STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP2319-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

MANUEL GARCIA,

Defendant-Appellant.

ON APPEAL FROM A DECISION OF THE WISCONSIN COURT OF APPEALS, DISTRICT II, REVERSING A JUDGMENT OF CONVICTION

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER

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ISSUE PRESENTED

Did the court of appeals err when it reversed Defendant-Appellant Manuel Garcia's conviction on the ground that the circuit court's allowing the trial use of Garcia's inculpatory statements to police violated his Fifth Amendment rights, even though the admission of the statements was permissible under the "opening the door" doctrine elucidated by this Court in *Brecht*[1]?

The circuit court allowed the State to use Garcia's statements, despite their being previously excluded under *Miranda*[2], because it found that Garcia's cross-examination of a police witness had "opened the door" to the State's use of the statements.

The court of appeals reversed, concluding that the impeachment exception (which neither the circuit court nor the State relied on) did not apply because the defendant himself did not testify.

This Court should reverse and reinstate Garcia's judgment of conviction.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As this Court has accepted review of this case, oral argument and publication are customary and appropriate.

INTRODUCTION

In this case, this Court must decide whether a defendant may use a circuit court's exclusion of his

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[1] *State v. Brecht*, 143 Wis. 2d 297, 421 N.W.2d 96 (1988).

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

confession to manipulate a jury into believing that police failed to conduct a thorough investigation of a homicide when, in fact, police determined further investigation was unnecessary after the defendant confessed.

In 2010, Manuel Garcia beat his girlfriend's two-year-old son to death. When police questioned Garcia about the child's death, Garcia admitted that he had punched him several times and thrown him. Because Garcia's confession was consistent with the child's injuries, police determined that it was unnecessary to search for another perpetrator, and the State charged Garcia with first-degree reckless homicide.

Before trial, Garcia challenged the admissibility of his confession on *Miranda* grounds. The circuit court concluded that Garcia's waiver of his Fifth Amendment rights was invalid because of his limited English proficiency, and excluded Garcia's statements from use during the State's case-in-chief.

At trial, Garcia attempted to take advantage of the exclusion of his confession by asking the lead investigator on the case a series of questions clearly designed to suggest to the jury that police had failed to conduct a thorough investigation. The State then asked the court for permission to introduce Garcia's confession in order to rehabilitate its witness, arguing that Garcia had opened the door to its use. The court agreed, and on re-direct, the investigator explained that police had not followed up on other leads because Garcia's confession explained the victim's death and rendered further investigation unnecessary. At the end of trial, the jury convicted Garcia as charged.

Garcia appealed, arguing that the circuit court erroneously exercised its discretion when it admitted his confession. The State countered that the circuit court's

exercise of discretion was proper because Garcia's line of questioning seemed clearly intended to mislead the jury, which opened the door to the use of his confession.

An exception to the exclusionary rule allows the use of un-Mirandized statements to impeach a defendant testifying on his own behalf. The court of appeals ordered supplemental briefing on the applicability of the impeachment exception to Garcia's case. The State argued in its supplemental brief that the admission of Garcia's confession was consistent with the principles underlying the impeachment exception, although it did not contend that the impeachment exception controlled. Garcia argued that his confession could not be admitted under the impeachment exception because Garcia himself had not yet testified at the time the confession was introduced.

The court of appeals reversed Garcia's conviction in a published decision. The court determined that Garcia's confession was improperly admitted because the impeachment exception to the exclusionary rule could not be used to impeach the State's own witness. But the State had not introduced Garcia's confession in order to *impeach* any witness; it used the confession to correct Garcia's misleading cross-examination. With almost no analysis, the court dismissed the State's argument that Garcia had opened the door to the use of his confession.

This Court should reverse the court of appeals' decision and reinstate Garcia's conviction. The court of appeals drifted from the core issue in this case when it ordered supplemental briefing on the applicability of the inapposite impeachment exception, and then created binding precedent contradicting this Court's prior holdings.

The court of appeals was obliged to follow this Court's *Brecht* decision, which controls this case. This Court made

clear in *Brecht* that a defendant's decisions at trial can "open the door" to lines of questioning or argument that would otherwise be off limits to the State. This includes questioning that implicates a defendant's right to remain silent. The impeachment exception to the exclusionary rule has nothing to do with this case because the State never argued that Garcia's confession should be admitted under that exception.

