SUPREME COURT OF WISCONSIN

CASE NO.:	2009AP2057-CR
COMPLETE TITLE:	State of Wisconsin, Plaintiff-Appellant, v. David W. Stevens, Defendant-Respondent-Petitioner.
	REVIEW OF A DECISION OF THE COURT OF APPEALS Reported at: 330 Wis. 2d 833, 794 N.W.2d 926 (Ct. App. 2010 – Unpublished)
OPINION FILED:	July 13, 2012
SUBMITTED ON BRIEFS:	
ORAL ARGUMENT:	October 7, 2011
SOURCE OF APPEAL:	
COURT:	Circuit
COUNTY:	Waukesha
JUDGE:	Robert G. Mawdsley
JUSTICES:	
CONCURRED:	ZIEGLER, J., concurs (Opinion filed). ROGGENSACK and GABLEMAN, J.J., join concurrence. ABRAHAMSON, C.J., concurs in part and dissents in part (Opinion filed).
DISSENTED:	
NOT PARTICIPATING:	

ATTORNEYS:

For the defendant-respondent-petitioner, there were briefs filed by *Paul LaZotte*, assistant state public defender, and oral argument *by Paul LaZotte.*

For the plaintiff-respondent, the cause was argued by *Sally L. Wellman* and the brief was filed by *Mark A. Neuser*, assistant attorneys general, with whom on the brief was *J.B. Van Hollen.*

2012 WI 97

No. 2009AP2057-CR
(L.C. No. 2008CF761)

STATE OF WISCONSIN : IN SUPREME COURT

State of Wisconsin,

Plaintiff-Appellant,

v.

David W. Stevens,

Defendant-Respondent-Petitioner.

FILED

JUL 13, 2012

Diane M. Fremgen
Clerk of Supreme Court

REVIEW of a decision of the Court of Appeals. *Affirmed.*

¶1 DAVID T. PROSSER, J. This is a review of an unpublished decision of the court of appeals, State v. Stevens, No. 2009AP2057-CR, unpublished slip op. (Wis. Ct. App. Nov. 17, 2010). The Circuit Court for Waukesha County, Robert G. Mawdsley, Judge, suppressed an incriminating statement that David W. Stevens (Stevens) made to police during custodial interrogation. The court of appeals reversed, holding that even though Stevens invoked his right to counsel during questioning, he later initiated conversation with his police interrogator and

thereafter knowingly, intelligently, and voluntarily waived his rights before making the incriminating statement. Id., ¶18.

¶2 The issues presented for review are (1) whether any of the constitutional protections recognized in Miranda v. Arizona, 384 U.S. 436 (1966), were violated under the unusual facts of this case, and (2) whether the court of appeals was correct in disregarding State v. Middleton, 135 Wis. 2d 297, 399 N.W.2d 917 (Ct. App. 1986) in its analysis, on grounds that Middleton was overruled by State v. Anson, 2005 WI 96, 282 Wis. 2d 629, 698 N.W.2d 776.

¶3 The facts giving rise to this review may be summarized as follows: The suspect was arrested and taken into police custody. After receiving a Miranda warning and waiving his Miranda rights, the suspect began to answer questions. He then invoked his right to counsel and the questioning ceased. When the police interrogator escorted the suspect back to his holding cell, the suspect initiated a request to continue the interrogation "to clear [the] matter up." He said he would be willing to waive his right to an attorney. Instead of resuming questions, the police interrogator left the police station on other business. During the interrogator's absence, the suspect did not ask for his attorney or request that someone contact an attorney for him. However, before the interrogator returned, the suspect's attorney on a prior charge arrived at the police station and asked to see the suspect. She was refused access by an officer who was unaware of any of the conversations between the suspect and the absent police interrogator, including the

suspect's request for counsel. After the attorney left, the police interrogator returned to the police station to resume the questioning——after first administering a new Miranda warning to the suspect and receiving a waiver of the suspect's Miranda rights. In the ensuing interrogation, the suspect made an incriminating statement. He was not aware when he made the statement that his attorney on the prior charge had visited the police station and tried to see him.

¶4 We conclude that David Stevens withdrew his request for an attorney by voluntarily initiating a request to resume the questioning. He knowingly, intelligently, and voluntarily provided an incriminating statement to his interrogator after he was given a second Miranda warning. Although Stevens validly invoked his right to counsel, he cancelled his invocation of that right by initiating a dialogue in which he asked to continue the interrogation. This cancellation of the request for counsel was confirmed by the fact that Stevens made no effort to secure counsel while his interrogator was absent, by his recorded agreement that he initiated the conversation asking to resume questioning, and by his waiver of the right to counsel after receiving a second Miranda warning.

¶5 We also conclude that the decision in Blum v. 1st Auto & Casualty Insurance Co., 2010 WI 78, ¶13, 326 Wis. 2d 729, 786 N.W.2d 78, did not require the court of appeals to disregard Middleton in its analysis because Anson overruled Middleton only to the extent that "it held a circuit court may take additional evidence at [a Harrison v. United States, 392 U.S. 219 (1968)]

hearing." However, Middleton is factually distinguishable from this case and is now completely overruled on the merits.

¶6 Because we determine that Stevens' Fifth Amendment privilege against self-incrimination and his equivalent right under Article I, Section 8 of the Wisconsin Constitution were not violated, we affirm the decision of the court of appeals.

I. FACTUAL BACKGROUND

¶7 The law in this case is highly fact-dependent. Consequently, we set out the facts with particularity.

¶8 On July 22, 2008, David Stevens, a 19-year-old convicted sex offender, was involved in an incident with an eight-year-old Waukesha girl in a swimming pool at an apartment complex in the city. The incident occurred shortly after 5:00 p.m.

¶9 Around 7:00 p.m., two City of Waukesha officers were dispatched separately to the girl’s home. They met with the girl, her parents, and her older sister. Officers Michael Carpenter and Cory Fossum were told that the girl had been swimming in the pool when she was approached in the water by a young man who appeared to be about 17. The girl described the man as "creepy." She said the man asked to play with her. He grabbed her three or four times and ran his hands up and down the girl's sides. She did not assert that the young man had touched her private areas. The girl got out of the pool, crying, and told her older sister what had happened. The two wrote down the license plate of the man's car, which the older sister described as an orange vehicle with spray paint on it.

¶10 The two officers followed up their interview by going to the parking area of the apartment complex where they eventually located the car. As the officers looked for a vehicle identification number, Stevens came out of an apartment building and told them to get away from his car.

¶11 This exchange was the first interaction between police officers and Stevens concerning the incident. Stevens, who appeared to be wearing a swimming suit under his jeans, gave his name as David Stevens. Officer Carpenter asked him whether he had been at the pool. He admitted that he had. When asked about the girl, Stevens first denied any contact with a young girl, then told the officers that he saw a girl swimming in the deep end of the pool and grabbed her to pull her to safety because he was afraid she might not be able to swim. Challenged on this version of the facts, Stevens acknowledged rubbing his hands up and down the girl's sides and asking her to play. He eventually admitted having gratifying sexual thoughts about the girl but said he left the pool because he realized his behavior was wrong.

¶12 When Stevens gave his name, Officer Fossum went to his squad car to run an identity check on his computer. He later returned to the scene to ask Stevens about a pending felony charge of failing to update his residency information with the sex offender registry. Stevens acknowledged the charge and explained why he was required to register——he had committed the offense of fondling a 5-year-old girl when he was 14.

¶13 Shortly thereafter, Officer Carpenter arrested Stevens, placed him in his squad car, and transported him to the Waukesha police station where he was confined in a holding cell overnight. The arrest occurred sometime before 10:00 p.m. Stevens was not questioned in the squad car or at the police station.

¶14 Stevens did not have a fixed residence. He indicated that he had been kicked out of his mother's house, was homeless, and was temporarily staying with friends at the apartment complex.

¶15 The following day, July 23, at 10:30 a.m., Stevens was interviewed by Detective Rick Haines who had been assigned to the case by Lieutenant Detective William H. Graham, Jr. Detective Haines had been a police officer for more than 25 years and was working in the sensitive crimes unit of the Waukesha Police Department. The interview was electronically recorded. Stevens received and waived his Miranda rights before he began to answer questions. He agreed specifically to make a voluntary statement. Detective Haines warned Stevens that he would be asking him some "pointed questions about some things you[']ve been involved in." In response to a question, Haines replied: "You[']re going to be charged with something, you know, but to what degree or as far as what specifically, that[']s to be determined, all right?"

¶16 Over the course of the interrogation, Stevens admitted having physical contact with the young girl. He admitted

bumping into the girl intentionally once or twice, and wrapping his hands around her stomach.

¶17 Stevens then said, "I[']m starting to feel a little uncomfortable, like I want a lawyer here or something." Detective Haines inquired further whether Stevens wanted a lawyer and Stevens replied: "I think I want to talk to my lawyer." Detective Haines treated Stevens' statements as an invocation of the right to counsel and ceased the interrogation. The interrogation ended at 10:35 a.m., meaning that it had lasted about five minutes.

¶18 Detective Haines stepped out of the interview room briefly, then returned to escort Stevens back to the holding cell. During the short walk to the cell, Stevens indicated that he had changed his mind, that he wanted to clear the matter up and wanted to continue speaking to Haines. Detective Haines explained that he was not able to continue immediately and that, in any event, he could not resume the questioning unless Stevens waived his right to an attorney. According to Haines, Stevens replied that it was his intention once again to waive his right to an attorney. Before Detective Haines left, Stevens said: "Make sure you come back, make sure you come back because I want to talk to you." Detective Haines assured Stevens he would return. At that point, Detective Haines left to interview the complaining witness.

¶19 At approximately 1:00 p.m., Attorney Jenny Yuan, a public defender, came to the police department, seeking to meet with Stevens, but Lieutenant Graham denied her access. Attorney

Yuan went to the police station after Stevens' mother called her at 12:07 p.m., and left a message that Stevens was in custody for an alleged sexual assault. Lieutenant Graham later testified that he believed he had called Stevens' mother that morning to let her know that Stevens was in custody, inasmuch as he had had contact with the mother before. Lieutenant Graham testified that he denied Attorney Yuan access to Stevens because "I know that [Stevens] made no request for her. So how she ended up at the police department, the request had to come through somebody else."

¶20 Attorney Yuan, in turn, testified later that she "was not allowed to see Mr. Stevens." She was at the station because she had been called by Stevens' mother and "was representing him . . . on pending cases" and "wanted to know if he was being questioned or if he had asked for me." Attorney Yuan was told "[t]hat [she] would have to speak with Detective Haines and that he wasn't in the department at that time." Attorney Yuan left a written message for Detective Haines at the station. She also left a voicemail for him after returning to her office.

¶21 Detective Haines completed his interview of the complaining witness at the C.A.R.E. Center[1] and returned to the police station. There he met with Lieutenant Graham, but neither man could recall later whether there had been any discussion of Attorney Yuan's attempt to meet with Stevens.

[1] The C.A.R.E. center is a child advocacy center in Waukesha County that provides services to child abuse victims. It is a multi-agency collaboration that provides several services on-site including forensic interviews.

¶22 At approximately 3:00 p.m., Detective Haines went to the holding cell to ascertain whether Stevens still wished to answer questions. Stevens said that he wanted to continue. This willingness is reflected in the transcript of the second recorded interview.

> DETECTIVE HAINES: Okay, David, I brought you back up here because you indicated to me that you had a change - -
>
> MR. STEVENS: Uh huh [affirmative].
>
> DETECTIVE HAINES: - - a change of heart and that you wished to speak with me. Let it be clear that you approached me with that and I did not approach you with this?
>
> MR. STEVENS: Yes.
>
> DETECTIVE HAINES: Is that accurate?
>
> MR. STEVENS: That is clear.
>
> DETECTIVE HAINES: . . . Again, David, I am aware of the fact that our last interview ended when you invoked your Constitutional right to an attorney, and you had indicated to me that you wish to waive that right and speak to me now about this matter?
>
> MR. STEVENS: Yeah.
>
> DETECTIVE HAINES: Is that accurate?
>
> MR. STEVENS: I[']m afraid, but I[']m still willing to push forward because — —
>
> . . . .
>
> DETECTIVE HAINES: — — whether you[']d like to speak with me . . . . Again, I make no promises. I make no threats. I make no issue. You approached me with your intention of speaking with me further and again, I would be happy to speak with you. I[']d be happy to take down any information that you have to offer, but

I guess for the record, this was your idea, correct? Yes or no?

