Lonkoski knew this fact from his previous police encounters (26:10, 14-15). He incorrectly states as fact that the officers suggested they knew he killed his daughter. He claims neither detective denied accusing him of giving his daughter morphine. Lonkoski's Br. at 16. Wood explicitly stated he was not accusing Lonkoski of causing the child's death and Gardner implicitly did so (61:6-7; 71:00:30:30-00:31:03).

Lonkoski points to the fact that the detectives probably suspected Lonkoski or Amanda or both, because Wood made reference to bad parenting. He also points to what he considers a change in the tenor of the interview where Wood suggested somebody "did something" to P.L. Lonkoski's Br. at 16. Lonkoski's argument amounts to a claim that he was in custody because the detectives focused on him after receiving the lab report indicating P.L. had died of morphine toxicity. *Beckwith* rejected the "focus" approach to custody. *Beckwith*, 425 U.S. at 347.

The Court of Appeals has acknowledged the analysis required by the Fourth and Fifth Amendments are not always clearly distinguished in the case law. *State v. Morgan*, 2002 WI App 124, ¶ 13, 254 Wis. 2d 602, 648 N.W.2d 23. Whether a reasonable person would believe he was free to leave is the test for whether someone is seized under the Fourth Amendment. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

State v. Williams, 2002 WI 94, ¶ 4, 255 Wis. 2d 1, 646 N.W.2d 834. For example, a person is not free to leave during a traffic stop or when detained under *Terry v. Ohio*, 392 U.S. 1 (1968).

However, the police are not required to advise a person of his/her *Miranda* rights simply because the person is seized under *Terry* or during a traffic stop. *Berkemer*, 468 U.S.at 440; *State v. Griffith,* 2000 WI 72, ¶ 69 n.14, 236 Wis. 2d 48, 613 N.W.2d 72. The difference distinguishing a seizure from *Miranda* custody stems from the varying level of restraint required for each Amendment. To be "in custody" for *Miranda* purposes, the restraint must rise to the level "associated with a formal arrest." Freedom-of-movement is necessary but not sufficient for *Miranda* custody. *Shatzer,* 130 S.Ct. at 1224.

The factors here point to the conclusion the circuit court reached. First, Lonkoski was not invited to the police station at all; he was there because he drove Amanda. Amanda had requested to speak to Detective Crowell who had requested she, not Lonkoski, come to the sheriff's department. Lonkoski's presence at the sheriff's department was fortuitous. Second, the interview to the point the circuit court found the detectives arrested him of the arrest totaled thirty to thirty-one minutes. Not a long time, as the circuit court observed. Third, the detectives told Lonkoski several times he was not under arrest.

Concerning the degree of restraint, Lonkoski was never handcuffed. Although the door to the interview room was closed, the detectives told him they closed the door out of privacy concerns. Lonkoski knew the door was not locked because

the detectives left and reentered during the interview. The door separating the interview area from the lobby was not locked either (26:15; 61:4). And Lonkoski knew that fact from prior experience (26:15). The interview took place at the same location; Lonkoski was never moved. There are no weapons apparent on the recording of the interview (71). The interview did take place in a police station conducted by two detectives. But an interview at the police station does not alone make an interview custodial. *Beheler*, 463 U.S. at 1125; *See also e.g., Grady*, 317 Wis. 2d 344, ¶ 4. Under these circumstances, a reasonable person would have felt free to terminate the interview and leave.

Lonkoski relies on four cases: *Jackson v. State*, 528 S.E.2d 232 (Ga. 2000), *Mansfield v. State,* 758 So. 2d 636 (Fla. 2000), *Ramirez v. State*, 739 So. 2d 568 (Fla. 1999), and *United States v. Jacobs*, 431 F.3d 99 (3rd Cir. 2005). Reliance on cases from other jurisdictions is some help in determinations under a totality of the circumstances standard but each of these cases has important distinguishing facts.

For example, Jackson had just confessed his involvement in a crime to law enforcement officers so the court believed a reasonable person who had so confessed would believe himself/herself to be in custody. *Jackson*, 528 S.E.2d at 235. Lonkoski made no such admission prior to his arrest.

