STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2013AP2100-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JULIUS ALFONSO COLEMAN,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in the Milwaukee County Circuit Court, the Honorable Jeffrey Wagner, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

While in custody, Julius Coleman was interviewed twice by police. During the first interview, Mr. Coleman was never advised of his ***Miranda*** rights, but he and the detective discussed the evidence against him as well as how he might become an informant. One hour after that interview ended, he was brought back to the interrogation room at his request, read his ***Miranda*** rights, and he made a statement concerning the events leading to his arrest.

> Should the circuit court have suppressed the contents of the first interrogation because Mr. Coleman was never advised of his ***Miranda*** rights? And should the circuit court have suppressed the contents of the second interrogation as an unlawful continuation of the first, even though he was advised of his rights?

The circuit court ruled that the first interview was not an interrogation, so it denied suppression.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The United States Supreme Court has held that in some circumstances, a ***Miranda*** violation at a first interview may require suppression of subsequent statements, even after the ***Miranda*** warnings are given. ***Missouri v. Seibert***, 542 U.S. 600 (2004). There was no majority opinion in that case. A four-justice plurality and Justice Anthony Kennedy produced competing tests to determine when suppression is required. No Wisconsin case has adopted either test. Publication is appropriate to adopt one of the competing tests, and to provide guidance by applying the proper test.

Although counsel believes this issue can be addressed adequately in briefing, he welcomes the opportunity for oral argument if the court believes it would be helpful.

STATEMENT OF FACTS

In May 2011, Corey Long was facing criminal charges for possessing cocaine and marijuana. (89:73, 117-18). While those charges were pending, he made a deal with the State to help uncover criminal activity in exchange for dismissing the charges against him. (89:74-75, 118-19). While assisting law enforcement, Mr. Long began communicating with the defendant, Julius Coleman, about a possible armed robbery.

Mr. Coleman called Mr. Long and asked whether Mr. Long knew anyone he could rob. (89:122). Mr. Long said they could rob, Poncho, a drug dealer. (89:122). Poncho did not exist; Mr. Long made him up in order to make Mr. Coleman believe there was someone they could rob. (89:122). Over the next three weeks, police recorded a series of phone calls and meetings between Mr. Long and Mr. Coleman, during which they discussed plans to rob Poncho at his home. (2:3-4). In the recordings, Mr. Coleman can be heard saying he had guns that could be used for the robbery. (2:3-4).

On June 9, 2011, Mr. Coleman drove two other individuals in his red Monte Carlo to meet Mr. Long and commit the robbery. (91:124). Mr. Long drove them all to a parking lot, from which they could access Poncho's house. (89:148). As part of their plan, Mr. Long got out of the van so that he could go to Poncho's house and make sure the coast was clear. (89:113, 115).

After Mr. Long got out, police surrounded the van with a "tactical team" of 15-16 officers, and a BearCat, "an

armored vehicle," originally designed for military use. (93:16). Police deployed two "flash-bang" grenades, intended to disorient anyone in the van, then shot out the windows of the van with rubber bullets. (93:19-20, 30). Police then arrested the three occupants. (93:24).

First Interrogation

Mr. Coleman was brought to the Wauwatosa Police Department, where he was interviewed twice by then-Detective Robin Schumacher.[1] During the first interview, the detective confirmed Mr. Coleman's name and background, then asked if he had any questions for her. (18:1; 113-11:29:34).[2] After confirming that he had been arrested for possessing a firearm as a felon, the detective told him that there could be some "leeway" on his charges "as long as we have a little level of honesty." (18:2; App. 163).

Instead of advising Mr. Coleman of his ***Miranda***[3] rights before going further, the detective went on to discuss the need for Mr. Coleman to be honest about the events leading to the arrest if he wanted to be an informant. She

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[1] Detective Schumacher has since been convicted of felony misconduct in public office for stealing drugs from the police department evidence room. Jesse Garza, *Wauwatosa Detective Sentenced for Drug Theft*, http://www.jsonline.com/news/crime/wauwatosa-detective-sentenced-for-drug-theft-b99298767z1-264515021.html (last visited Mar. 14, 2016).

[2] Audio-visual recordings of the interrogations are included on a disc in the appellate court record. (113). The disc contains two folders. The folder labeled 20160104-170207 includes Mr. Coleman's first interrogation (beginning at 11:15:33). The folder labeled 20160104-175411 includes the second interrogation (beginning at 13:22:58). Record citations to the recordings in this brief will be to the timestamp on the audio-visual recording.

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

explained that she could only justify working with him "based on the level of cooperation and honesty" he displayed during their interview. (18:3; App. 164). She explained that as consideration for his "weapons violation" he "would have to come up with something violent." (18:4-5; App. 165-66).

Their conversation about becoming an informant eventually merged into a discussion of the events leading to Mr. Coleman's arrest. The detective explained that the recorded calls with Mr. Long suggested he was going to be involved in a very violent offense, so police had to stop him. (18:5; App. 166). Mr. Coleman explained that he just wanted his mother protected if he cooperated with police. (18:5; App. 166). He then admitted his guilt, stating "I made a mistake you know what I'm sayin'? You guys got me. Got my phone conversation." (18:6; 113-11:43:35; App. 167). He also reiterated that he wanted to cooperate to mitigate any punishment for the recent offense. (18:6; App. 167).