MR. STEVENS: Yes.

¶23 Detective Haines then went through eight questions embodying the rights against self-incrimination set out in Miranda, 384 U.S. at 479. Stevens waived his rights and agreed again "to make a voluntary statement."

¶24 Detective Haines then elicited additional information from Stevens. Stevens admitted that he had intentionally touched the victim with his "intimate parts" three or four times for the purpose of sexual gratification.

¶25 Detective Haines then requested that Stevens give a written statement. Stevens gave a statement to Detective Haines. Haines wrote out the statement, and Stevens reviewed it and signed it.

¶26 The written statement is on a form titled "Waukesha Police Department Criminal Complaint Statement Form," dated July 23, 2008, at 3:00 p.m. It lists and acknowledges constitutional rights and contains the written statement. The statement provides a few additional details about the incident including the name of the apartment complex, the victim's name and approximate age, and the desire of Stevens to get mental health treatment rather than go to jail. The form notes that the interrogation ended at 3:40 p.m.

¶27 The second interrogation, conducted in mid-afternoon, and the written statement signed by Stevens are at issue in this case.

II. PROCEDURAL HISTORY

¶28 The State filed a criminal complaint against Stevens on July 24, 2008. It charged him with First Degree Sexual Assault——sexual contact with a child under the age of 13, contrary to Wis. Stat. § 948.02(1)(e),[2] and Felony Bail Jumping, contrary to Wis. Stat. § 946.49(1)(b). The court found probable cause for a bindover at a preliminary examination on August 7, after hearing testimony from Detective Haines.

¶29 On November 17, Stevens moved to suppress all statements he made to law enforcement officers. He also sought an evidentiary hearing on his motion. This led to hearings before Judge Mawdsley on April 1, April 29, and June 11, 2009, where most of the facts cited in Section I were developed.

¶30 Judge Mawdsley's oral findings of fact——on June 25——are consistent with the facts recited in Section I. However, Judge Mawdsley was impressed by the testimony of Lieutenant Graham: "Graham testified credibly that if in fact he had known that Mr. Stevens had invoked his right to have . . . contact with his counsel[,] then he would have definitely allowed Attorney Yuan to have contact . . . with the defendant." Judge Mawdsley added:

> I think the key case here . . . is the Middleton case, and the key factor here is that the second waiver of rights did not have any information communicated to the defendant . . . that his attorney had appeared and that his attorney wanted to speak to

[2] All subsequent references to the Wisconsin Statutes are to the 2007-08 version unless otherwise indicated.

> him, or just the fact that the attorney had appeared might have been sufficient.
>
> So basically in my opinion the State . . . failed to prove by a preponderance of the evidence that [Stevens'] change of heart to speak to an attorney would have continued if he had been given that knowledge. (Emphasis added).

¶31 Relying heavily on Middleton, Judge Mawdsley determined that because information about Attorney Yuan's visit was not disclosed to Stevens before the second interview, Stevens' second waiver of his Miranda rights "was not a knowing waiver," thus requiring suppression of everything in the second interview. He ruled, in effect, that Stevens could not waive his Miranda rights without having information about the attorney's visit.

¶32 On August 7, 2009, the State filed a notice of appeal under Wis. Stat. § 974.05(1)(d)2., challenging the circuit court's decision to suppress some of Stevens' custodial statements. That same day, the State (via the Assistant District Attorney) moved to supplement the factual record. Together with its notice of appeal, the Department of Justice filed a motion with the court of appeals to remand the case to the circuit court to give the circuit court authority to supplement the factual record. The court of appeals granted this motion.

¶33 After several delays, the circuit court held a hearing on the motion to supplement the record. This motion was vigorously resisted by the defendant and denied by the court,

even though the State complied with a court directive to submit an offer of proof. The offer of proof read in part:

> The State of Wisconsin, by Assistant District Attorney Lloyd V. Carter, . . . filed a motion in the above case to supplement the factual record generated on April 1, 2009; April 29, 2009; and June 11, 2009. The Court rendered its decision regarding the defendant's motions on June 25, 2009 at or shortly after 11:00 a.m.
>
> On June 25, 2009, after receiving the Court's decision, Assistant District Attorney Lloyd V. Carter, along with legal intern Bryan Bayer were returning to the Waukesha County District Attorney office facilities on the ground floor of the courthouse when they were approached by a person recognized by ADA Carter as the mother of David W. Stevens (believed to be Kathryn A. Stevens . . .). ADA Carter further recognized this individual as having been present at all of the aforementioned evidentiary hearing dates and this female subject did identify herself as the mother of defendant, David W. Stevens. Kathryn Stevens did initiate conversation with ADA Carter . . . . Kathryn Stevens went on to state that she wished she had an opportunity to provide information to the Court earlier when [Lieutenant] Detective Graham and Attorney Yuan had testified relative to the evidentiary motions that had just been decided in Branch 11. Kathryn Stevens further went on to provide unsolicited statements that the reason she had contacted the Public Defender's office and asked Attorney Yuan to go to the City of Waukesha Police Department to see her son was because she had received a telephone call from her son who was in custody at the City of Waukesha Police Department and that her son had requested that she contact his attorney, who represented him on another matter. Upon receiving this information, ADA Carter asked a few clarifying questions and confirmed Kathryn Stevens' position, that the defendant had called her from the City of Waukesha jail and asked her to contact Attorney Yuan to come see him.
>
> ADA Carter believed this factual assertion by Kathryn Stevens to be both material and relevant to

> the Court's decision rendered earlier that date, which decision was made without the benefit of this additional factual information.

(Emphasis added.)

¶34 Neither Stevens' counsel nor the circuit court wanted any part of supplementing the record with new evidence. On November 11, 2009, the court issued a final order: "The Court finds that the testimony shall not be re-opened. The offer of proof fails to provide facts which would change the court's original decision." Consequently, there is no evidence in the record that Stevens ever called his mother and asked her to contact the attorney who represented him in another matter. The defendant's counsel strongly opposed the introduction of evidence to support this proposition, and the State refused to stipulate to it. Thus, such evidence was not considered by the court of appeals, Stevens, No. 2009AP2057-CR, unpublished slip op., ¶16 n.4, and will not be considered by this court.

¶35 As noted, in an unpublished opinion, the court of appeals reversed the circuit court's decision to suppress evidence, and it remanded the case for trial. Id., ¶1. The court of appeals concluded that the circuit court's determination that Stevens initiated contact with his interrogator was not erroneous. Id., ¶13. It ruled that Stevens' lack of knowledge regarding whether the attorney had visited the police station did not affect whether his waiver was knowing. Id., ¶15. In the end, the court of appeals held that the suppression order was reversed "[b]ecause Stevens initiated contact with the police and knowingly, intelligently and

voluntarily waived his Fifth Amendment right to counsel." Id., ¶18.

III. STANDARD OF REVIEW

¶36 When we review a decision to suppress statements made to police, we accept the "circuit court's findings of historical fact unless they are clearly erroneous."[3] State v. Ward, 2009 WI 60, ¶17, 318 Wis. 2d 301, 767 N.W.2d 236. We review de novo the application of constitutional principles to those facts. Id.

IV. ANALYSIS

¶37 The Fifth Amendment to the United States Constitution reads in part that: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

¶38 This element of the amendment has been incorporated into the Fourteenth Amendment to apply to the States. Malloy v. Hogan, 378 U.S. 1, 6 (1964).

¶39 Article I, Section 8 of the Wisconsin Constitution contains a parallel provision: "No person . . . may be compelled in any criminal case to be a witness against himself or herself." Wis. Const. art. I, § 8.

¶40 This court has normally construed the right against self-incrimination in Article I, Section 8 of the Wisconsin Constitution to be consistent with the United States Supreme Court's interpretation of the federal right. State v. Jennings,

[3] The circuit court's findings of fact were not clearly erroneous; thus we are bound by them.

2002 WI 44, ¶¶37-42, 252 Wis. 2d 228, 647 N.W.2d 142 (citing cases).

A. The Right to Counsel Under Miranda v. Arizona

¶41 In Miranda v. Arizona, the Supreme Court dealt with the question of what

> restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime. . . . [And] with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.

Miranda, 384 U.S. at 439.

¶42 The Miranda Court focused on pre-charge custodial interrogation[4] which the Court had held, two years earlier, is a critical stage in criminal proceedings. Escobedo v. Illinois, 378 U.S. 478, 486 (1964).[5] The Court described the nature and setting of custodial interrogation at length, stressing "the inherent pressures of the interrogation atmosphere," Miranda,

[4] The Court in Miranda v. Arizona, 384 U.S. 436 (1966), defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Id. at 444.

[5] Moran v. Burbine, 475 U.S. 412, 430 (1986), clarified the constitutional source of the rights described in Miranda, disavowing a Sixth Amendment basis for those rights. Pre-charge custodial interrogation is undoubtedly an important point in criminal procedure but because it precedes the filing of a criminal charge, it does not trigger a Sixth Amendment right to counsel.

384 U.S. at 468, including psychological coercion. Id. at 445-56.

> We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.

Id. at 467.

> Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process.

Id. at 469.

¶43 To ensure that the Fifth Amendment privilege against self-incrimination is not lost in these circumstances, the Court declared that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Id. at 444.

¶44 The Court said that police are free to use any "fully effective means . . . to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it," id., but the Court prescribed a constitutionally sufficient method to protect that right and others——the now well-known Miranda warning: "Prior to any questioning [of a person in custody], the person must be warned that he has a right to

remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Id.

¶45 The Court restated and amplified its holding later in the opinion:

> To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

Id. at 478-79 (emphasis added).[6]

[6] The Court was careful to limit the "burdens" of its holding so that it would "not constitute an undue interference with a proper system of law enforcement." Miranda, 384 U.S. at 481. The Court specifically noted that the decision "does not mean, as some have suggested, that each police station must have a 'station house lawyer' present at all times to advise prisoners." Id. at 474.

¶46 The precise Constitutional status of the Miranda warning remains somewhat unsettled. Compare New York v. Quarles, 467 U.S. 649, 654 (1984), with Dickerson v. United States, 530 U.S. 428, 432 (2000). But the purpose of a Miranda warning is not in question: It is to ensure that a suspect's privilege against self-incrimination when in custody is protected, so that if the suspect chooses to speak and makes an incriminating statement, the statement will be knowing, intelligent, and voluntary. The suspect must understand that he has the right to remain silent.

¶47 The majority opinion in Miranda is more than 60 pages long. It represents a compelling statement of constitutional principles to protect defendants from official overreaching in criminal cases. It also contains enduring guidelines of the procedures that law enforcement officers are expected to follow in conducting custodial interrogations. At the same time, the Miranda decision is filled with ambiguities and internal conflicts. Like other landmark decisions, Miranda could not anticipate, and does not provide answers for, every possible fact situation. The present case is like a law school exam question that tests conflicting principles and challenges the court to synthesize and reconcile the decisions in a number of key Supreme Court and Wisconsin Supreme Court cases that have interpreted Miranda over the past four decades.

¶48 Among the most important conclusions in Miranda is that once an individual invokes the right to counsel, interrogation must cease. Id. at 444-45. "If [a suspect]

indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." Id. "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." Id. at 473-74.