Ramirez was in possession of physical evidence of a murder including the murder weapon and some of the victim's jewelry. He had provided the physical evidence prior to questioning. Police informed him that they had

overheard a conversation with his accomplice in which they discussed destroying the evidence. *Ramirez*, 739 So. 2d at 572. The detectives told Ramirez that they knew he was involved. *Id.* at 574. The court found that a reasonable person in Ramirez's circumstances would believe himself/herself to be in custody. *Id.*

Mansfield was interrogated by three detectives at a police station, confronted by strong evidence of his guilt and was told by one detective: "You and I are going to talk. We're not going to leave here until we get to the bottom of this." *Mansfield*, 758 So. 2d at 644. The court concluded that the police restrained Mansfield to a level associated with a formal arrest. It asked not whether a reasonable person in Mansfield's circumstances was free to leave but whether a reasonable person in Mansfield's circumstances would believe himself to be in custody. *Id.*

Jacobs was summoned to Federal Bureau of Investigation (FBI) offices without explanation, incriminating evidence was place in her view, she was told the interrogator thought she was guilty and reasonably felt her status as an FBI informant obliged her to stay. *Jacobs*, 431 F.3d at 105.

The fact that police confront a suspect with evidence of his/her guilt has no bearing on the custody inquiry. In *Mathiason*, the questioning officer confronted Mathiason by falsely claiming his fingerprints had been discovered at the scene. The Supreme Court of Oregon found this false statement to be another circumstance contributing to the coercive environment which made the *Miranda* rationale applicable. The Court

responded, "Whatever relevance this fact may have to other issues in the case, it has nothing to do with whether respondent was in custody for purposes of the Miranda rule." *Mathiason*, 429 U.S. at 495-96.

The circuit court correctly found Lonkoski was not in custody when he requested a lawyer. The detectives were not required to honor his request.

III. LONKOSKI REINITIATED FURTHER CONVERSATION WITH THE DETECTIVES.

If this court believes that Lonkoski was in custody or if it chooses to assume custody as the Court of Appeals did, Lonkoski initiated further communication with the detectives.

As previously noted, once a suspect in custody asserts the *Miranda* right to counsel, *Edwards* prohibits any future questioning unless counsel is present, or (1) "the accused himself initiates further communication, exchanges, or conversations with the police," *Edwards*, 451 U.S. at 485; and (2) waives the right to counsel voluntarily, knowingly and intelligently. *Hambly*, 307 Wis. 2d 98, ¶¶ 69-70. Eight of nine Supreme Court Justices approved this two-step analysis in *Oregon v. Bradshaw*, 462 U.S. 1039, 1044-46, 1053 (1983).

The circuit court rejected the State's contention that Lonkoski re-initiated communication because it believed that some time must pass between the invocation of the *Miranda* right to counsel and suspect initiated questioning

(60:6). The court stated, "So it wasn't a matter here of defendant not reinitiating as much as it was the interrogation procedure never ending. They never really stopped the interrogation." (60:7). On reconsideration, the court stated:

> there was not the *Edwards v. Arizona* break that that case anticipated because *Edwards v. Arizona* as I indicated, anticipates that the defendant is placed back in his or her cell and there's no contact with that defendant and then the defendant on his own initiative contacts the police and says, "look, I thought this over I want to speak with you," we didn't have that situation here. There wasn't a break.

(61:14).

The Court of Appeals assumed Lonkoski's custodial status but concluded "the transcript of the interrogation shows a clear break in the discussion after Lonkoski requested counsel. Wood specifically said: 'We're gonna quit' and 'I don't want to talk to you at this point. Let's take a little break.'" Slip op. ¶ 7. The Court of Appeals rejected Lonoski's characterization of the interchange between he and the detectives as interrogation. Slip op. ¶¶ 8-9. It held his subsequent waiver of counsel to have been voluntary, knowing and intelligent. Slip op. ¶ 10.

Lonkoski argues that he did not initiate further communication with the detectives because interrogation never ceased. Lonkoski's Br. at 24. As he did in the Court of Appeals, Lonkoski characterizes the interchange between he and the detectives as interrogation. Lonkoski's Br. at 24-26. In his view, a suspect cannot initiate further communication with police unless a break occurs

between the assertion and the accused's initiation which requires the interrogation to cease.

Lonkoski's argument must be rejected because: (1) although police must scrupulously honor a request for counsel, no cessation in communication must occur as this court held in *Hambly* and as the language of the *Edwards* Court implies; and (2) the Court of Appeals correctly held the interchange between Lonkoski and the detectives did not constitute interrogation so the detectives did scrupulously honor Lonkoski's request and ceased interrogation.

It is true that police must scrupulously honor a request for counsel during custodial interrogation. But *Hambly* strongly suggests no break in communication need occur in order for an accused to initiate further questioning with police. Stated differently, any communication between a valid assertion and suspect initiated questioning must not be interrogation.