About 25 minutes after the interview started, the detective said she needed to read Mr. Coleman his rights, like from the TV show COPS. (18:8; App. 169).[4] Before she began reading those rights, Mr. Coleman asked if his girlfriend could get her car back. (18:8; App. 169). Instead of waiting until after the ***Miranda*** warnings to start discussing the case again, she answered that that was a "good stepping stone," then complained about Mr. Coleman hiding a key. (18:8; App. 169). She continued, and asked Mr. Coleman a direct question about the offense: "I think a sign of good faith would be like, ok, I'll get you that car back—I mean, there's no other weapons in that car?" (113-11:49:02). On the recording, Mr. Coleman appears to shake his head, and the

[4] The detective, in a whispering voice seemingly intended to imitate the show, stated, "you have the right to remain silent," before Mr. Coleman asked his question. (113-11:48:20).

detective said, "OK, that was like a half truth." (113-11:49:11). Mr. Coleman then answered her, saying, "No, ain't nothing in that car." (113-11:49:13). The detective then told him: "If we don't need it—if there's no evidence in there, there's really no need, as long as you're cooperative, for me to hold onto that car. If you half-truth it, then yeah, you know, I'm going to make it inconvenient. You want to make my life inconvenient, I'm going to make your life inconvenient." (18:8; 113-11:49:22; App. 169).

The detective continued to talk about how he might be able to earn credit, and how she would have to "sell" using him as an informant to her boss. (18:9; App. 170). He was concerned about still having some time over "[his] head," regardless of how many people he helped turn over. (113-11:52:30). The detective disagreed, noting he might be able to avoid time in custody if he could "dazzle" her with information about other criminal activity." (113-11:52:35).

Mr. Coleman then began discussing the lack of evidence against him, pointing out that there were only recorded phone calls. (18:9-10; App. 170-71). The detective still failed to read the ***Miranda*** warnings. Instead, they kept talking about the evidence in the case, leading to Mr. Coleman saying he was only facing a charge of conspiracy:

> Det. Schumacher: But there's two charges though. There's the felon in possession of a firearm—
>
> Mr. Coleman: That one's being dropped.
>
> Det. Schumacher: Five year minimum. Would never be dropped. Because the surveillance. Remember, remember, we were there. Remember that's how we got your car.

> Mr. Coleman: Exactly. But do the surveillance present Julius Coleman with the firearm. The back windows have tint. The front windows have tint. I mean the two front ones.

(113:11:46:45). He then kept talking about how police never saw him with a gun, and she responded that she saw him "coming from the Monte Carlo to the van," when he met up with Mr. Long on the way to the robbery. (113-11:57:33).

Going further, Detective Schumacher told Mr. Coleman that the two codefendants would probably make statements implicating him: "First of all, what I, what I truly enjoy about it is you're forgetting that there's two other gentlemen that are on probation that you think are going to be honorable men." (113-11:58:45). Mr. Coleman briefly interrupted her and said something that cannot be discerned on the recording, then she continued, "And who do you think is going to say whose weapon that is? And whose—and who said it was his own weapon on his own phone? You." (113-11:59:02).

She then summarized more of the evidence against him: "I know where you're coming from; I get it. I don't blame you for talking your way through it. I don't blame you for wanting to know a little bit more about it. But let's be honest, I know you say nothing with the phone conversations. Unfortunately, Julius, there's multiple. There's such a hard core--." (113-12:04:25). He then made another admission, explaining that he agreed to the robbery only after Mr. Long suggested it. (18:13; App. 174).

The conversation continued on that theme. Mr. Coleman would identify some weakness in the case, the detective would remind him about other unfavorable

evidence, then Mr. Coleman would respond. Eventually, the conversation prompted Mr. Coleman to admit his guilt:

> Det. Schumacher: What about the other two that are in custody that are going to make a statement, I'm guessing pretty similar, that's going to coincide with the recordings. That's going to coincide with the actual fact that you showed up. I mean, I'm just saying—
>
> Mr. Coleman: I'm guilty about that. I'm going to plead guilty.

(113-12:09:33).

After another 15 minutes of conversation, Mr. Coleman stormed out of the room, saying "Bring me back to my room. Man, I don't want to talk." (18:19; 113-12:24:00). After getting outside the interrogation room, he pretended to have a seizure and fell down until he was brought back to his cell. (81:16, 18).

Second Interrogation

Just over an hour later, Mr. Coleman and Detective Schumacher were back in the interrogation room, now accompanied by Detective John Milotzky. (113-13:26:40). Detective Schumacher confirmed that Mr. Coleman called her back to his cell, then hurriedly read Mr. Coleman his ***Miranda*** rights. (113-13:26:54). Mr. Coleman did not initially agree to make a statement,

> Det. Schumacher: You understand these rights?
>
> Mr. Coleman: Yes, ma'am

Det. Schumacher: Realizing you have these rights, you want to make a statement, or answer questions?

Mr. Coleman: Like as far as what?

Det. Schumacher: It's either yes or no, and then we'll go from there.

(113-13:27:25). Mr. Coleman gave a response that cannot be discerned on the recording, but the statements that followed demonstrate it was not a statement that he wanted to answer questions:

Det. Schumacher: We can start over, but I'm not gonna sit and bullshit for an hour again, and then [unintelligible]. It's just not going to happen.

Det. Milotzky: This is your only chance to tell your side of the story, man.

Mr. Coleman: OK.

Det. Milotzky: This is the one chance—you're getting a second chance already, so you're gonna take this opportunity to get your side of the story out there, otherwise we'll go with what we got and we'll put you back in.

Mr. Coleman: OK.

Det. Schumacher: Do you understand these rights?

Mr. Coleman: Yes.

Det. Schumacher: Realizing you have these rights do you want to make a statement or answer questions.

Mr. Coleman: I'll answer questions.

Det. Schumacher: Is that a yes?

Mr. Coleman: Yes.

(113-13:27:53).

