STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2010AP2809-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MATTHEW A. LONKOSKI,

Defendant-Appellant.

On Notice of Appeal From a Judgment of Conviction
Entered in the Oneida County Circuit Court,
the Honorable Mark A. Mangerson, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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CASES CITED

ISSUE PRESENTED

Are Mr. Lonkoski's statements to the police admissible, when he asked for an attorney during his questioning at the sheriff's department and the officers continued the interrogation?

The trial court initially suppressed the statements, but reversed itself on a motion for reconsideration.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Mr. Lonkoski believes that the briefs can adequately present the issue for this court's review, though he would welcome oral argument should this court deem it desirable. Because this case involves the application of established constitutional principles to a particular fact situation, publication of the court's opinion is not merited.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Matthew Lonkoski pleaded guilty to two charges arising from the death of his infant daughter. His pleas were entered after the circuit court reversed its earlier decision to suppress Mr. Lonkoski's custodial statements to law enforcement. Mr. Lonkoski asks this court to reinstate the circuit court's original decision and suppress the statements and all evidence derived from them, because the law enforcement officers continued to interrogate him after he asked for a lawyer, in violation of his ***Miranda*** right to counsel.

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 responders 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 on Peyton. (14:15-17). Samples of Peyton's blood and urine taken during that autopsy 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, 2009, an Oneida County Sheriff's detective asked Ms. Bodoh to come to the department, where she was interviewed. (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. 102).

A DVD of the video is included in the record on appeal. (71). The state submitted a partial transcript as an

attachment to its brief in opposition to Mr. Lonkoski's suppression motion. (21:11-18). What follows is undersigned counsel's transcription of relevant portions of the interview as depicted by the video. Consistent with the circuit court's discussion, times noted are from the beginning of the video; i.e. the times reflected on the DVD 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. As with the state's partial transcript, the following is intended as a guide for the court's review; the definitive record is the video itself.

(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?

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 various 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 assistant district attorney's office about whether it is permissible to continue to interrogate Mr. Lonkoski.

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).

On May 26, 2009, Mr. Lonkoski was charged with first-degree reckless homicide. (1:1). Mr. Lonkoski 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. 105-07).[1]

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 fact, in custody at the time he made his request for counsel. (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 he had immediately re-initiated 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

1 This transcript appears twice in the record as compiled, as items 23 and 60.

invoke his right to counsel. (61:10-11; App. 118-19). 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. 119-20).

Ultimately, 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. 129). Mr. Lonkoski timely filed a notice of intent and a notice of appeal. (47;64).

ARGUMENT

I. Summary of argument and standard of review.

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 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. It is the officers' failure to honor Mr. Lonkoski's request for counsel that forms the basis for his appeal.

Mr. Lonkoski unambiguously asked for an attorney after about a half-hour of questioning. Rather than stopping the interrogation as ***Miranda*** requires, the officers continued.

Pursuant to ***Edwards v. Arizona***, 451 U.S. 477 (1981), this violation of Mr. Lonkoski's Fifth Amendment right to counsel[2] requires the suppression of all statements that he made after that point. Statements he made during subsequent interrogations must also be suppressed, both pursuant to ***Edwards*** and to ***State v. Harris***, 199 Wis. 2d 227, 248, 544 N.W.2d 545 (1996).

Three arguments against suppression were raised below. Two were adopted by the circuit court, and one was advanced by the state but rejected by the court.

First, the court held that Mr. Lonkoski was not in custody at the moment he asked for a lawyer, and that this prevented his request from triggering the protections of ***Miranda***. Both premises of the court's holding were incorrect. Mr. Lonkoski was in custody when he requested a lawyer. Further, even if he had not been, a person need not be actually undergoing custodial interrogation in order to invoke the ***Miranda*** counsel right. A person has an enforceable right to an attorney any time that custodial interrogation is "imminent." Assuming for the sake of argument that Mr. Lonkoski was not actually in custody at the instant he asked for a lawyer, custody was undeniably imminent.