Hambly asserted "that for a suspect to 'initiate' communication or dialogue there must be a break between the suspect's invocation of the right to counsel and the subsequent communication by the suspect to law enforcement that led to the inculpatory statements." *Hambly*, 307 Wis. 2d 98, ¶ 76. Hambly argued the dialog between he and police "had never ceased and no break in the dialogue occurred" before he initiated further communication. *Id.* This Court responded, "Whether a suspect 'initiates' communication or dialogue does not depend solely on the time elapsing between the invocation of the right to counsel and the suspect's beginning an exchange with law enforcement, although the lapse of time

is a factor to consider." *Id.* ¶ 77. And in *Hampton*, there was no break in the interchange between Hampton and police. *State. v. Hampton*, 2010 WI App 169, ¶¶ 10-15, 330 Wis. 2d 531, 793 N.W.2d 901.

In setting out the additional safeguards the Court deemed necessary when the accused asks for counsel, the *Edwards* Court made no reference to a break or to time in any way.

> [W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Edwards, 451 U.S. at 484-85. Surely, if the Court meant to require a break between the accused's expressed desire for counsel and his/her initiation of further communication, it would have explicitly stated so. It did not.

Additionally, a requirement of a break does not readily square with the underlying reasons for the Court's imposition of additional safeguards. "*Edwards* is designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights. The rule ensures that any statement made in subsequent interrogation is not the result of coercive pressures." *Minnick*, 498 U.S. at 150-51 (internal quotation marks

omitted). The "increased risk results not only from the police's persistence in trying to get the suspect to talk, but also from the continued pressure that begins when the individual is taken into custody as a suspect and sought to be interrogated—pressure likely to increase as custody is prolonged[.]" *Shatzer*, 130 S.Ct. at 1222 (citing *Minnick*, 498 U.S. at 153).

Inserting a required break between an expression of the desire for an attorney and any further initiation of communication prolongs and therefore increases rather than diminishes the pressure the Court sought to avoid. There seems to be no dispute that Lonkoski did, in fact, initiate the further exchange. The dispute appears to be whether that initiation "counts" given the short time between his expressed desire for an attorney and his expressed desire to talk to the detectives. The rule he advocates here acts to defeat an accused's clear intention to communicate with police. That is an undesirable result. *See Minnick*, 498 U.S. at 155 ("Both waiver of rights and admission of guilt are consistent with the affirmation of individual responsibility that is a principle of the criminal justice system.").

Whether the detective scrupulously honored Lonkoski's request for counsel by ceasing interrogation appears a more appropriate inquiry. The Court of Appeals correctly held they did.

The interchange between Lonkoski and the detectives after Lonkoski's demand for a lawyer was short.

> Lonkoski: Are you accusing me of giving my daughter Morphine?

Gardner: Matt Matt look at me ... every time you and I have talked okay ... and we go back a long way all right ... there's been some rough stuff that you and I have dealt with ...

Lonkoski: I want a lawyer. I want a lawyer now. … this is bullshit.

Wood: Okay.

Lonkoski: I would never do that to my kid ever I wasn't even at the apartment at all except at night ... wh wh why are you guys accusing me?

Wood: I didn't accuse you ...

Gardner: We were asking.

Lonkoski: There is this is is is is is is is is insane....

Wood: I have to stop talking to you though cause you said you wanted a lawyer.

Lonkoski: Am I under arrest?

Wood: You are now.

Lonkoski: Then I'll talk to you without a lawyer. … I don't want to go to jail. I didn't do anything to my daughter I would not lie to you guys. … this is in fact life or death.

Wood: Well now you now you complicate things.

Lonkoski: I just I just want to leave here and go by my mom now because this is in this is this is insane.

> Gardner: Matt we can't we can't talk to you just because you don't want to go to jail okay some things that we wanted to talk to you about were like Jim said ... we know what happened to Peyton ... we need to know a couple of the gaps to fill ... the gaps.
>
> Lonkoski: All right ...
>
> Gardner: (Not audible) ….
>
> Lonkoski: … ask those gaps....
>
> Gardner: ... that's what we want you to talk to us about. …
>
> Lonkoski: ask those gaps ...
>
> Gardner: But I don't want you to feel like we're accusing you ...
>
> Lonkoski: All right. … I will calm down.

(21:12-14; 71:00:30:29-00:31:03).

There are four statements from detectives in this interchange:

- I didn't accuse you.
- We were asking.
- I have to stop talking to you though cause you said you wanted a lawyer.
- You are now.

None of these statements constitutes interrogation.

> [T]he term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the

> police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

Rhode Island v. Innis, 446 U.S. 291, 301 (1980). This Court has referred to an "objective foreseeability test." *State v. Cunningham*, 144 Wis. 2d 272, 278, 423 N.W.2d 862 (1988). The test asks "whether an objective observer could foresee that the officer's conduct or words would elicit an incriminating response." *Id.* Police will not be held accountable for the unforeseeable results of their words or actions. *Innis*, 446 U.S. at 301-02.