What followed was a long statement by Mr. Coleman, punctuated by a few questions or statements from the detectives. Mr. Coleman talked about meeting with the co-defendants and his conversations with Mr. Long. (113-13:29:40, 13:36:45). He discussed when police stormed the car, and claimed he was on drugs when talking with Mr. Long about the robbery. (113-13:35:00, 13:37:15). After being prompted by Detective Schumacher, he admitted that he understood the wrongfulness of agreeing to participate in the crime and trying to involve others in it. (113-13:38:15). He continued to deny knowing who brought the gun, and claimed he was lying when he told Mr. Long he would bring a gun. (113-13:39:15, 13:46:00). He agreed to provide a DNA sample to check against the gun. (113-13:41:00). The interrogation ended when Detective Schumacher left the room (Detective Milotzky left a few minutes earlier), telling Mr. Coleman she was done dealing with his denials. (113-13:51:15).

Pretrial/Suppression

On June 14, 2011, the State filed a complaint charging Mr. Coleman with one count of conspiracy to commit armed robbery, one count of possessing a firearm as a felon, and two counts of misdemeanor bail jumping, contrary to Wis. Stat. §§ 939.31, 943.32(2), and 946.49(1)(a). (2).

Before trial, Mr. Coleman moved to suppress the statements he made at both of his interrogations. (11; 13). The

motion argued that the statements in the first interview had to be suppressed because he was never advised of his ***Miranda*** rights before being subjected to custodial interrogation, and the second interview had to be suppressed because it was tainted by the first, citing ***Missouri v. Seibert***, 542 U.S. 600 (2004) as support.

The court held a hearing on the suppression motion at which Detective Schumacher testified. (81; App. 110). She testified that she had never been trained to interview a suspect without reading the ***Miranda*** rights, then attempt to obtain a second confession after giving the warnings. (81:4; App. 113). She testified that she interviewed him the morning and early afternoon after the arrest. (81:8; App. 117). She testified that Mr. Coleman immediately began asking questions about becoming an informant. (81:8, 28; App. 117, 137). She told him she would have to trust him to let him be an informant, but that she wanted to talk about the previous night. (81:12; App. 121). She testified that she did not ask Mr. Colman specific questions about the circumstances surrounding his arrest. (81:12; App. 121). She noted that before she could read him his rights, he was asking questions he had. (81:12; App. 121).

She did not believe that any of their conversation related to the events leading to the arrest. (81:13; App. 122). But on cross examination, she acknowledged a number of statements she made concerning the type and quality of the evidence the police had. (81:34-36; App. 143-44). He eventually became agitated, left the room, and pretended to have a seizure. (81:15-16; App. 124-25). She testified that Mr. Coleman never admitted to being a part of the conspiracy or possessing a firearm during the first interview. (81:18; App. 127). However, on cross examination, she recalled Mr.

Coleman saying he was guilty, and he would plead guilty. (81:42; App. 151).

She testified that shortly after the interview ended, Mr. Coleman started calling out from the jail cell that he wanted to talk again. (81:19-20; App. 128-29). About an hour after the first interview, they returned to the interrogation room, this time with Detective Milotzky, due to Mr. Coleman's erratic behavior at the end of the prior interview. (81:21; App. 130). She testified that Mr. Coleman waived his ***Miranda*** rights during this interview, then made a statement. (81:22-23; App. 131-32).

At the close of the hearing, defense counsel requested that the court review the first of the interrogations. (81:47; App. 156).

At a decisional hearing two weeks later, the court denied suppression after reviewing the interrogation disc. (82:6; App. 109). The court found that Mr. Coleman was clearly in custody, but that no interrogation took place during the first interview. (82:3-4; App. 106-07). After discussing how Mr. Coleman could get consideration for cooperating, "there was some talk that contained the offense, but towards the end of the—there was no admission, but then again, there was no questions—there was nothing that would indicate to the court that there was an interrogation at the time of the interview." (82:4; App. 107). The court then offered its ruling: "The bottom line is the court does not believe that there was an interrogation on the first interview and that during the course of the events on the second interview, the defendant was advised of his ***Miranda*** rights, understood those rights, and agreed to speak with the detective and gave a voluntary statement and was not coerced into doing do." (82:5; App. 108). Therefore, the court denied suppression.

Trial

At the trial that followed, the State called six witnesses. Corey Long, the informant, testified that he was helping police in exchange for consideration in an open drug case he was facing.[5] (89:72-75). He testified that he made up Poncho, and discussed robbing Poncho with Mr. Coleman. (89:75-77, 122-23). During his testimony, the State played recordings of his meetings and calls with Mr. Coleman. He testified that when he met with Mr. Coleman and the other two co-defendants, he saw Mr. Coleman get a gun from under the hood of his car. (89:109-10). He testified that he then drove the four of them to the area where the robbery was supposed to take place and got out of the car. (89:113).

Onterio Girley, one of the codefendants, testified that he entered into a plea agreement in exchange for his testimony. (90:7-8). He then testified that his attorney forced him to plead guilty, and that he made up a story about participating in an armed robbery to please the police. (90:12-13). He testified that he was with Mr. Coleman, Mr. Long, and the other codefendant, but denied seeing a gun or hearing any discussion about a robbery. (91:26). He testified that he made up his prior stories to help himself. (91:43).

Detective John Milotzky testified about prior inconsistent statements Mr. Girley made to him in the jail. He testified that Mr. Girley said he met with Mr. Long, Mr. Coleman, and the other co-defendant, and that Mr. Coleman said there was a gun in the car. (91:80-81). He testified that Mr. Girley said the codefendant and Mr. Long discussed robbing someone. (91:82).

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[5] Mr. Long has since been convicted of first degree intentional homicide in Milwaukee County Case No. 12-CF-6006.

Officer David Cefalu testified that he was the handler working with Mr. Long as an informant. (91:96-97). He arranged to record the conversations between Mr. Long and Mr. Coleman. (91:101). When Mr. Long met with the three defendants, he was conducting surveillance and saw Mr. Coleman retrieve something from under the hood of his car before getting in the van with Mr. Long to drive to the staged robbery. (91:127). He also testified about an interview he had with the third codefendant, where the codefendant admitted to participating in the planned robbery. (91:162-67).

