STATE OF WISCONSIN

IN SUPREME COURT

No. 2013AP1108-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JESSE J. DELEBREAU,

Defendant-Appellant-Petitioner.

REVIEW OF A DECISION AND ORDER OF THE WISCONSIN COURT OF APPEALS, DISTRICT III, AFFIRMING A JUDGMENT AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN BROWN COUNTY CIRCUIT COURT, THE HONORABLE THOMAS J. WALSH, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

(1) Were Delebreau's *Miranda* waivers sufficient to waive his right to counsel under the Sixth Amendment to the United States Constitution and art. I, § 7 of the Wisconsin Constitution before the custodial interviews where Delebreau was represented by counsel at the time?

The circuit court did not directly address this question, denying Delebreau's motion to suppress custodial statements on other grounds (111:43-53; A-Ap. 46-56).

The Wisconsin Court of Appeals said yes. In a published decision, *State v. Delebreau*, 2014 WI App 21, ¶¶ 7-14, 352 Wis. 2d 647, 843 N.W.2d 441, the court of appeals observed that five justices of this court concluded that, under *Montejo v. Louisiana*, 556 U.S. 778 (2009), police may question in custody a defendant who has been charged and is represented by counsel upon obtaining the defendant's *Miranda* waiver, which is sufficient to waive his or her Sixth Amendment right to counsel. The court of appeals reached this conclusion upon reviewing this court's multiple opinions in *State v. Forbush*, 2011 WI 25, 332 Wis. 2d 620, 796 N.W.2d 741.

(2) If a *Miranda* waiver is sufficient under Sixth Amendment jurisprudence for a represented defendant to waive the right to counsel before a custodial interview, should this court nonetheless hold that a *Miranda* waiver is insufficient to waive the right to counsel under art. I, § 7 of the Wisconsin constitution?

Neither the circuit court nor the court of appeals addressed this argument.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This court normally holds oral argument in its cases and publishes its decisions.

STATEMENT OF THE CASE

Jesse Delebreau was in jail on a probation hold when, sometime between April 7-9, 2011, he submitted a hand-written note to jail staff requesting to speak with someone in the county drug task force unit (111:9-10, 27; A-Ap. 9-10, 30). On April 14, 2011, Delebreau was charged in a criminal complaint with delivery of heroin (1:1). That day, Delebreau made his initial appearance in court, and was assigned a public defender to represent him (104; 111:26-27; A-Ap. 29-30).[1]

On April 15, 2011, a deputy with the drug task force responded to Delebreau's note, and met with Delebreau at the county jail (111:9-10, 12-13; A-Ap. 12-13, 15-16). The deputy testified he had previously referred some charges on Delebreau to the district attorney's office, but he was unaware of the status of those charges (111:14; A-Ap. 17). The deputy believed Delebreau was being held on a probation hold (111:11-12; A-Ap. 14-15). The deputy returned on April 18, 2011, for a follow-up interview (111:17; A-Ap. 20-21). Each interview began with the deputy reading Delebreau his

[1] Delebreau states that his first attorney, William Fitzgerald, had a conflict of interest (Delebreau's Br. at 7-8). A new attorney, Genelle Johnson, was appointed to represent Delebreau on April 19, 2011 (4). The State does not dispute that Delebreau was represented by counsel when he was interviewed on April 15 and 18, 2011.

Miranda warnings (23:1, 6; 111:15, 18-19; A-Ap. 18, 21-22).

In the April 15 interview, Delebreau admitted generally to having sold drugs (71:Ex. 6). However, Delebreau said he could not remember anything about the charged incident, even after being shown the video of the transaction (71:Ex. 6). In the April 18 interview, the deputy read a statement he prepared for Delebreau, which Delebreau signed (71:Ex. 7). The statement asserts that he (Delebreau) is the person shown in the video, and that he "must have" sold the heroin to the confidential informant based on the video of the transaction, but that he has no recollection of the incident (71:Ex. 7).[2]

On September 8, 2011, Delebreau filed a motion to suppress his statements made in the April 15 and 18 interviews (22). Delebreau argued that his circumstances were like those of the defendant in *Forbush*,[3] relying heavily on the analysis of the lead opinion in that case (22:4-6). Following an October 17, 2011 hearing, the circuit court denied the motion based in part on the facts that (1) Delebreau did not request counsel after he

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[2] In the court of appeals, the State made a harmless error argument because Delebreau's confession was not particularly strong (he could not recall the charged incident), and because the video evidence of the transaction (71:Ex. 5) and the testimonies of the confidential informant and co-actor Chris Woodliff (*see* 122:54-55, 61-62, 118-19, 134) proved Delebreau's guilt. The State does not assert harmless error in this court.

[3] *State v. Forbush*, 2011 WI 25, 332 Wis. 2d 620, 796 N.W.2d 741.

was read his *Miranda* rights before the interviews; and (2) Delebreau had initiated the contact with investigators (111:43-45; A-Ap. 46-48).[4] Delebreau filed a petition for leave to appeal the order denying the suppression motion, which the Wisconsin Court of Appeals summarily denied upon concluding that Delebreau had failed to meet the criteria for interlocutory review (35; 36).

Delebreau went to trial, and video recordings of portions of the April 15 and 18 interviews were played to the jury (71:Exs. 6, 7; 122:144). The jury found Delebreau guilty of the charged count of delivery of heroin. The court sentenced Delebreau to eight years' imprisonment, consisting of four years' initial confinement and four years' extended supervision (95).

On appeal, Delebreau challenged the circuit court's denial of his suppression motion. By appointed counsel, Delebreau asserted that, following the United States Supreme Court's decision in *Montejo v. Louisiana*, 556 U.S. 778 (2009), and the Wisconsin Court of Appeals' decision in *State v. Forbush*, 2010 WI App 11,

[4] In its oral ruling, the court first concluded that Delebreau waived his implied Fifth Amendment right to counsel by agreeing to talk to the deputy after being read the *Miranda* warnings, and by initiating the interview himself (111:43-45; A-Ap. 46-48). The court then—incorrectly, in the State's view—engaged in a separate Sixth Amendment analysis, concluding that his right to counsel under this provision was not violated because the deputy did not know that Delebreau was represented, and the prosecutor's knowledge of this fact could not be imputed to the deputy (111:45-49, 51; A-Ap. 48-51, 54).

323 Wis. 2d 258, 779 N.W.2d 476,[5] "police initiated interrogation of an accused after charges have been filed are not per se invalid under the Sixth Amendment" (Delebreau's Ct. App. Br. at 5).

However, Delebreau appeared to argue that a *Miranda* waiver should be insufficient for a represented defendant to waive his or her Sixth Amendment right to counsel (Delebreau's Ct. App Br. at 6-8). Instead, Delebreau argued for a "*Miranda*-plus" standard, in which law enforcement would provide additional warnings to represented persons similar to those that courts provide pro se defendants under *Faretta* and *Klessig*,[6] presumably to inform such persons of the dangers of proceeding pro se in a custodial interview (Delebreau's Ct. App. Br. at 6-8).

In a decision and order recommended for publication,[7] the Wisconsin Court of Appeals affirmed the judgment of conviction and order suppressing Delebreau's custodial statements. *State v. Delebreau*, 2014 WI App 21, 352 Wis. 2d 647, 843 N.W.2d 441 (A-Ap. 65-73). To address Delebreau's argument, the court of appeals declared it necessary to "ford the muddy waters

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[5] Delebreau did not address this court's *Forbush* decision in his court of appeals' brief.

[6] *Faretta v. California*, 422 U.S. 806 (1975); *State v. Klessig*, 211 Wis. 2d 194, 564 N.W.2d 716 (1997).

[7] The original opinion filed January 7, 2014, was not recommended for publication. However, by an errata issued January 17, 2014, the court recommended publication. *See* Wisconsin Supreme Court and Court of Appeals Access Program, http://www.wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=107094, accessed September 16, 2014.

left by *State v. Forbush*, 2011 WI 25, 332 Wis. 2d 620, 796 N.W.2d 741." *Delebreau*, 352 Wis. 2d 647, ¶ 5 (A-Ap. 67).