Second, the circuit court opined that Mr. Lonkoski's clear statement – "I want a lawyer. I want a lawyer now." – was ambiguous when considered in light of his subsequent agreement to talk to the police without counsel. This conclusion is directly contrary to United States Supreme

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2 The right to counsel discussed in ***Miranda*** is founded in the Fifth Amendment rather than the Sixth. This brief will use the term "***Miranda*** right to counsel" and "Fifth Amendment right to counsel" interchangeably.

Court precedent that post-request statements cannot render a clear request ambiguous.

Finally, the state argued below that even if Mr. Lonkoski effectively invoked his right to counsel, he later waived it after re-initiating the conversation with the police officers. The circuit court was correct to reject this claim, because the officers did not respond to Mr. Lonkoski's request for a lawyer by ceasing interrogation. Rather, they continued it in a successful bid to get him to keep talking. This is exactly what ***Edwards*** prohibits, and the violation negates any claim of re-initiation by the defendant. Mr. Lonkoski's agreement to talk was a direct product of police interrogation that never stopped, and so cannot have been re-initiated.

The remedy for the sheriff's officers' violation of ***Edwards*** is suppression of Mr. Lonkoski's post-violation statements. Any evidence derived from suppressible statements, as well as statements made during later interrogation, must also be suppressed.

It is the state's burden to show that a confession is voluntary, and it must show this by a preponderance of the evidence. ***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 must uphold the trial court's factual findings unless clearly erroneous, but independently applies the constitutional standard to the facts as 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 these facts demonstrate that Mr. Lonkoski was in custody, and whether the interrogators violated his rights under ***Miranda*** and its progeny, are questions of law that are reviewed de novo. ***State v. Cunningham***, 144 Wis. 2d 272, 282, 423 N.W.2d 862 (1988); ***State v. Clappes***, 117 Wis. 2d 277, 280, 344 N.W.2d 141 (1984).

II. General principles – police must cease all custodial interrogation when a suspect requests 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.[3]

Id. at 473-74.

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3 The Court later clarified that the request for counsel need not come after the giving of warnings to be effective, as the the beginning of the above quotation 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).

If a suspect requests counsel and law enforcement officers continue or resume interrogation before an attorney is present, all subsequent statements must be suppressed. *See* ***Edwards,*** 451 U.S. at 487. Even the later reading and waiver of ***Miranda*** rights will not render the statements admissible. "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." ***Edwards***, 451 U.S. at 484. 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; ***State v. Hambly***, 2008 WI 10, ¶¶69-70, 307 Wis. 2d 98, 745 N.W.2d 48.

III. Mr. Lonkoski's request for counsel was timely, as he was under interrogation, and custody was either present or imminent.

After originally suppressing Mr. Lonkoski's statements, the circuit court reversed course and held that his request for counsel was premature. The court enumerated various factors it had considered in determining that Mr. Lonkoski was not in custody during the time leading up to his request for counsel, nor during the very instant that he asked for a lawyer. (61:3-6; App. 111-14). It then stated "[a]lthough 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." After reciting several paragraphs of text from the transcript of the interrogation, the court went on:

> 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; App.118-19).

The circuit court appears to have been of the belief that a person who is not in custody may not invoke his or her Fifth Amendment right to counsel. This is incorrect.

It is true that the ***Miranda*** warnings are not required until the commencement of custodial interrogation. *See* ***Miranda***, 384 U.S. at 478-79. It is also true that the ***Miranda*** right to counsel is "specific to custodial interrogation." ***Hambly***, 307 Wis. 2d 98, ¶22. That is, it is specifically a right to an attorney "in dealing with custodial interrogation." ***United States v. LaGrone***, 43 F.3d 332, 340 (7th Cir. 1994). This does not mean, however, that a suspect is helpless to *invoke* the right until the very instant that the police begin a custodial interrogation.

In ***McNeil v. Wisconsin***, 501 U.S. 171, (1991), the United States Supreme 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 only invoke the ***Miranda*** counsel right when custodial interrogation is "imminent." *See*, *e.g.*, ***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.").

The Supreme Court of Wisconsin joined the discussion 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 precise reasoning behind this result. One bloc would have held that a suspect may invoke his or her ***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 before them would satisfy either standard. ***Id.***, ¶33.