This Court should decline to allow Garcia and similarly situated defendants to turn the shield of *Miranda* into a sword to mislead juries. *Miranda* was never intended to provide defendants with an *advantage* in trials where police failed to secure a valid waiver of their Fifth Amendment rights; it merely serves to ensure that police do not use their power to unfairly secure confessions from criminal suspects. Permitting a defendant to exploit the blank spot in the record created by the exclusion of his confession in order to hoodwink the jury would provide a windfall for the defense unlike anything else in case law and completely inconsistent with the goals and principles of the justice system.

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*[3]. (R. 56; 57; 58; 59; 62.) The hearings included testimony from Spiegelhoff (R. 59:7–9) and Garcia (R. 59:9–11), 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.)

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

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. (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, defense counsel asked questions to elicit admissions 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.) Defense counsel also asked questions suggesting 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. 118.) 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. 118.) The State argued that this questioning "opened the door" to Garcia's confession because explaining why the police did not investigate certain incidents—they already had Garcia's confession—was the only way to rehabilitate Spiegelhoff's credibility as a witness. (R. 77:182, Pet-App. 118.) The court noted that it was concerned by some of Garcia's questions.

(R. 77:183, Pet-App. 119.) 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. 122.) The court began by reciting Garcia's cross-examination of Spiegelhoff. (R. 79:5–10, Pet-App. 124–29.) The court then commented that it was "absolutely proper cross-examination." (R. 79:10, Pet-App. 129.) 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, [to] 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. 129.)

The court then reviewed the transcript of Garcia's confession. (R. 79:13–18, Pet-App. 132–37.) 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. 138.) 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. 138.) The court continued, "So Judge Marik's aware of the *Miranda Goodchild* law rules. And he indicated no effect upon use for rebuttal purposes which again leads me to conclude that Judge Marik had no issue with the voluntariness of the statement." (R. 79:19–20, Pet-App. 138–39.) 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. 139.) The court agreed with Judge Marik's determination that the confession was voluntary. (R. 79:20, Pet-App. 139.)

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. 140.) 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. 141.) 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. 141.) 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. 141.)

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 CoA Br. 8–9.) The State responded, arguing that admission of the statements was proper because Garcia had opened the

door to their use. (State's CoA Response Br. 9.) The State did not rely on the impeachment exception for the admissibility of the statements. 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. 101.) 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. 101–02.) The parties filed supplemental briefs as ordered. The State did not argue that the impeachment exception applied to this case, but did explain that the policy reasons underlying that exception were consistent with the policies underlying the "opening the door" exception. (State's Supplemental CoA Br. 8–11.)

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?" *State v. Garcia*, 2020 WI App 71, ¶ 1, 394 Wis. 2d 743, 951 N.W.2d 631. (Pet-App. 104–05.) 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. 115.) It

therefore reversed Garcia's conviction and remanded the matter to the circuit court.

The State petitioned for this Court's review, which this Court granted.

STANDARD OF REVIEW

When reviewing the admissibility of evidence that implicates constitutional claims, appellate courts "employ a two-step process." *See State v. Harris*, 2017 WI 31, ¶ 9, 374 Wis. 2d 271, 892 N.W.2d 663. First, the court reviews "the circuit court's factual findings and upholds them unless they are clearly erroneous." *Id.* Second, the court applies "constitutional principles to those facts *de novo*, without deference to the courts initially considering the question, but benefiting from their analyses." *Id.*

ARGUMENT

The court of appeals erred when it reversed Garcia's conviction.

A. A criminal defendant's cross-examination of a State's witness may open the door to the introduction of previously excluded statements.

1. Opening the door is a distinct exception to the exclusionary rule.

Custodial statements made by a defendant who has not received 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*"). However, voluntary 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.

The State has maintained throughout this case that Garcia "opened the door" to the introduction of his inculpatory statements. "Opening the door," sometimes also called the "fair response" doctrine, is the principle that evidence that is otherwise inadmissible may become admissible if its introduction is a "fair response" to an argument made by a party. *See United States v. Robinson*, 485 U.S. 25, 34 (1988).

