IN THE SUPREME COURT OF WISCONSIN

No. 2013 AP 1108 CR

STATE OF WISCONSIN,

Plaintiff–Respondent,

v.

JESSE J. DELEBREAU,

Defendant–Appellant-Petitioner.

BRIEF AND SHORT APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

Appeal from Judgment of Conviction and Order Denying Motion To Suppress Statements Entered In Brown County Circuit Court, The Honorable Mark A. Warpinski, Presiding

Stephen P. Hurley
Wisconsin Bar No. 1015654
Marcus J. Berghahn
Wisconsin Bar No. 1026953

HURLEY, BURISH & STANTON, S.C.
Counsel for Jesse J. Delebreau
33 East Main Street, Suite 400
Madison, Wisconsin 53703
[608] 257-0945

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ISSUE

Was Jesse Delebreau's right to counsel under the state and federal constitutions violated when:

- Delebreau was in custody because of his alleged involvement in a controlled delivery of heroin for which the investigator had recommended criminal prosecution to the District Attorney's Office;

- Delebreau appeared in court in relation to a criminal charge for the very same controlled delivery;

- at his initial appearance, at which the District Attorney was present, Delebreau was represented by counsel;

- a day after his initial appearance, Delebreau was questioned about the very same offense conduct alleged in the criminal complaint;

- at the time of the interrogation Delebreau was in custody;

- Delebreau's counsel was not notified of the interrogation, and he was not present during the interrogation;

- at the outset of the interrogation Delebreau was advised of his right to counsel under *Miranda v. Arizona*, 384 U.S. 436 (1966), but he signed no written waiver of the right;

- the investigator took no steps to learn what became of the criminal charge he requested be filed against Delebreau, nor whether Delebreau had been charged, appeared in court or was represented by counsel; and

- when, during the interrogation, Delebreau made passing mention of the criminal complaint, the investigator never asked whether he had appeared in court or was represented by counsel.

The Circuit Court found that Delebreau's Sixth Amendment right to counsel had not been violated. R34; R111:55. The Court of Appeals, citing *Montejo v. Louisiana*, 556 U.S. 778 (2009), agreed. App. 65.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The reasons for granting review also counsel for oral argument and publication, which rightly is this Court's usual practice.

STANDARD OF REVIEW

Whether the investigator violated Jesse Delebreau's right to counsel requires this Court to determine, under the facts presented, whether Delebreau's right to counsel under the state or federal constitution attached, and, if so, whether he later waived that right.

Resolving an issue of constitutional fact requires a circuit court to apply constitutional principles to evidentiary or historical facts. *State v. Martwick,* 2000 WI 5, ¶ 17, 231 Wis. 2d 801, 604 N.W.2d 552. A constitutional fact is one that is "decisive of constitutional rights." *Id.* When reviewing issues of constitutional fact, this Court engages in a two-step analysis. *Id.*

First, as it relates to the circuit court's decision in a suppression matter, a deferential, or clearly erroneous, standard is applied to the circuit court's findings of evidentiary or historical facts. *Id.* at ¶ 18; *State v. Coerper,* 199 Wis. 2d 216, 221–22, 544 N.W.2d 423 (1996).

Then this Court reviews the application of constitutional principles to the historical facts. *Martwick,* 2000 WI 5, ¶ 17. On the latter question, this Court is not bound by the determination of the circuit court. *State v. Kramar,* 149 Wis. 2d 767, 781, 784, 440 N.W.2d 317 (1989). The application of constitutional principles to the historical facts are reviewed independently. *Martwick,* 2000 WI 5, ¶ 18; *State v. Dagnall*, 2000 WI 82, 236 Wis. 2d 339, 354-55, 612 N.W.2d 680, 687; *State v. Ward,* 2009 WI 60, ¶ 17, 318 Wis. 2d 301, 767 N.W.2d 236; *State v. Forbush*, 2011 WI 25, 332 Wis. 2d 620, 628-29, 796 N.W.2d 741, 745-46.

STATEMENT OF THE CASE

Nature of the Case. This is an appeal from Jesse Delebreau's criminal conviction in Brown County Circuit Court. On May 22, 2014, this Court granted review to address an issue first raised by Delebreau in the Circuit Court relating to the admission of statements made by him to a police investigator. The statements at issue were made by Delebreau while he remained in jail one day *after* he appeared in court for an initial appearance (and with counsel); the questioning related to the offense for which he was charged in the criminal complaint.

Procedural Status. Jesse Delebreau was charged in Brown County Circuit Court with delivery of heroin, as a party to the crime, a violation of WIS. STAT. § 961.41(1)(d)1. R1; App 1. Prior to trial Delebreau challenged the admissibility of two recorded statements he made to police while in custody and after his right to counsel had attached following his initial appearance on the criminal charge. R22. Delebreau argued that the admission of these recorded statements violated his constitutional rights under both the state and federal constitutions. *Id*. Delebreau's motion was denied by the Circuit Court. R34. Delebreau sought leave to appeal this non-final order in the Court of Appeals. R35. His petition for an interlocutory appeal was denied. R36.

On September 26, 2012, the case was tried to a jury. Delebreau's video-recorded statements to police were presented to the jury in an edited and condensed form during the investigator's testimony. R122:144; ex. 6 & 7. The jury found Delebreau guilty. Delebreau was sentenced on November 29, 2012; and the judgment was entered a day later. R95.

Delebreau pursued a timely appeal. R94. The Court of Appeals affirmed his conviction in a published decision. *State v. Delebreau,* 2014 WI App 21; App 65. As to the issue presented for review here, the

Court of Appeals held that because *Montejo v. Louisiana*, 556 U.S. 778 (2009), was controlling, "The trial court properly denied Delebreau's motion to exclude his statements." App. 73. Delebreau timely petitioned for review raising claims under both the state and federal constitutions. This Court granted review and appointed counsel.

Disposition in Courts Below. Jesse Delebreau was sentenced on November 29, 2012, not only for the delivery of heroin that forms the conviction from which he appeals, but two other files as well; one charging bail jumping and the other, a charge of operating a motor vehicle while impaired.[1] Judge Thomas Walsh sentenced Delebreau to a four year term of initial confinement, which is to be followed by a four year term of extended supervision. R95; R126:29. Judge Walsh also imposed a two year sentence for a conviction for bail jumping, concurrent to the sentence imposed for delivery of heroin as a party to the crime. *Id.* Delebreau is in prison now.

Facts. Testimony from the jury trial established why Jesse Delebreau found himself in jail speaking to an investigator for the Brown County Drug Task Force, Roman Aronstein. This interrogation happened the day after Delebreau appeared in court for an initial appearance—at which time he was represented by counsel—but his counsel was not present during the interrogation.

On February 21, 2011, Brett Johnson, a confidential informant working for the Brown County Drug Task Force arranged to purchase cocaine and heroin from Christopher Woodliff. R122:51. Johnson told the jury that he knew Woodliff from prior drug deals. *Id.*, at 64.

Johnson worked as a confidential informant in order to avoid being charged for the possession of drugs, including heroin, *id.*, he admitted

[1] Neither case figures in this appeal.

to working for the Task Force after he overdosed on heroin. *Id.*, at 63. This was neither the first nor last time that Johnson worked as an informant. *Id.*, at 63-65.

On this occasion, Johnson was instructed to purchase drugs. His actions would be monitored by investigators. *Id.* Johnson wore a wire (with audio and video recording capability) and he was given $200 in pre-recorded money to purchase the drugs. *Id.*

Once inside, Johnson testified that he saw Woodliff and two other males, one of whom was cutting the others' hair. *Id.*, at 53. Johnson described Delebreau as the individual whose hair was being cut, *id.*, at 54, though he did not know Delebreau from prior contacts. *Id.*, at 56. Later, Johnson identified Delebreau through a photographic array. *Id.*, at 64, 70.