Sergeant David Moldenhauer testified about the events immediately surrounding the arrest. He testified that 25 people from law enforcement were involved in the arrest. (92:29-30). He was at the site of the arrest with a "tactical team" of 15-16 officers, and the BearCat, an armored car designed for military use. (92:16). After Mr. Long got away from the van, the BearCat drove to the bumper of the van and they fired two flash-bang grenades at the car to disorient the three defendants. (92:19-20). Police ordered the men to show their hands because they could not see clearly into the van. (92:21). Police then shot out the windows of the van with rubber bullets to see inside the car. (92:21). The men then exited the van as instructed by police and they were arrested. (92:23-24). Detective Moldenhauer then identified a number of photos of the scene, including a picture of a gun that was found in the van. (92:25-27).

Finally, Detective Schumacher testified about her interrogation of Mr. Coleman. She testified that Mr. Coleman was asking about becoming an informant, but she told him they could only work together if he was honest. (92:47, 55; App. 189, 197). She testified that Mr. Coleman admitted to planning the robbery with Mr. Long, but he denied possessing the gun. (92:49-51, 58; App. 191-93, 200). She testified that

Mr. Coleman admitted to being guilty of being a party to a crime, but he believed police made their arrest too early to convict him. (92:52-53; App. 194-95). She also testified that she was with Officer Cefalu when the three defendants met with Mr. Long before the staged robbery, and she saw Mr. Coleman go to the hood of his car and hand something to the Mr. Girley. (92:41-45; App. 183-87).

The jury convicted Mr. Coleman of possessing a firearm as a felon and one count of bail jumping. (95:12). The jury was unable to reach a unanimous verdict on the counts of conspiracy to commit armed robbery and bail jumping. (95:13).

On August 9, 2012, the court sentenced Mr. Coleman to five years in confinement, followed by five years of extended supervision for possessing a firearm, concurrent to a nine month jail sentence for bail jumping. (100:23).

Mr. Coleman appeals.

ARGUMENT

I. The Court Should Suppress Mr. Coleman's Statements from Both of His Interrogations Because the First Was Conducted Without ***Miranda*** Warnings and the Second Was Tainted, Despite a ***Miranda*** Waiver.

The only issue on appeal is whether Mr. Coleman's statements should have been suppressed based on a violation of his constitutional right to remain silent. U.S. Const. amend. V; Wis. Const. art. I, § 8.

This court should suppress both of the statements Mr. Coleman made to Detective Schumacher. The first statement must be suppressed because Mr. Coleman was subjected to

custodial interrogation without being advised of, or waiving, his ***Miranda*** rights. The second statement must be suppressed as an unlawful continuation of his unwarned statement. ***Missouri v. Seibert***, 542 U.S. 600 (2004).

A. Police needed to notify Mr. Coleman of his ***Miranda*** rights before conducting a custodial interrogation.

Mr. Coleman, like any suspect, needed to be advised of his ***Miranda*** rights if he was (1) in custody, and (2) subject to "express questioning or its functional equivalent." ***Rhode Island v. Innis***, 446 U.S. 291, 300-01 (1980). If police did not advise him of his ***Miranda*** rights before questioning, his statements must be suppressed. ***State v. Morgan***, 2002 WI App 124, ¶ 10, 254 Wis. 2d 602, 648 N.W.2d 23.

"[T]he sufficiency of the ***Miranda*** warnings and waiver of ***Miranda*** rights are ultimate issues of constitutional fact which this court determined *de novo*." ***State v. Santiago***, 206 Wis. 2d 3, 18, 556 N.W.2d 687 (1996). Whether Mr. Coleman was subject to custodial interrogation is also a question of constitutional fact, so this court reviews the circuit court's underlying factual findings for clear error, but reviews *de novo* whether those facts constitute custodial interrogation. ***State v. Hambly***, 2008 WI 10, ¶ 49, 307 Wis. 2d 98, 745 N.W.2d 48.

The burden is on the State to prove by a preponderance of the evidence that Mr. Coleman's statement was taken in compliance with ***Miranda***. ***State v. Armstrong***, 223 Wis. 2d 331, 345-46, 588 N.W.2d 606 (1999).

B. The contents of Mr. Coleman's first interrogation must be suppressed because he was never advised of his ***Miranda*** rights before being subjected to custodial interrogation.

Here, there is no dispute that Mr. Coleman was in custody when he spoke with police. He was arrested and held in a jail cell for his believed involvement in a conspiracy to commit armed robbery. ***State v. Fischer***, 2002 WI App 5, ¶ 23, 259 Wis. 2d 799, 656 N.W.2d 503 (custody occurs "after a person has been taken into custody or otherwise deprived of his or her freedom of action in any significant way."). The State has never made any argument that Mr. Coleman was not in custody.

This case turns on whether Mr. Coleman was "interrogated" during the first interview. If any questioning occurred, the first statement must be suppressed because it was made without the ***Miranda*** warnings. ***State v. Kiekhefer***, 212 Wis. 2d 460, 469, 569 N.W.2d 316 (Ct. App. 1997) ("The failure to provide ***Miranda*** warnings creates a bright-line, legal presumption of coercion, requiring suppression of all unwarned statements." (internal quotations omitted)).

The United States Supreme Court has recognized a broad interpretation of "interrogation." Interrogation is not limited to express questioning. Rather, "the term 'interrogation' under ***Miranda*** refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." ***Innis***, 446 U.S. at 300-01. Under this definition, "[a] law enforcement officer may thus be viewed as interrogating a suspect by a statement, *without asking a single question*, if the law

enforcement officer's conduct or speech could have had the force of a question on the suspect." ***Hambly***, 2008 WI 10, ¶ 46 (emphasis added).