The court reviewed the multiple opinions of this court in *Forbush*, and counted five votes for the view that the United States Supreme Court's decision in *Montejo*, effectively overruled this court's decision in *State v. Dagnall*, 2000 WI 82, ¶ 67, 236 Wis. 2d 339, 612 N.W.2d 680 (Sixth Amendment prohibits police from questioning a person represented by counsel without counsel present). *Delebreau*, 352 Wis. 2d 647, ¶¶ 9-14 (A-Ap. 68-70).

The court then noted that, in its own published decision in the *Forbush* case, *State v. Forbush*, 2010 WI App 11, ¶ 2, 323 Wis. 2d 258, 779 N.W.2d 476, the court of appeals had held that *Montejo* overruled *Dagnall*. *Delebreau*, 352 Wis. 2d 647, ¶ 14 (A-Ap. 70). Because five justices expressly agreed with this holding on review, the court concluded this portion of the court of appeals' decision remained good law, citing *Blum v. 1st Auto & Cas. Ins. Co.*, 2010 WI 78, ¶¶ 44, 91, 326 Wis. 2d 729, 786 N.W.2d 78 (majority and dissent) ("Holdings not specifically reversed on appeal retain precedential value."). *Delebreau*, 352 Wis. 2d 647, ¶ 14 (A-Ap. 70).

The court then "easily dispense[d]" with Delebreau's specific argument, concluding that his suggestion that a *Miranda* waiver is insufficient to waive a represented person's Sixth Amendment right to counsel was foreclosed by *Montejo*. *Delebreau*, 352 Wis. 2d 647, ¶¶ 5, 15-19 (A-Ap. 67, 70-73). Delebreau filed a petition for review, which this court granted.

ARGUMENT

I. AS FIVE JUSTICES RECOGNIZED IN *FORBUSH*, *MONTEJO* OVERRULED *DAGNALL*, AND THUS *MIRANDA* WAIVERS WERE SUFFICIENT FOR THE REPRESENTED DELEBREAU TO WAIVE HIS SIXTH AMENDMENT RIGHT TO COUNSEL.

A. Introduction.

On review by newly-appointed counsel, Delebreau does not dispute (and has never disputed) that he was read *Miranda* warnings at the beginning of the April 15 and 18, 2011 custodial interviews, and that he agreed to talk after the warnings were read. Rather, he argues that his *Miranda* waivers were insufficient to waive his right to counsel under the Sixth Amendment to the United States Constitution and art. I, § 7 of the Wisconsin constitution because he had been charged and was represented by counsel at the time.

To this end, Delebreau appears to argue that this court in *Forbush* saved *Dagnall*, and thus Delebreau's *Miranda* waivers before his custodial interviews were insufficient to waive his Sixth Amendment right to counsel once he was charged and represented by an attorney (Delebreau's Br. at 12-14, 26-29). Delebreau also argues that *Dagnall* was in effect at the time of his custodial interviews in mid-April 2011, because this court's *Forbush* decision was not mandated until April 29, 2011 (Delebreau's Br. at

11-12, 29-30). Further, Delebreau reprises his argument to the court of appeals that a *Miranda* waiver is insufficient for a represented person to waive the Sixth Amendment right to counsel, and suggests that additional warnings ("*Miranda*-plus") must be given to ensure the voluntariness of a waiver in these circumstances (Delebreau's Br. at 14-19). Delebreau is mistaken on all counts.

As developed below, Delebreau misreads *Forbush*. Therein, five justices—Chief Justice Abrahamson, and Justices Bradley, Crooks, Ziegler and Gableman—in three opinions expressly concluded that *Dagnall*'s interpretation of the Sixth Amendment was overruled by *Montejo*. *Forbush*, 332 Wis. 2d 620, ¶ 64 n.6 (Abrahamson, C.J., concurring); ¶ 127 (Crooks, J., dissenting); ¶ 158 (Ziegler, J., dissenting).

To the extent that the timing of the interviews may matter to the analysis, *Dagnall* was plainly not in effect at the time of Delebreau's April 2011 interviews because the United States Supreme Court had mandated *Montejo* two years earlier. In fact, the Wisconsin Court of Appeals' published decision in *Forbush*, which held that *Montejo* overruled *Dagnall*, was in effect at the time of the interviews.

Finally, Delebreau's argument that a *Miranda* waiver is insufficient to waive the Sixth Amendment right to counsel is foreclosed by *Montejo* and a majority of this court in *Forbush*. *See Montejo,* 556 U.S. at 786-87; *Forbush*, 332 Wis. 2d 620, ¶ 64 n.6 (Abrahamson, C.J., concurring); ¶ 127 (Crooks, J., dissenting).

B. Applicable Legal Principles.

1. Standard of review.

On an order denying a motion to suppress, the circuit court's findings of evidentiary or historical fact must be upheld unless they are clearly erroneous. *See State v. Hambly*, 2008 WI 10, ¶ 49, 307 Wis. 2d 98, 745 N.W.2d 48. However, the court's application of the facts to the relevant legal standard is reviewed de novo. *See State v. Douglas*, 2013 WI App 52, ¶ 13, 347 Wis. 2d 407, 830 N.W.2d 126.

The issue of whether a *Miranda* waiver is sufficient to waive the Sixth Amendment right to counsel of a person represented by counsel is a question of law that is reviewed de novo. *See State v. City of Oak Creek,* 2000 WI 9, ¶ 18, 232 Wis. 2d 612, 605 N.W.2d 526 (constitutional interpretation is subject to independent review).

2. Custodial interrogation and the right to counsel.

Once a criminal complaint has been filed, "'the Sixth Amendment guarantees a defendant the right to have counsel present at all "critical" stages of the criminal proceedings,'" including interrogation by the State. *State v. Stevens*, 2012 WI 97, ¶ 66, 343 Wis. 2d 157, 822 N.W.2d 79 (quoting *Montejo,* 556 U.S. at 786). However, "defendants can waive the Sixth Amendment right to counsel, even if already represented, without speaking to counsel about the waiver." *Stevens*, 343 Wis. 2d 157, ¶ 56 (citing *Montejo*, 556 U.S. at

786, and *Michigan v. Harvey*, 494 U.S. 344, 353 (1990)).

Under the rule of *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981), once an accused invokes his right to counsel during a custodial interview, questioning must cease until counsel has been made available to the accused unless the accused personally initiates further contact with investigators. *See also Minnick v. Mississippi*, 498 U.S. 146, 153 (1990). This rule is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Harvey*, 494 U.S. at 350.

A defendant's waiver of his *Miranda* rights amounts to a valid waiver of his Sixth Amendment right to counsel, as well as his implied right to counsel under the Fifth Amendment. *Patterson v. Illinois*, 487 U.S. 285, 296 (1988); *see also Montejo,* 556 U.S. at 786-87.

a. The pre-*Montejo* rule: *Jackson* and *Dagnall*.

In *Michigan v. Jackson*, 475 U.S. 625 (1986), the Supreme Court extended *Edwards* by holding that an invocation of the Sixth Amendment right to counsel at an arraignment or other preliminary proceeding must be treated as an invocation of the right at all subsequent stages of the prosecution, including interrogations. Thus, under *Jackson*, once the right to counsel had been asserted at an arraignment, any uncounseled waiver of the right during a custodial interview was invalid. *Id.* at 635. Further, police were not required to have personal knowledge of the accused's invocation of

the right at the court proceeding; the prosecutor's knowledge would be imputed to the police. *Id.* at 634.

Relying extensively on the *Jackson* court's interpretation of the Sixth Amendment, the Wisconsin Supreme Court in *Dagnall*, 236 Wis. 2d 339, ¶ 53, declared that "[a]fter an attorney represents the defendant on particular charges, the accused may not be questioned about the crimes charged in the absence of an attorney." *See also State v. Hornung*, 229 Wis. 2d 469, 476, 600 N.W.2d 264 (Ct. App. 1999) ("[A] criminal defendant's assertion of th[e] right [to counsel at a preliminary court proceeding], prohibits the government from initiating any contact or interrogation concerning the charged crime, and any subsequent waivers by a defendant during police-initiated contact or interrogation are deemed invalid.").

b. *Montejo*.