Johnson asked Woodliff for two bags of crack cocaine and two bags of heroin and then gave Woodliff the money that the investigators had provided to him. *Id.* Johnson claimed that Woodliff returned $80 to him and that Woodliff then asked Delebreau whether he had any bindles left. *Id.*

Johnson testified that he gave $80 to Delebreau. *Id.*, at 55. Then, according to Johnson, Delebreau and Woodliff left the room and entered a bathroom. *Id.* Johnson did not join Delebreau and Woodliff in the bathroom. *Id.* When they returned, Johnson claimed that Delebreau handed him two baggies containing what he believed to be heroin. *Id.*, at 56. Johnson testified that Woodliff provided him with cocaine and, after he received the drugs, he remained for another 45 minutes or so. *Id.*, at 57.

Johnson later gave four baggies of drugs, along with the recording equipment to an investigator. *Id.*, at 59. Roman Aronstein maintained the evidence until it was placed into the evidence lock-up. *Id.*, at 138.

The heroin allegedly sold to Johnson was weighed at the State Crime Laboratory. An analyst testified that the two packages of heroin had a combined weight of 0.013 grams. R122:98.

A video recording of the transaction was introduced at trial. R71, ex. 5; R122:62. The recording contradicted key parts of Johnson's testimony, despite the fact that Johnson told the jury that he had reviewed his statements and the recordings in preparation for his testimony at trial. R122:69-70. For example, Johnson admitted that he did not hand money to Delebreau. But, after the video he said "I handed [the money] to Mr. Woodliff who I saw, in turn, hand it to Mr. Delebreau." *Id*., at 66. Contrary to Johnson's testimony, the recording did not show Woodliff and Delebreau go to the bathroom. *Id*. And Johnson admitted that Delebreau did not hand any heroin to him. *Id*., at 68. The drugs, Johnson now explained, were given to him by Woodliff. *Id*.

Christopher Woodliff was also charged and convicted in relation to the sale of cocaine to Johnson on multiple occasions, including on February 21, 2011. Woodliff testified at Delebreau's trial. Independent of the video recording Woodliff recalled few details. *Id*., at 123. He recalled selling cocaine to Johnson on February 21, 2011. *Id*., at 116. Woodliff claimed that Delebreau sold heroin to Johnson. *Id*., at 117. But Woodliff could not give details about Delebreau's purported transaction. He recalled something that Johnson had not: "Dave might have been holding the heroin for [Delebreau]." *Id*., at 124. But no other witness testified about this. Johnson and Woodliff were the only witnesses to testify at trial with personal knowledge of the purported drug transaction.

Delebreau, who was on probation at the time, was taken into custody on or about March 31, 2011, likely on a probation hold. Investigator Aronstein knew that Delebreau was on supervision at the time. R111:11-12. Aronstein "is sure" that he informed Delebreau's

probation agent of the fact that Delebreau was implicated in the delivery of heroin. *Id*., at 21. Aronstein referred criminal charges related to the February 21, 2011 controlled buy to the Brown County District Attorney's Office in early April, 2011, but in any case well before his meeting with Delebreau at the Brown County Jail.

Aronstein explained that he received a note from Delebreau asking for a meeting. R111:11. Delebreau's note was either sent or received—the record is unclear as to which—about one week prior to the jail interrogation, so about April 8, 2011.[2] *Id*., at 10.

Aronstein was well aware that Delebreau would face criminal charges for the delivery of heroin. He claimed to not know what came of the referral. *Id*., at 14.

On April 14, 2011, Jesse Delebreau appeared in Brown County Circuit Court for an initial appearance. R104. A criminal complaint filed that day by the Brown County District Attorney's office alleged delivery of heroin, as a party to a crime, on February 21, 2011. R1. Delebreau appeared before Court Commissioner Gazeley with counsel, Attorney William Fitzgerald.[3] R104. The District Attorney was present and the appearance was entered on CCAP. *Id*.

Commissioner Gazely set cash bail in the amount of $15,000. At the request of attorney Fitzgerald, the hearing was continued for two weeks. *Id*., at 4. Attorney Fitzgerald explained that Delebreau

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[2] No note was ever introduced as evidence at either the motion hearing or the trial.

[3] On the day of Delebreau' s initial appearance, April 14, 2011, *State v. Forbush*, 2011 WI 25, 332 Wis. 2d 620, 796 N.W.2d 741, had been briefed and argued, but the case was not decided until later that month, on April 29, 2011—one day after Delebreau's continued initial appearance.

> has read the complaint. I believe he understands the nature of the charge. We'll waive a reading today. We'll request a preliminary hearing, but ideally, it's a situation where we'll ask the State to tell us if we have a conflict with respect to the confidential informant.

Id., at 2. (There is no dispute that Delebreau was represented by counsel and charges were filed on April 14, 2011. R111:25-26.)

The day after his initial appearance charging delivery of heroin, as a party to the crime, Delebreau was interrogated by investigator Aronstein at the Brown County Jail. R111:13. There is no evidence that, after he appeared in court and with his counsel, Delebreau made any effort to seek out the investigator. Because of the potential for a conflict, Delebreau had no opportunity to discuss with his attorney whether he ought speak to, or possibly even cooperate with, the investigator.

Aronstein made no effort to ascertain whether Delebreau's right to counsel had attached: he did not check with the District Attorney's office about the criminal referral. *Id*., at 21. Nor did he access CCAP to see whether Delebreau had been charged. *Id*. Aronstein did not ask Delebreau whether he had been charged. *Id*., at 22. Nor did Aronstein ever ask Delebreau whether he was represented by counsel. *Id*.

Before starting the interrogation, Aronstein activated the audio/video recording capability for the room. R122:143. He then read Delebreau the *Miranda* warning. *Id*.; R111:15. Aronstein testified that Delebreau waived his rights and that he did not ask for counsel. *Id*., at 16-17. Delebreau never signed a written acknowledgment of his right to assistance of counsel.

When, during the interrogation, Aronstein showed Delebreau a portion of the video taken by Johnson, both Delebreau and Aronstein made

reference to "paperwork." In context, this most reasonably meant the criminal complaint that was given to Delebreau one day earlier.[4]

Three days later Aronstein returned to interrogate Delebreau a second time. R111:17. The interrogation took place in the same room. *Id*. Again, the interrogation was audio and video recorded. Before the second meeting, Aronstein made no effort to check whether a criminal complaint had been filed against Delebreau or whether he had counsel. R111:22. Again, as the second meeting began, Aronstein read Delebreau the *Miranda* warning. *Id*., at 19. As before, Delebreau did not sign a written acknowledgment of his right to assistance of counsel.

Early in their second meeting Aronstein told Delebreau that Aronstein had spoken with the prosecutor a few times since the first interrogation and two times that very same day; Aronstein said that he informed the prosecutor that Delebreau was cooperative and that Aronstein would be meeting with Delebreau again.[5] Despite these meetings—if they occurred—Aronstein still claimed not to have known that a criminal complaint had been filed, nor that Delebreau had appeared in Court for an initial appearance nor that Delebreau had counsel. R111:22.

Aronstein testified that during their second meeting Delebreau made a statement about not wanting to hire a private lawyer to defend him on the charges. Aronstein's report of interrogation makes no mention of Delebreau's reference to a lawyer, but at the motion hearing Aronstein explained that

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[4] This exchange occurs at about 36 minutes into the first recorded interrogation.

[5] This occurred about 5:40 into the second video. If true, WIS. SCR 20:4.2 ought have caused the prosecutor to direct Aronstein not to interrogate Delebreau.

> I noted that approximately half hour into the interview, Mr. Delebreau indicated that he wasn't going to be able to beat these charges and that with an attorney and that it was just going to cost him $10,000, and he was going to end up going to prison anyway so he might as well just cooperate with law enforcement.

R111:19. Delebreau's statement, he said, "made me believe that no meeting with an attorney occurred, thus [Delebreau] had no intentions of doing so." *Id.*, at 20.

