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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

No. 2018AP2319-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

MANUEL GARCIA,

Defendant-Appellant.

PETITION FOR REVIEW AND APPENDIX

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INTRODUCTION

The State of Wisconsin petitions this Court for review of the court of appeals' decision in *State v. Manuel Garcia*, No. 2018AP2319-CR, 2020 WL 5933798 (Wis. Ct. App. Oct. 7, 2020) (recommended for publication). (Pet-App. 101–15.)

Defendant-Appellant Manuel Garcia made inculpatory statements to police about his involvement in the death of his girlfriend's two-year-old son, J.E.M. The Racine County Circuit Court excluded those statements from use at trial, finding that Garcia's waiver of his *Miranda*[1] rights was voluntary but invalid due to his limited English proficiency. However, the circuit court later allowed the State to use the statements on redirect after Garcia's cross-examination of a witness opened the door to their introduction. A jury convicted Garcia of first-degree reckless homicide.

Garcia appealed, arguing that the circuit court erroneously exercised its discretion when it admitted his statements. The court of appeals ordered supplemental briefing to address whether the impeachment exception discussed in *Harris*[2] applied in this case and the effect, if any, it had on the *Brecht*[3] rule that a defendant may open the door to the use of his statements.

The court of appeals reversed in a decision recommended for publication. Despite the fact that the statements were not offered or admitted under *Harris*'s impeachment exception, the court concluded that *Harris* forbade admission of Garcia's statements unless Garcia

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).
[2] *Harris v. New York*, 401 U.S. 222, 225–26 (1971).
[3] *State v. Brecht*, 143 Wis. 2d 297, 421 N.W.2d 96 (1988).

himself testified. The court dismissed the State's reliance on this Court's *Brecht* holding, stating that *Brecht* did not apply because it involved pre-*Miranda* silence rather than an invalid *Miranda* waiver.

This Court should accept review and reverse the court of appeals. In so doing, this Court should clarify that "opening the door" and impeachment are distinct exceptions to the inadmissibility of un-Mirandized statements and hold that the "opening the door" exception applies to un-Mirandized statements as well as pre-*Miranda* silence.

ISSUE PRESENTED FOR REVIEW

Did the court of appeals err when it reversed Garcia's conviction based on the legal conclusion that the introduction at trial of inculpatory statements Garcia made to police violated his rights under *Miranda* because Garcia himself did not testify, despite the fact that the circuit court admitted the statements under the "opening the door" exception, elucidated by this Court in *Brecht*, and not the impeachment exception discussed in *Harris*?

The circuit court allowed the State to use Garcia's statements, despite their being previously excluded under *Miranda*, because it found that Garcia's cross-examination of a witness had "opened the door" to the State's use of the statements.

The court of appeals reversed, concluding that the impeachment exception did not apply because the defendant himself did not testify.

STATEMENT OF CRITERIA SUPPORTING REVIEW

The issue presented by this petition presents a "real and significant question of federal . . . constitutional law."

See Wis. Stat. § (Rule) 809.62(1r)(a). Specifically, this case involves the admissibility of Garcia's inculpatory statements in a trial for the violent homicide of a two-year-old child, which implicates his rights under the Fifth Amendment to the United States Constitution.

Additionally, the issue presented "is a question of law of the type that is likely to recur unless resolved by the supreme court." *See* Wis. Stat. § (Rule) 809.62(1r)(c)3. In cases where a defendant's statements are excluded under *Miranda*, litigants and courts need clarity on the applicability of exceptions that might lead to statements becoming admissible. The court of appeals' opinion in this case muddied the waters rather than making them clearer because it implied that the limitations on the impeachment exception apply equally to all other exceptions to the general rule of the inadmissibility, including the "opening the door" exception.

Finally, review is warranted because the court of appeals' opinion—which the court recommended for publication—"is in conflict with controlling opinions of" this Court. *See* Wis. Stat. § (Rule) 809.62(1r)(d). Specifically, although the statements in question were admissible under *Brecht*, the court of appeals erroneously determined that *Brecht* was inapplicable.