It does not matter whether the defendant's answers are actually incriminating. "[T]he words 'incriminating response' mean *any response*—'whether inculpatory or exculpatory—that the prosecution may seek to introduce at trial.'" ***State v. Cunningham***, 144 Wis. 2d 272, 279, 423 N.W.2d 862 (1988) (quoting ***Innis***, 466 U.S. at 301 n.5). Thus, if Detective Schumacher said or did anything that could reasonably be expected to get Mr. Coleman talking about the events leading to his arrest, interrogation occurred.

The test is objective, and focuses on whether an officer would reasonably expect his or her words or actions to elicit a response from the suspect. ***Id.*** The officer's subjective intent is secondary; the test focuses on the perceptions of the suspect. ***Innis***, 446 U.S. at 301. Of course, if an officer intentionally tries to circumvent ***Miranda***, it is likely that any statements by the officer would be the type that a reasonable officer would expect to elicit an incriminating response. ***Id.*** at 301 n.7; ***Cunningham***, 144 Wis. 2d at 279.

Here, the first interview between Mr. Coleman and Detective Schumacher started off with the type of background questioning that does not require ***Miranda*** warnings. ***Innis***, 446 U.S. at 300-01; (18:1; App. 162). And even though parts of the conversation that followed were about how Mr. Coleman could become an informant, the conversation eventually transformed into interrogation. Detective Schumacher asked direct questions, and continuously discussed the evidence with Mr. Coleman in a manner that would lead any reasonable officer to expect Mr. Coleman to respond by talking about the case and his involvement.

Therefore, this court should suppress his unwarned statements.

Immediately after telling Mr. Coleman that he was arrested for possessing a firearm as a felon, Detective Schumacher told him that there could be some "leeway" with those charges depending on his "level of honesty" with her. (18:2; App. 163). She repeatedly referred to his need to prove to her that he was credible. (18:2-4; App. 163-65). Although those statements were not interrogation, it set the stage for the interrogation that followed, and alerted Mr. Coleman that he should talk to her if he wanted to mitigate any future punishment.

As their conversation continued, they increasingly turned away from how to be an informant, and toward the recent arrest. Most pointedly, she asked him to confirm: "there's no other weapons in that car?" (113-11:49:02). This was express questioning. The car was safely in police custody, so that question cannot be construed as any type of public safety exception. *See* ***New York v. Quarles***, 467 U.S. 649 (1984). It was a question bearing directly on whether Mr. Coleman was guilty of possessing a firearm as a felon. The only reasonable view of the question was that it was intended to elicit a response that could be used in a future prosecution.

After that direct question, the interrogation continued. Detective Schumacher engaged in a long back-and-forth with Mr. Coleman about the evidence against him. When he claimed there was no evidence he had a gun, she told him she saw him "coming from [his car] to the van" Mr. Long was driving. (113-11:57:33). As any reasonable officer would predict, Mr. Coleman responded by continuing to discuss the evidence, telling the detective she was lying, that his fingerprints were not on the gun, and that he did not even

know the gun was in the car. (18:10; App. 171). This is undoubtedly the "functional equivalent" of questioning because any reasonable officer knew that by responding to Mr. Coleman's statements about the evidence, he would continue making statements either denying involvement or accepting responsibility.

Detective Schumacher also reminded Mr. Coleman that the other two co-defendants were going to tell police that the gun was his, inviting him to accept responsibility and mitigate any damage he was doing by lying. (113-11:58:45). After he denied that it was his voice on the recordings, she told him that everyone in the car could be convicted for possessing the firearm. (18:11; App. 172). She also discussed the recorded phone conversations directly, telling Mr. Coleman that his defense was weak because "there's multiple" conversations with such "hard core" content. (113-12:04:25).

Although most of her comments might not be punctuated with a question mark in a transcript, she was engaged in the functional equivalent of express questioning. Mr. Coleman would offer his view of the evidence, then she would respond with contrary evidence and allow him to reply. Any reasonable person or police officer would expect Mr. Coleman to respond by talking more about the case and his arrest.

This court suppressed statements in a similar circumstance in ***State v. Bond***, 2000 WI App 118, 237 Wis. 2d 633, 614 N.W.2d 552. There, the defendant's friend had recently been arrested during an undercover drug operation. ***Id.***, ¶ 2. The defendant called the undercover officer (not knowing it was a police officer), and made threats to kill him if he appeared in court to testify against his friend. ***Id.***, ¶ 3.

The officer, still pretending to be a drug dealer, asked the defendant who he was; the defendant identified himself as "the man behind the man." ***Id.*** A short time later, police identified the defendant by his voice and arrested him in the Milwaukee County Criminal Justice Facility. ***Id.***, ¶ 4. While walking the defendant to the jail, he asked why he was being arrested, and the officer told him to wait. ***Id.*** Apparently recognizing the officer, the defendant said "oh, you're the man." ***Id.*** The officer responded, "no, I'm the man behind the man," and the defendant said, "oh, that is what this is about." ***Id.***

This court held that when the officer said, "no, I'm the man behind the man," he engaged in the functional equivalent of express questioning. ***Id.***, ¶ 14. The court held that even though the officer did not say much, his statement was particularly "provocative" because he was referring specifically to his knowledge of the defendant. ***Id.***, ¶ 19. The court also relied on another officer's testimony that he believed the officer's statement was intended to elicit a response from the defendant. ***Id.***, ¶ 18. Finally, the court pointed out that the officer's statement was directed at the defendant, rather than to another officer, as occurred in some other cases. ***Id.***, ¶ 20. Taking those factors together, the court concluded that even this single statement qualified as interrogation because a reasonable officer would have expected some response from the defendant. ***Id.***, ¶ 14.

