STATE OF WISCONSIN
SUPREME COURT

NO. 2014AP001767-CR

DISTRICT II
LOWER CASE NO. 2011 CF 797

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN I. HARRIS,

Defendant-Appellant-Petitioner.

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

ON PETITION FOR REVIEW FROM
A DECISION OF THE WISCONSIN COURT OF APPEALS
AFFIRMING THE JUDGMENT OF CONVICTION
ENTERED IN KENOSHA COUNTY CIRCUIT COURT,
THE HONORABLE S. MICHAEL WILK PRESIDING

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TABLE OF AUTHORITIES

The defendant, Brian Harris, by his attorney, Kathleen M. Quinn, relies on the reasoning and arguments set forth in his initial brief and incorporates them by reference herein. In addition, Harris submits the following replies to the assertions and arguments set forth in the brief of the Plaintiff-Respondent.

The State asserts that Buchanan's inquiry to Harris to the effect, "Do you wish to make a statement?" was one that an objective observer would have concluded was "far more likely to generate a 'yes' or 'no' response than it would produce an incriminating one" (Brief of Plaintiff-Respondent, page 9-10). The assertion is both baseless and irrelevant. There is neither data nor linguistic support for the State's assertion.

For conduct to be the functional equivalent of interrogation, the conduct of the police need only be "*reasonably likely* to elicit an incriminating response." *State v. Cunningham*, 114 Wis. 2d 272, 278, 423 N.W.2d 862 (1988), *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980). The conduct need not be *more likely* to produce an incriminating response than a non-incriminating response. It must be *reasonably likely* to elicit an incriminating response. It is beyond reasonable argument that the question, "Do you wish to make a statement?" put to a suspect in custody just hours after his middle-of-the-night arrest is reasonably likely to be perceived by the suspect as a request for a statement and, therefore, to elicit a statement the state will want

to introduce at trial. This is especially apparent under the circumstances of this case in which Detective Buchanan read the reports of the arresting officer before going to question Harris, (R97:143), and, therefore, knew Harris's emotional state was one in which he was especially inclined to explain himself to law enforcement with statements that a prosecutor would want to introduce at trial against Harris.

The State seems to urge a bright-line rule that if the question from law enforcement "Do you wish to make a statement?" can reasonably be interpreted as a request about whether or not a suspect wishes to talk to the police, the question should not be regarded as the functional equivalent of an interrogation. (State's Brief, page 9). This is turning the inquiry on its head. The critical inquiry is just the opposite: whether the question (or other police conduct) is reasonably likely to elicit an incriminating response - - and, if so, it is the functional equivalent of interrogation. *Cunningham*, 114 Wis. 2d at 278. That an alternate non-incriminating response is imaginable if the question can possibly be interpreted differently is not relevant or helpful.

The State's presentation of what was "the key" and what was "determinative" (Brief of Plaintiff-Respondent, pages 11 and 12) to the court in *State v. Hebert*, 277 Kan. 61, 82 P.3d 47 (Kansas Supreme Court 2004), overstates the import of comments made by the officer to the suspect, Hebert,

before asking Hebert if he would like the opportunity to tell his side of the story. The *Hebert* court's conclusion that the presumption of compulsion as to Hebert's initial confession made in response to police questioning was based squarely on the "officer's failure to administer a *Miranda* warning to Hebert prior to his custodial interrogation." *Id.*, 277 Kan. at 71.

The interview of Hebert was videotaped, and began with the following:

> S.A. Cordts: 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?
> Hebert: The officer and the dog came up the stairs and he stuck his head out there and I shot him.
> S.A. Cordts: Okay.
> Hebert: The dog came at me and I shot the dog.
> S.A. Cordts: 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., 277 Kan. at 67.