STATEMENT OF THE CASE

In the early morning hours of Friday, March 12, 2010, Racine Police Investigator Brad Spiegelhoff responded to a call of a deceased 26-month-old child—J.E.M., the son of Garcia's girlfriend—at Wheaton Franciscan Hospital. (R. 1:1.) During his investigation into the child's death, Spiegelhoff learned from Racine County Medical Examiner Tom Terry and forensic pathologist Dr. Linda Biedrzycki

that J.E.M. had experienced kidney failure, perforated intestines, a lacerated liver and pancreas, and broken ribs. (R. 1:1; 56:15.) Dr. Biedrzycki told Spiegelhoff that the injuries were caused by blunt force trauma to the chest and abdomen and that a simple fall could not have caused injuries that significant. (R. 1:1.) Knowing that J.E.M. had been in Garcia's care shortly before his death, Spiegelhoff went to Garcia's home and took him into custody. (R. 1:2; 56:17.)

At the police station, Spiegelhoff had Garcia read a notification and waiver of rights form. (R. 56:19.) After reading the form, Garcia signed it, indicating that he understood his rights and wished to speak with Spiegelhoff. (R. 1:2; 56:30.) "Within a couple of minutes, Garcia was crying and apologizing for what had happened." (R. 1:2.) Garcia admitted that he became frustrated with J.E.M. while trying to get ready for work on Thursday and punched J.E.M. two or three times, then threw him onto a mattress before punching him again. (R. 1:2.) Garcia said he punched J.E.M. in the chest, on the back by his kidneys, on the side of his body, and on the front right side of his abdomen. (R. 1:2.)

The State charged Garcia with first-degree reckless homicide on April 1, 2010. (R. 3:1.) During pretrial proceedings, the State moved to admit Garcia's confession at trial. (R. 9:1.) The circuit court held a series of hearings over the course of the next two years to determine whether Garcia's statements were admissible under *Miranda* and *Goodchild*[4]. (R. 56; 57; 58; 59; 62.) The hearings included testimony from Spiegelhoff (R. 59:7–9) and Garcia (R. 59:9–

[4] *State ex rel. Goodchild v. Burke*, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

11), as well as expert testimony related to Garcia's capacity to understand the English language. (R. 59:15–28.)

Following the hearings and written arguments by the parties, the circuit court delivered an oral ruling. (R. 59:1.) The court reviewed the voluminous testimony collected during the hearings and concluded that the State had made a prima facie showing that Garcia waived his *Miranda* rights, but further determined that Garcia had successfully rebutted the State's showing and demonstrated that he did not understand his rights when he waived them. (R. 59:35.) The court therefore denied the State's motion to use Garcia's confession as a part of its case in chief. (R. 59:35.) The court noted, however, that its ruling had "no effect upon use for rebuttal purposes." (R. 59:36.)

A jury trial began on September 8, 2014.[5] (R. 76:1.) On the second day of trial, Spiegelhoff testified about his involvement with the case and the investigation into J.E.M.'s death. (R. 77:142.) While cross-examining Spiegelhoff, Garcia asked a series of questions that evoked answers indicating that police investigators did not follow up on an incident at a laundromat in which J.E.M. allegedly fell from a laundry cart. (R. 77:163–68.) Garcia also asked questions that suggested that the police did not investigate anything that happened the Wednesday before J.E.M.'s death, and that they did not thoroughly investigate a claim by Garcia that J.E.M. fell down some stairs before his death. (R. 77:169–80.)

After Garcia completed cross-examination, the State requested a sidebar. (R. 77:182, Pet-App. 119.) Outside of the jury's presence, the State argued that Garcia had "gone to great lengths to challenge the credibility and the job done by

Investigator Spiegelhoff." (R. 77:182, Pet-App. 119.) The State argued that this questioning "opened the door" to Garcia's confession because explaining why the police did not investigate certain things—they already had Garcia's confession—was the only way to rehabilitate Spiegelhoff's credibility as a witness. (R. 77:182, Pet-App. 119.) The court noted that it was concerned by some of Garcia's questions. (R. 77:183, Pet-App. 120.) The court deferred ruling on the State's request until it had the opportunity to review the transcript.