The two recorded interrogations were later edited and condensed for use at trial. The initial hour-long interrogation was condensed to about three minutes; the second hour-long interrogation was condensed to about two minutes. R122:144; R71, ex. 6 & 7.

ARGUMENT

Jesse Delebreau's right to counsel attached on April 14, 2011. On that day he appeared in Brown County Circuit Court for an initial appearance. At this hearing Delebreau was represented by counsel. In every sense, the adversarial process in regard to the allegation that Delebreau had delivered heroin to an informant on February 21, 2011, was underway.

Under *State v. Dagnall*, 2000 WI 82, 236 Wis. 2d 339, 612 N.W.2d 680, which then still applied, statements made by Delebreau during an in-custody interrogation the day after his initial appearance at which his counsel was not present should not have been admitted at Delebreau's trial. Consistent with Wisconsin precedent, the interrogation violated Delebreau's right to counsel under the state constitution.

Delebreau's appearance in court with his lawyer sufficiently invoked his right to counsel. The record of Delebreau's invocation of his right to counsel is more clear than the invocation of the right to counsel accepted by this Court in *State v. Dagnall*, 2000 WI 82, 236 Wis. 2d 339, 612 N.W.2d 680, and *State v. Forbush*, 2011 WI 25, 332 Wis. 2d 620, 796 N.W.2d 741. Among other details, those two cases involved an invocation of counsel and interrogation prior to an initial appearance in a Wisconsin court. The rule of *Montejo v. Louisiana*, 556 U.S. 778 (2009), allowing police to interrogate a represented defendant after his right to assistance of counsel has attached at an initial appearance and placing the onus on the defendant to re-invoke his right to counsel at the time of the interrogation is "inconsistent with both the letter and the spirit of our law." *State v. Dagnall*, 2000 WI 82, ¶ 59. Because *Forbush* controls, *Montejo*, does not sanction the admission of statement made during an interrogation with a represented defendant.

While the Circuit Court found that the investigator did not know that Delebreau was represented, R111:44, the evidence suggests otherwise. More than ten years before Delebreau's interrogation our Court warned that investigators "must not avoid discovering whether an accused has invoked his Sixth Amendment right to counsel." *Dagnall*, 2000 WI 82, ¶ 51; *Forbush*, 2011 WI 25, ¶ 54. At best, that is exactly what the investigator did here: he took a calculated chance. He interrogated Delebreau weeks after he referred charges to the district attorney. By failing to check court records and never asking Delebreau whether he had appeared in court—even when Delebreau mentioned reading "paperwork" about the incident—the investigator did his level best to avoid learning the truth about whether Delebreau had invoked his right to counsel.[6]

Procuring statements from Delebreau about the purported sale of heroin on the day after the initial appearance (on the very same criminal charge), and then using those statements against him at trial on the very same charge denied Delebreau basic constitutional protections found in the state and federal constitutions. *See Massiah v.*

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[6] Investigator Aronstein's lack of curiosity is ostrich-like. It is one not permitted other citizens. In a slightly different context a court might describe his lack of inquisitiveness as conscious-avoidance; then the court might offer the following instruction to the jury as to the investigator's knowledge of Delebreau's legal status:

> You may infer knowledge from a combination of suspicion and indifference to the truth. If you find that a person has a strong suspicion that things were not what they seemed or that someone withheld some important fact, yet shut his or her eyes for fear of what he or she would learn, you may conclude that he or she acted knowing as I have used that work. You may not conclude that the defendant had knowledge if he or she is merely negligent in not discovering the truth.

United States v. Carrillo, 435 F.3d 767 (7th Cir. 2006) (affirming district court's decision to instruct jury on conscious-avoidance).

United States, 377 U.S. 201, 206 (1964). On these facts, *Massiah*, *Dagnall* and *Forbush* all require exclusion of the statements made in violation of Delebreau's right to counsel.

This Court's decision in *Forbush*, though splintered, did not allow the Court of Appeals to determine that *Montejo* controlled and that no violation of Delebreau's right to counsel had occurred under either the state or federal constitution. The Court of Appeals effectively adopted the dissenting opinion of Justice Crooks without addressing the majority opinions, all of whom concurred in the mandate. Whatever *Forbush* may mean, it applies to these facts.

Where Delebreau's right to counsel was invoked prior to his interrogation—at the initial appearance—that right could not be waived by reliance on the *Miranda* warning. Nothing in the record shows that Delebreau sought to initiate contact with the investigator after he appeared in court with counsel. Under *Edwards v. Arizona*, 451 U.S. 477 (1981), once a defendant has invoked the right to counsel police must cease custodial interrogation and any subsequent interrogation is only permissible once counsel has been made available to him, or he himself initiates further communication, exchanges, or conversations with the police, and not the other way around. *See Montejo v. Louisiana*, 556 U.S. 778, 794 (2009); *Maryland v. Schatzer*, 559 U.S. 98 (2010) (*Edwards* rule does not apply if a break in custody lasting 14 days has occurred).

Even if Delebreau's re-initiation of contact with the investigator is found to be proper under *Edwards,* waiver of the right to counsel should not be permitted under the Wisconsin constitution. While the investigator provided Delebreau with the *Miranda* warning, advising the subject of interrogation of the right to counsel is not the same as seeking a waiver of the same right, particularly when the defendant has already appeared in court with his counsel.

As the interests protected by the Fifth and Sixth Amendments (and their Wisconsin corollaries) differ significantly, waiver of the right to counsel *after* criminal charges have been filed and the defendant appears with counsel requires more. The *Miranda* warning did not sufficiently inform Delebreau of the differences between the source of the right, the interests protected, or the advantages gained by *continuing* to be represented by counsel at trial. Too, more may be required under "the fundamental charter between Wisconsin and the people of this state." *Forbush*, 2011 WI 25, ¶ 67 (Abrahamson, C.J.); *see also Montejo*, 556 U.S. at 793 ("if a state wishes to abstain from requesting interrogations with represented defendants when counsel is not present, it obviously may continue to do so").

I. DELEBREAU DID NOT WAIVE HIS RIGHT TO ASSISTANCE OF COUNSEL AT TRIAL.

On both occasions when investigator Aronstein interrogated Delebreau at the Brown County Jail, after the initial appearance in which he was represented by counsel, Aronstein read Delebreau the *Miranda* warning, presumably from a police-issued card. Delebreau did not sign a written acknowledgment of his right to counsel. Aronstein testified that both times Delebreau waived his rights and did not ask for counsel.

Delebreau did not waive his right to counsel under Article I, § 7 of the Wisconsin Constitution. A competent waiver of his right to counsel requires more than the *Miranda* warning.

The warning given to Delebreau informed him as to his right against self-incrimination. "He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an

attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

This warning did not explain his right to counsel under Article I, § 7 of the Wisconsin Constitution, including the advantages of being represented by counsel at trial so that Delebreau could knowingly, intelligently and voluntarily waive his right to counsel. (Indeed, the warning implied that Delebreau did not have counsel, though he did.) Nor does the record show that Aronstein explained these points to Delebreau.

Equating a waiver of the Fifth Amendment right to counsel with a waiver of the right to counsel under the Sixth Amendment has an easy symmetry; indeed, the language of the *Miranda* permits the ready adoption of an already known standard. However, the symmetry extends only so far. Advising a suspect of his right to counsel when he is in custody and being questioned before he has been charged with a crime is substantively different from seeking an effective waiver of the right to counsel after the defendant has appeared in court with counsel. Waiver in the case of the latter requires more, because the defendant has a lawyer already.

The right to counsel under the Fifth and Sixth Amendments attach at different times (during a custodial interrogation as opposed to after the filing of criminal charges), vary as to their scope (all statements versus statements made in relation to the charged crimes), and differ as to the interests they protect (self-incrimination versus representation at trial).

For example, the right to counsel under the Fifth Amendment is a safeguard recognized by the Supreme Court as necessary to protect the Fifth Amendment right against compulsory self-incrimination and assures the introduction at trial of voluntary statements. This right to

counsel is, therefore, only constitutionally required in the setting of custodial interrogation.