In 2009, the Supreme Court in *Montejo*, 556 U.S. at 797, expressly overruled *Jackson*. The *Montejo* court held that an accused's representation by counsel at a preliminary court proceeding does not render presumptively invalid any subsequent waiver of the right to counsel at a police-initiated custodial interview. *See id.* at 792-97. Noting that the rationale for the *Jackson* rule was to protect persons from police badgering, *Montejo*, 556 U.S. at 786-87, the *Montejo* court concluded that the *Miranda* regime already provided sufficient protection against badgering for a waiver of *Miranda* rights to constitute a valid waiver of the Sixth Amendment right to counsel:

> [W]ithout *Jackson,* how many [involuntary waivers] would be [induced by badgering]? The answer is few if any. The principal reason is that the Court has already taken substantial other, overlapping measures toward the same end. 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. 384 U.S., at 474 []. Under *Edwards*' prophylactic protection of the *Miranda* right, once such a defendant "has invoked his right to have counsel present," interrogation must stop. 451 U.S., at 484 []. 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." 498 U.S., at 153 [].
>
> These three layers of prophylaxis are sufficient. Under the *Miranda-Edwards-Minnick* line of cases (which is not in doubt), a defendant who does not want to speak to the police without counsel present need only say as much when he is first approached and given the *Miranda* warnings.

Id. at 794.

Montejo thus concluded that *Jackson* was unnecessary where *Miranda, Edwards* and *Minnick* already provided sufficient safeguards to ensure a knowing and voluntary waiver of the right to counsel for persons represented by counsel. *Id.* at 795-96. *Jackson*'s additional layer

of protection only served to guarantee "voluntariness on stilts." *Id.* at 796. Further, the costs of the *Jackson* rule—which deterred police from even seeking confessions from persons who may have been willing to voluntarily waive the right to counsel—were substantial, and outweighed any marginal benefits of the rule. *Id.*

In overturning *Jackson*, the court expressly rejected the approach of the Louisiana Supreme Court in Montejo's case. *Montejo*, 556 U.S. at 783-85. The Louisiana court had held that *Jackson*'s protections extended only to persons who *request* counsel, not to those like Montejo who are assigned counsel and do not take affirmative steps to invoke the Sixth Amendment right. *Id.* at 782-83. Thus, police could seek to interview in custody persons who had been appointed counsel without making any express assertion of the right to counsel, but not those who had requested to have counsel appointed or had hired counsel on their own. *See id.* at 783-85. The *Montejo* court called this approach "troublesome," and concluded that it would "lead either to an unworkable standard, or to arbitrary and anomalous distinctions between defendants in different States." *Id.* at 783-84.

Secondarily, the *Montejo* court also concluded that a represented defendant's assertion of the right to counsel must be clear and unequivocal to be valid. *See id.* at 797-98. Delebreau's case does not implicate this holding of *Montejo* because there is no suggestion that Delebreau made statements to police representing an assertion of the right to counsel (equivocal or unequivocal) at any time. Delebreau's contention is only that the appointment of counsel itself served to "invoke" his right to counsel and

rendered invalid his subsequent *Miranda* waivers of the right to counsel.

C. Under *Montejo* and *Forbush*, Delebreau's pre-interview *Miranda* waivers were sufficient to waive his Sixth Amendment right to counsel.

In *Forbush*, this court was presented with the issue of whether *Montejo* effectively overruled its interpretation of the Sixth Amendment in *Dagnall*. *See generally Forbush*, 332 Wis. 2d 620. On this question, five justices expressly agreed: *Montejo* overruled *Dagnall*. *Forbush*, 332 Wis. 2d 620, ¶¶ 58, 64, 74 n.1 & n.6 (Abrahamson, C.J., concurring); ¶¶ 118, 120, 132-38 (Crooks, J., dissenting); ¶ 157 (Ziegler, J., dissenting). Nonetheless, a divided court in *Forbush* reversed the court of appeals, with four justices concurring in the mandate under three different rationales. *Forbush*, 332 Wis. 2d 620, ¶¶ 1-56 (Roggensack, J., lead opinion); ¶¶ 57-81 (Abrahamson, C.J., concurring, joined by Bradley, J.); ¶¶ 82-117 (Prosser, J., concurring).

Delebreau's case gives this court an opportunity to plainly announce for the bench, bar and law enforcement the rule endorsed by a majority of the *Forbush* court: That an uncounseled *Miranda* waiver is sufficient for a represented person to waive his or her Sixth Amendment right to counsel before a custodial interview.

1. *Forbush*.

a. Circuit Court and Court of Appeals' Decisions.

Chad Forbush was charged in a 2008 criminal complaint with attempted second-degree sexual assault and false imprisonment. *Forbush*, 332 Wis. 2d 620, ¶ 3 (Roggensack, J., lead opinion). Forbush was arrested in Michigan, with the assistance of Michigan counsel, and waived extradition to Wisconsin. *Id.* Upon his arrival, Forbush was questioned in custody by a detective, and made inculpatory statements. *Id.* ¶ 4.

Forbush moved to suppress his custodial statements before trial, and the circuit court granted his motion. *Id.* ¶ 7. The State appealed. *Id.* ¶ 8. During the pendency of the appeal, the Supreme Court decided *Montejo*. *State v. Forbush*, 2010 WI App 11, ¶ 2, 323 Wis. 2d 258, 779 N.W.2d 476, *rev'd*, 2011 WI 25, 332 Wis. 2d 620, 796 N.W.2d 741.

After receiving supplemental briefs, the Wisconsin Court of Appeals reversed the circuit court's order, concluding that *Montejo* had effectively overruled this court's interpretation of the Sixth Amendment in *Dagnall*. *Forbush*, 323 Wis. 2d 258, ¶ 2. Thus, assuming that Forbush's retention of Michigan counsel on the extradition issue meant that Forbush was represented by counsel on his Wisconsin charges at the time of the interviews, his *Miranda* waiver of his right to counsel was sufficient to waive his custodial statements. *Id.* ¶¶ 4, 5, 17 and n.2. Further the court of appeals declined Forbush's

invitation to save the *Dagnall* rule under the state constitution, concluding that the protections of art. I, § 7 of the state constitution were identical those provided in the Sixth Amendment to the federal constitution. *Forbush*, 323 Wis. 2d 258, ¶¶ 14-16.

b. The Wisconsin Supreme Court's *Forbush* opinions.

On review, this court reversed the court of appeals' decision with four justices concurring in the mandate under three separate rationales. Below is a summary of each of the five opinions filed in this court's decision in *Forbush*, 332 Wis. 2d 620.

Justice Roggensack's Lead Opinion.

Applying a narrow interpretation of *Montejo*, the lead opinion concluded that *Montejo* "does not sanction the interrogation" in Forbush's case. *Forbush*, 332 Wis. 2d 620, ¶ 2 (Roggensack, J., lead opinion).[8] The lead opinion read *Montejo* to apply only to the "certain circumstances" of that case, where Montejo had been appointed counsel, but the Supreme Court could not determine whether Montejo had subsequently made statements unequivocally invoking his right to counsel. *Id.* ¶ 34.

[8] In this section, the parenthetical stating the author of the opinion under discussion, *e.g.*, (Roggensack, J., lead opinion), is provided with the first citation, but is omitted in subsequent citations for readability.

According to the lead opinion, "[t]he *Montejo* decision did not conclude that a charged defendant who has affirmatively invoked his Sixth Amendment right to counsel by retaining and receiving the services of a lawyer for the offenses charged must 're-invoke' his Sixth Amendment right to counsel every time law enforcement attempts to interrogate him." *Id.* ¶ 35. The lead opinion suggested that this conclusion was compelled by a pre-*Jackson* case, *Massiah v. United States*, 377 U.S. 201 (1964). *Id.*

The lead opinion also discussed Wisconsin law at length, but declined to conclude that art. I, § 7 of the Wisconsin Constitution provided greater protection for defendants than the Sixth Amendment. *See id.*, ¶¶ 41-51. Instead, upon summarizing *Dagnall* and other Wisconsin cases, Justice Roggensack concluded that "the fundamental constitutional principles underlying those decisions" were "compelling" and "sound policy" for Wisconsin. *Id.* ¶ 50.