The latter two statements can be quickly rejected; they are not the functional equivalent to interrogation. The first, "I have to stop talking to you though cause you said you wanted a lawyer," would make all statements conveying the *Miranda* requirement to cease questioning a continuation of interrogation automatically violating *Miranda*. Such a conclusion would prevent police from explaining the requirements of the law to suspects, an undesirable result. The court of appeals has recently found a reinitiation under similar facts. *Hampton*, 330 Wis. 2d 531, ¶¶ 10-14.

The circuit court found the second statement, "You are now," to be the equivalent of "[You] are under arrest" (61:2). *Innis* specifically excluded from its definition of interrogation, words "normally attendant to arrest and custody." *Innis*, 446 U.S. at 301.

The other two statements, one by Wood and one by Gardner were responses to Lonkoski's question, "Why are you guys accusing me?" Both

responses are declaratory statements, not questions. The detectives' responses did not call for any response from Lonkoski at all. On similar facts, the Court of Appeals has found a response to a custodial suspect not to be interrogation. *State v. Banks*, 2010 WI App 107, ¶¶ 33, 35, 328 Wis. 2d 766, 790 N.W.2d 526. When a police officer prepared to leave once Banks invoked his right to counsel,

> When Banks asked Jacobsen about the reason for his detention, Jacobsen told him it was in regard to a green van, a foot chase, and a gun. This is not express questioning, nor is it the functional equivalent. … Banks' subsequent unsolicited comment about his presence in the area was not provoked by any statement or action on the part of Jacobsen.

Id. ¶ 35 (internal citation omitted).

Several federal courts have held that responses to a suspect's questions are not interrogation. *See United States v. Jackson*, 863 F.2d 1168, 1172 (4th Cir. 1989), which the *Hambly* Court cited with approval, ("Just think about Harry Payne," in response to repeated questions about why the defendant was being arrested); *United States v. Briggs*, 273 F.3d 737, 740 (7th Cir. 2001) (response to what would happen to Trigg); *United States v. Conley*, 156 F.3d 78, 83 (1st Cir. 1998) (no interrogation where police responded after suspect repeatedly asked, "What's this all about?"); *United States v. Benton*, 996 F.2d 642, 643-44 (3rd Cir. 1993) (no interrogation where police responded to suspect's demand to know "what was going on"); *United States v. Taylor*, 985 F.2d 3, 6 (1st Cir. 1993) (no interrogation where officer responded: "You can't be growing dope on your property like that." to

Taylor's question, "Why is this happening to me?").

The *Taylor* court's following comment is applicable here.

> Viewed objectively, appellant's initial inquiry ("Why is this happening to me?") was a direct request for an explanation as to *why she was under arrest*. Appellant would have us propound a rule that police officers may not answer direct questions, even in the most cursory and responsive manner. It might well be argued, however, that an officer's refusal to respond to such a direct question in these circumstances would be at least as likely to be perceived as having been intended to elicit increasingly inculpatory statements from a disconsolate suspect arrested moments before.

Taylor, 985 F.2d at 8 (emphasis in original).

Nor did the detectives "badger" Lonkoski into initiating further communication. Lonkoski claims the detectives arrested him for exercising his right to counsel. The argument concedes that Lonkoski was not in custody when he expressed his desire for counsel. If he was already in custody, how could his arrest be the result of his assertion of his right to counsel?

Further, as the Court of Appeals found, Gardner specifically told Lonkoski that they could not talk to him if his only motivation was to avoid jail (21:13). Also, it is undisputed that the detectives did take a break before obtaining a waiver of *Miranda* rights. If, as Lonkoski claims, his arrest was predicated on his exercise of his right to counsel rather than probable cause, the statement should be barred as the product of an

illegal arrest not because he did not initiate further communication with police. Lonkoski never claimed his arrest to be illegal. And neither the United States Supreme Court or this Court have looked at a suspect's motivation for initiating further communication.

Lonkoski relies on *United States v. Gomez*, 927 F.2d 1530 (11th Cir. 1991), and *Collazo v. Estelle*, 940 F.2d 411 (9th Cir. 1991). Both of those cases can be distinguished on their facts. In *Gomez*, officers badgered Gomez into talking by telling him he was facing "a possible life sentence and a minimum of ten years, and that the only chance he had to reduce the sentence was through cooperation with the government." *Gomez*, 927 F.2d at 1536. In *Collazo*, the officers intimidated Collazo into talking by telling him after he said he wanted to talk to a lawyer, that this was his last chance to talk to them and if he didn't talk to the police "[t]hen it might be worse for you." *Collazo*, 940 F.2d at 414. There is no evidence of intimidation, coercion, or deception that would constitute badgering Lonkoski into talking despite his request for counsel here. To the contrary, Lonkoski made a deliberate choice to talk to the detectives.