The right to assistance of counsel at trial exists in the text of our constitution: "In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel." Article I, § 7, Wisconsin Constitution. This right applies to a defendant in all critical stages of criminal proceedings, including pretrial interrogation. As such, this right to counsel serves a more broad purposes: not only providing counsel as an intermediary between the defendant and the State, but also striving for a fair adversarial process. *See Massiah v. United States*, 377 U.S. 201, 205 (1964) (noting that the purpose of the Sixth Amendment is to protect "the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime"); *Maine v. Moulton*, 474 U.S. 159, 176 (1985) ("the right to rely on counsel as a 'medium' between him and the State").

The right to counsel is rooted in the recognition that the typical defendant lacks legal knowledge or skills and that counsel is needed when a defendant is faced with an opponent who does have such knowledge or training. *United States v. Gouveia*, 467 U.S. 180, 189 (1984) (purpose of the right to counsel is to protect "the unaided layman at critical confrontations with his adversary").

In the context of post-arraignment interrogation, a lawyer is needed in order to achieve the over-arching objective of a fair adversarial process. The constitution's focus on the fairness and integrity of the adversarial process explains why the right to counsel protects the accused in critical stages of proceedings (where a similar right grounded on the Fifth Amendment and Article I, § 8 do not).

By contrast, the right to counsel before a criminal proceeding has commenced has a limited focus. *Miranda v. Arizona*, 384 U.S. 436 (1966), provides certain safeguards, in the context of a custodial

interrogation, to assure that a suspect is given "a full opportunity to exercise the privilege in self-incrimination." *Id.*, at 467. This right to counsel assures that any statement made is a voluntary one.

Generally, waiver of a constitutional right requires "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Patterson v. Illinois*, 487 U.S. 285, 292 (1988) (waiver requires "an intentional relinquishment or abandonment of a known right or privilege"). Effective waiver thus hinges on whether the defendant knowingly, intelligently and voluntarily surrendered that privilege.

In the context of relinquishing the right to counsel during an interrogation prior to the filing of criminal charges, the question of waiver boils down to an examination of whether the statements were "the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist." *State v. Davis,* 2008 WI 71, ¶ 36, 310 Wis. 2d 583, 751 N.W.2d 332. The inquiry examines the totality of the circumstances. *Id.,* ¶ 37. But this inquiry does not examine an understanding of the rights protected after the individual has been charged with a crime.

Delebreau acknowledges that some courts suggest that the waiver of the right to counsel can be accomplished using the waiver under *Miranda*. In those cases, the facts drive the result: such as where the suspect has made an ambiguous request for counsel or where the suspect is interrogated prior to being charged with a crime. Distinctions between the source of the right and the interests protected may cause "strained and artificial distinctions in Fifth and Sixth Amendment jurisprudence." *State v. Ward*, 2009 WI 60, ¶ 85, 318 Wis. 2d 301, 767 N.W.2d 236 (2009) (Crooks, J., dissenting).

Other cases clearly establish a higher bar for the waiver of the right to counsel after the defendant has been charged with a crime. Delebreau suggests that these cases offer a better standard by which to judge waiver against. Thus, where a defendant seeks to relinquish his right to counsel in order to represent himself at trial, before waiver may be found, the court must engage the defendant in an intensive colloquy. Valid waiver is focused not exclusively on the voluntariness of the act, but requires acknowledgment of the advantages lost when the defendant is not represented by counsel.

In the context of a defendant's waiver of the right to counsel at trial and proceeding without counsel, the scope, extent and interpretation of the right to assistance of counsel is identical under both the Wisconsin and the United States Constitutions. *State v. Klessig*, 211 Wis. 2d 194, 202-03, 564 N.W.2d 716, 719 (1997).

Under *Klessig*, when a defendant seeks to proceed *pro se*, the trial court must insure that the defendant has knowingly, intelligently and voluntarily waived the right to counsel and that he is competent to proceed *pro se*. In order for the defendant's waiver of counsel to be valid, the record must reflect not only his deliberate choice to proceed without counsel, but also his awareness of the difficulties and disadvantages of self-representation, the seriousness of the charge or charges he is facing and the general range of possible penalties that may be imposed if he is found guilty. *Klessig,* 211 Wis. 2d at 205; *see Faretta v. California*, 422 U.S. 806 (1975); and WIS. JI–CRIM SM 30.

An on-the-record examination of the defendant is the clearest and most efficient means of insuring that the defendant has validly waived his or her right to the assistance of counsel and of preserving and documenting that valid waiver for purposes of appeal and postconviction motions. *Id.* A properly conducted colloquy serves two purposes: ensuring that a defendant is not deprived of his constitutional rights and of efficiently guarding scarce judicial

resources. *State v. Polak*, 2002 WI App 120, 254 Wis. 2d 585, 592-94, 646 N.W.2d 845, 848-50.

Such a thorough inquiry ought be required to relinquish the right to counsel at a "critical stage" of the proceedings—during interrogation about the criminal charge after the represented defendant has appeared in court for an initial appearance. Proper waiver of the right to counsel includes the same admonitions which a court would rely on. *See State v. Bangert*, 131 Wis. 2d 246, 272, 389 N.W.2d 12, 25 (1986). The differing inquiries for waiver highlight that waiver of the right to assistance of counsel at trial should not accomplished through the limited lens of the *Miranda* warning. Waiver of the right to counsel is fundamentally different after the defendant has been charged with a crime and has appeared in court with counsel.

II. ADMISSION AT TRIAL OF STATEMENTS MADE DURING AN INTERROGATION THE DAY AFTER HIS APPEARANCE IN COURT WITH COUNSEL VIOLATED DELEBREAU'S CONSTITUTIONAL RIGHT TO COUNSEL BECAUSE HIS RIGHT TO COUNSEL WAS PROPERLY INVOKED WHEN HE APPEARED IN COURT WITH COUNSEL AT THE INITIAL APPEARANCE.

Jesse Delebreau's right to counsel was invoked when he appeared in Brown County Circuit Court for an initial appearance on April 14, 2011 and was represented by counsel. R104. This, the facts of the case make clear. Moreover, at the time of the interrogation, the controlling Wisconsin precedent, *State v. Dagnall*, 2000 WI 82, 236 Wis. 2d 339, 612 N.W.2d 680, held that the right to counsel did not allow an investigator to interrogate Delebreau in the absence of his counsel and then use the fruits of that interrogation at trial. *State v. Forbush*, 2011 WI 25, 332 Wis. 2d 620, 796 N.W.2d 741, though decided after the

interrogation at issue, confirmed that the right to counsel under Article I, § 7 bars the admission of Delebreau's statements.

The *Forbush* Court's treatment of *Montejo v. Louisiana*, 556 U.S. 778 (2009), shows that *Dagnall* and *Forbush* apply here, not *Montejo*.[7] No statement made by Delebreau during the interrogation should have been admitted at his trial. The lower courts' decisions to the contrary were in error.

A. Invocation of Right to Counsel.

The Sixth Amendment right of the "accused" to assistance of counsel in "all criminal prosecutions" is limited by its terms: "it does not attach until a prosecution is commenced."[8] *McNeil v. Wisconsin,* 501 U.S. 171, 175 (1991). The Supreme Court has, for purposes of the right to counsel, pegged the commencement of this right to " 'the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *United States v. Gouveia,* 467 U.S. 180, 188 (1984); *Rothgery v. Gillespie County*, 554 U.S. 191, 198 (2008). The rule is not "mere formalism," but a recognition of the point at which "the government has committed itself to prosecute," "the adverse positions of government and defendant have solidified," and the accused "finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Kirby v. Illinois,* 406 U.S. 682, 689 (1972).

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[7] *See* note 3, *supra*.

[8] The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." In relevant part, the Wisconsin Constitution, Article I, § 7, provides that "In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel."