Justice Roggensack then summarized *Montejo*'s impact on *Dagnall* as follows:

> I affirm the reasoning of *Dagnall* as controlling on the issue of the right to counsel for a defendant who has affirmatively invoked his right to counsel by requesting and receiving the services of counsel for pending charges. I agree with the State that *Montejo* did modify *Dagnall* such that there is no presumption of a Sixth Amendment violation due to police interrogation of a represented defendant when the "certain circumstances" of defendant match those of defendant-Montejo.

Id. ¶ 51.

Applying this standard to the facts, Justice Roggensack emphasized the fact that, in this case (unlike *Montejo*), Forbush had taken affirmative steps to hire an attorney: "Under the undisputed facts herein presented, Forbush affirmatively invoked his Sixth Amendment and Article I, Section 7 rights to counsel by retaining and receiving the services of counsel for the crimes charged . . . . " *Id.* ¶ 55. Justice Roggensack also relied on the circuit court's finding that the authorities knew that Forbush was represented when they interviewed him: "I reaffirm that authorities must not avoid discovering whether an accused has invoked his Sixth Amendment right to counsel. *Dagnall*, 236 Wis. 2d 339, ¶ 51, 612 N.W.2d 680." *Id.* ¶ 54.

In a final footnote, the lead opinion declared that "this is not a waiver case, i.e., the question presented is not whether Forbush waived his right to counsel during [the detective's] interrogation. This is an invocation case, i.e., the question presented is whether Forbush invoked his Sixth Amendment and Article I, Section 7 rights to counsel." *Id.* ¶ 55 n.20.

Chief Justice Abrahamson's Concurring Opinion, Joined By Justice Bradley.

The Chief Justice's concurring opinion began by addressing the lead opinion's precedential value, explaining that it "has none" because it was joined by no other justice. *Id.* ¶ 57 (Abrahamson, C.J., concurring).

Chief Justice Abrahamson then joined many of the criticisms of the lead opinion expressed in Justice Crooks' dissenting opinion (discussed at pp. 23-26 below).

First, the Chief Justice stated that she "agree[d] with Justice Crooks' criticism of Justice Roggensack's reasoning regarding Wisconsin law and *Montejo v. Louisiana*, 556 U.S. 778, 129 S.Ct. 2079, (2009)." *Id.* ¶ 58. The Chief Justice agreed with Justice Crooks that the lead opinion's interpretation of *Montejo* "lacks foundation in the text of the decision." *Id.* ¶ 58 n.2.

Second, the Chief Justice joined Justice Crooks' criticism of the lead opinion's reliance on "fundamental constitutional principles" and "sound policy," stating that "a determination of an accused's constitutional rights is tethered to the text of a constitution." Id. ¶ 58, n.2.

Third, the Chief Justice agreed with Justice Crooks that *Montejo* erased any distinctions that still remained between invocation of the Fifth Amendment and the Sixth Amendment, and noted that *Montejo* thus overruled *State v. Hornung*, 229 Wis. 2d 469, 600 N.W.2d 264 (Ct. App. 1999) (requirement that a person "unequivocally" assert the right to counsel did not apply to represented persons), and invalidated the portion of *State v. Ward*, 2009 WI 60, ¶ 43 n.5, 318 Wis. 2d 301, 767 N.W.2d 236, that cited *Hornung*. *Id.* ¶ 64 n.6. The Chief Justice stated: "I agree with Justice Crooks that the protections for the right of counsel should be same for the Fifth and Sixth Amendments." *Id.* ¶ 64 n.6.

Fourth, the Chief Justice agreed with Justice Crooks that the supreme court in *Dagnall* "interpreted the Sixth Amendment to the United States Constitution, not the Wisconsin Constitution." *Id.* ¶ 62.

Finally, the Chief Justice reached the same conclusion as Justice Crooks regarding the continued viability of *Dagnall*: "The United States Supreme Court's interpretation of the Sixth Amendment in *Montejo* supersedes our interpretation of the Sixth Amendment in *Dagnall* and our previous interpretations of the Sixth Amendment." *Id.* ¶ 64 & n.6.

The Chief Justice then stated that she would hold that, "under the Wisconsin Constitution, an accused is afforded the protections this court previously described in *Dagnall* . . . to be attached to the Sixth Amendment." *Id.* ¶ 71. "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.'" *Id.* ¶ 71 & n.17 (citing *Dagnall*, 236 Wis. 2d 339, ¶ 4).

Justice Prosser's Concurring Opinion.

In this opinion, Justice Prosser acknowledged that the *Montejo* decision, by overruling *Jackson*, "undercut many of the major underpinnings of *Dagnall*, which relied heavily on *Jackson's* reasoning." *Id.* ¶¶ 82-83 (Prosser, J., concurring).

Nonetheless, Justice Prosser concluded that, because *Dagnall* was the rule of law in Wisconsin at the time of Forbush's 2008 custodial interview, when "the advent of the *Montejo* ruling was barely a glimmer in Justice Scalia's eye," the circuit court was correct in suppressing Forbush's custodial statements. *Id.* ¶¶ 93, 103. Justice Prosser concluded that the officers' decision to request an interview with the represented Forbush was contrary to the guidance provided in the Wisconsin Department of Justice, *The Miranda Primer: A Handbook for Law Enforcement* (Feb. 2004). *Id.* ¶ 102. "[L]aw enforcement should not be rewarded for disregarding settled law in anticipation that someday it may be overruled," Justice Prosser concluded. *Id.* ¶ 104.

Regarding future cases, Justice Prosser recognized that "*Montejo* is unquestionably the current controlling law on the subject of the Sixth Amendment right to counsel," but added that "neither this court nor law enforcement currently has the benefit of the inevitable explanation, application, and modification of the principles that *Montejo* so recently announced." *Id.* ¶ 116. "Whether rights afforded by the Sixth Amendment will require additional protection in this state remains to be determined." *Id.* ¶ 114.

Justice Crooks' Dissenting Opinion, Joined By Justices Ziegler And Gableman.

In this opinion, Justice Crooks concluded that "*Montejo*'s clear and emphatic rejection of the *Jackson* rule effectively overrules *Dagnall*, as the court of appeals appropriately concluded." *Id.* ¶120 (citing *State v. Forbush*, 2010 WI 11, ¶ 13,

323 Wis. 2d 258, 779 N.W.2d 476) (Crooks, J., dissenting)

Justice Crooks' opinion includes a detailed summary of the *Montejo* decision. *See id.* ¶¶ 121-28. In overruling *Jackson*, Justice Crooks explained that the *Montejo* Court determined that the protections offered by *Miranda*, *Edwards* and *Minnick* already ensured the voluntariness of a defendant's decision to talk to law enforcement. *Id.* ¶ 124 & n.4. What little additional protection the *Jackson* rule offered against police badgering was outweighed by its substantial costs, which include deterring law enforcement from obtaining voluntary confessions. *Id.* ¶ 124.

Upon summarizing *Montejo*, Justice Crooks asserted that "the United States Supreme Court's definitive interpretation of the Sixth Amendment right to counsel in *Montejo* clearly invalidates Justice Roggensack's reasoning for upholding *Dagnall*." *Id.* ¶ 129. "[I]t simply is not possible to read *Montejo* as narrowly as Justice Roggensack desires," explained Justice Crooks. *Id.* ¶ 132.