Robinson demonstrates why a defendant must not be allowed to use his constitutional protections to manipulate the jury and sandbag the justice system. It involved a prosecutor's comments during summation on the defendant's decision not to testify. *Robinson*, 485 U.S. at 26. During the defendant's own summation, he claimed multiple times that he had been denied the opportunity to explain his actions. *Id.* at 27. The prosecutor then sought and received permission from the trial court to argue to the jury that the defendant could have taken the stand and explained his actions if he wished. *Id.* at 27–29. The United States Supreme Court concluded that the prosecutor's comments on the defendant's decision not to testify did not violate his Fifth Amendment rights:

> It is one thing to hold, as we did in *Griffin*[4] that the prosecutor may not treat a defendant's exercise of his right to remain silent at trial as substantive evidence of guilt; it is quite another to urge, as defendant does here, that the same reasoning would

[4] *Griffin v. California*, 380 U.S. 609 (1965).

> prohibit the prosecutor from fairly responding to an argument of the defendant by adverting to that silence. There may be some "cost" to the defendant in having remained silent in each situation, but we decline to expand *Griffin* to preclude a fair response by the prosecutor in situations such as the present one.

Id. at 34.

Not long after *Robinson*, this Court cited the decision in its discussion of the "opening the door" exception in *State v. Brecht*, 143 Wis. 2d 297, 313, 421 N.W.2d 96 (1988). There, the State was allowed to present 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. Defense counsel had 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 313–14. On redirect, the State asked about Brecht's pre-*Miranda* silence. Although such testimony is generally inadmissible during the State's case-in-chief, this Court held that under the circumstances the redirect testimony was permissible. *Id.* "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 *Robinson*, 485 U.S. at 34).

The principle that certain lines of defense may allow otherwise inadmissible evidence to be introduced as a "fair response" is consistent with other holdings in Wisconsin and across other jurisdictions. For example, this Court in *Doss* adopted a three-factor test—recognized by the Wisconsin

Court of Appeals and based on the United States Supreme Court's holding in *Robinson*—for the admissibility of references to a defendant's failure to testify. *State v. Doss*, 2008 WI 93, ¶ 81, 312 Wis. 2d 570, 754 N.W.2d 150; *see also State v. Jaimes*, 2006 WI App 93, ¶¶ 21–25, 292 Wis. 2d 656, 715 N.W.2d 669. Similarly, the Wisconsin Court of Appeals in *Keith* considered the constitutionality of comments made by the State on a defendant's decision not to meet with a clinical psychologist in a chapter 980 matter. *See State v. Keith*, 216 Wis. 2d 61, 80–81, 573 N.W.2d 888 (Ct. App. 1997). Observing that Keith had first raised the issue, the court commented that "a defendant's presentation at trial may open a door for the prosecution that would otherwise remain closed." *See id.* at 80 (citing *State v. Edwardsen*, 146 Wis. 2d 198, 213, 430 N.W.2d 604 (Ct. App. 1988)). The State's commentary on Keith's decision not to meet with the psychologist did not violate his constitutional rights, the court reasoned, because "[t]he State merely responded" to the issue that Keith had raised. *Keith*, 216 Wis. 2d at 81–82.

Federal courts agree. The Fifth Circuit, for example, has held that "where the defendant had 'opened the door' respecting his post-arrest interaction with the authorities 'he discarded the shield which the law had created to protect him' from comment on his post-arrest silence." *United States v. Martinez-Larraga*, 517 F.3d 258, 268 (5th Cir. 2008) (quoting *United States v. Fairchild*, 505 F.2d 1378, 1383 (5th Cir. 1975)). *Fairchild* offers a similar holding. During Fairchild's trial, his counsel tried to create the impression that he had cooperated fully with investigators. *See Fairchild*, 505 F.2d at 1383. In response, the government "was allowed to elicit from a government witness . . . the fact that Fairchild had refused to make a statement after he had been read his *Miranda* rights." *Id.* at 1382.

On appeal, the government offered two rationales for the admissibility of the testimony. *Id.* First, the government argued that the commentary on Fairchild's silence "was admissible for impeachment purposes." *Id.* Second and separately, the government argued that Fairchild "opened the door" for the testimony. *Id.* While the Fifth Circuit expressed doubts that Fairchild's silence in custody was admissible for impeachment purposes, it affirmed Fairchild's conviction after concluding that it was not error for the court to admit Fairchild's silence because Fairchild had opened the door to its use. *Id.* at 1382–83. In arriving at this conclusion, the court observed that a defendant's silence, though often relevant and probative, is usually not admissible. *Id.* "But it is important to note that it is excluded for the purpose of protecting certain rights of the defendant. It is not excluded so that the defendant may freely and falsely create the impression that he has cooperated with the police when, in fact, he has not." *Id.* at 1383. "Having . . . raised the question of his cooperation with the law enforcement authorities, Fairchild opened the door to a full and not just a selective development of that subject." *Id.*

