STATE OF WISCONSIN
SUPREME COURT

NO. 2014AP001767 CR

DISTRICT II
LOWER CASE NO. 2011CF797

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

BRIAN I. HARRIS,

Defendant-Appellant-Petitioner.

BRIEF-IN-CHIEF OF DEFENDANT-APPELLANT-PETITIONER

ON APPEAL FROM JUDGMENT OF CONVICTION AND ENTERED
IN KENOSHA COUNTY CIRCUIT COURT,
HONORABLE S. MICHAEL WILK, PRESIDING

Kathleen M. Quinn, Attorney at Law
SBN 1025117
Attorney for Brian I. Harris,
Defendant-Appellant-Petitioner
207 E. Buffalo Street, Suite 514
Milwaukee, WI 53202
414.765.2373, Fax: 414.765.0828

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Defendant-appellant-petitioner, Brian I. Harris, urges this Court to reverse the decision of the Wisconsin Court of Appeals affirming his conviction and sentence in Kenosha County Circuit Court - - *State v. Harris*, Appeal No. 2014AP1767-CR, slip op. (Wis. Ct. App. December 30, 2015). (App. 6: 1-13).

ISSUE PRESENTED

1. Is a defendant deprived of his constitutional right against self-incrimination and his rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 8 of the Wisconsin Constitution by the admission at trial in the state's case-in-chief of his unwarned custodial statements made in response to law enforcement's asking for a statement?

Trial court: No.

Court of Appeals: No.

STATEMENT OF THE CASE

On or about August 19, 2011, Brian Harris was charged by criminal complaint with one count of burglary of a building or dwelling as a repeater in violation of §§ 943.10(1m)(a), 939.50(3)(f), and 939.62(1)(c), Stats. (Count One); one count of possession of burglarious tools as a repeater in violation of §§ 943.12, 939.50(3)(i), and 939.62(1)(b), Stats. (Count Two); one count of criminal damage to property as a repeater in violation of §§ 943.01(1), 939.51(3)(a), and 939.62(1)(a), Stats. (Count Three); and one count of criminal trespass as a repeater in violation of §§ 943.14, 939.51(3)(a), 939.62(1)(a), Stats. (Count Four). (Criminal Complaint, R1, App 2:1-4)

On May 3, 2013, an amended information was filed by which Harris was charged with the same four offenses set forth in the criminal complaint. R35. On May 6, 2013, Harris proceeded to jury trial. (Transcript, Jury Trial, 05/06/13, R96). On May 8, 2013, the jury returned verdicts of guilty on all four counts. (Transcript, Jury Trial, 05/08/13, R98:141-45; Verdicts, R38, R39, R40, R41; Judgment of Conviction, R49, App 1:1-3).

On July 17, 2013, Harris was sentenced. (Transcript, Sentencing, 07/17/13, R101). The court withheld sentences on all counts and put Harris on probation for 30 months on Counts 1 and 2 and for 24 months on Counts 3 and 4. R101:29-31; R49, App 1:1-3).

The Court of Appeals denied Harris's appeal by decision dated December 30, 2015. *State v. Harris*, Appeal No. 2014AP1767-CR, *slip op.* (Wis. Ct. App. December 30, 2015). App. 6: 1-13.

STATEMENT OF FACTS

Jury Trial

In the early morning hours of August 13, 2011, R97:74-75, the occupant of XX23 63rd Street in Kenosha called the police about noise coming from the attached townhouse unit at XX21 63rd Street. R97: 63, 64, 65. For about a month leading up to August 13, 2011, no one had lived at the townhouse from which the noise was coming. R97: 56.

Officer Niebuhr arrived at about 3:22 a.m. and went inside the caller's home to listen to the noise coming from the neighboring townhouse. R97:74-75. He heard a loud, constant clanging of metal that was continuous for several minutes. R97: 76.