¶49 This rule was firmed up in Edwards v. Arizona, 451 U.S. 477 (1981).[7] Robert Edwards was charged with three felonies, including first-degree murder. In custody he promptly asserted his right to counsel and his right to remain silent. Nonetheless, the police, without furnishing him an attorney, returned the following day to confront Edwards and secure an incriminating statement from him. The Edwards Court determined that once an accused invokes his right to counsel under Miranda, the police must cease interrogation until counsel is present unless the accused himself initiates further communication with the police. Id. at 484-85.

¶50 Post-Miranda cases have frequently presented questions about whether an accused has, in fact, invoked his right to counsel after receiving a Miranda warning and, if he has, whether law enforcement has faithfully honored that right. These issues are not presented in this case because Stevens

[7] Edwards v. Arizona was decided under the Fifth and Fourteenth Amendments with respect to counsel, self-incrimination, and custodial interrogation, 451 U.S. 477, 478-80 (1981), even though the case involved interrogation after a criminal complaint had been filed.

clearly invoked his right to counsel and Detective Haines honored that right.

¶51 Instead, this case poses the question whether Detective Haines was entitled to approach Stevens and ask for permission to resume interrogation in light of intervening events. Edwards explained that once an accused has expressed "his desire to deal with the police only through counsel, [he] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." Id. (emphasis added).

¶52 The Edwards Court did not adopt the assertion in Justice Powell's concurring opinion that "police legitimately may inquire whether a suspect has changed his mind about speaking to them without an attorney." Edwards, 451 U.S. at 490 (Powell, J., concurring). On the contrary, police may not "inquire" until the accused himself has initiated further communication with them, opening the door to further discussion.[8] When the accused initiates communication with police, the paradigm is reset and police may explore whether the accused is willing to answer questions. They may proceed with custodial interrogation if the accused again is given a Miranda warning

[8] "The Edwards rule is 'designed to prevent police from badgering a defendant into waiving his previously asserted Miranda rights.'" Montejo v. Louisiana, 556 U.S. 778, 129 S. Ct. 2079, 2085 (2009) (quoting Michigan v. Harvey, 494 U.S. 344, 350 (1990)).

and again waives his Miranda rights. See Oregon v. Bradshaw, 462 U.S. 1039, 1044 (1983) (plurality opinion).[9]

¶53 The Edwards rule has been described as a prophylactic "bright-line rule to safeguard" the right against self-incrimination. Once the right to counsel has been invoked, a waiver of that right is acceptable if and only if the suspect initiates communication with police. Solem v. Stumes, 465 U.S. 638, 644, 646 (1984).[10]

¶54 Here, there is no question that Stevens initiated conversation with Detective Haines. Detective Haines carefully documented that initiation and also informed Stevens of the Miranda safeguards a second time and obtained a new waiver. There appears to be no dispute that these procedures would be

[9] The plurality opinion in Oregon v. Bradshaw, 462 U.S. 1039 (1983), explains that the initiation of conversation by an accused does not amount to a waiver of the previously invoked right to counsel in the sense that police may begin or resume questioning without administering a new Miranda warning or otherwise being prepared to show that any statements offered by the accused are knowing, intelligent, and voluntary. Id. at 1044-46.

The concurrence/dissent seeks to transform Bradshaw into a rule that an accused's invocation of the Fifth Amendment right to counsel remains completely intact, no matter what the accused says to withdraw or cancel that invocation, until he is given and waives a second Miranda warning. Chief Justice Abrahamson's concurrence/dissent, ¶¶112, 123. This is not what Bradshaw holds or implies.

[10] In State v. Hambly, 2008 WI 10, 307 Wis. 2d 98, 745 N.W.2d 48, the court discussed what constitutes sufficient initiation by an accused individual to permit further interrogation. Id., ¶¶67-90. The sufficiency of the initiation in this case is not before us.

unassailable if Detective Haines had sought to resume interrogation immediately.

¶55 Stevens asserts, however, that Detective Haines could not resume questioning, even with an explicit waiver from Stevens, because Stevens was not informed and did not know that his attorney in a different case had attempted to see him. He cites Middleton to support this contention. Stevens contends that Waukesha police had a constitutional duty to give the attorney access to Stevens or at least inform Stevens that the attorney was trying to see him. Stevens argues that without the benefit of conferring with counsel or being informed that counsel had attempted to see him, he could not make a knowing, intelligent, and voluntary waiver, and police had no right to approach him to ask for one.

¶56 This argument requires the court to examine additional cases. The Supreme Court has held that defendants can waive the Sixth Amendment right to counsel, even if already represented, without speaking to counsel about the waiver. Michigan v. Harvey, 494 U.S. 344, 353 (1990); see also Montejo v. Louisiana, 556 U.S. 778, 129 S. Ct. 2079, 2085 (2009) ("The defendant may waive the right whether or not he is already represented by counsel; the decision to waive need not itself be counseled."). If a person can waive his Sixth Amendment right to counsel without speaking to counsel about the waiver, an individual should be able to waive his Fifth Amendment right inasmuch as the individual——who is still uncharged——normally does not yet have counsel.

¶57 Here, Stevens was not represented by counsel on either of the new charges because he had not yet been charged. Attorney Yuan had not yet been appointed on new charges.

¶58 Thus, the critical issue is whether Stevens' invocation of the right to counsel at 10:35 a.m. on July 23 somehow survived his almost immediate initiation of conversation with his interrogator in which he emphatically asked to resume the questioning and expressed his willingness to withdraw his request to speak with his attorney by waiving his Miranda rights. It should be noted that Stevens' initiation occurred before his attorney in the prior case appeared at the police station and before she even learned that Stevens was in custody. Did Stevens' invocation at 10:35 a.m. require that Attorney Yuan be given access to him at 1:00 p.m., notwithstanding Stevens' initiation of conversation with Detective Haines shortly after 10:35 a.m.?

¶59 The Supreme Court's decision in Moran v. Burbine, 475 U.S. 412 (1986) is helpful. It addressed a situation in which an attorney attempted to see a person in custody——before the person was charged——and was not only denied access but also misled by police. The issue in Burbine was "whether a prearraignment confession preceded by an otherwise valid waiver must be suppressed . . . because [police] failed to inform the suspect of [an] attorney's efforts to reach him." Burbine, 475 U.S. at 420. The Court held that the statement need not be suppressed. Id.

¶60 In Burbine, Cranston, Rhode Island, police arrested a man in connection with a burglary and sought to question him about an unrelated murder. Id. at 416. That evening, the accused's sister contacted the Public Defender's Office, and an Assistant Public Defender followed up by contacting police and notifying them that she would serve as the accused's counsel during any lineup or questioning. Id. at 416-17. Police assured the attorney that they would not question the accused until the next day. Id. at 417. The accused was unaware that his sister had contacted an attorney and unaware that an attorney had contacted police on his behalf. Id. Later that day, the accused waived his Miranda rights and admitted to the murder. Id. at 417-18.

¶61 The Court held that the incriminating statement did not need to be suppressed. Id. at 420. The Court noted that the accused's waiver of his rights was voluntary. Id. at 421-22. The Court stated:

> Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right. . . . No doubt the additional information would have been useful to respondent; perhaps even it might have affected his decision to confess. But we have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.

Id. at 422.

¶62 In explaining its decision, the Court went on further to say:

> Nor do we believe that the level of the police's culpability in failing to inform respondent of the telephone call has any bearing on the validity of the waivers. In light of the state-court findings that there was no "conspiracy or collusion" on the part of the police, we have serious doubts about whether the [First Circuit] Court of Appeals was free to conclude that their conduct constituted "deliberate or reckless irresponsibility." But whether intentional or inadvertent, the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his rights. Although highly inappropriate, even deliberate deception of an attorney could not possibly affect a suspect's decision to waive his Miranda rights unless he were at least aware of the incident. Compare Escobedo v. Illinois, 378 U.S. 478, 481 (1964) (excluding confession where police incorrectly told the suspect that his lawyer "'didn't want to see' him"). Nor was the failure to inform respondent of the telephone call the kind of "trick[ery]" that can vitiate the validity of a waiver. Miranda, 384 U.S. at 476. Granting that the "deliberate or reckless" withholding of information is objectionable as a matter of ethics, such conduct is only relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.

Id. at 423-24 (citations omitted).

¶63 The Court in Burbine "decline[d] the invitation to further extend Miranda's reach" to require "the reversal of a conviction if the police are less than forthright in their dealings with an attorney or if they fail to tell a suspect of a lawyer's unilateral efforts to contact him." Id. at 424. Such a rule would "ignore[] the underlying purposes of the Miranda rules." Id. The Court also expressed concern about the ripple effect such a rule would have and the myriad questions such a rule would raise. Id. at 425. Thus, "[b]ecause neither the

letter nor purposes of Miranda require[d]" it, the Court was "unwilling to expand the Miranda rules to require the police to keep the suspect abreast of the status of his legal representation." Id. at 427.

¶64 In the course of its decision, the Burbine Court stated that "the privilege against compulsory self-incrimination is . . . a personal one that can only be invoked by the individual whose testimony is being compelled." Id. at 433 n.4. In other words, in pre-charge circumstances, a third-party such as an attorney, a family member, or a friend may not invoke, on behalf of the suspect, the suspect's constitutional right to request the presence of an attorney. Only the suspect may invoke that right.

¶65 The Burbine analysis was affirmed in State v. Hanson, 136 Wis. 2d 195, 401 N.W.2d 771 (1987), and Ward, 318 Wis. 2d 301. The Hanson case specifically rejected an appeal that the court interpret Article I, Section 8(1) of the Wisconsin Constitution to require law enforcement authorities to inform a suspect that there is an attorney available and asking to see him. The Court said:

> Hanson requests that this court hold that law enforcement personnel violated his rights under Article I, sec. 8(1) of the Wisconsin Constitution by questioning Hanson without his "appointed" counsel's consent or presence and failing to inform Hanson that counsel was trying to see him.
>
> . . . .
>
> We do not believe that the suspect's knowledge of the location of a particular counsel can affect the

> intelligent waiver of his constitutional rights as described in Miranda warnings. Since the knowledge of the location of counsel adds no constitutional rights, does not alter the facts of the case as the suspect knows them, and does not give rise to any coercive influence by the police, such knowledge is not relevant to the suspect's voluntary decision to waive his rights. Although a suspect who was ready to waive his rights might change his mind when told an attorney was waiting to see him, the critical factor would be the convenience of seeing the attorney, not the intelligent perceived need for legal counsel. Since the convenience of the defendant is not constitutionally protected, the location of a particular attorney is not constitutionally required information.[11]

Hanson, 136 Wis. 2d at 207-08, 211-12.

¶66 There are compelling reasons why an attorney under the Fifth Amendment is different from an attorney under the Sixth Amendment. The Sixth Amendment right to counsel is grounded in the text of the amendment. It attaches "only at or after the initiation of adversary judicial proceedings against the defendant." United States v. Gouveia, 467 U.S. 180, 187 (1984). "[O]nce the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings." Montejo, 129 S. Ct. at 2085 (citing United States v. Wade, 388 U.S. 218, 227-28 (1967); Powell v. Alabama, 287 U.S. 45, 57 (1932)). Once the right has attached, the police may not

[11] The Hanson court also stated: "We agree with the United States Supreme Court that an event occurring outside the presence of the defendant and entirely unknown to him can have no bearing on his capacity to comprehend and knowingly relinquish a constitutional right." State v. Hanson, 136 Wis. 2d 195, 217, 401 N.W.2d 771 (1987).

interfere with the efforts of a defendant's attorney to act as a "medium" between the suspect and the State during interrogation. Burbine, 475 U.S. at 428 (citing Maine v. Moulton, 474 U.S. 159, 176 (1985)).

¶67 The Fifth Amendment does not address the right to counsel in its text. Rather, the Fifth Amendment establishes a person's right not to "be compelled in any criminal case to be a witness against himself." While a suspect's right to remain silent undoubtedly applies to pre-charge custodial interrogation, the suspect's right to counsel before a charge is filed is derivative of the Fifth Amendment right to remain silent. It serves as a prophylactic to shore up the privilege against self-incrimination. The Court in Miranda said that "the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires." Miranda, 384 U.S. at 470 (emphasis added).

