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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

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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?

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[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

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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 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,

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[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]

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[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,

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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 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.

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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.

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