In *McNeil*, Wisconsin properly conceded that the right to counsel attached at the first appearance before a county court commissioner, who set bail and scheduled a preliminary examination. *McNeil*, 510 U.S. at 173 ("It is undisputed, and we accept for purposes of the present case, that at the time petitioner provided the incriminating statements at issue, his Sixth Amendment right had attached ... ").[9] The *McNeil* court did more than just accept the state's concession. The court affirmed that "[t]he Sixth Amendment right to counsel attaches at the first formal proceeding against an accused," and observed that "in most States, at least with respect to serious offenses, free counsel is made available at that time ... ." *Id.,* at 180–181. Presented with a similar question 17 years after *McNeil,* the Supreme Court stayed the course. *Rothgery v. Gillespie County*, 554 U.S. 191 (2008).

In this regard, *Montejo* changed nothing. "Under our precedents, once the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings. Interrogation by the State is such a stage." *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009) (internal citations omitted); *Brewer v. Williams*, 430 U.S. 387, 401 (1977). "Once the right to counsel has attached and been asserted, the State must of course honor it." *Maine v. Moulton*, 474 U.S. 159, 170 (1985). Particularly, because pretrial proceedings "might well settle the accused's fate and reduce the trial itself to a mere formality." *Id.* Moreover "the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." *Id.*, at 171.

This Court has interpreted the right to the assistance of counsel at trial to commence at the initial appearance when the defendant is represented. *State v. Forbush*, 2011 WI 25, ¶ 21, 332 Wis. 2d 620, 796

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[9] The state made a similar concession in the trial court. *See* R111:25-26.

N.W.2d 741, quoting *State v. Dagnall*, 2000 WI 82, ¶¶ 51-52, 236 Wis. 2d 339, 612 N.W.2d 680 ("After an attorney represents the defendant on particular charges, the accused may not be questioned about the crimes charged in the absence of an attorney. The authorities must assume that the accused does not intend to waive the constitutionally guaranteed right to the assistance of counsel").

"Logically, a right that need not be requested or invoked is self-executing at every critical point where the right attaches." *Dagnall*, 2000 WI 82, ¶ 36, citing *Brewer v. Williams*, 430 U.S. 387, 404 (1977) ("the [Sixth Amendment] right to counsel does not depend upon a request for by the defendant"). It is not in dispute that Delebreau's appearance in court with counsel for the initial appearance marked the moment that his right to the assistance of counsel at trial was invoked.

B. **Dagnall** ***and*** **Forbush** ***Direct That Delebreau's Statements, Made While In Custody and Without His Counsel The Day After His Initial Appearance In Court (With Counsel), Violate His Constitutional Right to Assistance of Counsel at Trial.***

The circumstances of Jesse Delebreau's invocation of his right to counsel were more clear than the invocation of the right to counsel accepted as sufficient by this Court in *State v. Forbush*, 2011 WI 25, 332 Wis. 2d 620, 796 N.W.2d 741, or *State v. Dagnall*, 2000 WI 82, 236 Wis. 2d 339, 612 N.W.2d 680. Here, unlike in *Dagnall* and *Forbush*, Delebreau was interrogated twice ***after*** he appeared in court with counsel, not before.

Dagnall, *Montejo* and *Forbush* provide the legal framework within which Delebreau's claim of a constitutional violation must be analyzed. As he explains, Delebreau believes that *Dagnall* and *Forbush* control.

1. In *Dagnall*, the defendant was interrogated prior to his initial appearance in Circuit Court, but after he was charged with homicide. Dagnall was arrested in Florida. After his arrest, but before he appeared in a Wisconsin court, investigators traveled to Florida for the purpose of returning him to Wisconsin. Detectives wanted "to try to get him to talk about the case." *Id.*, at ¶ 8. Before leaving for Florida, however, the investigators were informed by Dagnall's lawyer that he was represented and ought not be interrogated in the lawyer's absence. *Id.*, at ¶ 6. When detectives spoke to Dagnall, he told them that "My lawyer told me I shouldn't talk to you guys." *Id.*, at ¶ 9. Nevertheless, having been read the *Miranda* warning, Dagnall spoke with police about the conduct charged in the already filed criminal complaint. *Id.*, at ¶¶ 11-13. Dagnall challenged the admission of his statement relying on his Sixth Amendment right to counsel. *Id.*, at ¶ 3.[10]

This Court found that detectives knew Dagnall to be represented by counsel but "they proceeded to Florida, not only to accompany Dagnall back to Wisconsin, but also for the avowed purpose of obtaining a statement from him." 2000 WI 82, ¶ 58. "[T]he officers admittedly intended to bolster the prosecution against Dagnall by inducing him to 'talk about the case.' They accomplished this objective ..." *Id.* "Even as he began to talk, he expressed an inarticulate concern about self-incrimination, thereby revealing that he was indeed not equipped to navigate the legal system alone." *Id.*

In light of these facts, the Court held that the interrogation violated Dagnall's right to counsel.

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[10] While the court noted that Article I, § 7 of the Wisconsin Constitution also affords the right to counsel, *id.*, at ¶ 28 n.7, because the issue of whether the defendant had properly invoked his right to counsel under the Wisconsin constitution was not raised, the *Dagnall* court did not rely on our constitution. Instead the decision relied on the Sixth Amendment.

> To permit police questioning under these circumstances would authorize police subversion of the attorney-client relationship. Under these facts, we need not examine whether Dagnall "invoked" his Sixth Amendment right to counsel. He did not have to invoke his right because he already had counsel. To require an accused person to assert the right to counsel after the accused has counsel would invite the government to embark on a persistent campaign of overtures and blandishments to induce the accused into giving up his rights. ***This would be inconsistent with both the letter and the spirit of our law***.

Id., at ¶ 59 (emphasis added). The Court explained that because Dagnall had established an attorney-client relationship and had counsel for the case, he was not required to "invoke" his Sixth Amendment right to counsel. *Id.*, at ¶ 62.

Dagnall was grounded on concerns designed to safeguard a defendant's right to rely on the assistance of counsel at a time in the proceedings when he transformed from suspect to defendant. To do otherwise "would authorize police subversion of the attorney-client relationship." *Id.*, at ¶ 59. This right exists to "protect the unaided layman at critical confrontations with his adversary," *United States v. Gouveia*, 467 U.S. 180, 189 (1984), and allowing him "the right to rely on counsel as a 'medium' between him[self] and the State." *Maine v. Moulton*, 474 U.S. 159, 176 (1985).

2. In *Montejo v. Louisiana*, 556 U.S. 778 (2009), the Supreme Court addressed the invocation and waiver of the Sixth Amendment right to counsel. Montejo was arrested in connection with a robbery and murder. Montejo waived his rights under *Miranda v. Arizona,* 384 U.S. 436 (1966), and was interrogated over the course of an afternoon and evening and into the early morning hours of the next day. Three days later he was brought before a judge. The minutes of the hearing reflect

that he was being charged with murder. While he did not appear with counsel, the court ordered that counsel be appointed. Later that same day, two detectives visited Montejo at the jail and requested that he accompany them in an attempt to locate the murder weapon. Detectives again read Montejo the *Miranda* warning and he agreed to accompany them. While in their company Montejo wrote an inculpatory letter of apology to the victim's widow. On his return to the jail, Montejo finally meet his court-appointed attorney. *Montejo*, 556 U.S. at 781-82.

The Court began by emphasizing the legal issues not at issue: once the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all "critical" stages of the criminal proceedings, interrogation being such a stage. *Id.*, at 786. "The *only* question raised by this case ... is whether courts must *presume* that such a waiver is invalid under certain circumstances. *Id.*, at 787. "[I]t would be completely unjustified" the Court noted, "to presume that a defendant's consent to police-initiated interrogation was involuntary or coerced simply because he had previously been appointed a lawyer." *Id.*, at 792.