¶68 In short, a suspect in custody may remain silent by declining to answer questions, by asserting his right to remain silent, or by invoking his right to an attorney to help him remain silent. But the suspect must invoke the right to counsel to assure that interrogation is not only terminated but also may not be resumed except at the personal initiation of the suspect. If a suspect wishes to be placed on the constitutional equivalent of a "do not call" list, he must invoke the right to counsel so that the police may not approach him to ask

questions. If interrogation is terminated because a defendant has invoked the right to counsel, the actual need for counsel is substantially eliminated, and thus counsel may not be appointed until the defendant appears in court. There is no need to suppress a defendant's statements if the police have not asked him questions.

¶69 In Hanson, this court held that the Wisconsin Constitution provides no further protections beyond Burbine that would require police to tell suspects of an attorney's availability to see them. Hanson, 136 Wis. 2d at 208-12. The court stated:

> If this information were required, distinctions between suspects would unfairly develop depending on whether third persons were able to engage the services of an attorney. A new area of law would develop regarding actions of police in particular fact situations, i.e., was the attorney in the building, was the attorney on the telephone, was the attorney on his way to the building, was the attorney not immediately available but would be by a definite time, would a substitute attorney satisfy the requirement. Another line of cases could develop around who requested such representation: the accused's family, friends, or perhaps a criminal accomplice, or the attorney himself who has a reduced caseload.

Id. at 212.

¶70 This brings us back to the present case. This case is distinguishable from Burbine, Hanson, and Ward on the simple fact that at 10:35 a.m. Stevens invoked the right to counsel. If nothing else had happened, Detective Haines would not have been able to approach Stevens again, would not have been able to ask him whether he was willing to talk, and would not have been

able to administer a new Miranda warning. This follows the rule in Edwards. See also Arizona v. Roberson, 486 U.S. 675 (1988); Minnick v. Mississippi, 498 U.S. 146, 153 (1990) ("[W]e now hold that when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney.").

¶71 But something else happened. First, after Detective Haines terminated the interrogation, Stevens spontaneously initiated conversation with his interrogator and asked to continue the questioning——to clear the matter up. When Detective Haines explained that he was not able to continue immediately and that he could not resume the questioning unless Stevens waived his right to an attorney, Stevens replied that it was his intention to waive his rights again. He said to Detective Haines, as the detective was leaving: "Make sure you come back, make sure you come back because I want to talk to you." Detective Haines assured Stevens that he would return.

¶72 Second, there is no evidence in the record that Stevens changed his mind during the four plus hours between the time when Detective Haines left and the time he returned. There is no evidence that he made any effort to secure counsel while Detective Haines was absent. On the contrary, Lieutenant Graham testified that "I know that [Stevens] made no request" for Attorney Yuan.

¶73 Finally, Stevens affirmed his desire to continue talking; and after receiving his Miranda warning a second time,

he waived his rights. This encounter was recorded and the recording has been transcribed.

¶74 Thus, Stevens withdrew his request for counsel. He cancelled his invocation of the right to counsel by initiating a dialogue in which he asked to continue the interrogation. This cancellation was confirmed by the fact that Stevens made no effort to secure counsel while his interrogator was absent, by repeating his desire to continue discussion, and by waiving the right to counsel after receiving a second Miranda warning.

¶75 In Minnick v. Mississippi, 498 U.S. at 156, the Court explained that "Edwards does not foreclose finding a waiver of Fifth Amendment protections after counsel has been requested, provided the accused has initiated the conversation or discussions with the authorities." (Emphasis added.) This case represents a textbook example of that exception.

¶76 In Miranda, the Court observed that "Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms." Miranda, 384 U.S. at 448. Here, however, all interrogation was recorded. More important for our purposes is the fact that Stevens' initiation of conversation is confirmed in a recording along with his second waiver of Miranda rights. The evidence of what went on in the interrogation room is not secret.

¶77 Consequently, we conclude that Stevens' Fifth Amendment privilege against self-incrimination and his equivalent right under Article I, Section 8 of the Wisconsin

Constitution were not violated and that Stevens' oral and written statements should not be suppressed.

B. Blum and Middleton

¶78 This case presents a collateral issue that requires comment: Whether the court of appeals was correct in disregarding Middleton in its analysis, on grounds that Middleton was overruled by Anson, 282 Wis. 2d 629, ¶¶13, 31.

¶79 In its unpublished per curiam opinion in this case, the court of appeals observed in a footnote that:

> Our forthcoming analysis spends no time on State v. Middleton, 135 Wis. 2d 297, 399 N.W.2d 917 (Ct. App. 1986), because that case was overruled in State v. Anson, 2005 WI 96, ¶13, 282 Wis. 2d 629, 698 N.W.2d 776. Our supreme court made clear in Blum v. 1st Auto & Cas. Ins. Co., 2010 WI 78, ¶56, 326 Wis. 2d 729, 786 N.W.2d 78, that a[n] overruled decision of this court has no precedential value whatsoever. Therefore, Middleton is out of the mix.

Stevens, No. 2009AP2057-CR, unpublished slip op., ¶11 n.3.

¶80 This court's decision in Blum in 2010 provided a standard that the court of appeals and this court could apply in evaluating the precedential value of a prior court of appeals decision that this court subsequently overruled. In two places in the opinion, the court concluded that "[a] court of appeals decision loses all precedential value when it is overruled by this court." Blum, 326 Wis. 2d 729, ¶¶3, 57. The court now reaffirms this principle as a general rule. Hence, if this court overrules a court of appeals decision without further comment, the court of appeals decision has no precedential

value. The policy reasons for this rule are explained in Blum. Id., ¶¶46-56.

¶81 Part of our reason for a bright-line rule was to "eliminate the confusion that has surrounded" the question of what remains precedent, id., ¶53, and to spare courts the burden of trying to figure out "precisely which holdings in court of appeals decisions are still good law." Id., ¶54.

¶82 It must be acknowledged, however, that our Blum decision did not eliminate all "confusion" because of the fact that four times we used a qualifying "unless" clause in the discussion, namely, "unless this court expressly states otherwise," id., ¶42, "Unless this court explicitly states otherwise," id., ¶46, "unless it expressly states otherwise," id., ¶54, and "unless this court expressly states that it is leaving portions of the court of appeals decision intact," id., ¶56.

¶83 These "unless" clauses provided direction to this court to state its intent as clearly as possible if it wishes to overrule only part of a decision. However, we have come to realize that applying these "unless" clauses to past cases in which this court failed to overrule a decision without qualification is not always easy and may require interpretation if there is any serious doubt about this court's intent.

¶84 Anson's overruling of Middleton illustrates the point. Middleton was a lengthy decision. It contained an extensive discussion of whether defendant Middleton had invoked the right to counsel after his arrest by calling his wife and asking her

to contact "Gregory Hunsader" who happened to be a local attorney. Middleton, 135 Wis. 2d at 304. A sheriff's deputy overheard this call but did not share what he had heard with the officers interrogating Middleton. Attorney Hunsader later showed up at the jail but was denied access to Middleton, and Middleton was not told of the attorney's presence before he made some of his admissions to officers. Middleton never explicitly invoked the right to counsel. The court of appeals agreed, id. at 310, but it concluded that some of Middleton's statements (after the attorney came to the jail) had to be suppressed because of the failure of officers to advise him "that the specific attorney he had directed his wife to contact had arrived." Id. at 313. However, Middleton's other statements, if made before the attorney's arrival, might stand.

¶85 A second section of the opinion——plainly delineated as a different section——dealt with the fact that Middleton testified at trial after the incriminating statements had been admitted. Was this testimony "impelled" by the state's use of tainted evidence? Id. at 317. If so, was Middleton's "impelled" testimony harmless error? The court of appeals determined that the trial court could hold an evidentiary hearing on remand to determine whether Middleton's testimony was "impelled by those admissions" under Harrison v. United States, 392 U.S. 219 (1968). Middleton, 135 Wis. 2d at 323.

¶86 In Anson, this court ruled "that a Harrison hearing is not an evidentiary hearing and overrule[d] the court of appeals' decision in Middleton to the extent it held a circuit court may

take additional evidence at such a hearing. We hold that a Harrison hearing is a paper review during which a circuit court makes findings of historical fact based on the record." Anson, 282 Wis. 2d 629, ¶13 (emphasis added). "[W]e overrule the court of appeals' decision in Middleton, to the extent it holds that the circuit court may conduct a full evidentiary hearing when engaging in a Harrison analysis." Id., ¶31 (emphasis added); see also id., ¶57.

¶87 Looking at the narrow language of the Anson decision as applied in the broad context of the Middleton case, we conclude that the Anson court did not overrule the entire Middleton decision, and we believe it would be unreasonable to hold that it did. The court clearly identified the portion of the Middleton opinion that it found objectionable, and it overruled Middleton to that extent. The language used appears to leave the rest of Middleton unaffected. Therefore, we must conclude that the court of appeals was not correct in disregarding Middleton on grounds that, because of Anson, Middleton had "no precedential value whatsoever."

¶88 On the other hand, the court of appeals was correct on the merits in not relying on Middleton. First, the Middleton court ruled that the defendant did not invoke the right to counsel. Middleton, 135 Wis. 2d at 310. Here, Stevens did invoke the right to counsel but then cancelled the invocation. Second, the Middleton court said that notwithstanding the fact that the defendant did not invoke his Miranda rights, he did initiate "the events which led to a specific attorney's coming

to the jail." Id. at 312. Not so, Stevens. Attorney Yuan came to the jail as the result of a call from Stevens' mother, not a call directly or even indirectly from Stevens. Third, in Middleton, a deputy heard Middleton make a call and his knowledge was attributed to all other officers. If knowledge of Stevens' invocation at 10:35 a.m. should have been attributed to all other officers in the Waukesha department, so also should his cancellation of the invocation moments later.

¶89 The two cases are very different on their facts, so that Middleton would not influence the decision in Stevens. Moreover, the Middleton decision was effectively repudiated by United States District Judge Barbara Crabb in an unpublished opinion involving Middleton in 1992, Middleton v. Murphy, No. 91-C-0751-C, unpublished op. (W.D. Wis. Jan. 28, 1992). The Seventh Circuit agreed with Judge Crabb, attaching her full opinion to its brief opinion in 1993, Middleton v. Murphy, No. 91-C-0751-C, unpublished op. 996 F.2d 1219 (7th Cir. June 21, 1993). We include Judge Crabb's opinion as an appendix to this decision.

¶90 Because we agree with Judge Crabb's conclusion that Douglas Middleton's confessions were voluntary and that Burbine was incorrectly applied in Middleton's case, we overrule State v. Middleton in its entirety.

¶91 In 2010, after a great deal of internal discussion, the Blum court made a determination that overruled court of appeals decisions should have no precedential value unless this court expressly states that it is leaving portions of the court

of appeals decision intact. We realize now that it is much easier to apply this rule prospectively than it is to apply it retroactively.[12] We think the Blum rule should be applied retroactively but with the following caveat.

¶92 The "overruled unless" test cannot be applied retroactively with the same rigor that it can be applied prospectively because, before the Blum decision, this court did not have any agreed upon language to partially overrule a court of appeals decision, except an announcement that the court is

[12] For example, how might a strict application of the Blum rule apply to a past decision of this court that overruled two court of appeals cases, but did so utilizing different language without the guidance of Blum? E.g., Colby v. Columbia Cnty., 202 Wis. 2d 342, 363 & n.11, 550 N.W.2d 124 (1996) ("Because the court of appeals in Fox[v. Smith, 159 Wis. 2d 581, 464 N.W.2d 845 (Ct. App. 1990)] failed to follow the precedent established by this court in Maynard and its progeny, we hold that the Fox decision is overruled.") ("We similarly overrule that portion of Schwetz[v. Employers Ins. of Wausau,] 126 Wis. 2d [32,] 37 n.4, 374 N.W.2d 241 [(Ct. App. 1985)], which is in conflict with the remainder of our holding in the present case.") (emphasis added).