Niebuhr went to the locked back door of the house from which the clanging was coming. R97:77. He saw a screen from one of two small windows on the ground and the latch on the top of the window was unlocked and the glass cracked. R97:77. Officer Gonzalez arrived, entered the house through the window, and unlocked the door to allow Niebuhr to enter the kitchen of the house. R97:78. As soon as both officers walked on the kitchen floor, the metal clanging noises stopped. R97: 78.

The officers started down the stairs into the darkened basement, calling for anyone in there to come out. R97: 80, 81. They got no response. R97: 80. As the officers were still on the stairs, they saw a pair of feet sticking out from another staircase that was in the basement. R97: 80. They got no response when they directed the person to come out with hands up. R97: 81. The officers made their way over to the other staircase and could then see Brian Harris seated there. R97:81. He came out and was arrested while wearing black work-style gloves on his hands. R97: 81, 83.

Niebuhr saw copper piping on the floor that looked to have come from the basement ceiling. R97:82. There was a duffel bag on the floor containing tools including a saw with replacement blades, a bolt cutter type tool, crowbars, flashlights, and a large garbage bag. R97:82-83. Niebuhr brought Harris out to his squad car

where Harris made a batch of incriminating statements including that he was homeless and consistently goes into vacant buildings to sleep. R97: 84. Harris told Niebuhr that he was going to sell copper piping for money and often commits misdemeanors and sells things he gets from vacant homes to have money to get by. R97: 84, 85.

At about 9:00 a.m. the next morning, Detective Buchanan went to the Kenosha County Jail to interview Harris. R97:142, 153. Harris was escorted by jailers to Buchanan in the area just outside of the interview rooms. R97: 143, 144, 151. Buchanan asked Harris if he would like to give a statement to which Harris responded something like, "They caught me, man, I got nothing else to say." R97:151.

After admission of the statements attributed to him by Niebuhr and Buchanan during the state's case-in-chief, Harris testified at trial. R97:191-217. He told the jury he recalled drinking alcohol throughout the afternoon and all during the evening of August 12, 2011, with his friend at his friend's house and then at a nearby bar. R97: 191-195. He very faintly recalled leaving the bar with his friend at about 2:30 a.m. on August 13, 2011. R97:194, 203. He walked in the direction of another friend's house on 64th Street, where he planned to stay. R97: 194, 204. Because Harris was intoxicated at the time, he could not recall what happened when he got to the friend's house on 64th Street or even if he made it to that friend's house. R97:195, 217. The next thing Harris remembered was a police officer standing over him and

telling Harris he was in a house he should not have been in. R97:195-96. Harris recalled being handcuffed by that officer and then recalled nothing else until he was awakened, in the jail, by a detective. R97-196.

Harris explained he did not know anyone who ever lived at the house in which he was found and he did not have consent to be in the house nor to damage anything there. R97:205-06. Harris did not remember going into the house. R97:198. He did not intend to enter the house nor to break anything nor take anything from the house when he did enter. R97: 199-200. Harris did not own any of the items - - the duffel bag, the tools, the crowbars, the bolt cutter, the gloves - - that were found in the house. R97:198-99. He never heard any banging noises when he was in the house. R97:209.

Suppression motion hearing.

Prior to trial, counsel for Harris filed a motion to suppress statements attributed to Harris at the scene of his arrest and, later, at the jail. R32, App. 3:1-2. The motion sought suppression of Harris's statements because required *Miranda* warnings were not given at the scene of his arrest nor at the jail and, under the totality of the circumstances, his statements were not voluntary. R32, App. 3:1-2.

On the day of trial, an evidentiary hearing was held on the motion. R96:4-33. At the hearing, Niebuhr testified about statements he attributed to Harris at and near the scene of his arrest (which are not at issue here), and Buchanan testified about the

statement he attributed to Harris at the Kenosha County Jail several hours after his arrest. R96: 5-18, 19-21. Harris did not testify at the suppression hearing. R96.