Detective Schumacher's statements were much more akin to questioning than the single statement from ***Bond***. Just as the officer in ***Bond*** directed his statement to the defendant, everything Detective Schumacher said was directly to Mr. Coleman. They were talking about the evidence in the case, so it was entirely predictable that when Detective Schumacher kept talking about the evidence, Mr. Coleman's

guilt, and his need to be honest, he would respond with statements about the case. Detective Schumacher's statements were particularly provocative because her statements referred to the evidence she knew she had against Mr. Coleman, just as the officer in ***Bond*** was provocative because he referred specifically to his prior knowledge of the defendant through the phone call. And unlike ***Bond***, this was not a single statement. Detective Schumacher made *repeated* comments about the evidence in order to keep Mr. Coleman talking. Therefore, just as in ***Bond***, this court should find that Mr. Coleman was subject to interrogation during the first interview, reverse his conviction, and suppress his statements from that interview.

C. When police take a statement without advising a suspect of his or her ***Miranda*** rights, subsequent interviews may be tainted by the earlier violation.

The court should also suppress Mr. Coleman's second statement. Even though that statement was made after Mr. Coleman waived his ***Miranda*** rights, the statement must still be suppressed as an illegal extension of the unwarned statement he made an hour earlier. ***Seibert***, 542 U.S. 600.

In ***Seibert***, the United States Supreme Court suppressed statements made during a ***Mirandized*** interrogation after police obtained an unwarned statement only moments earlier. 542 U.S 600. In that case, police admitted to using an interrogation tactic where they deliberately questioned the victim without the ***Miranda*** warnings, then, after obtaining an inadmissible confession, gave the warnings and got a second confession 15-20 minutes later. ***Id.*** at 605-606.

Although no opinion in ***Seibert*** commanded a majority of the justices, a four-justice plurality held that a ***Miranda*** was not satisfied when the suspect waived her rights before the second statement. ***Id.*** at 611-12. "The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as ***Miranda*** requires." ***Id.*** The plurality held that a "midstream recitation of warnings after interrogation and unwarned confession could not comply with ***Miranda***'s constitutional requirement," so both statements had to be suppressed. ***Id.*** at 604. The plurality reasoned that it was "unrealistic to treat two spates of integrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because ***Miranda*** warnings formally punctuate them in the middle." ***Id.*** at 614. The plurality found it particularly alarming that the suspect was never advised that the first, unwarned statement was inadmissible. Consequently, she was left to believe that invoking her ***Miranda*** rights during a subsequent interrogation would be useless. ***Id.*** at 613. Thus, the court decided that only after a meaningful departure from the unwarned statement, and a proper waiver of ***Miranda*** could a subsequent statement be admissible.

The plurality proposed an objective test to determine whether a ***Miranda*** violation during the first interrogation required exclusion of a subsequent interrogation. It identified a series of relevant factors to consider: "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." ***Id.*** at 615.

The plurality pointed out that the case before it presented an "extreme" set of facts that clearly required suppression. ***Id.*** at 616.[6] The first interrogation was exhaustive, and was separated from the second interrogation by only 15-20 minutes. ***Id.*** Both interrogations were conducted by the same officer in the same place, and the officer "said nothing to counter the probable misimpression that the advice that anything Seibert said could be used against her also applied to the details of the inculpatory statement previously elicited." ***Id.*** Finally, the officer treated the second as a continuation of the first by referring back to the prior interrogation. ***Id.*** at 616-17.

Justice Kennedy, writing for himself, but providing the fifth vote in favor of suppression, concluded that a subjective test should be employed. ***Id.*** at 622. He concluded that in the rare instance where police deliberately try to evade ***Miranda*** by taking an unwarned statement followed by a warned statement, both interrogations must be suppressed. ***Id.*** If the first unwarned statement was not part of a strategy to undermine ***Miranda***, there would be no need to suppress the second statement. ***Id.*** And even if police deliberately took an unwarned statement, the second statement could still be admissible if police took certain "curative steps" to ensure that the suspect actually understood his or her ***Miranda***

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[6] The court pointed out that in almost any case were police deliberately conduct an unwarned interrogation shortly followed by a warned interrogation for the express purpose of subverting ***Miranda***, both statements would be suppressed: "By any objective measure, applied to circumstances exemplified here, it is likely that if the interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content." ***Id.*** at 613.

rights. ***Id.*** Because no curative steps were taken, Justice Kennedy concluded that suppression was necessary. ***Id.***

To prove the viability of their competing tests, the plurality and Justice Kennedy compared this case to a similar case in ***Oregon v. Elstad***, 470 U.S. 298 (1985). There, police went to arrest the 18-year-old defendant at his parents' house after he became a suspect in a recent burglary. ***Id.*** at 300. Before arresting the defendant, police asked him to join them in the living room. The officer asked the defendant if he was familiar with the burglary and the defendant responded that he was there. ***Id.*** at 301. Police then brought the defendant to the patrol car and drove them to the police station. ***Id.*** About an hour later, at the police station, the defendant was advised of his ***Miranda*** rights, waived those rights, and made a full confession. ***Id.***

The ***Seibert*** plurality applied its objective test to ***Elstad*** and confirmed that the court was correct to deny suppression in that case. The court pointed out that ***Elstad*** was essentially on the other end of the spectrum from the case before it, with two interrogations separated in time and space, and after only an relatively innocuous ***Miranda*** violation in the living room: "In ***Elstad***, it was not unreasonable to see the occasion for questioning at the station house as presenting a markedly different experience from the short conversation at home; since a reasonable person in the suspect's shoes could have seen the station house questioning as a new and distinct experience, the ***Miranda*** warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission." ***Seibert***, 542 U.S. at 615-16.