In ***Hambly***, then, the entire Supreme Court accepted the premise that a suspect may invoke the ***Miranda*** counsel right where custodial interrogation is "imminent or impending," even if it could not agree as to whether custody alone would suffice. The trial court here thus erred in concluding that Mr. Lonkoski's "I want a lawyer now" could not invoke his right to counsel if he was not in custody at the very instant he spoke. Under ***Hambly*** and the foregoing cases, Mr. Lonkoski's request for counsel triggered the protections of ***Miranda*** and ***Edwards*** if either of two conditions was met: if he was actually undergoing custodial interrogation at the time he made the request, or if such interrogation was imminent. Because Mr. Lonkoski was undoubtedly being interrogated both before and after he requested counsel, the question boils down to whether custody was either present or imminent at the time of the request.

A suspect is in custody when a reasonable person in the suspect's position would not feel free to leave. ***State v. Koput***, 142 Wis. 2d 370, 380, 418 N.W.2d 804 (1988). This determination is to be 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 totality of 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. The door to this room was closed. In the room along with Mr. Lonkoski were two Sheriff's officers. As the video shows, this room was small enough for three people to render it crowded.

Mr. Lonkoski freely admits that he was not in custody at the beginning of the interview. Lt. Wood informed him upon meeting him that he was not under arrest – obviously a pertinent fact bearing on whether a person would consider him- or herself to be in custody. Further, the initial interrogation consisted of, as the circuit court noted, "open-ended," non-accusatory questions. (61:4-5; App. 112-13). However, the first few minutes of the interview are not the relevant time period. As the circuit court understood, the crucial time period is the one leading up to Mr. Lonkoski's request for counsel. (61:5-6, 10; App. 113-14, 118).

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. He intimated that somebody "did something" to her. He suggested that there were two possibilities for what this something was – either an "intentional" act or "poor parenting." Mr. Lonkoski clearly grasped the import of the word "parenting," since he then asked Lt. Wood whether Amanda had smothered Peyton. Lt. Wood denied this, and informed Mr. Lonkoski that Peyton had died of an overdose of morphine. He then noted that Mr. Lonkoski had told Peyton that he was "sorry" when her body was being taken away. He pointedly rejected

Mr. Lonkoski's explanation that he was simply sorry that she had died. 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." 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?" Neither officer denied this, at which point Mr. Lonkoski made his request for counsel.

As numerous 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. 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. ***Koput***, 142 Wis. 2d at 380. 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 circuit court concluded 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. (61:10-11; App. 118-19). That Lt. Wood confirmed the obvious fact of custody at that instant does not mean that the fact did not exist 20 seconds earlier. Nothing about the situation had changed in that time – except that Mr. Lonkoski had invoked his right to counsel.

Further, even if the circuit court were correct about the moment that custody commenced, Mr. Lonkoski's invocation of his right to counsel would still be effective. As detailed above, a suspect can assert the ***Miranda*** right to counsel either during custodial interrogation or when custodial interrogation is impending. ***LaGrone***, 43 F.3d at 340. Only a few moments after Mr. Lonkoski's request for a lawyer, he was told he was under arrest and then questioned over the next two hours. There can be no dispute, then, that custodial interrogation was at the very least "impending" at the time of

the request. The circuit court thus erred in concluding that Mr. Lonkoski had not successfully asserted his right to counsel.

IV. Mr. Lonkoski's request for counsel was unambiguous.

The circuit court also stated that Mr. Lonkoski did not "clearly claim" his right to counsel, and that his request for an attorney was not clear and unambiguous. (61:10-12; App. 118-20). An ambiguous request for counsel does not require the cessation of interrogation or the suppression of its fruits. ***Davis v. United States***, 512 U.S. 452, 459 (1994).

Few statements could be less ambiguous than Mr. Lonkoski's "I want a lawyer. I want a lawyer now." The court nevertheless held that Mr. Lonkoski's subsequent statements that he would talk to the officers without counsel created an ambiguity. (61:11-12; App. 119-20).

