STATE OF WISCONSIN

IN SUPREME COURT

No. 2010AP2809-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW A. LONKOSKI,

DEFENDANT-APPELLANT-PETITIONER.

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

BRIEF OF THE PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

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

STATEMENT OF THE CASE

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

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

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

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

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

(60:6-7).

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

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

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

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

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

(61:6). The court then held:

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

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

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

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

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

STATEMENT OF FACTS

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

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

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

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

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

STANDARD OF REVIEW

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 795 (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

right to counsel outside the context of custodial interrogation).

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

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

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

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

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

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

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

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

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

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

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

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

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

The circuit court made the following findings of evidentiary fact.

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

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

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

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

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

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

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

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

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

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

(61:6).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. LONKOSKI REINITIATED FURTHER CONVERSATION WITH THE DETECTIVES.

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

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

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

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

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

(61:14).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Wood: Okay.

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

Wood: I didn't accuse you ...

Gardner: We were asking.

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

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

Lonkoski: Am I under arrest?

Wood: You are now.

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

Wood: Well now you now you complicate things.

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

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

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

There are four statements from detectives in this interchange:

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

None of these statements constitutes interrogation.

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

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

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

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

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

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

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

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

Id. ¶ 35 (internal citation omitted).

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

Respectfully submitted,

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CERTIFICATION

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

Dated this 19th day of December, 2012.

_____
Warren D. Weinstein
Assistant Attorney General

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

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

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

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

Dated this 19th day of December, 2012.

_____
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