Justice Kennedy agreed that ***Elstad*** was correctly decided, but relied on the fact that the original ***Miranda*** violation in the living room was seemingly inadvertent, and

was not intended to evade the purposes of the ***Miranda*** warnings. ***Id.*** at 619. He pointed out that ***Seibert*** was different because it involved a deliberate technique, intended to circumvent the defendant's ***Miranda*** rights. ***Id.*** at 620.

D. This Court should adopt the plurality approach from ***Seibert*** because it most accurately reflects the opinions of the justices and is more consistent with existing law.

Since ***Seibert*** was decided, neither the United States Supreme Court, nor any Wisconsin appellate court has adopted either the plurality's or Justice Kennedy's test.

This court should adopt the plurality approach for two reasons: (1) it more accurately reflects the opinions of the justices that decided ***Seibert***, and (2) an objective test is more consistent with existing Fifth Amendment law.

1. The plurality test best reflects the opinions of the justices in ***Seibert***.

The Seventh Circuit has compellingly explained why the plurality approach should be preferred in ***United States v. Heron***, 564 F.3d 879 (7th Cir. 2009). There, the defendant was interrogated without being advised of his ***Miranda*** rights, then, 32 hours later, he was interviewed again with ***Miranda*** and made an essentially identical statement. ***Id.*** at 882. The court was asked to decide whether both statements needed to be suppressed under ***Seibert***.

The court began by noting that when the Supreme Court decides a case without a majority opinion, lower courts should adopt the "position taken by those Members who concurred in the judgments on the narrowest grounds." ***Id.*** at 884 (quoting ***Marks v. United States***, 430 U.S. 118, 193

(1977)). However, the court also pointed out sometimes a plurality opinion and a concurrence cannot be reconciled with any "common denominator," and that in those cases, the ***Marks*** rule does not apply. ***Id.***

Applying those principles to ***Seibert***, the court acknowledged that ***Marks*** could not apply: "Although Justice Kennedy provided the crucial fifth vote for the majority, we find it a strain at best to view his concurrence taken as a whole as the narrowest ground on which a majority of the Court could agree." ***Id.*** In fact, the court pointed out that both the plurality and the four-justice dissent flatly rejected a subjective test in favor of an objective standard. ***Id.*** at 884-85. At most, only two justices supported Justice Kennedy's subjective test.[7] ***Id.***

The ***Heron*** court ultimately concluded that it did not need to pick a test because the defendant would lose under either. ***Id.*** at 885-86.

However, ***Heron*** persuasively makes the case that the plurality approach is preferable: seven of the ***Seibert*** justices rejected Justice Kennedy's subjective test. "In dissent, Justice O'Connor, joined by the Chief Justice and Justices Scalia and Thomas, repeatedly agreed with the plurality that the subjective intent of the interrogator cannot control." ***United States v. Rodriguez-Preciado***, 399 F.3d 1118, 1140 (9th Cir. 2005) (Berzon, J., dissenting). Therefore, Justice Kennedy's test should be disregarded, and cannot be said to be the narrowest opinion. That leaves the plurality's objective test as the holding from ***Seibert***. Therefore, this court should adopt and apply the objective test.

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[7] Justice Breyer wrote a concurrence agreeing with Justice Kennedy's statement that a good-faith exception should apply, but he also signed the plurality opinion. ***Seibert***, 542 U.S. at 617-18.

2. An objective test is more consistent with existing Fifth Amendment law.

This court should also adopt the ***Seibert*** plurality's objective test because it is more consistent with existing case law than Justice Kennedy's subjective test.

In essentially every instance applying the right against self-incrimination, courts have adopted an objective test. Whether a defendant is in custody is an objective test. ***State v. Morgan***, 2002 WI App 124, ¶ 10, 254 Wis. 2d 602, 648 N.W.2d 23 ("The relevant inquiry is how a reasonable person in the suspect's situation would understand the situation.").

Whether a suspect has been subjected to interrogation is an objective test. ***Innis***, 446 U.S. at 301 (interrogation means "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.").

Whether a suspect has invoked his right to counsel or silence is an objective test. ***State v. Ross***, 203 WIs. 2d 66, 78, 552 N.W.2d 428 (Ct. App. 1996) (invocation or right to silence or counsel must be sufficiently clear that "a reasonable police officer in the circumstances would understand the statement to be an invocation" of the right.).

There is no logical reason to depart from this preference for objective tests. The ***Seibert*** plurality identified a number of objective factors that could easily be applied to any other case, and would not require an examination into the subjective intent of every officer responsible for interrogating a suspect.

The factors suggested by the ***Seibert*** plurality also bear some resemblance to another objective test used in Fifth

Amendment cases: whether police may reinitiate an interrogation after a suspect invokes his right to silence. In those cases, courts employ an objective test that balances the following five factors: "(1) whether the original interrogation was promptly terminated; (2) whether interrogation was resumed after a significant period of time; (3) whether the accused received Miranda warnings at the beginning of the subsequent interrogation; (4) whether a different officer resumed the questioning; and (5) whether the subsequent interrogation was limited to a different crime than the previous interrogation." ***State v. Bean***, 2011 WI App 129, ¶ 28, 337 Wis. 2d 406, 804 N.W.2d 696 (citing ***Michigan v. Mosley***, 423 U.S. 96 (1975)).

There is no logical reason to depart from this uniform adherence to objective tests. Therefore, this Court should adopt the test set out by the ***Seibert*** plurality, and consider a set of objective factors when determining whether a ***Mirandized*** statement must be suppressed after an earlier ***Miranda*** violation.

E. This court should suppress Mr. Coleman's second interrogation under either test.

Although Mr. Coleman urges the court to adopt an objective test, his statements should be suppressed regardless of the test this court employs.

1. This court should suppress Mr. Coleman's second interrogation if it adopts an objective test.

Under the objective test from ***Seibert***, the court balances the following factors: "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements,

the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." 542 U.S. at 615. Each of those factors weigh in favor of suppressing the second interrogation.