The next morning, the court returned to the State's request. (R. 79:3, Pet-App. 123.) The court began by reciting Garcia's cross-examination of Spiegelhoff. (R. 79:5–10, Pet-App. 125–30.) The court then commented that it was "absolutely proper cross-examination." (R. 79:10, Pet-App. 130.) The court noted that the State did not object to the questioning, but further explained that the issue was whether the questioning "opened the door or, put it in legal terms, put the issue into controversy as to whether or not the investigator can explain why he didn't investigate these things." (R. 79:10, Pet-App. 130.)

The court then reviewed the transcript of Garcia's confession. (R. 79:13–18, Pet-App. 133–38.) The court noted that Judge Marik's initial ruling on the admissibility of the confession did not mention the *Goodchild* portion of the inquiry related to voluntariness. (R. 79:19, Pet-App. 139.) The court further acknowledged Judge Marik's statement that the court's ruling had "no effect upon use for rebuttal purposes." (R. 79:19, Pet-App. 139.) The court continued, "So Judge Marik's aware of the *Miranda Goodchild* law rules. And he indicated no effect upon use for rebuttal purposes

[5] The Honorable Michael J. Piontek presided over the trial.

which again leads me to conclude that Judge Marik had no issue with the voluntariness of the statement." (R. 79:19–20, Pet-App. 139–40.) Finally, the court noted, "The reason that's important again is because if it's nonvoluntary, it doesn't matter how the State seeks to use it. If it's voluntary, the State can use it under certain circumstances." (R. 79:20, Pet-App. 140.) The court agreed with Judge Marik's determination that the confession was voluntary. (R. 79:20, Pet-App. 140.)

The court concluded that while Garcia's questioning of Spiegelhoff was proper, "from a fundamental fairness perspective to not allow the jury, and they are the fact finders, to hear Investigator Spiegelhoff's reasoning or rationale behind his decision to not investigate further would cause the jury to be misled. Period." (R. 79:21, Pet-App. 141.) The court called it offensive "that a jury would be misled into believing that somehow the investigator did not do his job when that is really at the behest of the defense to not allow him to explain why he took the actions that he did." (R. 79:22, Pet-App. 142.) The court continued, "the only way for him to do that is to explain that he had this statement in hand, what the statement said, and he felt he didn't need to go any further with looking for other potential causes." (R. 79:22, Pet-App. 142.) The court therefore ruled that the State would be allowed to recall Spiegelhoff as a witness and ask questions related to Garcia's confession. (R. 79:22, Pet-App. 142.)

The State recalled Spiegelhoff, who testified that he did not follow up on certain aspects of the investigation because he had already received a "plausible explanation of the injuries" from Garcia and described Garcia's confession. (R. 79:30.) The State then played a portion of Garcia's videorecorded interview with police for the jury. (R. 79:31.) In due course, the jury found Garcia guilty of first-degree

reckless homicide. (R. 80:86.) The court sentenced Garcia to 40 years of initial confinement and 10 years of extended supervision. (R. 35:1.)

Garcia appealed his conviction. He argued that the circuit court erroneously exercised its discretion when it allowed the State to introduce his inculpatory statements after finding he had opened the door to their use. (Garcia's Br. 8–9.) The State responded, arguing that admission of the statements was proper. (State's Response Br. 9.) Garcia did not file a reply brief.

The court of appeals then ordered supplemental briefing on "whether the rule set forth in *Harris v. New York*, 401 U.S. 222, 225–26 (1971), applies under the circumstances of this case where the evidence was introduced during the state's case-in-chief and was not introduced to impeach the defendant's testimony." (Pet-App. 116.) The court of appeals also ordered the parties to "address whether the concept that a defendant may 'open the door' to the admission of previously excluded evidence, as our supreme court discussed in *State v. Brecht*, 143 Wis. 2d 297, 313–14, 421 N.W.2d 96 (1988), and as was cited by the State in this case, is limited by *Harris* and its progeny or limited at all." (Pet-App. 116–17.) The court of appeals ordered the parties' supplemental briefs to be filed simultaneously, and it scheduled the matter for oral argument.[6] (Pet-App. 117–18.)