Montejo overturned *Michigan v. Jackson*, 475 U.S. 625 (1986), which, as characterized by Justice Scalia, decided that a request for counsel at an arraignment should be treated as an invocation of the Sixth Amendment right to counsel "at every critical stage of the prosecution," 475 U.S. at 633, despite doubt that defendants "actually inten[d] their request for counsel to encompass representation during any further questioning." *Id.,* at 632–633. Under *Jackson*, Justice Scalia explained, any subsequent waiver would be "insufficient to justify police-initiated interrogation." *Montejo*, 565 U.S. at 787-88.

The Supreme Court explained that giving police a greater ability to obtain admissions from a defendant (and not just suspects) was a net positive: the " 'ready ability to obtain uncoerced confessions is not an

evil but an unmitigated good.' Without these confessions, crimes go unsolved and criminals unpunished. These are not negligible costs." 556 U.S. at 796.

Thus, under the Sixth Amendment, the rule adopted by *Montejo* allows police to interrogate a defendant after he has appeared in court with counsel and requires the defendant to assert his right to counsel in every contact with police.

3. In as much as the defendant in *State v. Forbush*, 2011 WI 25, 332 Wis. 2d 620, 796 N.W.2d 741, was represented by counsel and interrogated prior to his initial appearance, the facts of *Forbush* mirror those in *Dagnall*. In *Forbush* this Court had to determine whether *Montejo* affected *Dagnall*. A majority of the Court answered no, but for differing reasons.

After a criminal complaint was filed, Forbush was arrested in Michigan. *Id*., at ¶ 3. There, he appeared in court with counsel. *Id*. With the assistance of counsel, he waived extradition. *Id*. He was then transported to Wisconsin. *Id*. His counsel notified the District Attorney that Forbush was represented by counsel prior to his interrogation. *Id*. A detective, but not the one who later interrogated Forbush, also had contact with his lawyer and learned that he was represented. *Id*.

At the jail, upon his return to Wisconsin and before the initial appearance, a detective interrogated him. Some time after he was read the *Miranda* warning, Forbush waived his right to counsel and began answering questions about the charged offense, making inculpatory statements. *Id*., at ¶ 4. Immediately following his interrogation, Forbush was taken to the initial appearance where his counsel was present. *Id*., at ¶ 5. Forbush's claim of a violation of the right to counsel was grounded in the state and federal constitutions. *Id*., at ¶ 2.

Justice Roggensack held that the undisputed facts showed that Forbush affirmatively invoked his right to counsel prior to his interrogation: Forbush had retained counsel, and he had received the assistance of counsel for the crimes charged. Moreover, the state was made aware that Forbush had counsel at least by the time when the detective began to question him.

> Accordingly, [the detective's] questioning violated Forbush's right to counsel afforded by the Sixth Amendment and Article I, Section 7 of the Wisconsin Constitution, from its inception; the circuit court's suppression of Forbush's statements to [the detective] was required due to the violation of Forbush's constitutional rights. Nothing in *Montejo* disturbs *Edwards* absolute bar to questioning a defendant who has invoked his right to counsel.

Forbush, 2011 WI 25, ¶ 55. Accordingly, "Forbush was not required to 're-invoke' his right to counsel when the investigator initiated interrogation." *Id.*, at ¶ 56.

Chief Justice Abrahamson (joined by Justice Bradley) agreed "with Justice Roggensack's bottom line that Forbush's right to counsel was violated and his statements must be suppressed." *Id.*, at ¶ 58. Chief Justice Abrahamson concluded that the right to counsel is "appropriately tethered to the Wisconsin Constitution." *Id.*, at ¶ 60.

Calling on a long-standing commitment "to protect the trial rights of an accused and to enhance the integrity of the fact-finding process," *id.*, at ¶ 78, the Chief Justice explained that

> Based on our long tradition, I accept Justice Scalia's invitation to interpret the protections afforded Forbush under the Wisconsin Constitution. I conclude that under

> the Wisconsin Constitution, an accused is afforded the protections this court previously described in *Dagnall, Hornung,* and *Ward* to be attached to the Sixth Amendment. Applying the holding of *Dagnall* to the Wisconsin Constitution, I conclude that Forbush "was not required to invoke the right to counsel in this case because he had been formally charged with a crime and counsel had been retained to represent him on that charge." My conclusion is grounded in Wisconsin's long history of protecting an accused's meaningful right to counsel, a history dating back well before the protections under the Sixth Amendment were extended to the people of this State.

Forbush, 2011 WI 25, ¶ 71 (internal footnotes omitted).

Justice Prosser, the author of *Dagnall*, offered a third, but narrower, basis on which to find that Forbush's right to counsel was violated. As to the invocation of the right to counsel, Justice Prosser noted "There is simply no basis for disconnecting the facts of this case from the clear law established in *Dagnall,* because under the law in *Dagnall,* Forbush was not required to personally, unambiguously, and unequivocally 'invoke' his right to counsel when he spoke to Detective Norlander." 2011 WI 25, ¶ 92.[11] Finding that, because *Dagnall* controlled at the time, "It is enough to now uphold the protections that were in place when Brad Forbush was questioned." *Id.*, at ¶ 116.

Acknowledging that *Montejo* "undercut many of the major underpinnings of *Dagnall*," *id.*, at ¶ 96, Justice Prosser recognized that the Supreme Court allowed states to offer "more protective [ ] procedures in the Sixth Amendment context ..." *Id.*, at ¶ 97. Future

[11] *See* note 3, *supra*.

cases, he noted, would require a jailed defendant to "invoke, assert or exercise the right to counsel to prevent interrogation." *Id*., at ¶ 109. But Justice Prosser did not indicate what additional protections the Wisconsin constitution might provide.

Justice Crooks (joined by Justices Ziegler and Gableman) dissented. The dissent would have adopted the rule announced in *Montejo v. Louisiana*, 556 U.S. 778 (2009). *See id*., at ¶ 118.

4. At the time Delebreau was interrogated, the day after his initial appearance, "the law of Wisconsin did not require [him] to 'invoke' is right to counsel under these circumstances. Rather it precluded law enforcement officers from initiating questions to the accused about these crimes. The law in Wisconsin was not ambiguous." *Forbush*, 2011 WI 25, ¶ 102 (Prosser, J., concurring). The interrogation of Delebreau was "inconsistent with both the letter and the spirit of our law." *Dagnall*, 2000 WI 82, ¶ 59.

When Jesse Delebreau appeared in Circuit Court on April 14, 2011, for his initial appearance, his right to counsel was properly invoked under the law at the time. *State v. Dagnall*, 2000 WI 82, 236 Wis. 2d 339, 612 N.W.2d 680; *State v. Hornung*, 229 Wis. 2d 469, 600 N.W.2d 264 (Ct. App. 1999). Counsel had been appointed and appeared with him in Court. The following day, the investigator brought Delebreau from his jail cell to an interrogation room. While the investigator gave Delebreau the *Miranda* warning, not once did the investigator inquire whether Delebreau had been charged, appeared in court or was represented by counsel. Nor did he take any steps to ascertain this information by other means.

Neither *Dagnall* nor *Forbush* require Delebreau to "re-invoke" his right to counsel when the investigator initiated interrogation after the initial appearance. Because this Court grounded *Forbush* on greater protections historically granted by the Wisconsin constitution, the

admission of statements made by Delebreau during his un-counseled interrogation violated his right to counsel.

III. THE WISCONSIN CONSTITUTION AFFORDS GREATER PROTECTION OF THE RIGHT TO COUNSEL THAN THE RULE ANNOUNCED IN *MONTEJO V. LOUISIANA*.