> Justice Roggensack insists that *Montejo* is limited to the "certain circumstances" presented in *Montejo*, which she vaguely asserts as "a charged defendant for whom counsel had been appointed by the court, but for whom the Supreme Court could not determine whether he had actually invoked his right to counsel and the protections that would then flow from *Edwards*." Justice Roggensack's op., ¶ 34 (citing *Montejo*, 129 S. Ct. at 2091–92). Justice Roggensack does not provide a single case from any court that has interpreted or limited *Montejo* in this way. I also found none. To the extent

> Justice Roggensack attempts to limit *Montejo* based on the Court's decision to remand to allow *Montejo* to make an argument that he "made a clear assertion of the right to counsel when the officers approached him," that is merely a reference to the legal standard after *Montejo*: a defendant cannot "invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation.'" *Montejo*, 129 S. Ct. at 2091 (quoting *McNeil*, 501 U.S. at 182 n.3) (emphasis added).

Id. ¶ 132 (footnotes omitted). Justice Crooks then explained that the "certain circumstances" in *Montejo* merely "refers to those in *Jackson*, where the defendant had affirmatively requested counsel." *Id.* ¶ 134.

Justice Crooks also criticized the lead opinion's reliance on "fundamental constitutional principles": "Justice Roggensack essentially concludes that when we interpreted and applied the Sixth Amendment right to counsel in *Dagnall*, we created 'fundamental constitutional principles' separate and independent from the federal constitution on which they were based. Justice Roggensack's op., ¶¶ 42, 50. This is a novel and unsupported interpretation." *Id.* ¶ 139 (footnote omitted).

Justice Crooks also noted that "the United States Supreme Court disposed of the distinctions between the Fifth and Sixth Amendment right to counsel in *Montejo*." *Id.* ¶ 128. "[S]ince the right under both sources is waived using the same procedure," Justice Crooks explained, "doctrines ensuring voluntariness of the Fifth Amendment

waiver simultaneously ensure the voluntariness of the Sixth Amendment waiver." *Id.*

Justice Crooks also criticized the analysis in Justice Prosser's concurrence as recognizing "an anomalous bad faith corollary to the good faith exception to the exclusionary rule" that "has never been recognized by any other court." *Id.* ¶¶ 118, 141.

Justice Crooks explained that *Dagnall* was based entirely on this court's interpretation of the Sixth Amendment, not art. I, § 7 of the state constitution, and, as such, *Dagnall* was overruled by *Montejo*. Justice Crooks "strongly" rejected Chief Justice Abrahamson's effort to save the *Dagnall* rule under the Wisconsin constitution:

> Chief Justice Abrahamson's opinion follows the well-established method of examining whether the Wisconsin Constitution provides greater protections than the federal constitution. While I do not quibble with her approach, for the reasons set forth in this dissent, I strongly disagree with her result. I do not believe that there are any requirements in our Wisconsin Constitution or laws upon which an attempt to salvage the *Dagnall* rule may be founded.

Id. ¶ 146.

Justice Ziegler's Dissenting Opinion, Joined By Justice Gableman.

Justice Ziegler wrote separately to emphasize her reasons for joining Justice Crooks' dissent. *Id.* ¶ 156 (Ziegler, J., dissenting). Justice

Ziegler explained that, while *Dagnall* "set forth a workable standard for those in the criminal justice system" that was "a sound and fair rule," after the *Montejo* decision "[it] can no longer be viewed as the law in this state—unless this court was to now rely on the Wisconsin Constitution to uphold *Dagnall* and the principles stated therein." *Id.* ¶¶ 157-58. Justice Ziegler explained that it would be inappropriate to save *Dagnall* under the Wisconsin constitution where the language of art. I, § 7, mirrors that of the relevant portions of the Sixth Amendment:

> Because I would adhere to the long-standing principle that we follow the United States Supreme Court's interpretation of the Sixth Amendment when interpreting the parallel provision, Article I, Section 7, of our state constitution, *see State v. Klessig*, 211 Wis. 2d 194, 202–03, 564 N.W.2d 716 (1997), it is my view that this court is required to follow the Supreme Court's clear decision in *Montejo*.

Id. ¶ 158.

2. A majority of this court in *Forbush* recognized that *Montejo* overrules *Dagnall*.

"Whatever *Forbush* may mean," Delebreau asserts, "it applies to these facts." (Delebreau's Br. at 13). *Forbush* certainly applies. However, Delebreau fails to grasp the meaning of *Forbush* because, at various points, he treats the lead opinion, which was joined by no other justice, as a majority opinion. At other points, he fails to

engage the substance of all five opinions in *Forbush*. (*See* Delebreau's Br. at 11-14, 26-29).

In three separate *Forbush* opinions, five justices of this court recognized that *Montejo* overruled *Dagnall*. In her concurrence, Chief Justice Abrahamson, joined by Justice Bradley, stated that the United States "Supreme Court's interpretation of the Sixth Amendment in *Montejo* supersedes our interpretation of the Sixth Amendment in *Dagnall*." *Forbush*, 332 Wis. 2d 620, ¶ 64 (Abrahamson, C.J., concurring). In his dissent, Justice Crooks, joined by Justices Ziegler and Gableman, declared that "*Montejo*'s clear and emphatic rejection of the *Jackson* rule [prohibiting custodial interrogations after the defendant was represented by counsel in court proceedings] effectively overrules *Dagnall*, as the court of appeals appropriately concluded." *Id.* ¶ 120 (Crooks, J., dissenting). In her dissent, Justice Ziegler, joined by Justice Gableman, also asserted that *Montejo* overruled *Dagnall*. *Id.* ¶¶ 157-58 (Ziegler, J., dissenting). Delebreau is simply wrong when he asserts that "[a] majority of the Court answered no" when confronted in *Forbush* with the question of "whether *Montejo* affected *Dagnall*." (Delebreau's Br. at 26).

As the five justices further recognized in *Forbush*, *Dagnall* was wholly grounded in a Sixth Amendment analysis, and relied extensively on the Supreme Court's interpretation of the Sixth Amendment in *Jackson*. *Forbush*, 332 Wis. 2d 620, ¶¶ 63-64 (Abrahamson, C.J., concurring); ¶ 138 (Crooks, J., dissenting) (noting that "the *Dagnall* majority referred to the Sixth Amendment 69 times and referred to the Wisconsin Constitution only in a footnote, which

was added to make absolutely clear that our decision was *not* based on Article I, Section 7.") (emphasis in original).

Thus, Delebreau is therefore incorrect in asserting that "this Court grounded *Forbush* on greater protections historically granted by the Wisconsin constitution" (Delebreau's Br. at 29). Only two justices, Chief Justice Abrahamson and Justice Bradley, grounded their analysis on the state constitution. *See Forbush*, 332 Wis. 2d 620, ¶¶ 59-60, 65-80 (Abrahamson, C.J., concurring).

Five justices agreed that *Montejo*'s clear rejection of *Jackson*'s interpretation of the Sixth Amendment effectively overruled *Dagnall*, and that any attempt to save *Dagnall* under the Sixth Amendment would run afoul of the Supremacy Clause.[9] *Forbush*, 332 Wis. 2d 620, ¶¶ 63-64 (Abrahamson, C.J., concurring); ¶ 120; ¶ 136 (Crooks, J., dissenting). Thus, a majority of this court recognized that, after the *Montejo* decision, the Sixth Amendment allows law enforcement to interview a represented person in custody upon obtaining a valid waiver of the person's *Miranda* rights. *Id.* ¶¶ 63-64 (Abrahamson, C.J.,

[9] Arguably, six justices acknowledged this fact. In his concurrence, Justice Prosser observed that "[i]n overruling *Jackson*, the Court undercut many of the major underpinnings of *Dagnall*, which relied heavily on *Jackson*'s reasoning." *Forbush*, 332 Wis. 2d 620, ¶ 96 (Prosser, J., concurring). Justice Prosser also summarized *Montejo* as follows: "The upshot of *Montejo* is that a charged defendant in custody must invoke, assert, or exercise the right to counsel, clearly, to prevent interrogation, even after counsel has been hired or appointed, so long as a proper *Miranda* warning has been provided." *Id.* ¶ 109 (Prosser, J., concurring).

concurring); ¶¶ 120, 136 (Crooks, J., dissenting). Only Justice Roggensack's lead opinion, which was not joined by any other justice, asserted that *Dagnall* survived *Montejo*, and then apparently only in certain factual circumstances. *Id.* ¶¶ 27, 35, 40 (Roggensack, J., lead opinion).