Niebuhr testified that he was sure that while Harris was in the basement and before he was removed to the squad car, Harris was asked questions about who he was and what he was doing in that location. R96:15. Niebuhr's aim in posing the questions was to find out who Harris was, if he lived at the building, and the reason he was in there. R96:16.

After asking Harris these questions, Harris was then moved to Niebuhr's squad car. R96:9,15. A plastic plexiglass partition separated Niebuhr from Harris, who was in the back of the squad. R96:15. Niebuhr obtained a mugshot of Harris based on either locating an ID on Harris or on Harris giving Niebuhr his name. R96:16. Niebuhr tried to get in contact with the property owner and was completing paperwork. R96:9,15.

Although Niebuhr was not asking Harris any questions at this time, Harris was making statements while seated in the back seat. R96:9, 10. Niebuhr testified he was not making any threats nor promises to Harris to get him to make statements. R96:10. Harris was telling Niebuhr that he had been homeless for approximately seven years; that he frequently went into vacant houses to sleep; that he was going to take the copper piping and sell it for money for food; that he often commits misdemeanor crimes to get items to sell for food; and that he was alone. R96:9.

As for Buchanan, he testified at the suppression hearing, "I went there [to the jail] with the intention of asking Mr. Harris if he would like to come with me to the detective bureau to be interviewed. I asked him if he would, and he stated to me something to the effect that they caught me, what's the point." R96-19-20. (At *trial*, Buchanan testified, "I reviewed the reports and went to the jail where I attempted to speak to the defendant (R97:143) . . . . I asked to speak to the defendant, and the jailers brought him out in a kind of the common area where I spoke to him. (R97:144). . . . *I asked the defendant if he would like to give me a statement*, and he said, they caught me man, I got nothing else to say." R97: 144.)

The conversation, which was neither videotaped nor recorded, ended there. R96:20, 21.

STANDARD ON REVIEW

Whether evidence should be suppressed because of a purported constitutional violation presents a question of constitutional fact. *State v. Samuel*, 2002 WI 34, ¶ 15, 252 Wis. 2d 26, 643 N.W.2d 423. When reviewing a question of constitutional fact, the circuit court's findings of fact will be upheld unless clearly erroneous, but whether the facts fulfill the constitutional standard is determined independently. *State v. Hambly*, 2006 WI App 256, ¶ 8, 297 Wis. 2d 851, 726 N.W.2d 697, 701.

In determining whether a *Miranda* violation has occurred, the first step is determining whether there was custodial interrogation because "*Miranda* warnings

need only be administered to individuals subject to custodial interrogation. *State v. Fischer*, 2003 WI App 5, ¶ 22, 259 Wis. 2d 799, 656 N.W.2d 503. The State has the burden to show by a preponderance of the evidence whether custodial interrogation occurred. *Id.*

ARGUMENT

The Fifth Amendment to the United States Constitution (applicable to the states by the Fourteenth Amendment), and Article I, § 8 of the Wisconsin Constitution guarantee that no person will be compelled to incriminate himself in a criminal case. "To protect this privilege against self-incrimination, the law forbids police from interrogating suspects held in custody unless the subject of the questioning is first advised of his . . . right to remain silent, i.e., given the *Miranda* warnings." *State v. Ezell*, 2014 WI App 101, ¶ 8, 357 Wis. 2d 675, 855 N.W.2d 453, citing *State v. Torkelson*, 2007 WI App 272, ¶11, 306 Wis. 2d 673, 743 N.W.2d 511. Statements obtained via custodial interrogation without the *Miranda* warnings are inadmissible against the defendant at trial. *Id.*

The Supreme Court in *Miranda v. Arizona*, 384 U.S.436, 86 S.Ct. 1602 held:

> [W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning . . . [h]e must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Id., 384 U.S. at 478-79.

Failure to comply with these constitutional safeguards renders the person's statements inadmissible against that person. *Id*.

In *Miranda*, the Supreme Court established that the State may not use a suspect's statements stemming from custodial interrogation unless the State demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. *Fischer* 2003 WI App at ¶21, 258 Wis. 2d at 811 citing *State v. Cunningham*, 144 Wis. 2d 272, 276, 423 N.W.2d 862 (1988).