Lonkoski does not claim that the waiver of his right to silence and to counsel after the break (21:18), is involuntary as *Hambly* requires.

CONCLUSION

For the reasons given above, this Court should hold that Lonkoski was not in custody when he expressed a desire for an attorney. In the alternative, this Court should affirm the decision of the Court of Appeals.

Dated at Madison, Wisconsin, this 19th day of December, 2012.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

WARREN D. WEINSTEIN
Assistant Attorney General
State Bar #1013263

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9444
(608) 266-9594 (Fax)
weinsteinwd@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,643 words.

Dated this 19th day of December, 2012.

_____
Warren D. Weinstein
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that: I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that: This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 19th day of December, 2012.

_____
Warren D. Weinstein
Assistant Attorney General

RECEIVED
01-09-2013
CLERK OF SUPREME COURT
OF WISCONSIN

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2010AP2809-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MATTHEW A. LONKOSKI,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District III,
Affirming a Judgment of Conviction
Entered in the Oneida County Circuit Court,
the Honorable Mark. A. Mangerson, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

TABLE OF CONTENTS

CASES CITED

OTHER AUTHORITIES CITED

ARGUMENT

I. Mr. Lonkoski's Clear Request for a Lawyer While Either Undergoing Custodial Interrogation or Facing Imminent Custodial Interrogation Was a Valid Invocation of His ***Miranda*** Right to Counsel.

A. Mr. Lonkoski was in custody when he asked for an attorney.

The state does not dispute that Mr. Lonkoski clearly requested an attorney while under interrogation. It argues only that he was not in custody until 30 seconds after his request, so the officers were free to ignore it.

The state enumerates factors which, it argues, militate against custody. Respondent's Brief at 24-28.[1] While identifying preconceived factors may be useful in analyzing custody, the question "cannot be resolved merely by counting up the number of factors on each side of the balance and rendering a decision accordingly"; overreliance on such factors may cause one "to lose sight of the forest for the trees." ***United States v. Czichray***, 378 F.3d 822, 827-28 (8th Cir. 2004).

---

[1] Two of the state's factual claims are erroneous. The detectives told Mr. Lonkoski he was not under arrest one time, at the beginning of the interview, not "several times" as the state asserts (and as the trial court mistakenly found). Respondent's Brief at 27, 23; (71:00:1:18). The record also does not show that Mr. Lonkoski knew he could exit the sheriff's station on his own. Respondent's Brief at 26, 28; (26:15-16) (Det. Gardner "assumed" he knew because at some unspecified time in the past he had opened the door, but admitted she had no way of knowing what he knew on the day in question).

Thus, while it is true that the officers did not move Mr. Lonkoski from place to place, nor handcuff him, nor point guns at him, Respondent's Brief at 27-28, none of these absent factors are particularly significant here. No such action would be necessary to convince a person in Mr. Lonkoski's position – one whose interrogators claim that they know, and can prove, that he caused the death of an infant[2] –that he is not going to be allowed to go free.

Mr. Lonkoski previously cited several cases for the proposition that such accusations on the part of the police are a factor suggesting ***Miranda*** custody. Opening Brief at 17. The state responds by claiming that "[t]he fact that police confront a suspect with evidence of his/her guilt has no bearing on the custody inquiry," citing ***Oregon v. Mathiason***, 429 U.S. 492 (1977). Respondent's Brief at 29. In ***Mathiason***, the interviewing officer falsely told the defendant his fingerprints had been found at the scene of a burglary. ***Id.*** at 493. The Court stated that "[w]hatever relevance this fact may have to other issues in the case, it has nothing to do with whether respondent was in custody for purposes of the ***Miranda*** rule." ***Id.*** at 495-96.

The Court decided ***Mathiason*** before it adopted the reasonable-person test for ***Miranda*** custody in ***Berkemer v. McCarty***, 468 U.S. 420, 442 (1984). *See* ***Quartararo v. Mantello***, 715 F. Supp. 449, 457 n.4 (E.D.N.Y. 1989), *aff'd*,

---

[2] The state disputes that this was the meaning of Lt. Wood's questioning, but does not elaborate or offer any other plausible interpretation. Respondent's Brief at 26. The implications of the conversation could hardly be plainer. Opening Brief at 4-7, 16. As to the officers' claims that they were "just asking" Mr. Lonkoski whether he had caused his daughter's death, rather than "accusing" him, they are laughable, both in light of the obvious accusations that preceded them and the formal arrest that immediately followed.