[6] Oral argument was later canceled and not rescheduled.

On October 7, 2020, the court issued a decision reversing Garcia's conviction and remanding the case to the circuit court. The court of appeals wrote that "[t]he issue presented [was] clear and straightforward: may the State invoke the impeachment exception to the exclusionary rule during the State's case-in-chief to 'rehabilitate' one of its witnesses?" *Garcia*, 2020 WL 5933798, ¶ 1. (Pet-App. 101.) The court "conclude[d] that a defendant's statements obtained in violation of *Miranda* may be used to impeach only the defendant's testimony, and, accordingly, may not be used during the State's case-in-chief." *Id.* ¶ 14. (Pet-App. 112.) It therefore reversed Garcia's conviction and remanded the matter to the circuit court.

ARGUMENT

I. This Court should accept review and reverse the court of appeals.

A. "Opening the door" is a distinct exception to *Miranda* unrelated to the impeachment exception.

It is well established that custodial statements made by a defendant without his being given the proper *Miranda* warnings are generally inadmissible in the State's case-in-chief. *State v. Knapp*, 2003 WI 121, ¶ 114, 265 Wis. 2d 278, 666 N.W.2d 881 ("*Knapp I*"), *vacated and remanded*, 542 U.S. 952 (2004), *reinstated in material part*, 2005 WI 127 ¶ 2, 285 Wis. 2d 86, 700 N.W.2d 899 ("*Knapp II*"). But statements obtained in violation of *Miranda* are admissible in certain circumstances because "the exclusionary rule is not absolute, but rather is connected to the public interest, which requires a balancing of the relevant interests." *Knapp II*, 285 Wis. 2d 86, ¶ 23. Two exceptions to the general rule of exclusion relevant to this case are "opening the door" and impeachment.

This Court explained the "opening the door" exception in *Brecht*. There, the State was allowed to elicit testimony about the defendant's pre-*Miranda*-warning silence because his lawyer "opened the door" to that issue while cross-examining a police officer who had arrested the defendant. *State v. Brecht*, 143 Wis. 2d 297, 313, 421 N.W.2d 96 (1988). Defense counsel elicited testimony that the defendant had told the arresting officer that he "wanted to talk to someone," and that "it was a 'big mistake,'" though he did not explain to the officer what he meant by "big mistake." *Id.* at 314. On redirect, the State asked about Brecht's pre-*Miranda*-warning silence. Although such testimony is generally inadmissible during the State's case-in-chief, this Court held that under the circumstances the redirect testimony on that subject was permissible. "Because Brecht's counsel initially raised the issue of Brecht's silence when under arrest [on cross-examination], the State was free to subsequently elicit [the officer's] testimony on Brecht's silence during arrest on redirect." *Id.* The Court suggested that the State's redirect was a "fair response" to Brecht's line of questioning. *Id.* at 314 (quoting *United States v. Robinson*, 485 U.S. 25 (1988)).

The impeachment exception, on the other hand, can be traced back to *Harris v. New York*. *Harris* involved a defendant convicted of selling heroin to an undercover police officer. *Harris v. New York*, 401 U.S. 222, 222–23 (1971). At trial, the defendant took the stand in his own defense, claiming that the substance he sold the undercover officer was actually baking powder. *Id.* at 223. On cross-examination, the prosecutor asked the defendant about certain un-Mirandized statements he made to officers shortly after his arrest that contradicted the testimony he gave at trial. *Id.* The trial court allowed the questioning, but it instructed the jury that the statements should be used

only for determining the defendant's credibility, not as evidence of guilt. *Id.*

The United States Supreme Court affirmed the defendant's conviction. The Court commented that although certain parts of *Miranda* "can indeed be read as indicating a bar to use of an uncounseled statement for any purpose," those parts of the opinion were not central to the holding. *Id.* at 224. It continued, "[i]t does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards." *Id.*

The Court went on to note that in *Walder v. United States*, 347 U.S. 62 (1954), it "permitted physical evidence, inadmissible in the case in chief, to be used for impeachment purposes." *Harris*, 401 U.S. at 224. It then quoted *Walder* directly: "It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage . . . ." *Id.* (quoting *Walder*, 347 U.S. at 65). Thus, the Court concluded, the "shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." *Harris*, 401 U.S. at 226.