The Court held:

> In this case, Agent Cordts testified that he was shocked that the defendant responded with an incriminating statement. This court, however, is not concerned with the agent's subjective feelings, but whether he or she should have known his or her words were reasonably likely to elicit an incriminating response. [citation omitted]. A careful review of the agent's entire opening statement reveals that it was reasonable that the defendant would respond in the manner that he did.

> Before asking, "Would you like the opportunity to tell me your side of the story," Agent Cordts told the defendant he would like to hear his side of the story in his own words. This is exactly what the defendant did. The officer should have known that the defendant, who had made no previous statement, who knew he had shot the officer, and who had been in custody for several hours, might be anxious to take him up on this request to hear his side of the story. This question was not a routine booking question; rather, it was designed to gain information from the defendant about the shooting. The brief question as to whether the defendant wanted to tell his side of the story, preceded by several requests by Agent Cordts that he wanted to hear the defendant's side of the story, elicited the defendant's confession while he was in custody. The interrogation should have begun with the administration of a *Miranda* warning.
>
> The officer'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 confession. Consequently, the defendant's pre-*Miranda* statement should have been suppressed.

(*Id*., 277 Kan. at 70-71).

In Harris's case, we cannot be sure of Buchanan's words to Harris because, unlike Agent Cordts, Detective Buchanan failed to record his questioning of Harris. Asked for a statement, that is exactly what Harris provided. Buchanan read the arresting officer's reports which were rife with incriminating statements Harris made at the time of his arrest and soon after the arresting officer asked him questions. From those reports, Buchanan knew that Harris was likely to be anxious to take Buchanan up on his request for a statement from Harris. Asking Harris if he would like to make a statement was not a routine booking question nor ministerial in any way. It was investigative and designed to gain information from Harris about the burglary for which he

was arrested and about which Harris had already provided a myriad of incriminating statements to the arresting officer. The question from Buchanan about whether Harris wanted to give a statement is what elicited Harris's confession to Buchanan. Harris did not blurt out a confession to the guards escorting him to the spot where Buchanan questioned him. Instead, his confession was in direct response to Buchanan's question.

The State finds it important that Hebert was in a designated interrogation room and Harris was not. Whatever room (or street, or lot, or car) in which an officer interrogates a subject *is* an interrogation room. The label on the door of a room does not define the conduct of the officer. To hold otherwise would encourage the mistaken belief that conduct the functional equivalent of interrogation is not, based on the label given to the room in which the conduct occurs.

In attempting to distinguish the *Hebert* case from Harris's case, the State overreaches. First, the State attributes to Hebert "stress" over the physical condition of the officer he had shot, writing, "Hebert encountered Agent Cordts within hours of the alleged shooting and had stress over the physical condition of the officer he had allegedly shot, while Harris met Detective Buchanan a day after being caught in the act of burglary." (Brief of Plaintiff-Respondent, p. 11). There is no basis for the State's attribution of

stress to Hebert; there is nothing in the decision to support that Hebert was under any stress other than the fact that, about an hour before Hebert was questioned, he asked whether the officer he shot died. *Hebert*, 277 Kan. at 67.

Furthermore, the State's suggestion that there was *any* difference - - let alone a meaningful one - - between the length of time from the arrest of each man to each man's interrogation is inaccurate.[1] It is a mistake for the State to suggest Hebert was questioned "within hours of the alleged shooting . . . while Harris met Detective Buchanan a day after being caught." (Brief of Plaintiff-Respondent, p. 11). In the case of both Hebert and Harris, about six hours lapsed between arrest at the crime scene and interrogation; Hebert was in custody from shortly after 3:45 p.m. on November 16, 1999, (277 Kan. at 64-65), until Agent Cordts spoke to him at about 9:45 p.m. that same day, (277 Kan. at 67), and Harris was in custody shortly after 3:22 a.m. on August 13, 2011 until Detective Buchanan spoke to him at about 9:00 a.m. that same day.