A different problem would be presented by a case that used very broad language in overruling court of appeals decisions. E.g., State v. Walstad, 119 Wis. 2d 483, 486, 351 N.W.2d 469 (1984):

> In so doing we specifically overrule and repudiate the entire line of cases stemming from State v. Booth, 98 Wis. 2d 20, 295 N.W.2d 194 (Ct. App. 1980), which hold that the destruction of the breathalyzer test ampoule warrants the suppression of the test results and which rely on the theory that a used ampoule is testable to determine blood alcohol and can supply material evidence in respect to a defendant's guilt or innocence.

Id. (emphasis added.)

"withdrawing" language from a decision. Thus, as noted above, courts may have to interpret cases from this court that were decided prior to Blum to determine whether an opinion "overruling" a court of appeals decision really intended to overrule the entire decision or only a portion of it.

¶93 In cases prior to Blum, if this court did not use any qualifying language in overruling a court of appeals decision, it probably intended to overrule the decision in its entirety, as Blum holds. However, if this court utilized qualifying language, it probably intended something less than a total overruling and the surviving portion of the partially overruled decision may be cited as precedent.

¶94 It is to be hoped that the Blum issues we discuss here will not surface very often.

V. CONCLUSION

¶95 We conclude that David Stevens withdrew his request for an attorney by voluntarily initiating a request to resume the questioning. He knowingly, intelligently, and voluntarily provided an incriminating statement to his interrogator after he was given a second Miranda warning. Although Stevens validly invoked his right to counsel, he cancelled his invocation of that right by initiating a dialogue in which he asked to continue the interrogation. This cancellation of the request for counsel was confirmed by the fact that Stevens made no effort to secure counsel while his interrogator was absent, by his recorded agreement that he initiated the conversation asking

to resume questioning, and by his waiver of the right to counsel after receiving a second Miranda warning.

¶96 We also conclude that the decision in Blum v. 1st Auto & Casualty Insurance Co., did not require the court of appeals to disregard Middleton in its analysis because Anson overruled Middleton only to the extent that "it held a circuit court may take additional evidence at [a Harrison v. United States] hearing." However, Middleton is factually distinguishable from this case and is now completely overruled on the merits.

¶97 Because we determine that Stevens' Fifth Amendment privilege against self-incrimination and his equivalent right under Article I, Section 8 of the Wisconsin Constitution were not violated, we affirm the decision of the court of appeals.

By the Court.—The decision of the court of appeals is affirmed.

1992 WL 601890
Only the Westlaw citation is currently available.
United States District Court, W.D. Wisconsin.

Douglas Arthur MIDDLETON, Petitioner,
v.
James P. MURPHY, Warden, Columbia Correctional Institution, Portage, Wisconsin, Respondent.

No. 91-C-0751-C. | Jan. 28, 1992.

Attorneys and Law Firms

Meredith J. Ross, Madison, WI, for Douglas Arthur Middleton.

Sally Wellman, Asst. Atty. Gen., Madison, WI, for Jamess P. Murphy.

Opinion

OPINION AND ORDER

CRABB, District Judge.

*1 This is a petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. Petitioner, an inmate at the Columbia Correctional Institution in Portage, Wisconsin, contends that he is in custody in violation of the Constitution of the United States. Petitioner seeks relief on the grounds that his pre-trial confessions were obtained improperly and used against him improperly at trial; that because the confessions were used at trial he was forced to take the stand against his will; and that without the confessions and testimony, the evidence at trial would have been insufficient to convict him. Respondent asserts that petitioner's oral and written confessions were obtained legally and were not admitted erroneously at trial; that even if the confessions were obtained illegally and so admitted erroneously, petitioner waived his objection to their admission by testifying at trial; and that because the question whether testimony at trial is impelled is a question of fact, the Wisconsin Court of Appeals was correct when it applied the clearly erroneous standard to the trial court's finding that petitioner's testimony was not impelled. [1] Petitioner has exhausted his state remedies as required under 28 U.S.C. § 2254. [2]

After reviewing the entire record, I conclude that the state trial court was correct in concluding that petitioner did not invoke his right to counsel before confessing, and I conclude that, as a matter of law, the arrival of petitioner's attorney at the police station was not a fact of which the police were required to advise petitioner, so that the trial court did not err in admitting the confessions into evidence. Because his oral and written confessions were constitutionally admissible, petitioner's testimonial confession was not impelled. The petition for writ of habeas corpus will be denied.

In considering habeas corpus petitions, the district court presumes state court findings of fact to be correct unless, upon consideration of the record as a whole, it concludes that the factual determinations are not "fairly supported" by the record. 28 U.S.C. § 2254(d)(8); *United States ex rel. Savory v. Lane,* 832 F.2d 1011, 1019 (7th Cir.1987). Petitioner does not object to the accuracy or completeness of the state court findings of fact, except for the trial court finding that his testimony at trial was not impelled. I adopt the following facts, based on the Wisconsin Court of Appeals' decisions in *State v. Middleton,* 135 W.2d 297, 399 N.W.2d 917 (Ct.App.1986) and *State v. Middleton,* 1988 Wisc.App. LEXIS 796 (Ct.App.1988), supplemented by pertinent facts from the record.

FACTS FOUND BY STATE COURTS

Petitioner murdered Hilda Miller, age 72, late on June 4 or early on June 5, 1984, in Edgerton, Wisconsin. He bludgeoned her with a hammer and then robbed her and set her apartment on fire. Between 10:00 and 10:30 a.m. on June 5, Lt. Toler of the Rock County, Wisconsin, Sheriff's Department arrested petitioner, advised him of his *Miranda* rights including his right to consult with a lawyer before and during questioning, and took him to the sheriff's department.

*2 At about 1:16 p.m., petitioner requested that a deputy sheriff place a call to petitioner's home. The deputy heard petitioner tell his wife that he was in the Rock County Jail and ask her to contact Gregory Hunsader. The deputy knew that Hunsader was a local lawyer, but petitioner did not refer to Hunsader as a lawyer during the conversation.

After the telephone call, the deputy turned petitioner over to the detective bureau for questioning. The deputy did not inform the detectives that petitioner had asked his wife to call Hunsader.

Three detectives began questioning petitioner at about 1:30 p.m. Lt. Toler initiated the session by asking petitioner whether he understood his *Miranda* rights; petitioner said that

he did. At no time did petitioner ask to see Hunsader or any other lawyer.[3] Sometime between 1:20 and 2:30 p.m. on June 5, petitioner confessed orally that he had murdered Hilda Miller.

At about 1:20 p.m., petitioner's wife called Hunsader and left a message that he should meet petitioner at the jail. Hunsader received the message at about 2:10. When he arrived at the jail at about 2:20, he asked to see petitioner. A deputy told Hunsader to wait because no interview room was available; at about 2:30 p.m. one of the interrogating detectives was told that Hunsader wanted to see petitioner. The detective informed Lt. Toler, who replied that petitioner had not requested a lawyer. The detective told Hunsader that petitioner had not asked for a lawyer, and refused to tell petitioner that his wife had arranged for Hunsader to meet him. The detective told Hunsader he could meet with Middleton if the district attorney agreed; at about 2:50 p.m. the detective told Hunsader that a lawyer in the district attorney's office had refused Hunsader permission to interview petitioner.

Between 2:44 and 3:56 p.m., after again receiving *Miranda* warnings, petitioner waived his rights in writing and gave a written statement to the detectives. Later in the afternoon, he gave two more written statements; before each, the detectives advised him of his rights and he waived them in writing.

Petitioner was alert and responsive during the questioning. He was not threatened and was not promised leniency.[4]

Before trial, petitioner offered a motion in limine, asking that his confessions be excluded from evidence. The state court judge denied petitioner's motion, finding that the deputy who had overheard petitioner tell his wife to call Hunsader had no duty to tell the interrogating detectives, and that because petitioner had been advised of his *Miranda* rights, and understood them, before he was questioned and before he gave his statements, his oral and written confessions were voluntary, were not coerced or the product of improper police pressure, and therefore were admissible.

At trial, the state introduced the confessions into evidence. Petitioner took the stand, testifying in his own defense that he had indeed killed Hilda Miller, but adding that he had been so intoxicated that he could not have formed the requisite intent for a conviction of first degree murder.

***3** On September 1, 1984, the jury returned guilty verdicts against petitioner on the charges of first degree murder, armed robbery, and arson. The court entered judgment and sentenced petitioner to life for the murder conviction, ten years for the armed robbery conviction, and five years for the arson conviction.

Petitioner appealed his convictions on the grounds that he invoked his right to counsel when the deputy overheard him ask his wife to contact Hunsader, that his interrogation should have ceased at that point, that his confessions should have been suppressed because the interrogation did not cease, that his trial testimony was impelled by the admission of the illegal confessions, and that the admission of the confessions was reversible error because the state did not have enough evidence to convict him without the confessions. The court of appeals ruled that petitioner had not invoked his right to counsel when the deputy overheard him ask his wife to call Hunsader, but that any confession obtained after Hunsader arrived at the sheriff's department was obtained in violation of petitioner's due process rights under the Fifth and Fourteenth Amendments because petitioner's confessions were not given after a knowing and voluntary waiver of his *Miranda* rights if he did not know his attorney had arrived at the station. The court of appeals found it undisputed that the three written confessions were given after Hunsader's arrival, and therefore should have been suppressed. On the record before it, however, the court of appeals could not determine whether petitioner's oral confession had been obtained before or after Hunsader arrived. The court of appeals remanded the case to the trial court for determination of two issues: 1) whether the oral confession had been obtained before or after 2:20 p.m., when Hunsader arrived at the department, and 2) if the confession was obtained after 2:20 p.m., and therefore was inadmissible, whether petitioner's testimony at the trial was freely given or impelled by the admission of the inadmissible confessions. At an evidentiary hearing on remand, the trial court determined that petitioner had given his oral confession after Hunsader arrived at the sheriff's department, and that the confession had been admitted erroneously into evidence. The court concluded also that the state's use of the confessions did not impel petitioner to testify, but that petitioner testified in order to make second-degree murder a jury issue, thereby waiving his objection to the admission of the inadmissible confessions and rendering the court's error harmless. To reach its decision that petitioner's testimony was not impelled, the trial court, at the direction of the court of appeals, reviewed the state's case independently of the tainted evidence, and the impact of the tainted evidence on the jurors in light of the other evidence. The court based its finding that petitioner's testimony was not impelled on petitioner's sister's testimony, the state's evidence other than the confessions, and the trial

court's conclusion that petitioner would be entitled to a second-degree murder instruction only if he testified.

*4 Petitioner appealed the trial court's decision a second time. In *State v. Middleton,* 1988 Wis.App. LEXIS 796, the court of appeals, deeming the question whether petitioner's testimony at trial was impelled to be a question of fact, applied a clearly erroneous standard of review to the trial court's finding that petitioner's testimony at trial was not impelled. The court of appeals found sufficient evidence in the record to support the trial court's finding, and so upheld its decision and petitioner's conviction. The Supreme Court of Wisconsin denied review when petitioner appealed.

OPINION

Petitioner raises several challenges to the findings and procedures of the Wisconsin courts that convicted him of murder, robbery and arson. The basis of the challenges is that the state courts committed federal constitutional error by ruling that petitioner's trial testimony was not impelled after finding that his pre-trial confessions were obtained illegally. The federal habeas court "can grant habeas relief only when there is a violation of federal statutory or constitutional law," and reviews *de novo* such questions. *Brewer v. Aiken,* 935 F.2d 850, 854–55 (7th Cir.1990) (quoting *United States ex rel. Lee v. Flannigan,* 884 F.2d 945, 952 (7th Cir.1989). Because it is dispositive of all of petitioner's challenges, I will begin with the challenge to the state court holdings that respondent raises in its response to this petition for habeas corpus.