Law enforcement officers must administer Miranda warnings at the first moment an individual is subjected to "custodial interrogation." *Miranda*, 384 U.S. at 444. In other words, police must read the Miranda warnings to any person who is both "in custody" and under "interrogation." *State v. Armstrong*, 223 Wis. 2d 331, ¶29, 588 N.W.2d 606 (1999).

The seminal case on interrogation is *Rhode Island v. Innis*, 446 U.S. 291 (1980). Under *Innis*:

> ". . . [T]he Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, 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 300-301.

The latter part of this definition focuses primarily upon the perceptions of *the suspect*, rather than the intent of the police. *Id*. at 301. "This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police." *Id*.

Wisconsin adopted the *Innis* test in *State v. Cunningham*, 144 Wis. 2d 272, 276-82, 423 N.W.2d 862 (1988). In Cunningham, the Wisconsin Supreme Court stated:

> Even where the officer testifies that his or her actions had some purpose other than interrogation, the action must be viewed from the *suspect's* perspective to determine whether such conduct was reasonably likely to elicit an incriminating response. *Cunningham*, 144 Wis. 2d at 279-80. (Emphasis added.)

"Incriminating response" means *any* response - - "whether inculpatory or exculpatory - - that the prosecution may seek to introduce at trial." *Cunningham*, 144 Wis. 2d at 865, quoting *Innis*, 446 U.S. at 301, n. 5, 100 S. Ct. at 1690, n. 5.

The Court of Appeals in *Fischer*, summarized the *Innis* test as follows: "if an objective observer (with the same knowledge of the suspect as the police officer) could, on the sole basis of hearing the officer's remarks or observing the officer's conduct, conclude that the officer's conduct or words would be likely to elicit an incriminating response, that is, could reasonably have had the force of a question on

the suspect, then the conduct or words constitutes interrogation." *Fischer*, 2003 WI App. ¶ 27, 258 Wis. 2d at 813.

Buchanan's question, regardless of his own stated purpose, had the force of exactly what it was - - a question - - and it elicited a responsive answer that objectively could have been anticipated - - an incriminating response that was a statement. Had Buchanan asked Harris if he wanted a drink and Harris blurted out, "I got caught," that would be a nonresponsive incriminating answer not likely to be objectively anticipated. The question Buchanan posed could be and was objectively understood by Harris as a request for a statement. His incriminating response should have easily and objectively and logically been anticipated.

Harris had already provided Officer Niebuhr with a store of unwarned incriminating statements shortly after being questioned in the basement where he was found. Knowledge of these statements would have put Buchanan on alert that Harris was particularly susceptible to police questioning such that contact with Harris, initiated by Buchanan in hopes of obtaining custodial statements useable at trial against Harris, should have commenced with the *Miranda* warnings.

While not binding on this Court, the reasoning of the Supreme Court of Kansas in a case quite similar to Harris's is helpful. In *State v. Hebert*, 277 Kan. 61, 82 P.3d 470 (Kan., 2004), the Supreme Court of Kansas that the defendant's responsive

answer to law enforcement's invitation to provide a statement before providing the defendant with *Miranda* warnings should have been suppressed. *Hebert*, 277 Kan. 61 at 71. The defendant was arrested following his being forced out of a home with tear gas after he shot a deputy sheriff and a police dog inside the house. A few days later, a law enforcement special agent began a videotaped interview with the defendant and the exchange went as follows:

> [Agent]: Talk to you a little bit and get both sides of the story. I've only heard one side of the story and, obviously, there's always two sides of a story here and I'd like in your words, your input and tell me what happened and explain in your words and coming from you. Would you like the opportunity to tell me your side of the story?
>
> [Defendant]: The officer and the dog came up the stairs and he stuck his head out there and I shot him.
>
> [Agent]: Okay.
>
> [Defendant]: The dog came at me and I shot the dog.
>
> [Aent]: Okay. Well, as you know, you've probably already seen it on T.V. a hundred times but, I need to read you your Miranda rights, which is your right to have that done and then I'll be glad to listen to anything you have to say and have you tell me in your own words what happened.