The first interrogation addressed almost all of the details from the case. They discussed the recorded calls between Mr. Coleman and Mr. Long (18:6, 13, 15; App. 167, 174, 176). Mr. Coleman admitted to the calls and they discussed some of the specific things that were said about how he would put a blanket over a kid if it turned into a shootout. (18:6, 13; App. 167, 174). They discussed what the codefendants might say, and why it would be harmful to him because they would accuse him of possessing the gun. (18:11, 14; App. 172, 174). The detective discussed mutual possession of the gun, and how he could be guilty even if he did not hold the gun. (18:11; App. 172). But she also told him about when she saw him with the gun, and he denied any connection to the gun. (18:10, 14-15; App. 171, 175-76). To rebut that and obtain a confession, she falsely implied there was video recording equipment in the car that might show him with the gun. (18:15-16; App. 176-77). They also discussed the charges he might face, pleas he might enter, and what sort of sentence he might wind up with. (18:9-10, 11; App. 170-71, 172). In the midst of all of this, Mr. Coleman said he was guilty, and admitted that he would plead guilty. (18:14; App. 175).

All the details that mattered came out during this hour-long interrogation. They discussed every stage of the investigation, the events ultimately leading to the arrest, and possible outcomes. Mr. Coleman denied some allegations, but admitted others. This interrogation was thorough and strongly

suggests that any post-***Miranda*** statement should be suppressed.

The two interrogations were also completely overlapping. Given the thoroughness of the first interrogation, there was little left unsaid. Mr. Coleman offered some additional details about how he got the codefendants involved shortly before the planned robbery, but he simply reiterated what had already been said about his conversations with Mr. Long, and he continued to deny knowing anything about the gun in the car.

The timing and setting of the interrogations weighs heavily in favor of suppression. Both interrogations took place in the exact same room, and they were only separated by an hour. (113). And the fact that even some break occurred does not prevent suppression. Even ***Seibert*** included a "20-minute coffee and cigarette break" between the unwarned and warned confessions. 542 U.S. at 605.

That Detective Schumacher conducted both interrogations also weighs in favor of suppression. Although Detective Milotzky was also present for the second interview, Detective Schumacher did almost all of the speaking with Mr. Coleman. (113).

Finally, although the detective did not explicitly refer back to the first interrogation, the two were clearly a continuation on the same theme. Both consisted predominantly of Mr. Coleman picking holes in the State's case, followed by Detective Schumacher identifying other evidence against him, followed by Mr. Coleman making more admissions/denials.

This case also presents the same problem the ***Seibert*** plurality found so alarming: no one ever told Mr. Coleman

that his unwarned statement could not be used against him. During that statement, he admitted to be guilty, and admitted police had his calls with Mr. Long. Like Seibert, he was left to believe that refusing to comply during the second interrogation would be to no avail because they already had a usable confession. 542 U.S. at 616.

This case also presents two aggravating factors not present in ***Seibert***. First, even when Mr. Coleman waived his ***Miranda*** rights during the second interrogation, he only did so after some cajoling from the detectives. After he initially declined to say whether he was willing to make a statement, Detective Milotzky urged him on, telling him that it was his last chance to tell his side of the story, otherwise they would just put him back in his cell. (113-13:27:53). Thus, even insofar as he eventually waived his ***Miranda*** rights, it was only after a level of coaxing that never apparently occurred in ***Seibert***.

Second, any defect in the second interrogation was exacerbated by Detective Schumacher's constant reminders during the first interrogation that she would be judging his credibility to determine whether he could become an informant. Thus, during both interviews, Mr. Coleman's will to resist questioning was weighted down by this advice. He was left to believe that he would have to make some statement to the detectives if he wanted any hope of improving his situation before being charged.

Overall, the factors suggest this case is more like ***Seibert*** than ***Elstad***. Mr. Coleman was subjected to a lengthy, unwarned interrogation touching on all subjects of his case. An hour later, the same detective brought him through the same subjects; the only difference was that he had finally been advised of his ***Miranda*** rights. But having already made

a full statement, like Seibert, Mr. Coleman was left to believe further silence would be futile. Therefore, this court should follow ***Seibert*** and order Mr. Coleman's second interrogation suppressed.

2. This court should suppress Mr. Coleman's second interrogation if it adopts a subjective test.

Even if this court concludes that Justice Kennedy's subjective test should be applied, it should still suppress Mr. Coleman's second interrogation.

Detective Schumacher's decision to conduct the entire first interrogation without notifying Mr. Coleman of his ***Miranda*** rights reflects a deliberate plan to circumvent ***Miranda***. Although she testified her goal was not to get an un-***Mirandized*** statement (81:19; App. 128), there was no alternate explanation for her failure to provide the ***Miranda*** warnings before having a detailed conversation with Mr. Coleman about the evidence in his case.

After a half-hearted effort to read the ***Miranda*** warnings during the first interrogation, the detective abandoned that plan and apparently decided to take a statement without worrying about those warnings. After the aborted attempt to read the warnings, they talked for another half hour about the evidence in the case. The detective never made any further attempt to read the warnings. It appears she knew the warnings were required, but she continued to interrogate Mr. Coleman, resulting in a series of incriminating statements that were admitted at his trial. This strategy, followed by the taking of a ***Mirandized*** statement only shortly after the first interview reflects a deliberate plan to withhold the warnings until obtaining an incriminating statement from Mr. Coleman.

Because, just as in ***Seibert***, no curative steps were taken to address the unwarned interrogation, Mr. Coleman's second interrogation should be suppressed.

CONCLUSION

For the reasons stated above, Mr. Coleman asks that this Court reverse the decision of the circuit court, vacate the judgment of conviction, and order that his statements be suppressed.

Dated this 15th day of March, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 8,465 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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

Dated this 15th day of March, 2016.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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