Respondent asserts that the trial court was correct in the first instance when it allowed into evidence the confessions of petitioner. The court of appeals determined in petitioner's first appeal that any confession secured after Hunsader's arrival at the sheriff's department was obtained illegally and was inadmissible. *Middleton,* 135 Wis.2d at 313–14. The court held that petitioner had "shown no reasonable basis ... to believe that the police would understand that he wanted an attorney, [and that therefore he] did not invoke his right to counsel," *id.* at 310, but then went on to hold that any confession obtained after the lawyer arrived at the station was inadmissible because "the knowing quality of Middleton's waiver [of his *Miranda* rights] disappeared when the facts of his interrogation were changed without his knowledge." *Id.* at 313.

The foundation of the right to counsel at issue is the Fifth Amendment privilege against self-incrimination and the requirement that suspects be warned prior to custodial interrogation that they have the right to remain silent and the right to have a lawyer present during questioning. *Miranda v. Arizona,* 384 U.S. 436, 469 (1966). Statements made by a suspect during interrogation are not admissible to establish guilt unless the suspect is informed of and waives his *Miranda* rights prior to making the statements. If a suspect "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." *Id.* at 444–45. Once a suspect invokes his right to counsel, before or during questioning, "the interrogation must cease until an attorney is present." *Id.* at 474.

*5 However, if a suspect does not invoke his right to counsel, but rather waives the right, then the interrogation may proceed. This is true even if a lawyer, either on her own or at the behest of a third party but without the knowledge of the suspect, arrives at the interrogation site and asks to consult with the suspect. *Moran v. Burbine,* 475 U.S. 412, 422–23 (1986). The reasoning is that the right to counsel belongs to the suspect rather than the lawyer, that it is the suspect who must make the knowing waiver, and that "[e]vents occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right." *Id.* at 422.

After being informed of his *Miranda* right to counsel, petitioner could choose one of two routes: he could choose not to invoke his right to counsel, in which case his interrogation could continue even after a lawyer appeared and wanted to see him, or he could invoke his right to counsel, in which case his interrogation had to stop immediately and could not continue until his counsel was in the interrogation room with him. *Miranda,* 384 U.S. at 474; *Minnick v. Mississippi,* 498 U.S. 146, 111 S.Ct. 486 (1990). Whether the interrogating officers were required to inform petitioner that the lawyer had asked to see him depended on whether petitioner had invoked his right to counsel.

Petitioner asserts that he did so when, after his arrest and after he was advised of his *Miranda* rights, he asked a deputy to place a call to his home and the deputy overheard petitioner tell his wife that he was in jail and she should contact Gregory Hunsader. Petitioner did not refer to Hunsader as a lawyer, and in the five times he was given his *Miranda* warnings or the three times he signed a written waiver of his right to counsel, he did not ask to see Hunsader or any other lawyer. [5] The court of appeals found the comment from petitioner to his wife to be insufficient to invoke his right to counsel because petitioner failed to communicate to the police his desire to have a lawyer present. *Middleton,* 135 Wis.2d at

309–10. The court observed that "we see no reason why indirect communication should be ineffective [to invoke the right to counsel] so long as the suspect has reason to believe the communication is effective," but found that the record failed to show that petitioner had a reason to believe he had made such a communication to the police. *Id.*

The court of appeals' holding that petitioner did not invoke his right to counsel is supported by the decisions of the Court of Appeals for the Seventh Circuit and the United States Supreme Court. Most recently, the Supreme Court has specified that the test for whether a suspect has invoked his right to counsel is not "the *likelihood* that a suspect would wish counsel to be present," but rather that he "ha[s] *expressed* his wish for the particular sort of lawyerly assistance that is the subject of *Miranda*." *McNeil v. Wisconsin,* 111 S.Ct. 2204, 2209 (1991) (emphasis in original). Expression "requires, at a minimum, some statement that can reasonably be construed to be expression of a desire for the assistance of an attorney *in dealing with custodial interrogation by the police*." *Id.* (emphasis in original). In *McNeil,* a suspect was represented by a public defender at an initial appearance, as was his right under the Sixth Amendment. Later in the day, he was taken to an interrogation room to be questioned about several different offenses, and given his *Miranda* warnings. After signing a waiver form, he confessed to the crimes. He sought then to suppress his confession on the ground that he had invoked his right to counsel at the initial appearance, and so could not be interrogated thereafter without his lawyer present.

***6** The Supreme Court differentiated between the Fifth Amendment prophylactic right to counsel designed to counteract the pressures of custodial interrogation and the Sixth Amendment right to counsel for accused criminal defendants. *Id.* at 2208. The Sixth Amendment right to counsel attaches when a prosecution is commenced and is "offense-specific," so that invocation of it pertains to the particular offense with which a suspect is charged. *Id.* at 2207–08. It cannot be invoked once for all future prosecutions. *Id.* at 2207. On the other hand, the Fifth Amendment right to counsel is non-offense-specific, so that when it is invoked no interrogation for any offense can occur until a lawyer is present. *Id.* at 2208. In order to invoke it, a suspect must express "a desire for the assistance of an attorney *in dealing with custodial interrogation by the police.*" *Id.* at 2209. In the *McNeil* context, this means that a Sixth Amendment invocation of right to counsel at an initial appearance does not translate into a Fifth Amendment invocation of right to counsel at a later interrogation for a different offense because the suspect did not express his desire to have a lawyer assist him in the interrogation.

In *Quadrini v. Clusen,* 864 F.2d 577 (7th Cir.1989), the Court of Appeals for the Seventh Circuit considered the question of what constitutes invocation of the right to counsel. In *Quadrini,* a suspect who was being interrogated stated that he did not want a lawyer and signed a *Miranda* waiver, but then showed the officers the business card of a public defender and told the officers that he had been told by the public defender not to make a statement. *Quadrini,* 864 F.2d at 582. The court found that the suspect had waived his right to counsel unequivocally, even though he had produced the business card of a lawyer and told the officers of the lawyer's advice. *Id.* at 582–83. The officers knew that the suspect had met already with a lawyer about the charges he faced, but that alone was not enough to invoke his right to counsel; the suspect had to ask for the lawyer to be present at the interrogation.

In this case, petitioner failed to invoke his Fifth Amendment right to counsel. He never asked to see a lawyer and he signed a waiver of his right to counsel three times. It was only by chance that the deputy who overheard petitioner ask his wife to call Hunsader knew that Hunsader was a lawyer; petitioner could have no reasonable expectation that his call to his wife would be understood as an invocation of counsel. Even if petitioner had told his wife to call a lawyer, rather than just calling Hunsader by name, he would not have successfully invoked his right to counsel during interrogation because he did not say that he wanted the lawyer for that purpose. In order to invoke his right to counsel during an interrogation, a suspect must express "a desire for the assistance of an attorney *in dealing with custodial interrogation.*" *McNeil,* 111 S.Ct. at 2209 (emphasis in original). Petitioner did not ask for a lawyer at all, much less ask for one to be present for interrogation.

***7** Because petitioner did not invoke his right to counsel when he called his wife, and then waived the right when he was given his *Miranda* warnings, the interrogating officers were not required to inform him when the lawyer arrived at the station. Petitioner did not ask for a lawyer; therefore the lawyer's attempt to see him was unilateral. *Moran v. Burbine,* 475 U.S. at 420, makes clear that a suspect's right to a lawyer belongs to the suspect, and cannot be invoked by a lawyer. *Id.* at 424–25. Petitioner validly waived his right to the presence of counsel. There is no allegation that the waiver was coerced by physical or psychological pressure. Although knowledge that a lawyer was willing to see him "might have affected his decision to confess, ... [the Supreme Court has] never read the

Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights." *Id.* at 422. Petitioner offered his confessions after a valid waiver of his right to counsel, and those confessions were admissible at his trial.

Because the confessions constituted admissible evidence, it was not a violation of the federal constitution for the trial court to admit them at trial. Because the confessions were admissible, petitioner cannot argue that his testimony was impelled by the introduction of tainted evidence. Petitioner's conviction must stand; his petition for habeas corpus will be denied.

ORDER

IT IS ORDERED that petitioner's petition for a writ of habeas corpus is DENIED on the grounds that the trial court did not err when it admitted his confessions into evidence at his trial and that his testimony was not impelled by the introduction of inadmissible evidence.

Footnotes

1 The term "impel" means to incite to action, or to induce, influence, or urge. *Webster's New International Dictionary,* 1248 (2d ed. 1957). Its meaning is similar to that of "compel": "compel is the stronger word, connoting force or coercion, with little or no volition on the part of the one compelled. Impel connotes persuasive urging, with some degree of volition on the part of the one impelled." Bryan A. Garner, *A Dictionary of Modern Legal Usage* 130 (1987). Thus it would seem that petitioner's claim is that his testimony at trial was compelled—that he had no choice but to testify—rather than impelled—that he was persuaded to do so. In *Harrison v. United States,* 392 U.S. 219 (1968), the seminal Supreme Court case concerning trial testimony tainted by illegally obtained and admitted confessions, Justice Stevens referred to such testimony as "impelled." Because the term has become part of the legal lexicon in cases such as this one, I will use it even though it is not precisely accurate.

2 In his response to the petition for writ of habeas corpus, respondent denied that petitioner has exhausted his state court remedies to the extent that he is claiming that the state appellate court failed to follow appropriate appellate procedures. Because I have decided that the trial court did not err when it admitted petitioner's confessions at trial, and that therefore his testimony was not impelled by inadmissible confessions, any claim by petitioner that the state appellate court failed to follow appropriate procedures is moot. Therefore there is no state court remedy to exhaust on that procedural issue.

3 At trial, petitioner claimed that he told the detectives he wanted to call Hunsader; the trial court disbelieved him.

4 Petitioner claimed at trial that he told the interrogating detectives that he was exhausted and wanted rest, but the court believed the officer's testimony to the contrary.

5 Petitioner claimed at trial that he told the detectives he wanted to call Hunsader, but the trial court disbelieved him. "It is well-settled law that a court of appeals does not stand in judgment of the credibility of witnesses. Rather that question is left to the sound discretion of the trier of fact." *Quadrini v. Clusen,* 864 F.2d 577 (7th Cir.1989) (citations omitted).

¶98 ANNETTE KINGSLAND ZIEGLER, J. *(concurring).* I join the majority opinion insofar as it concludes that (1) Stevens' privilege against self-incrimination, guaranteed by both the Fifth Amendment of the United States Constitution and Article I, Section 8 of the Wisconsin Constitution, was not violated; and (2) this court's decision in Blum v. 1st Auto & Casualty Insurance Co., 2010 WI 78, ¶56, 326 Wis. 2d 729, 786 N.W.2d 78, did not require the court of appeals to disregard State v. Middleton, 135 Wis. 2d 297, 399 N.W.2d 917 (Ct. App. 1986), in its entirety. I concur and write separately to clarify the majority opinion's discussion of Blum at ¶¶91-94.

¶99 In Blum, a majority of this court concluded that "a court of appeals decision expressly overruled by this court no longer retains any precedential value, unless this court expressly states that it is leaving portions of the court of appeals decision intact." 326 Wis. 2d 729, ¶56. Quite obviously, prior to Blum, no court could have known that it was expected to utilize magic language when partially overruling a court of appeals decision. In short, the Blum rule can be understood only with common sense in mind. In applying the rule, we simply must determine whether the court, in "overruling" a court of appeals decision, intended to overrule the entire decision or only a portion thereof.

¶100 I respectfully concur in order to clarify the Blum rule.

¶101 I am authorized to state that Justices PATIENCE DRAKE ROGGENSACK and MICHAEL J. GABLEMAN join this concurrence.

¶102 SHIRLEY S. ABRAHAMSON, C.J. *(concurring in part and dissenting in part).* I join the majority opinion with respect to the discussion of the "Blum issue" at ¶¶91-94. I dissent from the rest of the opinion relating to the Miranda issue.