The disparities between the verbal interactions of law enforcement with Hebert versus that with Harris is unknowable because Buchanan chose to commence his questioning of Harris without recording it. However, the

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[1] Harris notes that in *his* initial brief, at page 12, counsel for Harris wrongly indicated that the interrogation in the Hebert case took place "a few days" after Hebert's arrest. That was a mistaken statement of the facts in Hebert. In fact, from the time of Hebert's arrest to the time of his interrogation was six hours.

critical similarity is that, like the officer in *Hebert*, Buchanan failed to administer the *Miranda* warnings prior to eliciting the confession with a question that was reasonably understood by Harris to be a request for a statement about the crime for which he was arrested and in custody.

State v. Bond, 2000 WI App 118, 237 Wis. 2d 633, 614 N.W.2d 552 fully supports Harris's position that Buchanan's questioning constituted interrogation or its functional equivalent. The *Bond* court set forth the five factors linked to the *Innis/Cunningham* standards and every one of the factors supports Harris.

First, as in *Bond*, the words put to Harris by Buchanan were not attendant to arrest and custody.

Second, Buchanan should have foreseen that a request for a statement was likely to elicit an incriminating response from Harris because the reports written by the arresting officer and reviewed by Buchanan before he approached Harris made clear that Harris was unusually susceptible to police questioning and was likely to respond to the invitation to provide a statement with an incriminating one. Buchanan had from those reports specific knowledge about Harris which informed Buchanan that a question for a statement from Buchanan would have the force upon Harris of a question for a statement. Buchanan had information that put him on alert that an

interaction with Harris should commence with the *Miranda* warnings before any request for a statement.

Third, Harris's perception that Buchanan was asking him for a statement when Buchanan asked Harris if he would like to make a statement was utterly reasonable. It is from the *suspect's* perspective that the determination is to be made whether police conduct was reasonably likely to elicit an incriminating response. *Cunningham*, 144 Wis. 2d at 279-80. Buchanan readily conceded that it was his intent to talk to Harris to obtain from him a statement. Due to Buchanan's sloppiness in introducing the topic with a request for a statement before providing *Miranda* warnings, Harris's perception that he was being asked for an on-the-spot statement is understandable and reasonable.

The defendant in *Bond* was fortunate that there was an honest witness to his interaction with the officer whose conducted amounted to the functional equivalent of interrogation. It is not typical for impartial observers to be present during questioning of suspects by police, and Harris's case is no exception. This fact underscores the importance of recording interrogations for review by impartial courts. It is the State's burden under *State v. Fischer,* 2003 WI App 5, 259 Wis. 2d 799, 656 N.W.2d 503, to establish by a preponderance of the evidence whether or not a custodial interrogation took

place. Detective Buchanan's decision to initiate the interrogation of Harris without recording it should not accrue to the State's benefit. Harris's responsive statement made to the question put directly to him by Buchanan evinces Harris's perception that he was being asked for a statement. His perception, as the suspect, and under the circumstances of this case, was reasonable.

Fourth, Buchanan knew that Harris was a guy for whom nothing more provocative or more specific than a request for a statement was required to elicit from him incriminating statements. The statement made to the suspect in *Bond* was highly particularized and provocative, and revealed the intentional nature of the *Miranda* violation. The violation of Harris's *Miranda* rights was not undertaken with as much cunning or design as the violation of Bond's rights and did not need to be; the arresting officer's reports made clear for Buchanan that Harris was likely to be susceptible to a mere request for a statement. Moreover, as explained in Harris's initial brief, whether or not the violation of a suspect's *Miranda* rights is intentional or unintentional is not relevant to the determination of whether the statement obtained as a result of unwarned interrogation or its functional equivalent is admissible in the State's case in chief. It is not.