The Seventh Circuit addressed a similar situation in *United States v. Shue*, 766 F.2d 1122 (7th Cir. 1985). During Shue's trial for a series of bank robberies, he testified that he cooperated with authorities after his arrest by providing hair samples, writing samples, fingerprint specimens, and by participating in lineups. *Id.* at 1129. On cross-examination, however, Shue admitted that he refused to make a statement to FBI agents while he was in custody. *Id.* Shue complained on appeal that the government's cross-examination improperly raised his silence. *Id.*

The Seventh Circuit "agree[d] with the government that, although appellant never directly claimed to have cooperated fully with the authorities after his arrest, [the]

exchange did create the impression of general cooperation." *Id.* The court went on to say that "[a] defendant should not be permitted to twist his *Miranda* protection to shield lies or false impressions from government attack." *Id.* Thus, the court reasoned, "[w]hen a defendant has alleged or created an impression of general cooperation with police after arrest, a court may allow the prosecution to elicit testimony of the defendant's post-arrest silence to rebut the impression of full cooperation." *Id.* The court reversed Shue's conviction, however, because it concluded that the government's treatment of Shue's silence went beyond correcting the misimpressions created by his testimony and instead invited the jury to use his silence as substantive evidence of guilt. *Id.* at 1130.

These cases, and others like them, clearly establish that where a defendant's trial strategy creates a misimpression, evidence that is otherwise inadmissible—including evidence inadmissible for constitutional reasons—may become admissible. *Fairchild*, for example, involved two separate arguments in favor of admissibility: one was impeachment, and the other was fair response. *See Fairchild*, 505 F.2d at 1382. The Fifth Circuit, too, treated the arguments separately. *See id.* at 1382–83. Whether Wisconsin courts call this principle "opening the door," "fair response," or something else, cases like *Brecht* and *Doss* show that the rule is alive and well in Wisconsin. This Court should confirm that.

2. Opening the door applies equally to a defendant's statements and his silence.

While it is true that the cases discussed above generally involve a defendant's silence as opposed to his un-Mirandized statements, the same principles still apply. An

abundant body of case law demonstrates that courts treat a defendant's silence and his statements obtained in violation of *Miranda* equally. For example, 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).

The important thing to remember in this context, however, is that a suspect's "*Miranda* rights" are not directly provided by the Constitution. Rather, *Miranda* created a prophylactic rule designed to protect suspects' rights afforded by the Fifth Amendment. Commentary on a defendant's silence and the use of his un-Mirandized, custodial statements thus each implicate his rights under the Fifth Amendment. Logically, a rule that allows for the introduction of evidence implicating a defendant's Fifth Amendment rights should extend to the different ways in which that right might be implicated.[5]

Some cases have also discussed the implication of commentary on a defendant's post-*Miranda* silence on his due process rights, reasoning that it would be fundamentally unfair to inform a suspect that he has the right to remain silent but then use that silence against him. *See, e.g.*, *Doyle v. Ohio*, 426 U.S. 610, 611 (1976). Nevertheless, courts have found that the "open door" exception or "fair response"

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[5] This exception does not, however, extend to *involuntary* statements obtained in violation of a suspect's Fifth Amendment rights.

doctrine applies to such situations, as well. *See Shue*, 766 F.2d at 1129. Thus, "opening the door" applies to more than just commentary on a defendant's silence. Indeed, "opening the door" can extend beyond issues of a defendant's right to remain silent into illegally seized evidence. *See* 6 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 11.6(b) (6th ed.) ("[D]efense tactics are most likely to be found to have opened the door if they involved a calculated effort to create a high degree of confusion based upon knowledge that any adequate explanation would require some reference to evidence previously suppressed.").

B. The impeachment exception is a separate and distinct exception to the exclusionary rule, and it is not at issue in this case.

As a completely separate matter, a defendant may also have his un-Mirandized statements or his silence used against him in order to impeach his credibility if he chooses to testify in his own defense. The United States Supreme Court first addressed this question in *Harris*. *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.