¶103 As the majority notes with regard to the Miranda issue, "[t]he present case is like a law school exam question." Majority op., ¶47. The case presents a fact situation not previously faced by this court or, as best I can determine, by any other court. The members of this court, like law students, have to reach a decision on the basis of past cases (not directly on point), constitutional principles, and pragmatic concerns.

¶104 Here are the basic facts: During an initial interrogation, after receiving the first Miranda warnings, Stevens invoked his Fifth Amendment right to counsel. The questioning stopped——as it should. Shortly thereafter, Stevens expressed interest in cancelling his invocation of the right to counsel and in resuming discussion with the detective. He had the right to do so. Stevens was placed in a cell. Several hours passed before a law enforcement officer returned to talk with Stevens. During this several-hour hiatus, Stevens' attorney arrived at the police station. The police officers failed to inform Stevens of his attorney's arrival and refused to allow the attorney to see Stevens. When the law enforcement officers returned to talk with Stevens, Stevens was given the Miranda warnings, waived his rights, and made statements that he now seeks to suppress.

¶105 This court must determine whether the law enforcement officers violated the Fifth Amendment when they failed to inform Stevens of his attorney's arrival after Stevens expressed interest in cancelling his invocation of his right to counsel but before he received a second Miranda warning and waived his right to counsel. In other words, does a suspect's initiation of conversation with law enforcement officers after the suspect invokes the right to counsel constitute a waiver of the right to counsel in the absence of a second Miranda warning?[1]

¶106 The facts of the present case differ from prior cases. As the majority acknowledges, this case is distinguishable from Moran v. Burbine, 475 U.S. 412 (1986), State v. Hanson, 136 Wis. 2d 195, 401 N.W.2d 771 (1987), and State v. Ward, 2009 WI 60, 318 Wis. 2d 301, 767 N.W.2d 236. In these cases, the suspects never explicitly invoked their right to counsel while in custody. Majority op., ¶70. For the same reason, the present case is distinguishable from State v. Middleton, 135 Wis. 2d 297, 399 N.W.2d 917 (Ct. App. 1986), which seems to play a major role in the majority opinion.

¶107 With regard to the fact situations presented by Moran, Hanson, Ward, and Middleton, I agree with the majority opinion that the United States Supreme Court and this court have held that a suspect who has not invoked the right to counsel does not

[1] The majority states the issue as follows: "[T]he critical issue is whether Stevens' invocation of the right to counsel . . . survived his almost immediate initiation of conversation with his interrogator in which he emphatically asked to resume the questioning . . . ." Majority op., ¶58.

have the right to be informed that counsel who intends to represent the suspect is available to speak with the suspect, and counsel need not be given the opportunity to speak with the suspect.

¶108 With regard to the different fact situation presented in the instant case, I disagree with the majority. Unlike the majority, I conclude that Stevens' Fifth Amendment rights were violated. My conclusion, like the majority's to the contrary, is driven by a synthesis of principles derived from federal and state case law. My conclusion is also driven by the federal and state constitutional provisions enshrining the right against self-incrimination (including the right to counsel during custodial interrogation) and by the pragmatic need to minimize the grave personal and societal harms flowing from the impairment of these rights. The line between encouraging voluntary, true confessions and coercing confessions, whether true or false, is narrow. Today's majority is all too willing to ignore that line.[2]

I

¶109 The majority appears to acknowledge, and I agree, that once a suspect has invoked the right to counsel, not only must interrogation cease, but the suspect also has a right to be informed that an attorney has arrived at the station to speak with him. Majority op., ¶¶67-70. The United State Supreme Court declared in Miranda v. Arizona, 384 U.S. 436 (1966), that

[2] As I explain in Part IV, below, even if I agreed with the majority's Fifth Amendment analysis, I would conclude that the Wisconsin Constitution warrants a different result.

once a suspect invokes his or her right to counsel, "the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning."[3] Miranda thus provides that a suspect has two rights to counsel: (1) The right to consult with counsel prior to questioning; and (2) the right to have counsel present during any questioning.[4]

¶110 According to the majority opinion, law enforcement did not have to inform Stevens that his attorney had arrived because Stevens "cancelled" his request for counsel. And how did Stevens cancel his invocation of his right to counsel? According to the majority opinion at ¶4, Stevens "cancelled his invocation of that right by initiating a dialogue in which he asked to continue the interrogation." See also majority op., ¶74. The majority explains that Stevens' "cancellation of the request for counsel was confirmed by the fact that Stevens made

[3] Miranda v. Arizona, 384 U.S. 436, 474 (1966).

The Seventh Circuit's decision in Middleton v. Murphy, No. 92-1498, unpublished slip op. (7th Cir. June 21, 1993) also indirectly supports the proposition that a suspect who has invoked the right to counsel must be informed that an attorney has arrived. The district court (whose opinion was attached to the Seventh Circuit's decision) stated that "[b]ecause petitioner did not invoke his right to counsel when he called his wife, and then waived the right when he was given his Miranda warnings, the interrogating officers were not required to inform him when the lawyer arrived at the station." Middleton, No. 92-1498, unpublished slip op. at 7 (7th Cir. June 21, 1993) (emphases added). The converse is also true: If the petitioner did invoke his right to counsel and had not yet waived that right, the interrogating officers were required to inform him that his lawyer had arrived.

[4] Miranda, 384 U.S. at 470; Florida v. Powell, 130 S. Ct. 1195, 1206 (2010).

no effort to secure counsel while his interrogator was absent, by his recorded agreement that he initiated the conversation asking to resume questioning, and by his waiver of the right to counsel after receiving a second Miranda warning." Majority op., ¶4.

¶111 In the present case, counsel appeared at the police station before Stevens "confirmed" his cancellation of his invocation of the right to counsel. Stevens' counsel appeared at the police station asking to see Stevens before Stevens waived his right to counsel after the second Miranda warning. Majority op., ¶¶19, 73-74. As I explain below, the majority's conclusion that Stevens lost the rights he had gained by invoking the right to counsel merely by initiating conversation with the police, as opposed to both initiating conversation with the police and knowingly, intelligently, and voluntarily waiving the right to counsel, is not compelled by precedent.

¶112 I conclude that Stevens' invocation of his right to counsel during interrogation lasted until he knowingly, intelligently, and voluntarily waived that right. In this case, Stevens' only effective waiver came after the second Miranda warning. Stevens' waiver of counsel came after Stevens' counsel appeared at the police station to speak with Stevens. I therefore conclude that Stevens' Fifth Amendment right to counsel was violated when law enforcement failed to advise Stevens that counsel was available to speak with him.

¶113 My conclusion is supported by the United States Supreme Court's decision in Oregon v. Bradshaw, 462 U.S. 1039

(1983). In Bradshaw, eight justices (the four in the plurality and the four in dissent) agreed that in order for the interrogation of a suspect to continue without counsel once the suspect has invoked his or her right to counsel, two requirements must be met: (1) the suspect must, on his or her own accord, reopen dialogue with his interrogators; and (2) the suspect must again knowingly, intelligently, and voluntarily waive his Miranda rights.[5]

¶114 According to eight justices in Bradshaw, the suspect's mere initiation of conversation with law enforcement does not suffice to show a waiver of the previously asserted right to counsel. Rather, two steps must be analyzed before the suspect loses the rights he gained by invoking the right to counsel: the initiation step and the waiver step.[6]

[5] See Oregon v. Bradshaw, 462 U.S. 1039, 1044 (1983) (plurality opinion); Bradshaw, 462 U.S. at 1054 n.2 (Marshall, J., dissenting).

"The only dispute between the plurality and the dissent in this case concerns the meaning of 'initiation' for purposes of Edwards' per se rule." Bradshaw, 462 U.S. at 1054 n.2 (Marshall, J., dissenting).

[6] The plurality and dissenting justices agreed on this point.

As the plurality in Bradshaw stated, the lower court "was wrong in thinking that an 'initiation' of a conversation or discussion by an accused not only satisfied the Edwards rule, but ex proprio vigore suffices to show a waiver of a previously asserted right to counsel. The inquiries are separate, and clarity of application is not gained by melding them together." Bradshaw, 462 U.S. at 1045.

¶115 I recognize that the present case is not governed precisely by Bradshaw. In Bradshaw, the Court did not address the right of a suspect to be informed of an attorney's arrival. I do not claim that Bradshaw is on all fours with the present case. Nevertheless, Bradshaw is instructive and supports my conclusion.

¶116 Bradshaw addressed one of the rights gained by invoking the right to counsel——the right not to be subjected to further interrogation——and held that the right stays with the suspect until the suspect initiates further conversation and the police obtain a knowing, intelligent, and voluntary waiver by giving the suspect a Miranda warning.[7]

¶117 The present case addresses another right gained by a suspect who invokes the right to counsel——the right to be

---

The dissenting justices in Bradshaw agreed, stating: "If an accused has himself initiated further communication with the police, it is still necessary to establish as a separate matter the existence of a knowing and intelligent waiver under Johnson v. Zerbst, 304 U.S. 458, 464 (1938)." Bradshaw, 462 U.S. at 1054 n.2 (Marshall, J., dissenting).

The majority opinion refers to Oregon v. Bradshaw, 462 U.S. 1039 (1983) in ¶52. The majority explains Bradshaw as follows: "When the accused initiates communication with police, the paradigm is reset and police may explore whether the accused is willing to answer questions. They may proceed with custodial interrogation if the accused again is given a Miranda warning and again waives his Miranda rights."

[7] "[T]he question would be whether a valid waiver of the right to counsel . . . had occurred, that is, whether the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities." Bradshaw, 462 U.S. at 1045 (quoting Edwards v. Arizona, 451 U.S. 477, 486 n.9 (1981).

informed of an attorney's arrival at the station. To be consistent with Bradshaw, this court should hold that this right, like the right not to be subjected to further interrogation, stays with the suspect until the suspect initiates further conversation and the police obtain a knowing, intelligent, and voluntary waiver.

¶118 Bradshaw teaches that a suspect does not automatically waive his Fifth Amendment right to counsel by simply initiating a conversation regarding the investigation.[8] A suspect's cancellation of his Fifth Amendment right to counsel (after having invoked the right to counsel) requires a two-prong analysis. Separate inquires must be made and both prongs must be satisfied before the suspect loses the rights he gained by invoking the right to counsel.[9]

¶119 This court followed the Bradshaw two-prong analysis for continuation of interrogation of a suspect who has invoked his Fifth Amendment right to counsel. In State v. Hambly,[10] the court held that after a suspect effectively invokes his Fifth Amendment Miranda right to counsel, the State must meet two criteria to renew interrogation:

(A) The State has the burden to show that the suspect initiated further conversation with law enforcement.

[8] Bradshaw, 462 U.S. at 1044.

[9] The majority alludes to the two required steps under Bradshaw and Hanson at ¶¶52 and 74.

[10] See State v. Hambly, 2008 WI 10, ¶¶69–70, 307 Wis. 2d 98, 745 N.W.2d 48.

(B) The State has the burden to show that the suspect waived the right to counsel voluntarily, knowingly and intelligently; that is, the waiver of counsel must be a knowing, intelligent, and voluntary waiver of a known right.[11]

¶120 In Hambly, as in the present case, the first criteria was satisfied. The Hambly court then examined the facts to determine whether Hambly's waiver of his right to counsel after the second Miranda warnings were given was knowing, intelligent, and voluntary.[12]

¶121 In the present case, when Stevens initiated conversation with the detective shortly after invoking his right to counsel, according to the law enforcement officer, Stevens said that "it was his [Stevens'] intention once again to waive his right to an attorney." See majority op., ¶¶18, 71. Stevens is not quoted as, or treated as, knowingly, intelligently, and voluntarily waiving his right to counsel at the moment when he initiated conversation with law enforcement officers.