"It is the prerogative of the State of Wisconsin to afford greater protections to the liberties of persons within its boundaries under the Wisconsin Constitution than is mandated by the United States Constitution. Under the Fourteenth Amendment. This Court has never hesitated to do so." *State v. Doe*, 78 Wis. 2d 161, 171, 254 N.W.2d 21 (1977) (Heffernan, C.J.) (internal citation omitted).[12] This court has explained that it "will not be bound by the minimums which are imposed by the Supreme Court of the United States if it is the judgment of this court that the Constitution of Wisconsin and the laws of this state require that greater protection of citizens' liberties ought to be afforded." *State v. Forbush*, 2011 WI 25, ¶ 70, 332 Wis. 2d 620, 658-59, 796 N.W.2d 741, 761 (Abrahamson, C.J., concurring).

Justice Crooks, noting the dissonance between the right to counsel under the Fifth and Sixth Amendments, has commented that with respect to the influence the state has over the timing of when a criminal complaint is filed (and thus when the right to counsel under Article I, section 7 applies), "manipulation can be dispositive of the validity of a waiver of the right to counsel under Fifth and Sixth Amendment jurisprudence." *State v. Ward*, 2009 WI 60, ¶ 90 318 Wis. 2d 301, 367, 767 N.W.2d 236, 268 (Crooks, J., dissenting). Because of

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[12] *See, e.g., Hoyer v. State*, 180 Wis. 2d 407, 193 N.W.2d 89 (1923), *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699, N.W.2d 582, and *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899.

this effect, he recommended invoking greater protections under the Wisconsin constitution.

> Even if the circumstances presented here can be squared with the constitutional case law on waiver of right to counsel, it is worth considering bringing coherence to the odd patchwork of case law governing this area. To do so, we should turn, as many states have done, to our own constitution.

2009 WI 60, ¶ 96. As Justice Crooks explained, courts in six other states had invoked their state constitutions "to create clearer and fairer rules" that "provide a more robust right to counsel." *Id.*, at ¶ 97. Continuing the rule of *Forbush* and *Dagnall* on these facts accomplishes that goal here.

A. This Court Has Explained Why The Wisconsin Constitution Offers More Protection For The Right To Counsel.

There are many good reasons why this Court would interpret our constitution to protect the right to counsel in a manner more expansive than the rule announced in *Montejo v. Louisiana*, 556 U.S. 778 (2009). Indeed, the *Montejo* court invited state courts to do so, if they wished: "[I]f a state wishes to abstain from requesting interrogations with represented defendants when counsel is not present, it obviously may continue to do so." *Montejo v. Louisiana*, 556 U.S. 778, 793(2009).

Fairness, protecting the attorney-client relationship and autonomy are all hallmarks of the right to counsel that have been recognized by our courts. The importance of these rights have been recognized by our Court since 1859, when the Court asked rhetorically, "Why this great solicitude to secure him a fair trial if he cannot have the benefit of counsel?" *Carpenter v. County of Dane*, 9 Wis. 274, 277 (1959); s*ee also County of Dane v. Smith*, 13 Wis. 654, 656-57 (1861) (noting that, because

the defendant and the prosecution are inherently adverse, it would be "unsafe and hazardous" for the accused to proceed without counsel).[13] "[T]he state constitutional guarantees for a fair and full trial and an attorney at trial would be hollow rights if a conviction at trial is already assured because the suspect incriminates himself or herself during custodial questioning. ... A suspect's right to an attorney at custodial questioning to protect the privilege against self-incrimination is thus ***intricately intertwined with an accused's state constitutional right to a full and fair trial and a meaningful state constitutional right to an attorney at trial***." *State v. Jennings*, 2002 WI 44, ¶67, 252 Wis. 2d 228, 259, 647 N.W.2d 142, 157 (Abrahamson, C.J., dissenting) (emphasis added).

In *Forbush*, for example, Justice Roggensack noted that preserving the attorney-client relationship was an important consideration in arriving at a rule apart from *Montejo*. The relationship "is a consideration separate and apart from other reasons for the principles we explained." 2009 WI 25, ¶ 48. Indeed, "the confidence and trust underlying the attorney-client relationship are foundational to the practice of law and deeply rooted in our law and professional rules." *Id.*

Protecting a defendant's right to interact with the government only through counsel following the filing of criminal charges was a primary rationale underlying this Court's decision in *Dagnall*. The court noted that Dagnall had retained an attorney in connection with the charged crime and he had communicated with that attorney. In turn, his attorney had admonished the authorities not to question Dagnall about the crime, and had alerted authorities to the attorney-client relationship. *Dagnall* sought to safeguard a defendant's right to rely on the assistance of counsel at a critical time in the proceedings when

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[13] *Carpenter* and *Smith* are of import because the cases were decided 11 and 13 years after Wisconsin gained statehood and about 100 years before the United States Supreme Court recognized similar rights under the federal constitution.

he transformed from suspect to defendant; and the latter category conferred rights the former did not. "To permit police questioning under these circumstances would authorize police subversion of the attorney-client relationship." *Dagnall*, 2000 WI 82, ¶ 59.

Justice Abrahamson, also in *Forbush*, noted that the rule established in *Dagnall*—and anchored in our constitution—assured that a defendant had the right to counsel at a pretrial interrogation, a critical stage of criminal proceedings.

> Protecting an accused's right to counsel in pre-trial interrogation is imperative to protect the trial rights of an accused and to enhance the integrity of the fact-finding process. As the United States Supreme Court recognized in *Miranda:* 'Without the protections flowing from adequate warning and the rights of counsel, 'all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police.'

State v. Forbush, 2011 WI 25, ¶ 78 (internal citations omitted). *See also Sparkman v. State*, 27 Wis. 2d 92, 99-100, 133 N.W.2d 776 (1965) (holding that appointment of counsel prior to preliminary examination is required for "compelling reasons" such as to preserve the constitutional right to a fair trial, avoiding adverse psychological factors for the defendant, preparing and conducting the cross-examination of government witnesses and preserving testimony).

B. For Many Of The Same Reasons, Other States Have Chosen To Interpret The Right To Counsel Apart From **Montejo.**

Wisconsin is not alone in applying greater protection under its constitution in regard to the right to counsel. Other states, too, have abstained from the rule established in *Montejo*. West Virginia, for one, has expressed its belief "that our law is well-reasoned and appropriately ensures that statements made by a defendant during interrogation are voluntary and made with full knowledge of the right to be assisted by counsel." *State v. Bevel*, 231 W. Va. 346, 745 S.E.2d 237 (2013) (police-initiated interrogation after defendant requested appointment of attorney at his arraignment violated defendant's state constitutional right to counsel).

Like our Court, the court in *Bevel* noted that its precedent had often relied only on the Sixth Amendment.[14] The court then made reliance on ***its*** constitution explicit.

> We note that much of our case law examining the right to counsel ... only discusses the right in terms of the Sixth Amendment to the United States Constitution. Although we did not mention the West Virginia Constitution explicitly, it is clear from the Court's opinions that until now, the right to counsel guaranteed by the Constitution of West Virginia mirrored the right guaranteed by the Sixth Amendment. We now explicitly hold that if police initiate interrogation after a defendant asserts his right to counsel at an arraignment or similar proceeding, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid as being taken in violation of the defendant's right to counsel under article

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[14] *See State v. Dagnall*, 2000 WI 82 ¶ 28 n.7, 236 Wis. 2d 339, 355, 612 N.W.2d 680, 687.

> III, section 14 of the Constitution of West Virginia. Our holding today does not change what the right to counsel has entailed pursuant to this state's constitution since 1987 ...

Bevel, 231 W. Va. at 356, 745 S.E.2d at 247.