Respectfully, the State agrees with the reading of *Montejo* advanced by Chief Justice Abrahamson, and Justices Bradley, Crooks, Ziegler and Gableman. The majority opinion's analysis in Delebreau's case should begin with Justice Crooks' accurate and thorough summary of the *Montejo* decision in his *Forbush* dissent.[10] *See Forbush*, 332 Wis. 2d 620, ¶¶ 121-28. As Justice Crooks explained, *Montejo* overruled *Jackson* upon concluding

> that *Jackson* lacked compelling reasoning. [*Montejo*, 129 S. Ct.] 2089–91. The Court highlighted the absurdity of protecting a defendant from his own election to talk to law enforcement without counsel when other safeguards ensure that such a decision is knowing and voluntary. *Id.* at 2089–90. Little additional protection is gained from the *Jackson* rule considering the many prophylactic layers that exist to prevent police from obtaining involuntary or coerced statements. *Id.* The cost of the *Jackson* rule, on the other hand, is substantial, given that it could often be used to invalidate an entirely voluntary

[10] Because Chief Justice Abrahamson's concurrence expressly joined Justice Crooks in criticizing the lead opinion's interpretation of *Montejo*, and did not take issue with any portion of Justice Crooks' reading of *Montejo*, it is fair to say that Justice Crooks' summary of the *Montejo* decision represents the majority view of the court.

> confession and may deter law enforcement from even trying to obtain confessions. *Id.* at 2090–91. Ultimately, the Court overruled *Jackson*, holding that its limited benefit to constitutional protections came at too great a cost. *Id.* at 2091.

Id. ¶ 124 (Crooks, J., dissenting) (footnote omitted).

Montejo's rejection of the *Jackson* rule was categorical, not narrowly limited to the facts of Montejo's case. *See Id.* ¶¶ 121-28, 132 (Crooks, J., dissenting). *Montejo* did not preserve *Jackson* (and hence *Dagnall*) for cases in which the defendant takes some action or makes a statement invoking the Sixth Amendment right, but not for those who are assigned counsel and fail to do or say something to invoke the right. *See Id.* ¶ 132 (Crooks, J., dissenting). In fact, *Montejo* rejected as "problematic" the Louisiana Supreme Court's attempt to draw a similar distinction. *Montejo*, 556 U.S. at 783-84. Such a standard would effectively preserve *Jackson* and *Dagnall* in all cases because it would prove unworkable for law enforcement, who, before interviewing any represented defendant, would need to determine whether the defendant took any steps at any point in the proceedings to affirmatively invoke the right to counsel. *See id.*[11]

Nonetheless, the factual circumstances of Delebreau's case are distinguishable from those in *Forbush*, and thus, there is reason to believe that

[11] Moreover, in practice, this standard would also likely provide greater Sixth Amendment protection to defendants who can afford to hire a lawyer, and lesser protection to those who cannot.

even under the standard proposed in Justice Roggensack's lead opinion, Delebreau's statements would be admissible. Unlike Forbush, who retained counsel, Delebreau was appointed counsel (104), and there is no indication on this record that Delebreau took any steps to affirmatively invoke his Sixth Amendment right to counsel leading up to and including the interviews. Under Justice Roggensack's analysis, Delebreau's statements would be admissible because he never made any overt assertions of his Sixth Amendment right. *See Forbush,* 332 Wis. 2d 620, ¶¶ 2, 27, 51, 55-56 (Roggensack, J., lead opinion). Moreover, unlike *Forbush*, which Justice Roggensack stated was an "invocation case," *id.* ¶ 55 n.20, this is and has always been framed as a "waiver case."

Further, Delebreau, unlike Forbush, indicated his desire to talk with law enforcement by sending a note asking to speak with someone in the county drug task force unit, albeit before he was charged and appointed counsel (111:9-10, 27; A-Ap. 12-13, 30). Had Delebreau decided that he no longer wanted to talk once he was charged and appointed counsel, he could have told the deputy that he was no longer interested. Instead, Delebreau greeted the deputy at the April 15 interview by indicating he "wished to resolve the

matter at hand and kn[ew] that he [was] guilty of something" (23:1; 71:Ex. 6).[12]

Of course, regardless whether Delebreau's statements would be admissible under the lead opinion's analysis, the lead opinion does not state the rule established by five justices in *Forbush*. By this majority, *Forbush* recognized that *Montejo* overruled *Dagnall*, and thus *Miranda* waivers were sufficient for the represented Delebreau to waive the Sixth Amendment right to counsel. Accordingly, the circuit court properly admitted Delebreau's statements.

3. *Dagnall* was not in effect at the time of Delebreau's interviews.

Delebreau next argues that *Dagnall* was still in effect at the time of his interviews in early May 2011, and therefore the circuit court erred in admitting his statements (Delebreau's Br. at 11-12). Delebreau is mistaken.

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[12] To be clear, these facts are irrelevant to a *Montejo* analysis (see also pp. 43-44 below). Delebreau's statements would be admissible under *Montejo* even if Delebreau had never initiated contact with investigators, and no matter the timing of his request to speak with investigators vis-a-vis the date counsel was appointed. Likewise, whether the deputy knew that Delebreau had been assigned counsel the day before the first interview (the circuit court found the deputy did not know (111:46-49; A-Ap. 49-52)), is irrelevant under *Montejo*. The deputy was free to request an interview with the represented Delebreau under *Montejo*. However, the State submits that these facts do belie any claim that Delebreau's statements were involuntary in any real sense.

Unlike in *Forbush*, where the interview occurred when *Montejo* "was barely a glimmer in Justice Scalia's eye," *Forbush*, 332 Wis. 2d 620, ¶ 103 (Prosser, J., concurring), the interviews in this case occurred two years after the United States Supreme Court decided *Montejo*. Once *Montejo* was mandated, *Dagnall* was no longer the law in Wisconsin. *See State v. Jennings*, 2002 WI 44, ¶ 3, 252 Wis. 2d 228, 647 N.W.2d 142 ("Supremacy Clause of the United States Constitution compels adherence to United States Supreme Court precedent on matters of federal law.").

Moreover, Delebreau ignores the fact that the Wisconsin Court of Appeals' published decision in *Forbush* was also in effect at the time of his interviews. *See* Wis. Stat. § 752.41(2) (published opinions of the court of appeals have statewide precedential effect). That decision, issued in December 2009, concluded that *Montejo* overruled *Dagnall*, and declined to save the *Dagnall* rule under the Wisconsin constitution. *Forbush*, 323 Wis. 2d 258, ¶¶ 2, 14-16. It was well within the court of appeals' power to issue an opinion declaring that one of this court's decisions was overruled by recent United States Supreme Court precedent. *See Jennings*, 252 Wis. 2d 228, ¶ 19 (stating that the court of appeals has such authority). Moreover, it does not appear that this court issued an order staying the precedential effect of the court of appeals' *Forbush* decision while the matter was pending before this court.

Finally, by the time of the May 2011 interviews, Wisconsin law enforcement officers were receiving training that was consistent with *Montejo* and the court of appeals' decision in

Forbush. In his concurring opinion in *Forbush*, Justice Prosser cited a training publication of the Wisconsin Department of Justice to show that officers failed to follow the applicable standards (*Dagnall*) at the time of the Forbush's interview. *Forbush*, 332 Wis. 2d 620, ¶ 102 (Prosser, J., concurring) (citing Wisconsin Department of Justice, *The Miranda Primer: A Handbook for Law Enforcement* (Feb. 2004)). This publication was revised in 2010, and now contains the following summary of *Montejo* for law enforcement:

> *Montejo* court overruled years of federal and state court decisions based on the earlier Supreme Court case of *Michigan v. Jackson*, 475 U.S. 625 (1986). *Montejo* rejected the notion that no *represented* defendant can ever be approached by the state and asked to consent to an interrogation. The *Montejo* court determined that police can approach a charged and represented person to see if the person wishes to speak with the police. But, if the defendant asserts her right to counsel after being advised of her right to counsel, the inquiry must end. The police are not permitted to try again and again. Such efforts would constitute "badgering" and the *Montejo* court rejected such efforts, relying on *Edwards v. Arizona*, 451 U.S. 477 (1981) which prohibited such tactics. The police have one and only one opportunity to approach a charged and represented defendant. If the defendant invokes her right to counsel, all efforts to get the defendant to talk must therefore end.