In 1990, the Supreme Court revisited the impeachment exception. *See James v. Illinois*, 493 U.S. 307 (1990). In *James*, police arrested a murder suspect without probable cause and obtained inculpatory statements from him in violation of his Fourth Amendment rights, which the trial court excluded. *Id.* at 309–10. The defendant did not testify at trial, but a defense witness testified in a manner inconsistent with the defendant's excluded statements. *Id.* at 310. The prosecution then sought, and the trial court allowed, introduction of the previously excluded statements in order to impeach the defense witness. *Id.* The Supreme Court reversed the defendant's conviction, however,

reasoning that "[e]xpanding the class of impeachable witnesses from the defendant alone to all defense witnesses would create different incentives affecting the behavior of both defendants and law enforcement officers." *Id.* at 313. The Court held instead that the impeachment exception to the exclusionary rule did not extend to impeachment of other defense witnesses. *Id.*

C. The court of appeals conflated the separate "opening the door" and impeachment exceptions to the exclusionary rule, and erroneously applied the impeachment requirements to the "opening the door" analysis in this case.

Neither party has ever framed this case as an impeachment exception case. The State never claimed the impeachment exception allowed for Garcia's statement to be admitted. Garcia never claimed that his statement had been used to improperly impeach the State's own witness. And indeed, Garcia's statement was not used to impeach any witnesses. Instead, the State maintained throughout this case that Garcia "opened the door" to the use of his confession consistent with cases like *Brecht*.

Nevertheless, the court of appeals chose to focus on the impeachment exception in its decision reversing Garcia's conviction. In the very first sentence of its opinion, the court framed the issue as this: "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 WI App 71, ¶ 1. (Pet-App. 104–05.) In fact, the real issue presented to the court of appeals should have been described like this: "may the State seek to rehabilitate one of its witnesses by using a previously excluded statement when the defendant's cross-examination of that witness 'opened the door' to the statement's use?"

To be sure, the court of appeals' recitation of the law on the impeachment exception is accurate—plenty of case law suggests that the State may not impeach its own witnesses with the defendant's un-Mirandized statements. The problem with the court of appeals' decision, is that it did not resolve the issue before the court. Even if the State may not impeach its own witness with a defendant's un-Mirandized statements, so what? That is not what happened in this case. Just because Garcia's statements may not have been admissible to *impeach* Spiegelhoff, it does not follow that the statements were not admissible at all. As discussed, the statements were admissible to rebut the misleading impression that Garcia's cross-examination clearly created.

As noted earlier, the State relied on *Brecht* to justify the use of Garcia's statement on Spiegelhoff's re-direct. The court of appeals' decision criticized the State's reliance on *Brecht* in part because *Brecht* did not cite *Harris*. *Garcia*, 2020 WI App 71, ¶ 15 n.17. (Pet-App. 115–16.) That is true. Since this Court issued the decision in *Brecht* well after *Harris* was decided, why did this Court not cite *Harris* in *Brecht*? Simply put, this Court likely omitted any reference to *Harris* in *Brecht* because like this case, *Brecht* was not an impeachment case and *Harris* was not relevant. Unlike *Harris* (and *Walder*), *Brecht* did not involve impeachment of a witness. It is therefore wholly unsurprising that this Court's decision in *Brecht* did not cite to *Harris* or *Walder*. That fact does not make *Brecht* irrelevant here. Quite the contrary: this case is like *Brecht*, not like *Harris* or *Walder*.

Despite this not being an impeachment exception case, the State sought to answer the court of appeals' question about the applicability of the impeachment exception in its supplemental brief by establishing that the reasons for limiting the exception to impeachment of the defendant himself should not preclude use of the opening the door

exception. The State identified four primary concerns that led courts to so limit the impeachment exception: the reliability of the evidence the prosecution seeks to introduce, the deterrent effect on government misconduct, whether the defendant has control over the introduction of the evidence, and whether the evidence serves the court's fact-finding function. (State's Supplemental CoA Br. 7–8.) The State also commented that much of the discussion in impeachment exception cases involved the idea of "fairness," as did the discussion in cases like *Brecht*. (State's Supplemental CoA Br. 12–13.)