The Kansas Supreme Court also declined to follow *Montejo*, though mainly on state law grounds. *See State v. Lawson*, 296 Kan. 1084, 297 P.3d 1164 (2013). The *Lawson* court held that *Montejo* was contrary to a Kansas statute protecting the right to counsel which provides that after the statutory right to counsel has attached, a defendants uncounseled waiver of that right will not be valid unless it is made in writing and on the record in open court. Waiver using the *Miranda* warning was found to be an inadequate substitute for the waiver procedure required of Kansas courts. Notably, the *Lawson* court explained that Kansas has generally adopted the United States Supreme Court's interpretation of corresponding federal constitutional provisions as the meaning of the Kansas Constitution, notwithstanding any textual, historical, or jurisprudential differences order to achieve consistency, so that the state constitution receives a consistent interpretation. 297 P.3d at 1169. But "This case would be the prime example of why the wholesale, automatic adoption of federal constitutional jurisprudence does not produce such desired stability in the law for Kansans." *Id.*

C. The Right To Assistance of Counsel At Critical Stages Plays An Important Role In Protecting Fundamental Rights.

A year after establishing the right of an indigent defendant to counsel at a criminal felony trial in *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Supreme Court held that an individual suspected of committing a crime has a right to counsel during police interrogations under the

Sixth Amendment. The Court explained the importance of that right, noting

> We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.

Escobedo v. Illinois, 378 U.S. 478, 490 (1964).

The relationship between a represented defendant and counsel thus commands heightened protection from government interference once formal adversary proceedings have commenced. *See Patterson v. Illinois*, 487 U.S. 285, 290 n.3 ("Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect"); *Massiah v. United States*, 377 U.S. 201, 206 (1964). Counsel's role has long been recognized and is particularly critical for defendants, regardless of their education or socio-economic status. *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

The right to counsel, the Supreme Court explained

> is one of the safeguards of the Sixth Amendment deemed necessary to ensure fundamentally human rights of life and liberty ... it embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or

> liberty, wherein the prosecution is presented by experienced and learned counsel.

Johnson v. Zerbst, 304 U.S. 458, 462 (1938). "This view no more than reflects a constitutional principle established as long ago as *Powell v. Alabama*, 287 U.S. 45, where the Court noted that '* * * during perhaps the most critical period of the proceedings * * * that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation (are) vitally important, the defendants * * * (are) as much entitled to such aid (of counsel) during that period as at the trial itself.' " *Massiah v. United States*, 377 U.S. 201, 205 (1964). Thus, in *Massiah*, "the petitioner was denied the basic protections of that guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." *Id.*, 377 U.S. at 206.

Attempts to obtain an adversarial advantage by interrogating a defendant without counsel present creates perilous risks for the accused. As the Supreme Court recently observed, the coercive pressures of custodial interrogation "can induce a frighteningly high percentage of people to confess to crimes they never committed." *Corley v. United States*, 556 U.S. 303, 321 (2009) (citation omitted).

When Jesse Delebreau left the courtroom on April 14, 2011, he knew that he was represented by a lawyer. He also knew that the lawyer had to make sure that his representation of Delebreau was not in conflict with another client. As a result, counsel asked that the hearing be continued for two weeks. Until the conflict was sorted out, counsel could not provide advice to Delebreau; but he represented him all the same.

The next day, when Investigator Aronstein took Delebreau from his jail cell and brought him into an interrogation room, Delebreau had not

been able to speak with counsel about the case or whether he should cooperate with Aronstein. While Aronstein read the *Miranda* warning to Delebreau, he never explained to Delebreau what his right to counsel under Article I, § 7 meant. Aronstein was focused on obtaining an inculpatory statement from Delebreau, not even-handedly weighing the benefits and costs of how a statement might affect Delebreau's case at trial, like his counsel would.

What Delebreau needed—as the recording shows—is counsel to act as a medium between his legal interest and Aronstein's drive to collect evidence to be used at trial against him. Throughout the interrogation Aronstein kept after Delebreau in an effort to obtain any inculpatory statement to strengthen the case on the criminal charge at trial.

Delebreau's vulnerabilities are clear in the recording. He admits to using drugs. But he has no specific recollection of the charged offense. Even when Aronstein refers Delebreau to the criminal complaint, he has little specific recall of the events.

While investigators, such as Aronstein here, may try to suggest to defendants that they are able to make offers in the best interest of the defendant, it is legally doubtful that once an adversarial proceedings as begun—with the goal of obtaining a criminal conviction—the investigator could "wear the hat of an effective adviser to a criminal defendant while at the same time wearing the hat of law enforcement authority." *Patterson v. Illinois*, 487 U.S. 285, 310 (1987) (Stevens, J., dissenting).

If fairness and integrity of the fact finding process are values rightly protected by the right to counsel, then Delebreau's interrogation illustrates that the information obtained from him in the absence of his counsel was not of unquestioned reliability.

IV. DELEBREAU DID NOT REINITIATE CONTACT WITH POLICE AFTER HIS APPEARANCE WITH COUNSEL; *EDWARDS V. ARIZONA* DOES NOT APPLY.

Jesse Delebreau initiated contact with an investigator when he was placed in custody, but had not yet appeared in court for an initial appearance on the criminal charge. If Delebreau had not appeared in court and with counsel before Aronstein interrogated him, then the admissibility of the interrogation would be evaluated by *Miranda v. Arizona*, 384 U.S. 436 (1966).

Here, as Delebreau invoked his right to counsel under the Wisconsin constitution when he appeared in court with counsel, *Edwards v. Arizona*, 451 U.S. 477 (1981), applied. *See Montejo v. Louisiana*, 556 U.S. 778, 794 (2009) (Under *Miranda*'s prophylactic protection of the right against compelled self-incrimination, any suspect subject to custodial interrogation has the right to have a lawyer present if he so requests, and to be advised of that right. Under *Edwards*' prophylactic protection of the *Miranda* right, once such a defendant "has invoked his right to have counsel present," interrogation must stop. And under *Minnick*'s prophylactic protection of the *Edwards* right, no subsequent interrogation may take place until counsel is present, "whether or not the accused has consulted with his attorney") (internal citations omitted).

Interrogation under those circumstances would be permitted only if Delebreau—not investigator Aronstein—reinitiated contact. Delebreau did not initiate any further communication with the investigator after he appeared in court.

Once the right to counsel has attached, "any subsequent waiver during a police-initiated custodial interview is ineffective." *State v. Dagnall,* 2000 WI 82, ¶848, 236 Wis. 2d 339, 612 N.W.2d. 680. Delebreau's

appearance in court with counsel meant that the adversarial process had begun, and he was entitled to rely on counsel to act as a medium between himself and the State.

CONCLUSION

Finding a violation of Jesse Delebreau's right to counsel on the facts here does not create a rule that impedes law enforcement's access to an individual who is suspected of having committed a crime. Police may still speak to a defendant about an offense other than the charged offense even if he is represented. They may contact a charged defendant if he is not represented. Too, police may seek to reinitiate contact with a defendant after sufficient time passes. And a defendant may re-initiate contact with police himself.

But when a defendant appears in court with counsel on a specific criminal charge one day, he cannot be interrogated without counsel about that charge on the next day. On those facts, *Dagnall*, *Forbush* and Article I, § 7 of the Wisconsin Constitution hold that the right to assistance of counsel at trial prohibits the admission of the defendant's statements at trial.

The trial court was wrong to deny Jesse Delebreau's motion to suppress the two recorded statements. He now respectfully requests that this Court **REVERSE** the judgment of the Wisconsin Court of Appeals and **REMAND** for proceedings consistent with this Court's opinion.

Dated at Madison, Wisconsin, September 8, 2014.

Respectfully submitted,

JESSE DELEBREAU,
Defendant-Appellant-Petitioner.

Stephen P. Hurley
Wisconsin Bar No. 1015654
Marcus J. Berghahn
Wisconsin Bar No. 1026953

HURLEY, BURISH & STANTON, S.C.
33 East Main Street, Suite 400
Madison, Wisconsin 53703
[608] 257-0945

CERTIFICATION

I certify that this brief conforms with the rules contained in WIS. STAT. §§ 809.19(8)(b) and (c), for a brief produced using proportional serif font. The length of the portions of this brief described in WIS. STAT. § 809.19(1)(d), (e) and (f) is 10,997 words. *See* WIS. STAT. § 809.19(8)(c)1.

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Marcus J. Berghahn

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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 decisions of the administrative agency.

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INDEX TO SHORT APPENDIX