B. The court of appeals' published opinion erroneously disregarded this Court's holding in *Brecht* when it dismissed the applicability of the "opening the door" exception.

Since Garcia's trial in the circuit court, the State has maintained that Garcia's un-Mirandized statements became

admissible when Garcia's cross-examination of Investigator Spiegelhoff "opened the door" to their admission. (R. 77:182, Pet-App. 119; State's Response Br. 10–11; State's Supp. Br. 4–5.) Indeed, the court of appeals' order for supplemental briefing acknowledged the State's argument that Garcia had opened the door to use of his inculpatory statements. (Pet-App. 116.) Yet the court of appeals' opinion framed the issue very differently. It asked only whether the State could "invoke the impeachment exception to the exclusionary rule during the State's case-in-chief to 'rehabilitate' one of its witnesses," despite the fact that the State did not rely on the impeachment exception for admission of the evidence. *See Garcia*, 2020 WL 5933798, ¶ 1. (Pet-App. 101.) This flaw in the opening paragraph of the court of appeals' opinion set the stage for the problematic analysis that followed.

The court of appeals made two fundamental errors in reaching its conclusion that reversal was necessary. First, the court incorrectly conflated *Harris*'s impeachment exception and *Brecht*'s "opening the door" exception. Second, the court erroneously dismissed the applicability of *Brecht* in situations where the proffered evidence is a defendant's un-Mirandized statements rather than his pre-*Miranda* silence. Because the court recommended its opinion for publication, this Court should grant review in order to correct these errors and provide guidance to litigants in future cases.

1. The court of appeals conflated the impeachment exception and the "opening the door" exception.

As discussed, there are two separate exceptions to the exclusionary rule for un-Mirandized statements relevant to this appeal: "opening the door" and impeachment. Courts have held that the impeachment exception is available only to impeach the defendant's own testimony. It cannot be used,

for example, to impeach the testimony of another defense witness. *See James v. Illinois*, 493 U.S. 307, 313 (1990). The "opening the door" exception, on the other hand, is not subject to such limitations. Rather, this exception is available when introduction of the un-Mirandized statement or silence is a "fair response to a claim made by the defendant or his counsel." *Brecht*, 143 Wis. 2d at 314.

It is critical to note that the State did not offer Garcia's un-Mirandized statements for impeachment purposes at trial. Instead, the State argued that Garcia's cross-examination of Investigator Spiegelhoff had "opened the door" to the introduction of the statements. (R. 77:182, Pet-App. 119.) This Court's holding in *Brecht* thus offers the proper lens through which to view the State's request to introduce the statements.

The court of appeals, however, disregarded the fact that *Brecht* offered an independent basis for the statements' admissibility and instead applied the limitations of the impeachment exception to the case at hand. This conflation of the "opening the door" exception and the impeachment exception effectively read *Brecht* and "opening the door" out of existence. Under the court of appeals' formulation, the defendant's pre-*Miranda* silence in *Brecht* would not have been admissible: when the State introduced the defendant's pre-*Miranda* silence in *Brecht*, the defendant had not yet testified, as the court of appeals now says *Harris* requires. *Brecht*, 143 Wis. 2d at 306, 313. Thus, the court of appeals' holding here would have mandated a different outcome in *Brecht*.

This Court's holding in *Brecht* is binding authority on the court of appeals. The court of appeals is not free to overrule, modify, or discard this Court's precedents. *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). Yet that

is exactly what the court of appeals did by dismissing *Brecht* for failing to cite *Harris*. *See Garcia*, 2020 WL 5933798, ¶ 15 n.17. (Pet-App. 113.) *Brecht* was decided well after *Harris*, so it cannot be said that *Brecht* did not survive *Harris*. Stated simply, there was no basis whatsoever for the court of appeals to dismiss *Brecht* as it did.