Fifth, as with the provocative statement made to the defendant in *Bond*, the brevity of the conversation between Buchanan and Harris confirms the power of Buchanan's question to provoke from Harris a responsive incriminating statement. As the *Bond* court indicated, "To conclude otherwise would be to discount the claim of a defendant simply because he or she quickly succumbs to an effective police technique. That would indeed 'place a premium on the ingenuity of the police to devise methods of indirect interrogation, rather than to implement the plain mandate of *Miranda*.'" *Bond* at ¶ 22, referencing *Innis*, 446 U.S. at 299 n. 3 (quoted source omitted).

The State spends much energy on distinguishing *State v. Eli*, 126 Hawai'i 510, 273 P.3d 1196 (2012), from Harris's case. As stated in Harris's initial brief (at page 14), Harris indicated that this Court need not consider the issue posed in *Eli* regarding the impact of a "pre-interview" question without *Miranda* warnings on the admissibility of statements elicited in a subsequent, *Mirandized* interview. This is because in Harris's case, there was no subsequent *Mirandized* interview after the "pre-interview" question; 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. Nevertheless, the case *is* helpful to this Court because the *Eli* court articulated the problems posed by the pre-interview approach used by Buchanan in

questioning Harris - - an approach the Court of Appeals found to be "understandable." As the *Eli* court explains, the approach, at best, puts the suspect in the position of making the decision to enter or forego an agreement to make a statement without the information necessary for the making of the decision. At worst, the approach puts the suspect in the position of having entered an agreement to provide a statement in the absence of *Miranda* warnings from which, in the aftermath of *Miranda* warnings, he may find it difficult to withdraw. The subtle coercion created by this dynamic is real and is what up-front *Miranda* warnings prevent.

The State misconstrues Harris's conclusion that 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," (Brief of Defendant-Appellant, page 18) as a call for a "bright-line rule" prohibiting police from inquiring as to whether a suspect wishes to make a statement before the reading of *Miranda* warnings. Not so. For instance, such a question may not violate *Miranda* and the Fifth Amendment if it is posed in a conversation or contact initiated by the suspect. However, under the circumstances of Harris's case, the question violated Harris's Fifth Amendment rights and his rights under *Miranda* and *Innis* and it should have been suppressed.

This Court should hold that under the totality of the circumstances in this case, Buchanan should have reasonably foreseen that his question, "Do you wish to make a statement?" in the absence of *Miranda* warnings was reasonably likely to elicit an incriminating response and, as such, the statement should have been suppressed. Failure to so hold will encourage law enforcement to engage in the pre-interview approach used by Buchanan in Harris's case and, thus, to undercut the protections of *Miranda* and the Fifth Amendment.

Harris agrees that, following a decision by this Court that the circuit court and court of appeals erred by admitting Harris's statement to Detective Buchanan, the case should be remanded to the circuit court to make appropriate findings under *Harrison v. United States*, 392 U.S. 219, 224-26, 88 S. Ct. 2008 (1968) and *State v. Lemoine*, 2013 WI 5, 345 Wis. 2d 171, 827 N.W.2d 589.

Dated this 10th day of July, 2016.

Respectfully submitted:

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**CERTIFICATION OF CONFORMITY WITH § 809.19(8)(b) and (c)
AND OF COMPLIANCE WITH § 809.19(12)
AND CERTIFICATION OF DELIVERY**

I, Kathleen M. Quinn, hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with proportional serif font. The length of the brief is 2,894 words according to the word count function of the word processor available in WordPerfect 9.

I further certify that I have submitted an electronic copy of the brief and that the electronic brief is identical in content and format to the printed form of the brief filed.

Finally, I certify that I have made arrangements for the hand-delivery by the business, Alphagraphics, Madison, of 22 copies of this brief to: Clerk of Wisconsin Supreme Court, 110 E. Main Street, #215, P.O. Box 1688, Madison, WI 53701-1688 and 3 copies of this brief to: Attorney General Brad Schimel, 17 W. Main Street, P.O. Box 7857, Madison, WI 53707-7857. Delivery was arranged to be made no later than Monday, July 11, 2016.

Signed:

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