Id. at 67.

The Supreme Court of Kansas held that the agent's "failure to administer a *Miranda* warning to the defendant prior to his custodial interrogation creates the presumption of compulsion as to the defendant's initial confessions. Consequently, the defendant's pre-*Miranda* statement should have been suppressed." *Id*. at 71.

The decision of the Court of Appeals

The Court of Appeals affirmed the trial court's denial of Harris's motion to suppress the statement made to Buchanan, stating that Buchanan's questioning of Harris, "did not constitute 'interrogation,' and thus the detective did not err in failing to provide Harris the *Miranda* warnings." *State v. Harris*, Appeal No. 2014AP1767-CR, slip op., ¶1 (Wis. Ct. App. Decmeber 30, 2015).

The Court of Appeals noted that the precise word choice by Buchanan in asking Harris the question about his willingness to provide a statement is unknowable. Slip op. ¶ 22. Of course, this is due entirely to the fact that Buchanan chose to commence his questioning without recording the questioning. Nevertheless, and in the face of Buchanan's own admission at trial that the message he conveyed to Harris was, "Do you want to make a statement?" - - the Court of Appeals concluded that "the message Buchanan in fact conveyed to Harris was not reasonably likely to lead to an incriminating response and did not constitution interrogation." *Slip op.* ¶ 22.

The Court of Appeals stated:

> While one could argue, from a practical standpoint, Buchanan should have just 'played it safe' and provided Harris the Miranda warning prior to saying a single word to him, Buchanan's actual approach is understandable. If Harris rejected Buchanan's overture to cooperate and provide a formal statement - - as Harris essentially did when he responded to the effect of "I got caught, man, that is there's nothing else to say' - - there would be no subsequent interrogation requiring the *Miranda* warnings. Of his own volition, Harris chose to communicate 'no' to Buchanan in a foolish manner - - leading 'there's nothing else to say' with 'I got caught' - - that provided the State with additional evidence to use against him at trial.

Slip op. ¶ 24.

The decision of the Court of Appeals is in conflict with the *Innis* decision in that it fails to take into account that Harris's statement to Buchanan was reasonably perceived by Harris to be a request for a statement on the spot, made of him while he was in custody, and to which he responded. Without the *Miranda* warnings, it is remarkable that the Court would attribute foolishness to Harris for responding to the request for a statement with a direct, responsive *statement.*

The court of appeals saw as "understandable" the approach of Buchanan in conducting interrogation in what other courts have fairly called a "pre-interview" - - an interview to ferret out whether or not a suspect is likely to ultimately provide a more expansive statement *before* providing the suspect with *Miranda* warnings. Such a "pre-interview" interrogation ignores not only the mandates of *Miranda*, but the reasons for the protections it, along with the Fifth Amendment privilege, provides.

One of the problems of such "pre-interview" interrogations was explained by the Supreme Court of Hawai'i in *State v. Eli*, 126 Hawai'i 510, 273 P. 3d 1196 (2012). In that case, the detective met the in-custody defendant in an interview room, explained to the defendant that he was under arrest for assault, and asked the defendant if he wanted to give a statement and give his side of the story. *Id*. 273 P. 3d at 1200. The defendant agreed to make a statement at this point. *Id*. The detective then turned on a tape recorder and provided the defendant with his

constitutional rights which the defendant waived in writing. *Id.* at 1200-01. The defendant then made incriminating statements in response to questions from the detective. *Id*. The next day, without tape recording, the detective again advised the defendant of his *Miranda* rights and this time the defendant declined to give a statement and signed a form indicating his refusal to answer questions. *Id*. at 1202.