The court of appeals understood this Court's language in *Brecht* allowing commentary on a defendant's pre-*Miranda* silence when it was a "fair response to a claim made by defendant or his counsel" to be a comment mainly about "fairness." *Id.* ¶ 15. (quoting *Brecht*, 143 Wis. 2d at 314). (Pet-App. 113.) Because the Supreme Court addressed fairness in *Harris*, the court of appeals said, *Brecht*'s "fairness" rationale did nothing to overcome "the categorical conclusion that fairness and constitutional concerns dictated that the impeachment exception may only be used against the defendant when the defendant testifies contrary to his or her inadmissible, but voluntary statement." *Id.* (Pet-App. 113.) This reasoning was flawed. Just because fairness underpinned the decisions in both *Brecht* and *Harris* does not mean *Brecht* and *Harris* discuss the same exception and are thus subject to the same analysis. *Brecht* considered "opening the door"; *Harris* considered impeachment of witnesses. The fact that *Brecht* did not cite *Harris* actually illustrates the State's point: *Brecht* did not cite *Harris* because *Brecht* involved a different exception to *Miranda* than *Harris* did. A cite to *Harris* would have been inapposite, so not only was the court of appeals' critique of *Brecht* improper, it also was unwarranted.

Similarly, the court of appeals mistakenly framed the State's argument as being based solely on the idea of fundamental fairness. *Garcia*, 2020 WL 5933798, ¶ 15. (Pet-App. 113) Not so. The principle allowing certain evidence to be admitted when it is a "fair response" to a claim by the

defense is the legal standard this Court established in *Brecht*, which it derived from the United States Supreme Court's holding in *Robinson*, 485 U.S. at 32 ("where as in this case the prosecutor's reference to the defendant's opportunity to testify is a *fair response to a claim made by defendant or his counsel*, we think there is no violation of the privilege") (emphasis added). The State's argument was based on the legal principles espoused in those cases.

2. Opening the door applies to un-Mirandized statements as well as pre-*Miranda* silence.

The court of appeals also distinguished *Brecht* on the ground that *Brecht* involved commentary on a defendant's pre-*Miranda* silence while the situation here involved Garcia's un-Mirandized statements. *Garcia*, 2020 WL 5933798, ¶ 15 n.17. (Pet-App. 113.) But this is a distinction without a difference.

In many cases, courts have discussed the prohibition on using a defendant's statements and using his silence interchangeably. This Court in *Brecht* acknowledged that "[i]n *Miranda*, the [Supreme] Court noted that the prosecution may not use at trial the fact that a defendant stood mute or claimed his privilege in the face of accusation." *Brecht*, 143 Wis. 2d at 310. And, of course, a statement obtained from a suspect in custody without the suspect having received the *Miranda* warnings generally cannot be used during the State's case-in-chief. *See Miranda v. Arizona*, 384 U.S. 436, 478–79 (1966); *see also State v. Knapp*, 2003 WI 121, ¶¶ 111–14, 265 Wis. 2d 278, 666 N.W.2d 881, *vacated and remanded by* 542 U.S. 952 (2004), *reinstated in material part by* 2005 WI 127, ¶ 2 n.3, 285 Wis. 2d 86, 700 N.W.2d 899. Additionally, the *Harris* impeachment exception applies to both pre-*Miranda* silence

and un-Mirandized statements. *See Jenkins v. Anderson*, 447 U.S. 231 (1980). Thus, the prohibitions against using a defendant's silence and his un-Mirandized statements are inextricably linked, and *Brecht* is equally applicable to this case as it would be to any case involving a defendant's pre-*Miranda* silence.[7]

The court of appeals' suggestion to the contrary was error, and this Court should accept review so that it can clarify the matter in the published caselaw.

C. The circuit court properly admitted Garcia's statements because he opened the door to their use.

Finally, the court of appeals erroneously reversed Garcia's conviction because Garcia's cross-examination of Investigator Spiegelhoff opened the door to the admission of the inculpatory statements Garcia made to police. Those statements explained why Investigator Spiegelhoff did not investigate the other avenues Garcia questioned him about, and their admission was a "fair response" to Garcia's cross-examination of him. *See Brecht*, 143 Wis. 2d at 314.