The court's holding is directly contrary to ***Smith v. Illinois***, 469 U.S. 91 (1984). The ***Smith*** court held that, in determining whether a request for counsel is clear or ambiguous, courts may consider only the request itself and statements that *precede* the request. ***Id.*** at 97-98. Events occurring, or statements made, *after* a request for counsel are relevant only to determining whether the right has been subsequently waived after first being invoked. ***Id.*** at 98. "Invocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together." ***Id.***

When Mr. Lonkoski stated that he wanted a lawyer "now," he made a clear and unequivocal request for counsel. That he later agreed to speak without counsel present is of no import pursuant to ***Smith***. The circuit court erred in holding his request equivocal.

Because Mr. Lonkoski, while being subjected to custodial interrogation, asserted his right to counsel, the officers were required to immediately cease any interrogation until counsel was present.

V. The circuit court correctly held that Mr. Lonkoski did not re-initiate the conversation after his request for counsel. Further, his subsequent waiver of his right to counsel was not voluntary, because it was brought about by the continued interrogation in violation of ***Edwards***.

Because the interrogation in fact continued without the presence of counsel, Mr. Lonkoski's statements must be suppressed unless the state can show first, that it was Mr. Lonkoski, rather than the police, that re-initiated conversation, and second, that after re-initiating 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. The state argued below that Mr. Lonkoski had re-initiated the interrogation and voluntarily waived his right to counsel, rendering his subsequent statements admissible.

The circuit court was correct to reject the state's argument. As the court noted, the interrogation of Mr. Lonkoski never, in fact, ceased. (60:6-7; 61:14-15). "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.

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 next asked whether he was under arrest, Lt. Wood replied "You are now." (71:00:30:30).

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." (71:00:30:30) (emphasis added). Mr. Lonkoski 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 subsequently 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.

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 be reasonably likely to elicit incriminating responses (and a waiver of the right to counsel) from Mr. Lonkoski. Further, though it is not necessary for Mr. Lonkoski 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" is in fact a deliberate *attempt* to get Mr. Lonkoski to keep talking. And, 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 situation similar to this case. 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 as 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 re-initiation 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.

Here as in ***Collazo***, it would defy the very purpose of ***Miranda*** and ***Edwards*** to hold that Mr. Lonkoski re-initiated 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 re-initiation 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.").

For this reason, the state's reliance on ***Hambly*** in the trial court 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 re-initiated interrogation after a request for counsel. (21:5-6). 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 "re-initiation" 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 re-initiated 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.[4]

VI. Because the sheriff's officers violated ***Edwards***, Mr. Lonkoski's statements during custodial interrogation, and all evidence derived therefrom, must be suppressed.

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, under ***Gomez***, a refusal to honor a request for counsel cannot be "cured" even by a suspect's re-initiation of the conversation. 927 F.2d at 1539. Second, the state put forth no evidence that Mr. Lonkoski "re-initiated" subsequent interrogation, nor that he knowingly, voluntarily and intelligently waived his ***Miranda*** rights after doing so. Finally, the Wisconsin Supreme Court has held that all evidence derived from violations of the ***Miranda*** right to counsel is inadmissible as the fruit of the poisonous tree. ***State v. Harris***, 199 Wis. 2d 227, 248, 544 N.W.2d 545 (1996).

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4 The state also leaned heavily on ***State v. Price***, 111 Wis. 2d 366, 330 N.W.2d 779 (Ct. App. 1983). The ***Price*** court held that interrogation need not cease upon a suspect's request for counsel, and may be re-initiated by the police, rather than the suspect. ***Price*** was based on ***Wentela v. State***, 95 Wis. 2d 283, 294-95, 290 N.W.2d 312 (1980). ***Wentela*** was overruled on this point by ***Edwards*** as stated in ***State v. Jennings***, 2002 WI 44, ¶¶32-33, 252 Wis. 2d 228, 647 N.W.2d 142. ***Price*** is not good law and has nothing to say about whether the interrogation here "ceased" as ***Edwards*** requires.

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 February, 2011.

Respectfully submitted,

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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 7,101 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 February, 2011.

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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.

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