Wisconsin Department of Justice, *The Miranda Primer: A Handbook for Law Enforcement* at 9

(June, 2010) (discussing *Montejo*), available at http://ecampus.matc.edu/policetraining/Library/Required%20Reading/Miranda_primer%20June%202010.pdf (accessed September 23, 2014). Although this handbook was prepared before the supreme court's decision in *Forbush*, its guidance on the Sixth Amendment is consistent with the majority view on this court that *Montejo* overruled *Dagnall*.[13]

4. Delebreau's proposed "*Miranda*-plus" standard for waiver of the Sixth Amendment right to counsel is foreclosed by *Montejo* and *Forbush*.

Delebreau next argues that waiver of the Fifth Amendment implied right to counsel is different from the Sixth Amendment right to counsel, and that a *Miranda* waiver is insufficient—at least in some circumstances—to waive a represented person's Sixth Amendment right to counsel (Delebreau's Br. at 14-19). As he did in the court of appeals, Delebreau appears to argue that law enforcement must provide additional warnings—what Delebreau calls an "on-the-record colloquy" similar to the *Klessig* colloquy courts use with defendants who wish to represent themselves—to ensure a valid waiver of the Sixth Amendment right to counsel

[13] Even if *Montejo* and the court of appeals' *Forbush* decision had been issued *after* Delebreau's interviews, the State questions whether this would matter to the analysis. See *Forbush*, 332 Wis. 2d 620, ¶ 141-42 (Crooks, J., dissenting).

(Delebreau's Br at 18-19). This argument is foreclosed by *Montejo* and *Forbush*.

In his brief, Delebreau "acknowledges that some courts suggest that the waiver of the right to counsel can be accomplished using the waiver under *Miranda*." (Delebreau's Br. at 17). The assertion that only "some courts" view a *Miranda* waiver as sufficient to wave the Sixth Amendment right ignores more than 25 years of United States Supreme Court precedent, and *Montejo*'s recent holding that entirely erased what remained of the line between the Fifth Amendment and Sixth Amendment standards.

In *Patterson*, 487 U.S. at 296, the United States Supreme Court announced that "an accused who is admonished with the warnings prescribed by this Court in *Miranda*, 384 U.S., at 479, 86 S. Ct., at 1630, has been sufficiently apprised of the nature of his *Sixth Amendment* rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and intelligent one." (emphasis added)(footnote omitted).

But the *Patterson* court also recognized that "there will be cases where a waiver which would be valid under *Miranda* will not suffice for Sixth Amendment purposes," citing *Jackson*, 475 U.S. at 632. *Patterson*, 487 U.S. at 296 n.9. In *Ward*, this court also distinguished the Sixth Amendment right to counsel from the Fifth Amendment implied right to counsel, indicating in a footnote that an equivocal assertion would be sufficient to invoke the former but not the latter. *Ward*, 318 Wis. 2d 301, ¶ 43 n.5 (citing *Hornung*, 229 Wis. 2d at 477–78).

After *Patterson*, *Ward* and *Hornung*, however, the United States Supreme Court in *Montejo* "disposed of the[se] distinctions between the Fifth and Sixth Amendment right to counsel." *Forbush*, 332 Wis. 2d 620, ¶ 128 (Crooks, J., dissenting) (citing *Montejo*, 129 S. Ct. at 2090). "In determining whether a Sixth Amendment waiver was knowing and voluntary there is no reason categorically to distinguish an unrepresented defendant from a represented one." *Montejo*, 556 U.S. at 798; *see also Forbush*, 332 Wis. 2d 620, ¶ 128 (Crooks, J., dissenting). "*Miranda* warnings adequately inform [a defendant] 'of his right to have counsel present during the questioning,' and make him 'aware of the consequences of a decision by him to waive his Sixth Amendment rights.' *Montejo*, 556 U.S. at 798-99 (quoting *Patterson*, 487 U.S. at 293).

Five justices in *Forbush* also agreed that *Montejo* erased any distinctions that previously remained between invocation of the Fifth Amendment and the Sixth Amendment. *See Forbush*, 332 Wis. 2d 620, ¶ 127-28 (Crooks, J., dissenting, joined by Justices Ziegler and Gableman); ¶ 64 n.6 (Abrahamson, C.J., joined by Bradley, J., concurring) ("I agree with Justice Crooks that the protections for the right of counsel should be same for the Fifth and Sixth Amendments."). It would appear that Justice Crooks' concerns stated in *Ward* about the artificiality of the distinctions between the Fifth and Sixth Amendment in the law of custodial interrogation have been resolved by *Montejo*. *Ward*, 318 Wis. 2d 301, ¶ 85 (Crooks, J., dissenting) (*see* Delebreau's Br. at 17, 30-31).

Further, even if the Sixth Amendment as construed by the United States Supreme Court permitted this court to graft additional requirements onto *Miranda*, it is unclear why *Miranda* would be sufficient to waive the Fifth Amendment right, but something more—a "*Miranda*-plus" requirement—would be necessary to waive the Sixth Amendment right to counsel. Elevating the Sixth Amendment right to counsel in this manner would suggest that waiver of this right must be "really voluntary," but waiver of the Fifth Amendment right need only be voluntary to pass constitutional muster. *See Montejo*, 556 U.S. at 795-96 (the *Jackson* rule ensured "voluntariness on stilts").

For the foregoing reasons, Delebreau's *Miranda* waivers were sufficient for the represented Delebreau to validly waive his Sixth Amendment right to counsel, and thus the circuit court properly admitted his custodial statements.

II. ARTICLE I, § 7 OF THE WISCONSIN CONSTITUTION DOES NOT PROVIDE GREATER PROTECTION THAN THE SIXTH AMENDMENT, AND THEREFORE IS NOT GROUNDS FOR REVIVING *DAGNALL*.

Delebreau appears to argue that, even if his *Miranda* waivers of the right to counsel were valid under the Sixth Amendment, they were invalid under art. I, § 7 of the Wisconsin constitution, and thus the *Dagnall* rule should survive under state law despite *Montejo*'s rejection of *Jackson*.

Delebreau maintains that art. I, § 7 provides greater protection for the right to counsel than the Sixth Amendment (Delebreau's Br. at 30-38).

The issue of whether the *Dagnall* rule should be saved under art. I, § 7 of the state constitution was, of course, fully briefed in *Forbush*, and at that time a majority of this court declined to untether its art. I., § 7 jurisprudence from interpretations of the Sixth Amendment.

Four justices in *Forbush* concluded that this court follows the United States Supreme Court's interpretation of the Sixth Amendment in interpreting art. I, § 7 of the state constitution.

In her lead opinion, Justice Roggensack recognized that the "Article I, Section 7 right to counsel does not create a right different from the Sixth Amendment right to counsel," citing *State v. Sanchez*, 201 Wis. 2d 219, 226, 548 N.W.2d 69 (1996). *Forbush*, 332 Wis. 2d 620, ¶ 15 (Roggensack, J., lead opinion).

In his dissenting opinion, Justice Crooks, joined by Justices Ziegler and Gableman, emphatically rejected Chief Justice Abrahamson's conclusion that art. I, § 7 provided greater protections than the Sixth Amendment for represented persons approached for a custodial interview: "Chief Justice Abrahamson's opinion follows the well-established method of examining whether the Wisconsin Constitution provides greater protections than the federal constitution. While I do not quibble with her approach, . . . I strongly disagree with her result." *Forbush*, 332 Wis. 2d 620, ¶ 146 (Crooks, J., dissenting).

Regarding the state constitution, Justice Crooks concluded as follows: "I do not believe that there are any requirements in our Wisconsin Constitution or laws upon which an attempt to salvage the *Dagnall* rule may be founded." *Id.*

In her dissent, Justice Ziegler wrote separately to state that she "would adhere to the long-standing principle that we follow the United States Supreme Court's interpretation of the Sixth Amendment when interpreting the parallel provision, Article I, Section 7, of our state constitution, *see State v. Klessig*, 211 Wis. 2d 194, 202–03, 564 N.W.2d 716 (1997)." *Forbush*, 332 Wis. 2d 620, ¶ 158 (Ziegler, J., dissenting). Accordingly, Justice Ziegler concluded, "it is my view that this court is required to follow the Supreme Court's clear decision in *Montejo*." *Id.*

Only Chief Justice Abrahamson and Justice Bradley concluded that art. I, § 7 provided greater protection than the Sixth Amendment for represented defendants in the setting of a custodial interview. *See Forbush*, 332 Wis. 2d 620, ¶¶ 59-60, 65-80 (Abrahamson, C.J., concurring). [14]

Respectfully, the State agrees with Justices Crooks, Roggensack, Zielger and Gableman that art. I, § 7 provides the same protections as the Sixth Amendment in this context. The language of art. I, § 7, prior case law construing this provision, and the history of this provision all

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[14] For Justice Prosser's part, his analysis in *Forbush* did not require him to decide whether art. I, § 7 of the Wisconsin constitution provided greater protections than the Sixth Amendment to the United States Constitution. *See Forbush*, 332 Wis. 2d 620, ¶¶ 82-105 (Prosser, J., concurring).

support the four justices' conclusion that art. I., § 7 does not provide greater protection than the Sixth Amendment for represented defendants in custodial interviews. *State v. Pitsch,* 124 Wis. 2d 628, 646, 369 N.W.2d 711 (1985) (listing considerations relevant to construing a state constitutional provision); *see also State v. Cole*, 2003 WI 112, ¶ 10, 264 Wis. 2d 520, 665 N.W.2d 328.

As pertinent, the Sixth Amendment provides that "the accused shall enjoy . . . the assistance of counsel for his defense," U. S. Const. amend VI, while art. I, § 7 of the Wisconsin Constitution guarantees that "[i]n all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel." Wis. Const. art. I, § 7. Delebreau does not argue that any differences in the text of these provisions warrant interpreting art. I., § 7 more expansively than the Sixth Amendment (*See* Delebreau's Br. at 30-33). Similarly, Chief Justice Abrahamson's conclusion that art. I, § 7, offers broader protections does not rest on any differences in the language of the two provisions. *See Forbush*, 332 Wis. 2d 620, ¶¶ 59-60, 65-80 (Abrahamson, C.J., concurring).

Wisconsin courts have generally interpreted state constitutional provisions consistently with their federal counterparts, *see State v. Arias*, 2008 WI 84, ¶ 19, 311 Wis. 2d 358, 752 N.W.2d 748, and this is particularly true where, as here, "'the language of the provision in the state constitution is "virtually identical" to that of the federal provision.'" *Jennings*, 252 Wis. 2d 228, ¶ 39 (quoted sources omitted).

Accordingly, in *Sanchez*, 201 Wis. 2d at 226, this court construed art. I, § 7, to provide the same protections as the Sixth Amendment upon concluding that "[t]he language of [art. I, § 7] . . . does not appear to differ so substantially from the federal Constitution's guarantee of the right to counsel so as to create a different right." Likewise, in *Klessig*, 211 Wis. 2d at 202-03, this court held that "[t]he scope, extent, and, thus, interpretation of the right to the assistance of counsel is identical under the Wisconsin Constitution and the United States Constitution" (citation omitted).

Delebreau cites no cases in which a Wisconsin appellate court has construed art. I, § 7 to provide greater protection than the Sixth Amendment,[15] and his reasons for departing from established precedent in this instance are not persuasive.

Delebreau's argument focuses on the importance of the right to counsel, as illustrated in the early cases of *Carpenter v. County of Dane*, 9 Wis. 249, 251-52 (1859), *County of Dane v. Smith*, 13 Wis. 654, 656-57 (1861), and as explained in a more recent dissenting opinion of Chief Justice Abrahamson, *Jennings*, 252 Wis. 2d 228, ¶ 67 (Abrahamson, C.J., dissenting). But the right to counsel under the Sixth Amendment is surely important as well, and Delebreau does not adequately explain what makes the right of

[15] Nor does Chief Justice Abrahamson's concurrence cite any cases construing art. I, § 7 more broadly than the Sixth Amendment, s*ee Forbush*, 332 Wis. 2d 620, ¶¶ 59-60, 65-80 (Abrahamson, C.J., concurring), and the State has found none.

counsel in Wisconsin more robust than the right recognized in the vast majority of other jurisdictions.

Moreover, the many United States Supreme Cases Delebreau cites interpreting the Sixth Amendment do little to advance his argument that the right to counsel in art. I, § 7 provides greater protection than the Sixth Amendment. (Delebreau's Br. at 35-37). Rather, they only serve to demonstrate the robustness of the right under the Sixth Amendment, and the lack of justification for this court to begin recognizing a more expansive right to counsel under the state constitution. As a majority of this court acknowledged three years ago in *Forbush*, such a project is not warranted by the text, case law and history of art. I, § 7. *Forbush*, 332 Wis. 2d 620, ¶ 15 (Roggensack, J., lead opinion); ¶ 146 (Crooks, J., dissenting); ¶ 158 (Ziegler, J., dissenting).

III. THE FACT THAT DELEBREAU DID NOT ASK A SECOND TIME TO TALK TO INVESTIGATORS AFTER COUNSEL WAS APPOINTED IS IRRELEVANT TO THE ANALYSIS UNDER *MONTEJO* AND *FORBUSH*.

Finally, Delebreau acknowledges that he requested to speak with officers while he was in custody, but asserts that he did not "reinitiate contact" with an investigator after he was appointed counsel, and therefore, he argues, *Edwards* does not apply (Delebreau's Br. at 39-40). *Edwards*, 451 U.S. at 484-85 (once right to

counsel has been invoked, all questioning must cease unless the suspect initiates contact with police).

The State agrees that Delebreau did not ask again to talk with an investigator after counsel was appointed. But this fact—as well as the fact that Delebreau made an initial request to speak with counsel, and that the interviews occurred after the appointment of counsel—is irrelevant to the outcome of this case.

Under the former *Jackson* and *Dagnall* standard, these facts may well have been relevant. However, under *Montejo* and *Forbush*, they are irrelevant because law enforcement officers may request a custodial interview with a represented person, and the person's *Miranda* waiver is sufficient to waive his or her Sixth Amendment and art. I, § 7 right to counsel. Thus, whether and when Delebreau asked to talk to investigators does not matter; the deputy did not need an invitation to request an interview with Delebreau under *Montejo* and *Forbush*.

There is no issue under Edwards to be decided in this case. As discussed, *Jackson* extended *Edwards* by holding that an invocation of the Sixth Amendment right to counsel at a preliminary proceeding must be treated as an invocation of the right at all subsequent stages of the prosecution, including custodial interrogation. *Jackson*, 475 U.S. at 634-35. But *Montejo* overruled *Jackson*, and therefore the retention of counsel no longer triggers *Edwards'* protections against a law enforcement request for an interview.

CONCLUSION

For the benefit of the bench, bar and law enforcement, the State respectfully asks this court to announce—in a majority opinion—the rule of law recognized by five justices in three opinions in *Forbush*: That *Montejo* overruled *Dagnall*, and thus a *Miranda* waiver is sufficient for a represented defendant to waive the Sixth Amendment right to counsel. Further, this court should decline a second invitation to revive *Dagnall* under the state constitution, having rejected the same invitation three years ago in *Forbush*. Accordingly, the court of appeals' decision upholding the circuit court's order denying Delebreau's suppression motion should be affirmed.

Dated this 29th day of September, 2014.

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 10,027 words.

Dated this 29th day of September, 2014.

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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 29th day of September, 2014.

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