The court of appeals minimally acknowledged the "fair response" standard that this Court described in *Brecht*,

[7] The term "pre-*Miranda* silence" is perhaps a bit overbroad in this context. In *Brecht*, it was not entirely clear when the defendant was read his *Miranda* rights. "Because the record [did] not reflect that Brecht received his *Miranda* warnings until his initial appearance, [this Court] treat[ed] this testimony [referring to Brecht's silence after his arrest] as references to Brecht's pre-*Miranda* silence." *Brecht*, 143 Wis. 2d at 307–08. The point for purposes of the present case is that the Fifth Amendment's protections—and as a corollary, the exceptions thereto—apply equally to both a defendant's statements and his silence.

stating only that while "'fairness' is a concern," fairness alone was not enough to overcome the limitations of *Harris*. *Garcia*, 2020 WL 5933798, ¶ 15. (Pet-App. 113.) As discussed, this conflation of the standards was an error, and it yielded an opinion that lacked proper analysis on this issue. The circuit court correctly determined that Garcia's questioning of Investigator Spiegelhoff was likely to mislead the jury. This is the exact type of scenario the "opening the door" exception is designed to address.

As the circuit court stated, "from a fundamental fairness perspective to not allow the jury . . . to hear Investigator Spiegelhoff's reasoning or rationale behind his decision to not investigate further would cause the jury to be misled." (R. 79:21, Pet-App. 141.) The court further stated its belief that "it would be manifestly unfair to have the jury hear just that side of it and not allow the investigator, because of Judge Marik's ruling, to explain it." (R. 79:21–22, Pet-App. 141–42.) The court noted that Garcia made a strategic decision to attack the investigation, and that it did not have to be "an issue in controversy." (R. 79:22, Pet-App. 142.) The court called it offensive "that a jury would be misled into believing that somehow the investigator did not do his job when that is really at the behest of the defense to not allow him to explain why he took the actions that he did," and stated that the only way for Spiegelhoff to explain himself was by allowing him to tell the jury that he already had Garcia's confession in hand. (R. 79:22, Pet-App. 142.)

The circuit court was correct. Giving the State the opportunity to question Investigator Spiegelhoff about Garcia's statements was a fair response to Garcia's cross-examination of Investigator Spiegelhoff. The statements were therefore admissible under *Brecht*. This Court should grant review and reverse.

CONCLUSION

For the reasons discussed, the State respectfully requests that this Court grant its petition for review of the court of appeals' opinion in this case.

Dated this 5th day of November 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. § 809.62(4) for a petition for review produced with a proportional serif font. The length of this petition is 4,754 words.

Dated this 5th day of November 2020.

_____
JOHN A. BLIMLING
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.62(4)(b)

I hereby certify that:

I have submitted an electronic copy of this petition for review, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.62(4)(b) and 809.19(12).

I further certify that:

This electronic petition for review is identical in content and format to the printed form of the petition for review filed as of this date.

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

Dated this 5th day of November 2020.

_____
JOHN A. BLIMLING
Assistant Attorney General

Appendix
State of Wisconsin v. Manuel Garcia
No. 2018AP2319-CR

APPENDIX CERTIFICATION

I hereby certify that filed with this petition for review, either as a separate document or as a part of this petition, is an appendix that complies with Wis. Stat. § 809.62(2)(f) and that contains, at a minimum: (1) a table of contents; (2) the decision and opinion of the court of appeals; (3) the findings or opinion of the circuit court necessary for an understanding of the petition; and (4) portions of the record necessary for an understanding of the petition.

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.

Dated this 5th day of November 2020.

_____

JOHN A. BLIMLING
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.62(4)(b)

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. §§ (Rules) 809.62(4)(b) and 809.19(13).

I further certify that:

This electronic appendix is identical in content to the printed form of the appendix filed as of this date.

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

Dated this 5th day of November 2020.

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JOHN A. BLIMLING
Assistant Attorney General