The court took issue with the State's characterization of "fairness" as it relates to this case, noting that impeachment exception cases like *Harris* and its progeny had taken fairness into account and still concluded that the State may not impeach its own witnesses with previously excluded statements. *Garcia*, 2020 WI App 71, ¶ 15. (Pet-App. 115–16.) The court of appeals also dismissed the concerns identified by the State out of hand, commenting that there was no case discussing these four concerns together. *Id.* ¶ 16. (Pet-App. 116.) But the State did not offer the four concerns listed in its brief as a test for the admissibility of evidence. Rather, in an effort to propose how the rules governing the impeachment exception would apply to a situation like this one, the State discussed the four factors it believed were the most relevant to the reasons underlying limitations to the impeachment exception. These four factors were not meant to serve as a test for the admissibility of evidence, they were merely an attempt to apply the lessons of the impeachment exception to the present situation as the court of appeals requested.

Ultimately, the court of appeals asked and answered the wrong question in this case. Its opinion therefore missed the mark, and it created binding precedent that could be

interpreted as applying the limitations on the impeachment exception to any claim of admissibility of previously excluded, un-Mirandized statements—regardless of the theory of admissibility. Put another way, the court of appeals made every case involving the admissibility of un-Mirandized statements an impeachment case. But this simply does not make sense. There will certainly be situations like the one in the present case where the impeachment exception is not a good fit for the admissibility of evidence because the case does not involve impeachment. And as discussed, plenty of cases establish that a defendant need not testify in order to open the door to otherwise inadmissible evidence. *See supra* Section A.1.

This Court should therefore reverse the court of appeals at least to the extent that its opinion applies the limitations on the impeachment exception to non-impeachment cases. It should then resolve the outcome of this case under the proper legal framework: whether the circuit court was correct that Garcia's cross-examination of Spiegelhoff opened the door to the use of his inculpatory statements.

D. Garcia's cross-examination of Spiegelhoff opened the door to the introduction of Garcia's confession.

To resolve this case, this Court must determine whether the circuit court was correct when it concluded that Garcia's cross-examination of Spiegelhoff opened the door to the use of Garcia's un-Mirandized statements. It did. This Court should therefore reverse the court of appeals and leave Garcia's conviction intact.

To begin, it is helpful to revisit the circuit court's reasoning underlying its decision to allow admission of the statements. The court started by reviewing the exchange

between Garcia and Spiegelhoff during cross examination. (R. 79:5–10, Pet-App. 124–29.) The court commented that the questioning put Garcia in a position to argue that the police had conducted a "completely shoddy" investigation without giving the State the opportunity to explain to the jury why Spiegelhoff did not conduct a more thorough investigation. (R. 79:10, Pet-App. 129.) The court then reviewed Garcia's confession to confirm that Garcia gave it voluntarily, thus verifying that it would be admissible under the right circumstances. (R. 79:13–18, Pet-App. 132–37.)

With all of that in mind, the court turned to the public interest in not allowing Garcia to mislead the jury. (R. 79:21–22, Pet-App. 140–41.) The court stated, "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. 140.) The court went on to state 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. 140–41.) 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. 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," 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. 141.)

The court's reasoning holds up to scrutiny under the proper legal framework. As this court explained in *Brecht*, a party opens the door to the admission of otherwise

inadmissible evidence when it is a "fair response" to a line of inquiry or argument. The clear implication of Garcia's cross-examination of Spiegelhoff was that police had conducted a shoddy investigation in determining the cause of J.E.M.'s death. Garcia took the exclusion of his confession and turned it from a shield into a sword, wielding it to attack Spiegelhoff's investigation in a manner only possible due to the exclusion of the statements. Allowing the State to respond in the only manner in which it could—by explaining Spiegelhoff's decision not to investigate other falls J.E.M. allegedly suffered by asking Spiegelhoff why he did not investigate those incidents—was a "fair response" to Garcia's line of inquiry. *See Robinson*, 485 U.S. at 34. Like the State's commentary on the defendant's silence in *Brecht*, the State's introduction of Garcia's confession here did not run afoul of any constitutional rights. *See Brecht*, 143 Wis. 2d at 314.

The State's request and the court's reasoning also demonstrate that Garcia's statements were properly admitted as a response to the misconception created by Garcia's cross-examination of Spiegelhoff and not as substantive evidence of Garcia's guilt. After the State was allowed to introduce Garcia's statements, the State recalled Spiegelhoff to the stand. (R. 79:29.) The State asked Spiegelhoff, "Is there a reason why you did not continue to investigate this case as [Garcia's attorney] suggested?" (R. 79:29–30.) Spiegelhoff replied, "Yes. In the afternoon of Friday, the 12th, I interviewed Mr. Garcia at the Police Department. And while doing so, he gave a plausible explanation of the injuries describing that he punched [J.E.M.] several times." (R. 79:30.)