888 F.2d 126 (2d Cir. 1989). The above-quoted statement is clearly inconsistent with this test, and as such, "is often not followed by lower courts." ***Id.***, 2 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE §6.6(d) at 734 n.49 (3rd ed. 2007). In fact, the Court has since stated that an officer's communication of his or her suspicions to someone under interrogation is a factor for ***Miranda*** custody. ***Stansbury v. California***, 511 U.S. 318, 325 (1994).

B. Mr. Lonkoski's request for an attorney was a valid invocation of his ***Miranda*** right to counsel even if custody commenced seconds later.

Mr. Lonkoski argued in his opening brief that even if he was not in custody at the very instant he requested counsel, custodial interrogation was imminent and his request was unequivocally for "the assistance of an attorney in dealing with custodial interrogation." ***State v. Hambly***, 2008 WI 10, ¶21, 307 Wis. 2d 98, 745 N.W.2d 48. Opening Brief at 18-22.

The state responds first by citing a number of United States Supreme Court cases that, in its estimation, "preclude an imminent custody rule." Respondent's Brief at 11.

They do no such thing. Most consider whether ***Miranda*** *warnings* were required before the interrogations at issue, not whether government agents had to honor a suspect's invocation of the ***Miranda*** *rights*.[3] The distinction is fundamental. There is no question that ***Miranda*** warnings are not required unless and until custodial interrogation

[3] *See* ***Beckwith v. United States***, 425 U.S. 341, 341-42 (1976); ***Oregon v. Mathiason***, 429 U.S. 492, 492 (1977); ***California v. Beheler***, 463 U.S. 1121, 1121 (1983); ***Stansbury v. California***, 511 U.S. 318; 319 (1994).

begins. Because the warnings are designed to prevent the uninformed surrender of rights *during* custodial interrogation, it would be nonsensical to require that they be given at some other time. ***Miranda v. Arizona***, 384 U.S. 436, 467-69 (1966). In contrast, there is no reason that a citizen's assertion of the right to be *free* of custodial interrogation should be disregarded until the interrogation has already begun.

Both the United States Supreme Court and this one have recognized that a ***Miranda*** right may be invoked before custodial interrogation. In ***Miranda*** itself, the Court stated that while a suspect was not *required* to make a "pre-interrogation request for a lawyer … such request affirmatively secures his right to have one." ***Miranda v. Arizona***, 384 U.S. 436, 470 (1966). In ***Smith v. Illinois***, the Court described as "plainly wrong" the notion that a suspect's invocation before or during the warnings would not be effective, and rejected the theory that the invocation was for naught because "interrogation had not begun." 469 U.S. 91, 98 n.6 (1984) ("[A] request for counsel coming 'at any stage of the process' requires that questioning cease," *citing* ***Miranda***, 384 U.S. at 444-45). In ***State v. Hambly***, this court held that the police had to honor a suspect's request to speak to an attorney, even though that request came when no interrogation had begun and before the ***Miranda*** rights had been read. 307 Wis. 2d 98, ¶¶9, 44. Thus the fact that ***Miranda*** warnings are not yet required at a particular juncture cannot mean that a suspect's invocation of a ***Miranda*** right is ineffective.

Montejo v. Louisiana and ***Maryland v. Shatzer*** are still further off point. 556 U.S. 778 (2009); __ U.S. __, 130 S. Ct. 1213 (2010). ***Montejo*** deals with the Sixth Amendment, ***Shatzer*** with whether ***Edwards***' "re-initiation"

rule applies when a suspect has been released from custody. 556 U.S. at 786-87; 130 S. Ct. at 1223. The quotations the state relies on describe only briefly the parameters of the ***Miranda*** regime. Like any other legal writer, the Court does not lay out the intricacies of each doctrine to which it refers in passing. It is absurd to suggest that the Court's shorthand descriptions of ***Edwards*** and ***Miranda*** resolve a question it expressly left open in ***McNeil v. Wisconsin***, 501 U.S. 171, 182 n.3 (1991).

Nor do the Wisconsin cases cited by the state decide the issue. In ***State v. Hassell***, the defendant sought to suppress incriminating statements made during a custodial interrogation at the jail. 2005 WI App 80, ¶¶3, 5, 280 Wis. 2d 637, 696 N.W.2d 270. He claimed to have asserted his right to silence during a non-custodial discussion in his own home on the previous day. ***Id.***, ¶¶2, 5. The court of appeals rejected the claim. ***Id.***, ¶¶9, 10, 15. It did not, however, consider or discuss whether a suspect facing imminent or impending custodial interrogation might invoke a ***Miranda*** right; ***Hambly*** was still three years off.