¶122 The majority opinion does not assert that Stevens' initiation of conversation with the law enforcement officer was a valid waiver of his right to counsel. The majority opinion does not claim that Stevens waived his right to counsel before he was given the second Miranda warning. Nothing in the record establishes that Stevens knowingly, intelligently, and

[11] Hambly, 307 Wis. 2d 98, ¶¶68-70.

[12] Id., ¶¶98, 99.

voluntarily waived his right to counsel before he was given the second Miranda warning.

¶123 Thus when Stevens' attorney arrived at the police station before the second Miranda warnings were given, Stevens had not yet effectively cancelled his invocation of the right to counsel.

¶124 The majority opinion incorrectly treats Stevens' initiating communications with law enforcement as a per se cancellation of his earlier invocation of the right to counsel. Stevens' initiating communications with law enforcement did not, in and of itself, constitute a knowing, intelligent, and voluntary waiver of the previously invoked right to counsel. Initiating conversation with law enforcement simply made it possible for there to be a subsequent knowing, intelligent, and voluntary waiver of the right to counsel.

¶125 The record demonstrates that the police did not obtain a knowing, intelligent, and voluntary waiver of the right to counsel until after Stevens' counsel appeared at the police station. Therefore, during the interval between Stevens' initiating conversation with the police and the second Miranda warning, Stevens' invocation of the right to counsel was still in existence and he had a right to be informed that his attorney had arrived and to consult with his attorney if he wished to do so. This right was violated in the present case.

¶126 The majority does not apply the principles of Bradshaw and Hambly to the present case. The majority treats a suspect's initial invocation of the Fifth Amendment right to counsel as a

nullity once the suspect initiates conversation with law enforcement. The majority has no authority to support this thesis. The majority pieces together snippets from case law not addressing the issue presented in the instant case to support its conclusion that we may treat the invocation of the right to counsel as if it never occurred because the defendant merely initiated conversation with law enforcement.

¶127 The majority complains that my dissent "transform[s] Bradshaw into a rule that an accused's invocation of the Fifth Amendment right to counsel remains completely intact, no matter what the accused says to withdraw or cancel that invocation, until he is given and waives a second Miranda warning." Majority op., ¶52 n.9. The majority misstates my position.

¶128 My position is that a suspect's invocation of the Fifth Amendment right to counsel remains intact until (1) the suspect, on his or her own accord, reopens dialogue with the interrogators, and (2) the suspect knowingly, intelligently, and voluntarily waives his or her Miranda rights. See ¶¶112-117, supra. This interpretation of Bradshaw and application of Bradshaw to the present case properly recognizes the sanctity of a suspect's invocation of the right to counsel and the crucial importance of a knowing, intelligent, and voluntary waiver of that right.

¶129 It seems likely that a suspect's initiation of conversation will usually be followed almost immediately by the interrogators' obtaining a knowing, intelligent, and voluntary waiver of the right to counsel from the suspect (typically by

administering Miranda warnings). In the present case, however, there was a significant gap between the suspect initiating conversation and the suspect knowingly, intelligently, and voluntarily waiving the right to counsel. The waiver did not occur until hours later (after counsel had arrived at the station) when the second Miranda warnings were given.

¶130 Thus, I conclude that Stevens' statements during the second custodial interrogation were obtained in violation of Miranda, Edwards, and Bradshaw, and should have been suppressed. As I see it, precedent more strongly commands the outcome I urge than the outcome the majority reaches.

II

¶131 In addition to precedent, my conclusion is supported by the historical importance of the protections offered by the Fifth Amendment and the longstanding tradition of protecting the Fifth Amendment right to counsel, once invoked, with particular vigilance.

¶132 The Fifth Amendment embodies the privilege against self-incrimination, which is "the essential mainstay of our adversary system."[13] "[O]ur accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth."[14] Because of its

[13] Miranda, 384 U.S. at 460.

[14] Id.

fundamental importance, "the privilege has consistently been accorded a liberal construction."[15]

¶133 In order to honor fully the privilege against self-incrimination, Miranda requires police to inform suspects of both the right to silence and the right to counsel, among other things, before custodial interrogation may occur. Miranda, 384 U.S. at 479. Although the right to silence is a crucial element of the privilege against self-incrimination, the Supreme Court has confirmed that "additional safeguards are necessary when the accused asks for counsel."[16]

[15] Id. at 461.

[16] Edwards v. Arizona, 451 U.S. 477, 484 (1981).

See also Fare v. Michael C., 442 U.S. 707, 719 (1979):

> Whether it is a minor or an adult who stands accused, the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts. For this reason, the Court fashioned in Miranda the rigid rule that an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease.

At least one state has held that once a suspect invokes the right to counsel, he is incapable of waiving that right outside the presence of counsel. See People v. Cunningham, 400 N.E.2d 360 (N.Y. 1980).

The importance of the right to counsel in Wisconsin is evidenced by our legislature's criminalizing the denial of access to an attorney for a person in custody in certain situations. See Wis. Stat. § 946.75 ("Whoever, while holding another person in custody and if that person requests a named attorney, denies that other person the right to consult and be advised by an attorney at law at personal expense, whether or not such person is charged with a crime, is guilty of a Class A misdemeanor."). Wisconsin Stat. § 946.75 is not implicated by the facts of record in the present case.

¶134 This court should interpret and apply the Fifth Amendment and the relevant precedent with the goal of maintaining, rather than shrinking, the Fifth Amendment right to counsel. Consistent with the United States Supreme Court's declaration in Miranda, this court should construe precedent in favor of protecting the right to counsel. The majority fails at this task.

III

¶135 The third reason for my conclusion is the pragmatic concern that underlies the right to counsel and justifies treating an invocation of the right to counsel with great respect.

¶136 Although the United States Supreme Court has stated that voluntary confessions are "'an unmitigated good,' essential to society's compelling interest in finding, convicting, and punishing those who violate the law,"[17] the Court has also recognized that "the pressure of custodial interrogation is so immense that it 'can induce a frighteningly high percentage of people to confess to crimes they never committed.'"[18] The presence of counsel is a safeguard against the possibility of false confessions.

[17] Maryland v. Shatzer, 130 S. Ct. 1213, 1222 (2010) (quoting McNeil v. Wisconsin, 501 U.S. 171, 181 (1991)).

[18] J.D.B. v. North Carolina, 131 S. Ct. 2394, 2401 (2011) (quoting Corley v. United States, 556 U.S. 303, 321 (2009) (citing Steven A. Drizin & Richard A. Leo, The Problem of False Confessions in the Post-DNA World, 82 N.C. L. Rev. 891, 906-07 (2004))) (citing Miranda, 384 U.S. at 455 n.23).

¶137 When a false confession leads to a wrongful conviction, not only is the wrongfully convicted person harmed, but so is society. A wrongful conviction enables the guilty person to evade capture and commit more crimes. A wrongfully imprisoned individual costs the taxpayers substantial sums of money for trial, incarceration, and later exoneration in some cases.

¶138 False confessions are, unfortunately, unexceptional. Almost a quarter of the approximately 2,000 exonerations studied in a 2012 report involved a defendant who either falsely confessed or was falsely accused by a co-defendant who confessed.[19] According to recent data from the Innocence Project, approximately 25 percent of wrongful convictions overturned by DNA evidence in the United States have involved some form of false confession.[20] Wisconsin is not immune to the risk of false confessions and false convictions.[21]

[19] See Saumel R. Gross & Michael Shaffer, National Registry of Exonerations, Exonerations in the United States, 1989–2012 41 (2012).

[20] See Innocence Project, False Confessions & Recording of Custodial Interrogations, available at http://www.innocenceproject.org/Content/False_Confessions__Recording_Of_Custodial_Interrogations.php (last visited June 29, 2012).

[21] Of 891 individual exonerations listed by the 2012 study, Wisconsin had the eighth highest number of any state, with 21 exonerations. Saumel R. Gross & Michael Shaffer, National Registry of Exonerations, Exonerations in the United States, 1989–2012 35 (2012).

¶139 For the reasons discussed above, I conclude that the majority errs in its application of the Fifth Amendment in the present case.

IV

¶140 In any event, even if I agreed with the majority's Fifth Amendment analysis, which I do not, I would rely on the Wisconsin Constitution to reach a different result. As I noted in my dissent in Hanson, the United States Supreme Court in Moran v. Burbine, 475 U.S. at 428, expressly invited the states to promulgate their own rules governing the conduct of their police officers to protect the individual rights of citizens.[22] Wisconsin should accept that invitation.

¶141 As Justice Crooks noted in his dissent in Ward and as I noted in Hanson, we have serious concerns about the United States Supreme Court's decision in Moran. The majority decisions in Hanson and Ward unfortunately provide an opportunity, and perhaps even an incentive, for law enforcement officers to prevent individuals from meaningfully exercising the Fifth Amendment right against self-incrimination and the Fifth Amendment right to counsel during custodial interrogation.

¶142 Like United States Supreme Court Justice John Paul Stevens' dissenting opinion in Moran, I conclude that allowing law enforcement officers to withhold from a suspect the fact that an attorney has arrived or to deceive a suspect's attorney places the choice of whether an attorney will be present during

[22] State v. Hanson, 136 Wis. 2d 195, 220, 401 N.W.2d 771 (1987) (Abrahamson, J., dissenting) (citing Moran v. Burbine, 475 U.S. 412, 428 (1986)).

questioning in the hands of the law enforcement officers, not the individual being questioned. This outcome flies in the face of the Fifth Amendment protections that Miranda was meant to enforce.[23]

¶143 This court should reconsider its prior decisions regarding the obligation that law enforcement officers have to keep suspects informed of an attorney's availability. This court should join the many state courts that have rejected the United States Supreme Court's Moran decision and granted more

[23] Moran, 475 U.S. at 453 (Stevens, J., dissenting).

robust constitutional protections to their people under their state constitutions or laws.[24]

¶144 For the reasons stated, I write separately.

[24] See, e.g., State v. Stoddard, 537 A.2d 446, 452 (Conn. 1988) ("[A] suspect must be informed promptly of timely efforts by counsel to render pertinent legal assistance."); Bryan v. State, 571 A.2d 170, 176 (Del. 1990) ("[A] purported waiver can never satisfy a totality of the circumstances analysis when police do not even inform a suspect that his attorney seeks to render legal advice."); People v. McCauley, 645 N.E.2d 923, 930 (Ill. 1994) ("[W]hen police, prior to or during custodial interrogation, refuse an attorney appointed or retained to assist a suspect access to the suspect, there can be no knowing waiver of the right to counsel if the suspect has not been informed that the attorney was present and seeking to consult with him." (quoted source omitted)); State v. Reed, 627 A.2d 630, 643 (1993) ("[W]hen, to the knowledge of the police, such an attorney is present or available, and the attorney has communicated a desire to confer with the suspect, the police must make that information known to the suspect before custodial interrogation can proceed or continue." (quoted source omitted)); West v. Commonwealth, 887 S.W.2d 338, 343 (Ky. 1994) ("[T]here is no logical basis for distinguishing between an attorney requested by an accused and an attorney requested, as in this case, by a family member on behalf of the accused . . . ."); People v. Bender, 551 N.W.2d 71, 79 (Mich. 1996) ("[I]n order for a defendant to fully comprehend the nature of the right being abandoned and the consequences of his decision to abandon it, he must first be informed that counsel, who could explain the consequences of a waiver decision, has been retained to represent him."); Dennis v. State, 990 P.2d 277, 286 (Okla. Crim. App. 2001) ("[C]ommon sense and fundamental fairness suggest the fact of the attorney's presence is important information a suspect would use in determining whether to waive or invoke his rights."); Commonwealth v. Mavredakis, 725 N.E.2d 169, 179 (Mass. 2000) ("When an attorney identifies himself or herself to the police as counsel acting on a suspect's behalf, the police have a duty to stop questioning and to inform the suspect of the attorney's request immediately."); State v. Roache, 803 A.2d 572, 579 (N.H. 2002) ("[I]nterrogating officers have a duty to stop questioning the suspect and inform the suspect that the attorney is attempting to contact him or her.").