Although the lower court considered the detective's pre-Miranda question to be only "preliminary" and "not designed to elicit a spontaneous incriminating statement," (*Id.* at 1206-07), the Supreme Court of Hawai'i held that the detective's custodial solicitation of the defendant's side of the story without first informing the defendant that he had the right to remain silent was prohibited by *Miranda* and violated the defendant's due process right to a fair trial under the Hawai'i constitutional provision. *Id*. at 1209. In so holding, the court stated:

> By asking Defendant if he wanted to give his side of the story without first stating the Miranda warnings, Detective violated Defendant's right to be informed of his right to remain silent before making the decision and commitment to give a statement. In inviting Defendant to speak and in obtaining his commitment to do so before Miranda warnings were given, the police elicited statements without informing Defendant of the consequences of his waiving his right to remain silent and the entire panoply of rights such a commitment involved. In effect, in getting Defendant to agree to give a statement before being informed of his rights, the police invoked a practice that would permit a defendant to waive the right to be informed of his *Miranda* rights when *Miranda* recognizes a waiver of rights only if those rights are known to the defendant.

Id. at 1209.

The Supreme Court of Hawai'i understood that an in-custody suspect, without knowing his rights under Miranda, may make an agreement to make a statement he finds it difficult to renege upon once he is told about his rights. This Court need not consider such a scenario because in Harris's case there was no Mirandized, subsequent interview after the "pre-interview" question. That is because Harris reasonably understood Buchanan's question to be a request for an on-the-spot statement which, in the absence of Miranda warnings, Harris provided.

It may be that the Court of Appeals in Harris's case was loathe to criticize the actions of Detective Buchanan because they were not indicative of a clearly *intentional* violation of *Miranda* on Buchanan's part. However, the intent of Buchanan is not relevant because whether or not his *Miranda* violation was intentional, the *statements* derived from the violation should not have been admitted. If Harris's statement to Buchanan led to the discovery of derivative *physical* evidence, the fact that Buchanan's *Miranda* violation was probably not intentional would have some import. That is because, in the absence of actual coercion, suppression of *physical* evidence obtained as a consequence of unwarned interrogation is not required under the United States Constitution. *State v. Ezell*, 2014 WI App 101 at ¶ 9, 357 Wis. 2d 675, 855 N.W.2d 453, citing *United States v. Patane*, 452 U.S. 630, 643-44 (2004). Likewise, the Wisconsin Constitution requires "suppression of physical evidence obtained 'as a direct result of an intentional violation of *Miranda*,'

but in the absence of coercion or intentional violation of the suspect's rights, there is no basis for suppressing physical evidence." *Id*., quoting *State v. Knapp*, 2005 WI 127, ¶ 83, 285 Wis 2d 86, 700 N.W.2d 899.

Unlike the treatment of the admissibility of *physical* evidence derived from *Miranda* violations, the intentional or unintentional nature of a *Miranda* violation is simply not a factor in determining the admissibility of a suspect's *statements* obtained through unwarned custodial questioning. Both the Article I, § 8 of the Wisconsin Constitution and the Fifth Amendment to the United States Constitution promise that no person will be compelled to incriminate himself or herself in a criminal case. "To protect this privilege against self-incrimination, the law forbids police from interrogating suspects held in custody unless the subject of the questioning is ***first*** advised of his or her rights to remain silent, i.e., given the *Miranda* warnings. . . Statements obtained via custodial interrogation without *Miranda* warnings are inadmissible against the defendant at trial." *Ezell*, 2014 WI App, ¶ 8 [Emphasis added], citing *State v. Torkelson*, 2007 WI App 272, ¶ 11, 306 Wis. 2d 673, 743 N.W.2d 511.