State v. Kramer concerned a suspect's request for a lawyer during an armed standoff on his own property. 2006 WI App 133, ¶¶5, 10, 294 Wis. 2d 780, 720 N.W.2d 459. Custody did not commence until 4 ½ hours after the request, and interrogation began at the police station 10 hours later. Appellant's Brief at 7-8, 9-10, ***Kramer***, 294 Wis. 2d 780 (2005AP105-CR), *available at* http://libcd.law.wisc.edu/~wb_web/will0113/48778410.pdf. While the court stated generally that "unless a defendant is in custody, he or she may not invoke the right to counsel under ***Miranda***" it made the following qualification:

> Our holding here, however, is not meant to suggest that there are no exceptions to the general rule

> that a defendant may not anticipatorily invoke ***Miranda***. For example, there might be situations where a request for counsel at the conclusion of a standoff situation is so intertwined with imminent interrogation that the invocation should be honored.

Id., ¶15.

The ***Hambly*** court described ***Hassell*** and ***Kramer*** as "stand[ing] for the rule that a person who is not in custody cannot anticipatorily invoke a Fifth Amendment ***Miranda*** right to counsel or right to remain silent," but distinguished them by noting that ***Hambly***'s "request for counsel was an expression of a desire 'for the assistance of an attorney *in dealing with custodial interrogation by the police*.'" ***Hambly***, 307 Wis. 2d 98, ¶41 (emphasis in original). Mr. Lonkoski, who requested counsel while actually undergoing interrogation at the sheriff's station, was just as plainly seeking a lawyer's assistance in dealing with custodial interrogation – and the state has not suggested otherwise.

The state next provides citations to numerous foreign cases which, it contends, support its position. Most involve radically different facts from those here.[4] To the extent that any of them hold that a suspect may not invoke the ***Miranda*** rights until the very instant custodial interrogation begins,

---

[4] *See, e.g.*, ***United States v. Wyatt***, 179 F.3d 532, 533-34 (7th Cir. 1999) (defendant stated "I think I should see a lawyer" while standing outside a bar; was interrogated the following day in jail); ***United States v. Bautista***, 145 F.3d 1140, 1143-44 (10th Cir. 1998) (defendant asked for lawyer during non-custodial interview at police station; defendant left after interview; sought suppression of statements made after arrest six days later); ***Alston v. Redman***, 34 F.3d 1237, 1240-41 (3d Cir. 1994) (during meeting at jail with public defender employee defendant signed form letter requesting not to speak with police without an attorney; was interrogated three days later at police station).

they are simply in error. Such a view can only be derived from a radical overreading of ***McNeil***. The relevant footnote in that case, again, was:

> We have in fact never held that a person can invoke his ***Miranda*** rights anticipatorily, in a context other than "custodial interrogation"—which a preliminary hearing will not always, or even usually, involve. If the ***Miranda*** right to counsel can be invoked at a preliminary hearing, it could be argued, there is no logical reason why it could not be invoked by a letter prior to arrest, or indeed even prior to identification as a suspect. Most rights must be asserted when the government seeks to take the action they protect against. The fact that we have allowed the ***Miranda*** right to counsel, once asserted, to be effective with respect to future custodial interrogation does not necessarily mean that we will allow it to be asserted initially outside the context of custodial interrogation, with similar future effect.

McNeil, 501 U.S. at 182 n.3 (citations omitted).

The ***McNeil*** footnote contains no holding. It expresses doubt as to whether a defendant can invoke ***Miranda*** at a court hearing or by letter. Such invocations are clearly, as the court says, "anticipatory," since they address themselves to purely hypothetical interrogations; that is, they are made "outside the context of custodial interrogation." The footnote comes nowhere near stating that a defendant must wait until custodial interrogation has *actually begun* before invoking ***Miranda***. In fact, as noted above, the Court has said just the opposite, in ***Smith*** and in ***Miranda*** itself.

Further, such a rule would run contrary to the purpose of the ***Miranda*** rights. As the state notes, ***Miranda*** seeks to protect the citizen's right to silence from the compulsion inherent in custodial interrogation. Respondent's Brief at 19.

But in the state's view, if a citizen attempts to invoke his rights when custodial interrogation is about to begin, the police may simply ignore that invocation, and then bring that "inherent pressure" to bear. If the purpose of ***Miranda*** is to *prevent* compulsion, how can it be that the only valid invocation of the ***Miranda*** rights is one *made under* compulsion?

Nor is there any question of what standard to apply, contrary to the state's suggestion. In ***Hambly***, this court adopted an objective "reasonable person" standard to determine whether interrogation is imminent or impending. ***Hambly***, 307 Wis. 2d 98, ¶28 n.27. In any case, because the state apparently concedes that custodial interrogation was imminent here, there is no need to determine a standard.