The State then played a videorecording of Investigator's Spiegelhoff's interview with Garcia. (R. 79:31–32.) After the video played, the State asked Spiegelhoff if, after interviewing Garcia, he thought he "understood what

had happened." (R. 79:32.) Spiegelhoff replied that, based on the interview, he believed Garcia had caused J.E.M.'s injuries. (R. 79:32.) The State then asked Spiegelhoff whether he felt "a need to continue to investigate [the] laundromat or other possible sources of injury." (R. 79:32.) Spiegelhoff replied that he did not. (R. 79:33.) The State then moved a transcript of the interview into evidence and concluded its questioning of Spiegelhoff. (R. 79:33.)

Garcia's second cross-examination of Spiegelhoff focused on both the context and content of Garcia's statements, emphasizing that Garcia never actually said that he hit J.E.M. in the abdomen. (R. 79:34–43.) Garcia also continued to suggest that J.E.M. could have sustained the injuries in some other way, including in one of the falls that Spiegelhoff did not further investigate. (R. 79:41–43.) The State's re-redirect examination was short, clarifying just a couple of the points Garcia had challenged about specific words and motions. (R. 79:44–45.)

Garcia then testified, offering his explanation for the statements he made to Spiegelhoff, claiming that he had actually "spanked" J.E.M., not punched him, but did not know the word for "spank" at the time of the interview. (R. 79:77.) He claimed that he never struck or punched J.E.M. in the abdomen. (R. 79:77.) The State did not cross-examine Garcia. (R. 79:81.) Thus, consistent with its stated purpose, the State's use of Garcia's un-Mirandized statements was limited to providing context to Spiegelhoff's investigation. That the statements contained substantive evidence of Garcia's guilt is of little consequence; the purpose and use of their introduction is what matters.[6]

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[6] To the extent Garcia might argue that the State used his statements as substantive evidence of his guilt rather than solely

It is important to remember that it is Garcia—not the State—who created the situation this Court must now untangle. Garcia opened the door to the State's use of his inculpatory, un-Mirandized statements at trial when he suggested that the police had not performed a thorough investigation. The State can imagine no other reason for this line of questioning than to mislead the jury. The circuit court correctly determined that Garcia's cross-examination of Spiegelhoff was likely to mislead the jury about the nature of the police investigation into J.E.M.'s death. The court therefore properly allowed the State to introduce Garcia's statements not to impeach its own witness, but to rehabilitate him after Garcia's intimations of incompetence. The court of appeals missed the mark when it reversed on the basis that the State could not use an un-Mirandized statement to impeach its own witness. The State did no such thing.

The introduction of Garcia's statements was proper. This Court should reverse the court of appeals and allow Garcia's conviction to stand.

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to rehabilitate Spiegelhoff, any such use did not even arguably occur until the State's closing. Garcia did not object to the State's closing when delivered, nor did he raise any issue with it in any stage of his appeal. Instead, Garcia's focus has always been on the introduction of the statements through Spiegelhoff's testimony. The State would therefore counter that Garcia forfeited any such argument by failing to raise it below.

CONCLUSION

For the reasons discussed, this Court should reverse the court of appeals and reinstate Garcia's judgment of conviction.

Dated this 18th day of February 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,267 words.

Dated this 18th day of February 2021.

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JOHN A. BLIMLING
Assistant Attorney General

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WITH WIS. STAT. § 809.19(12)

I hereby certify that:

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

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

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Assistant Attorney General

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

Description of Document	Pages
State of Wisconsin v. Manuel Garcia, No. 2018AP2319-CR, Court of Appeals Order, dated Mar. 10, 2020	101–103
State of Wisconsin v. Manuel Garcia, No. 2018AP2319-CR, Court of Appeals Decision, dated Oct. 7, 2020	104–117
State of Wisconsin v. Manuel Garcia, No. 2010CF365, Racine County Circuit Court, Jury Trial Transcript (excerpt), dated Sept. 9, 2014 (R. 77)	118–121
State of Wisconsin v. Manuel Garcia, No. 2010CF365, Racine County Circuit Court, Jury Trial Transcript (excerpt), dated Sept. 10, 2014 (R. 79)	122–146

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

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.

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JOHN A. BLIMLING
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