Under *Innis*, the request for the statement directed at Harris while he was in custody and hours after his arrest and booking, was not administrative; it was investigative. It was an interrogation under *Innis*. The question posed by Buchanan was not innocuous; it was not related to administrative information necessary for the

booking of Harris or incident to his arrest. Harris's incriminating statement to Buchanan did not result from a conversation or contact initiated by Harris; it did not occur in the course of a conversation in which Harris put questions to Buchanan and then gave spontaneous reactions to responsive statements of Buchanan, as in *Fischer*. The statements were not spontaneously made by Harris in the absence of a question directed to him by law enforcement, as in *Cunningham* and *Innis*. Buchanan's question could only be understood to relate to the investigation from which Harris's charges were ultimately issued and for which he was in custody. The question was addressed directly to Harris by Buchanan and clearly invited a statement about the incident for which he was in custody. It was reasonably understood by Harris to be what it was - - a question - - asking for what he reasonably provided in response - - a responsive statement.

CONCLUSION

This Court should reverse the decision of the Court of Appeals and hold that Harris's unwarned statement in response to Buchanan's question should have been suppressed, vacate Harris's conviction, and remand the case for a new trial at which his unwarned statement is not admitted at trial.

This will underscore for police and courts that unwarned questioning of persons in custody about whether or not they will provide a statement *is* interrogation. Officers and detectives cannot reasonably claim to be surprised that a request for a

statement elicits what is requested - - a statement. Moreover, given the fact that the suspect has been arrested presumably based on probable cause, it is foreseeable that a responsive statement may be incriminating - - that is, it may be a response the prosecution may seek to introduce at trial.

As the *Cunningham* Court noted, the purpose behind the *Miranda* and *Innis* decisions is to prevent law enforcement officers from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment. *Cunningham*, 144 Wis 2d 283. In furtherance of the purposes of *Miranda*, this Court should underscore for law enforcement that a foreseeable result of asking an in-custody suspect if he would like to give a statement is that the suspect will give a statement that the prosecution may want to introduce at trial. This Court should clarify that law enforcement's use of an approach of intentionally or unintentionally putting to in-custody suspects requests or invitations to provide statements before providing *Miranda* warnings will result in the responses being unusable at trial. This will deter police from undertaking the "pre-interview" approach used by Buchanan in Harris's case that is in violation of *Miranda* and, to the extent it undercuts the protections *Miranda* and the Fifth Amendment are meant to ensure, it is unreasonable.

Failure to so hold will embolden or confuse police such that, in the wake of the Court of Appeals' decision, police will be more likely to forego informing suspects

of their *Miranda* warnings in favor of undertaking the initial stage of in-custody interrogations with lead-off questions such as, "Would you like to make a statement?" or "Do you have a statement for me?" or "How about a statement?" or "Would you like to give me your side of the story?" - - all likely to elicit incriminating responses.

Dated this 16th day of May, 2016.

Respectfully submitted:

s / Kathleen M. Quinn
Kathleen M. Quinn
Attorney at Law

CERTIFICATION OF CONFORMITY
WITH § 809.19(8)(b) and (c)

I, Kathleen M. Quinn, hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font. The length of this brief is 4,891 words according to the word count function of the word processor available in WordPerfect 9.

s / Kathleen M. Quinn
Kathleen M. Quinn
State Bar No. 1025117

CERTIFICATION OF COMPLIANCE WITH
§ 809.19(12)

I, Kathleen M. Quinn, hereby certify that I have submitted an electronic copy of the brief, excluding the appendix, which complies with the requirements of § 809.19(12). I further certify that the electronic brief is identical in content and format to the printed form of the brief filed.

Signed:

s / Kathleen M. Quinn
Kathleen M. Quinn
State Bar No. 1025117

CERTIFICATION OF CONFORMITY WITH § 809.19(2)(b) REGARDING APPENDIX

I hereby certify that filed with this brief, as a part of the paper version of the brief, is an appendix that complies with § 809.19(2)(a) and that contains: (1) a table of contents; (2) the findings or opinions of the trial 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 trial court's reasoning regarding those issues; and (5) the decision of the Court of Appeals.

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.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

I am not filing an electronic version of the appendix.

s / Kathleen M. Quinn
Kathleen M. Quinn
State Bar No. 1025117

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