Finally, though the state worries that custody is "easily manipulated by police," it is the state's rule that invites manipulation. Respondent's Brief at 20. As Mr. Lonkoski suggested in his opening brief, under the state's view of the law, police interrogating a suspect may respond to a request for an attorney by denying the request, arresting the person, and continuing the interrogation. Opening Brief at 22. The state has not responded and apparently agrees.

It is thus the state, not Mr. Lonkoski, that is proposing a rule "untether[ed] from [***Miranda***]'s theoretical basis." Respondent's Brief at 19. The state's position, if adopted, would allow the police to ignore a person's request for counsel "in dealing with custodial interrogation" and would invite them to manipulate what the circuit court correctly deemed a "technicality" to overcome a citizen's stated desire to deal with the police only through counsel. (61:11). This court has already rejected a similar position, in ***Hambly***, and should do the same here.

II. Mr. Lonkoski's Request to Continue Talking With the Detectives Was a Product of Their Post-Request Interrogation, and Hence Not a Valid "Initiation" Under ***Edwards***.

The state argues extensively against the notion that ***Edwards v. Arizona*** requires a break in time between a citizen's assertion of the right to counsel and the initiation of further conversation. 451 U.S. 477 (1981); Respondent's Brief at 31-34.

Despite the state's claim, this is not Mr. Lonkoski's position. He contends that after he invoked his ***Miranda*** right to an attorney, he did not "initiate[] further communication, exchanges, or conversations with the police," as ***Edwards*** requires. ***Id.*** at 484-85. He argues that the officers' response to his request for an attorney – telling him he was under arrest and implying that this was because he had asked for a lawyer – was the functional equivalent of interrogation under ***Rhode Island v. Innis***, 446 U.S. 291, 301 (1980). Opening Brief at 25. He further argues that it was this action by the officers that reinitiated the conversation. Opening Brief at 27.

In its discussion of ***Innis***, the state again devotes most of its attention to rebutting arguments that Mr. Lonkoski has not made. Respondent's Brief at 36-39. He has never asserted that "I didn't accuse you," "We were asking" or "I have to stop talking to you …" were the functional equivalent of interrogation. Respondent's Brief at 36. He has always maintained that Lt. Wood's informing him that he was "now" (having asked for an attorney) under arrest was objectively likely to "elicit an incriminating response," and hence was interrogation. ***Id.*** at 301.

The state claims that Lt. Wood's statement falls into a category exempted from ***Innis***'s "incriminating response"

test: words or actions that are "normally attendant to arrest and custody." ***Id.*** at 301; Respondent's Brief at 37. Numerous cases clarify that this phrase refers to "routine booking questions" – that is, questions aimed at obtaining "data required as part of the processing" of an arrestee. ***United States v. Kane***, 726 F.2d 344, 349 (7th Cir. 1984). "[T]he routine booking question exception is limited to routine questions asked to assist in the gathering of background biographical data." ***State v. Bryant***, 2001 WI App 41, ¶14, 241 Wis. 2d 554, 624 N.W.2d 865. Lt. Wood's statement obviously had nothing to do with obtaining biographical data, so it cannot fall within the "routine booking questions" exception. The state makes no argument that the statement was not likely to elicit an incriminating response; as such it was interrogation.

Further, even if Lt. Wood's "You are now" were not interrogation, this does not mean that the state has satisfied ***Edwards***. That case requires the state to show that Mr. Lonkoski "initiated" the conversation after he asked for an attorney. ***Edwards***, 451 U.S. at 484-85. If Lt. Wood's statement convinced Mr. Lonkoski to continue speaking with the officers, then it was Lt. Wood, rather than Mr. Lonkoski, who initiated the subsequent conversation. *See* ***Collazo v. Estelle***, 940 F.2d 411, 423 (9th Cir. 1991). The trial court found that Lt. Wood's statement did in fact prompt Mr. Lonkoski's change of heart:

> There was a question by the defendant whether he was under arrest. When he was formally arrested and told you are now, he then immediately says he wants to talk without a lawyer obviously impressed by the fact that he is now going to be detained. He said I'll talk to you without a lawyer.

(60:6).

The court was correct. After Mr. Lonkoski asked for a lawyer, Lt. Wood persuaded him to change his mind. Lt. Wood, not Mr. Lonkoski, initiated the subsequent conversation.

CONCLUSION

Because the sheriff's officers engaged in custodial interrogation of Mr. Lonkoski after he invoked his ***Miranda*** right to counsel, Mr. Lonkoski respectfully requests that this court vacate his conviction and sentence and remand to the circuit court with directions that his statements during this and subsequent interrogations, as well as all evidence derived therefrom, be suppressed.

Dated this 9th day of January, 2013.

Respectfully submitted,

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3,000 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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

Dated this 9th day of January, 2013.

Signed:

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner