IN THE SUPREME COURT OF WISCONSIN

No. 2013 AP 1108 CR

STATE OF WISCONSIN,

Plaintiff–Respondent,

v.

JESSE J. DELEBREAU,

Defendant–Appellant-Petitioner.

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

Appeal from Judgment of Conviction and Order Denying Motion To Suppress Statements Entered In Brown County Circuit Court, The Honorable Thomas Walsh, Presiding

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REPLY

Jesse Delebreau notes that the parties' briefs reflect some agreement, notably on four points: First, when he was interrogated the day after his initial appearance, Jesse Delebreau was represented by counsel. Second, the interrogation related to the conduct which formed the basis of the criminal charge that had been filed against Delebreau. Third, the state does not contend that a pretrial interrogation is anything other than a critical stage of the pretrial proceedings. Fourth, the state does not suggest that information about Delebreau's appearance in court and the attachment of the right to counsel was unavailable.

The state treats Delebreau's interrogation as if it occurred two days earlier—when his right to assistance of counsel had not yet attached and only the Fifth Amendment's proscription against involuntary statements applied. Relying on *Montejo v. Louisiana*, 529 U.S. 586 (2009), the state believes the *Miranda* warning was sufficient to fully apprise Jesse Delebreau of the import of his full complement of constitutional rights. Relying on the same grounds, the state urges this Court to hold that the warning was sufficient to establish a waiver of Delebreau's right to assistance of counsel under ART. I, § 7 of the Wisconsin Constitution.

The state's position requires this Court to ignore the meaning of the right to assistance of counsel as provided for in our constitution and precedent. Both sources of law provide that "once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him." *Brewer v. Williams*, 430 U.S. 387, 401 (1977), citing *Massiah v. United States*, 377 U.S. 201 (1964).

The uncounseled interrogation violated *Massiah's* prophylactic rule forbidding certain pretrial conduct by police. While *Massiah* suggested

that the violation occurred both when the statement was made and when it was offered at trial, *see Massiah*, 377 U.S. at 206, the Supreme Court more recently concluded "that the *Massiah* right is a right to be free of uncounseled interrogation, [and] is infringed at the time of the interrogation. That, we think, is when the 'Assistance of Counsel' is denied." *Kansas v. Ventris*, 556 U.S. 586, 592 (2009). *Cf. Spano v. New York,* 360 U.S. 315 (1959) (Douglas, J., concurring) ("[W]hat use is a defendant's right to effective counsel at every stage of a criminal case if, while he is held awaiting trial, he can be questioned in the absence of counsel until he confesses?").

In any event, admission of the product of the uncounseled interrogation does harm to the adversarial process—the fairness of which the right to assistance of counsel was designed to protect. This Court ought not permit uncounseled interrogations of represented defendants. Such "shabby tactics are intolerable in all cases." *Kansas v. Ventris*, 556 U.S. at 598 (Stevens, J., dissenting).

On the facts of this case, if the right to counsel means anything under the Wisconsin constitution, then Delebreau should have had been afforded the benefit of counsel's assistance during the interrogation, a critical stage of the proceedings. If he was not fully informed of his right to assistance of counsel and if he did not fully relinquish this right, then Delebreau's statements from the interrogation that occurred the day after his initial appearance should not have been introduced at trial.

I. KNOWLEDGE OF DELEBREAU'S INVOCATION OF RIGHT TO ASSISTANCE OF COUNSEL SHOULD HAVE BEEN IMPUTED TO INVESTIGATOR.

Knowledge of attachment of right to counsel is imputed to all state actors even if they are not present at the initial appearance. In *Michigan v. Jackson*, 475 U.S. 635 (1986), the Supreme Court held that the state is responsible, in the Sixth Amendment context, for the knowledge of all of its actors:

> Sixth Amendment principles require that we impute the State's knowledge from one state actor to another. For the Sixth Amendment concerns the confrontation between the State and the individual. One set of state actors (the police) may not claim ignorance of defendants' unequivocal request for counsel to another state actor (the court).

475 U.S. at 634.

In reaching this conclusion, the Supreme Court cited and quoted from *Maine v. Moulton,* 474 U.S. 159 (1985). True, *Montejo v. Louisiana* overruled *Jackson* insofar as it imposed a prophylactic rule forbidding interrogation once the accused has requested counsel. But *Montejo* expressly stated that it was not concerned with the substantive scope of the Sixth Amendment right to counsel, and cited both *Moulton* and *Massiah v. United States,* 377 U.S. 201 (1964).

> Montejo contends that our decisions support his interpretation of the *Jackson* rule. We think not. Many of the cases he cites concern the substantive scope of the Sixth Amendment—*e.g.,* whether a particular interaction with the State constitutes a 'critical' stage at which

> counsel is entitled to be present—not the validity of a Sixth Amendment waiver. Since everyone agrees that absent a valid waiver, Montejo was entitled to a lawyer during the interrogation, those cases do not advance his argument.

Montejo, 556 U.S. at 791 (citations omitted).

The circuit court found that the investigator did not know that the criminal complaint charging Delebreau with the unlawful possession and delivery of heroin had been filed in Brown County Circuit Court. R34. Nor did the investigator know that Jesse Delebreau had appeared in court the day prior to the interrogation.[1] *Id*. Even if, as Delebreau contends, the recorded interrogation belies the investigator's claims and the circuit court's finding, since the right to assistance of counsel is imputed to all state actors, the investigator's conscious avoidance of learning whether Delebreau's right to counsel had attached is immaterial. *Maine v. Moulton* requires the Court to "impute the State's knowledge from one state actor to another." 475 U.S. at 634.

II. A HEIGHTENED STANDARD FOR RELINQUISHING CONSTITUTIONAL RIGHTS IS APPROPRIATE.

The core of the right to counsel is a trial right, ensuring that the prosecution's case is subjected to the crucible of meaningful adversarial testing. The Supreme Court's decisions addressing the right to assistance of counsel have held that this right covers pretrial

[1] One may reasonably presume that the circuit court proceedings in Delebreau's case were timely updated on the Circuit Court Access Program. Nothing in the record suggests that the information was not available.

interrogations to ensure that police manipulation does not render counsel entirely impotent—depriving the defendant of "'effective representation by counsel at the only stage when legal aid and advice would help him.'" *Kansas v. Ventris*, 556 U.S. 586, 591 (2009).[2] Because of the importance of the right, waiver requires a heightened standard.

> The assistance of counsel has been denied, however, at the prior critical stage which produced the inculpatory evidence. Our cases acknowledge that reality in holding that the stringency of the warnings necessary for a waiver of the assistance of counsel varies according to 'the usefulness of counsel to the accused at the particular [pretrial] proceeding.'

Id., at 592 (internal citation omitted). Thus, waiver of the right to assistance of counsel "must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends ... 'upon the particular facts and circumstances surrounding [each] case....'" *Estelle v. Smith*, 451 U.S. 454, 471 n.16 (1981).

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[2] Similarly, the right to assistance of counsel means that counsel's presence is a "requisite to conduct of the lineup, absent an intelligent waiver." *United States v. Wade*, 388 U.S. 218 (1967) (internal quotation marks omitted). If the constitutional right to assistance of counsel entitles a defendant to such robust protection during a lineup, surely it entitles him to such protection during a custodial interrogation, when the stakes are as high or higher. *Wright v. State*, 46 Wis. 2d 75, 82, 175 N.W.2d 646, 650 (1970) (Since the lineup here did take place after the issuance of the warrant, the presence of counsel, or, in the alternative, waiver of counsel, was required). *See also Estelle v. Smith*, 451 U.S. 454 (1981), overturning death penalty where defendant was examined by a psychiatrist after arraignment, but without the assistance of counsel, and the records of that examination were utilized in death penalty phase of trial because that examination violated the defendant's Sixth Amendment right to the assistance of counsel.

"The right to counsel does not depend upon a request by the defendant . . . and courts indulge in every reasonable presumption against waiver. This strict standard applies equally to an alleged waiver of the right to counsel whether at trial or at a critical stage of pretrial proceedings." *Brewer v. Williams*, 377 U.S. at 404 (internal citations omitted). "Waiver requires not merely comprehension but relinquishment." *Id.* The purpose of the guarantee to assistance of counsel "after the adverse positions of government and defendant have solidified," is to "protec[t] the unaided layman at critical confrontations" with his expert adversary." *United States v. Gouveia*, 467 U.S. 180, 189 (1984).

Because the interests they protect differ, the protection afforded by the right to assistance of counsel is not concomitant with the protections under the Fifth Amendment.

> To invoke the Sixth Amendment interest is, as a matter of *fact, not* to invoke the *Miranda–Edwards* interest. One might be quite willing to speak to the police without counsel present concerning many matters, but not the matter under prosecution.

McNeil v. Wisconsin, 501 U.S. 171, 178 (1991).

Telling Delebreau that he had the right to counsel *after* Delebreau had appeared in court with counsel did not properly inform him of his constitutional right to assistance of counsel. In this context, the *Miranda* warning is confusing: Delebreau already had a lawyer; was there supposed to be different counsel than the one with whom Delebreau appeared in court? Could he not have the same lawyer? While the perfunctory reading of the warning may allow a court to find that admissions made by Delebreau were voluntary under the Fifth Amendment, the warning does not fully inform Delebreau of his right to the assistance of counsel under our constitution.

The *Miranda* warning is not sufficiently stringent, in part because it does not properly advise the defendant of the scope of the right. *Miranda* warnings are designed to inform a suspect who is in custody of his constitutional rights prior to an interrogation, and relatedly, to inform the suspect that the interrogators will recognize his or her rights if exercised. *Miranda,* 384 U.S. at 468. The focus of the warning is the protection of the individual's privilege against self-incrimination; to ensure that admissions are made free and unconstrained. *State v. Hambly,* 2008 WI 10, ¶ 48, 307 Wis. 2d 98, 745 N.W.2d 48 (noting that *Miranda* is designed to prevent "government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment").

The inadequacy of the *Miranda* warning is more obvious in the case of a *represented* defendant. While informing a charged but unrepresented defendant of his right to counsel alerts him to the fact that he is entitled to obtain something he does not already possess, providing that same warning to a defendant who has *already* secured counsel is more likely to confound than enlighten. Assuming that the *Miranda* warning are sufficient to ensure that a defendant's waiver is knowing and voluntary, one must overlook the actual advice Delebreau received. The warning read to him did not inform him of his relevant Sixth Amendment rights or alert him to the possible consequences of waiving those rights.

A defendant's decision to forgo the assistance of counsel, when he is represented, and to speak with police is a grave decision. Given the high stakes of this choice and the potential value of counsel's advice at that critical stage of the criminal proceedings, it is imperative that a defendant possess "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it," *Moran v. Burbine,* 475 U.S. 412, 421 (1986), before his waiver may be valid. *Iowa v. Tovar,* 541 U.S. 77, 81 (2004); *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938). Because the reading of the *Miranda* warning did not

ensure that Jesse Delebreau understood the Sixth Amendment right he was being asked to surrender, this Court should not conclude that Delebreau validly waived his right to counsel, even without *Jackson*' s enhanced protections.

Waiver of the right to assistance of counsel based on the *Miranda* warning reminds Delebreau of the Supreme Court's observation in *Escobedo,* where the Court noted that if the rule proposed by the state were adopted the result

> would make the trial no more than an appeal from the interrogation; and the 'right to use counsel at the formal trial (would be) a very hollow thing (if), for all practical purposes, the conviction is already assured by pretrial examination'. *** 'One can imagine a cynical prosecutor saying: 'Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at the trial.'

Escobedo v. Illinois, 378 U.S. 478, 487-88 (1964).

III. FUNCTION OF LAW ENFORCEMENT WILL NOT BE FRUSTRATED BY HEIGHTENED WAIVER REQUIREMENT.

A common thread runs through cases interpreting a defendant's right to assistance of counsel: the concern of striking the proper balance between the upholding a defendant's constitutional right to assistance of counsel and law enforcement's need for access to the defendant to solve crimes. The standard Delebreau believes applies will provide for a rule that is clear and easily followed.

Justice Stevens, dissenting in *Montejo* cited with approval the supplemental brief submitted by lawyers and judges with extensive experience in law enforcement and prosecution on the issue of whether the rule of *Michigan v. Jackson* should be overruled.[3]

> [*A*]mici [ ] argue persuasively that *Jackson*'s bright-line rule has provided law enforcement officers with clear guidance, allowed prosecutors to quickly and easily assess whether confessions will be admissible in court, and assisted judges in determining whether a defendant's Sixth Amendment rights have been violated by police interrogation. While *amici* acknowledge that "*Jackson* reduces opportunities to interrogate defendants" and "may require exclusion of evidence that could support a criminal conviction," they maintain that "it is a rare case where this rule lets a guilty defendant go free." *Ibid.* Notably, these representations are not contradicted by the State of Louisiana or other *amici,* including the United States. See United States Brief 12 (conceding that the *Jackson* rule has not "resulted in the suppression of significant numbers of statements in federal prosecutions in the past"). In short, there is substantial evidence suggesting that *Jackson*'s rule is not only workable, but also desirable from the perspective of law enforcement.

Montejo v. Louisiana, 556 U.S. at 808-09.

Such an approach is consistent with the view that "[a] single, familiar standard is essential to guide police officers, who have only limited expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Dunaway v. New*

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[3] The brief was filed in support of Montejo by numerous federal and state law enforcement officers, prosecutors and judges.

York, 442 U.S. 200, 213014 (1979). Adopting *Montejo* will make complex what has, until now, been a straight-forward rule barring certain pretrial police procedures.

Moreover, "to refuse to recognize the right to counsel for fear that counsel will obstruct the course of justice is contrary to the basic assumptions upon which this Court has operated in Sixth Amendment cases." *United States v. Wade*, 388 U.S. 218, 237-38 (1967). The Supreme Court continued, by noting that "In our view counsel can hardly impede legitimate law enforcement; on the contrary, for the reasons expressed, law enforcement may be assisted by preventing the infiltration of taint in the prosecution's identification evidence. That result cannot help the guilty avoid conviction but can only help assure that the right man has been brought to justice. *Id.*

CONCLUSION

Whatever *State v. Forbush,* 2011 WI 25, 332 Wis. 2d 620, 796 N.W.2d 741, may mean, the Wisconsin constitution requires more than what *Montejo* offers in terms of protecting the defendant's right to assistance of counsel. Without proper respect for the right to assistance of counsel, post-charging and pre-trial interrogations may easily be abused to avoid the involvement of counsel. Voluntary statements may follow, but the right to assistance of counsel will lose its meaning; this is not what the right to assistance of counsel meant to the drafters of our Constitution.

Jesse Delebreau 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, October 13, 2014.

Respectfully submitted,

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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 2,742 words. *See* WIS. STAT. § 809.19(8)(c)1.

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Marcus J. Berghahn

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of WIS. STAT. § 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 the opposing party.

_____

Marcus J. Berghahn