No. 21-

In the

Supreme Court of the United States

STATE OF WISCONSIN,

Petitioner,

v.

MANUEL GARCIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

JOHN A. BLIMLING*
Assistant Attorney General

Attorneys for Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-3519
(608) 294-2907 (Fax)
blimlingja@doj.state.wi.us
**Counsel of Record*

QUESTION PRESENTED

Manuel Garcia beat his girlfriend's two-year-old son to death. He voluntarily confessed to the crime in an interview with police a short time later. However, the trial court ruled that Garcia did not understand the *Miranda*[1] warnings when he waived his rights at the beginning of the police interview, so it excluded his confession from the State's case-in-chief. At trial, Garcia sought to exploit the exclusion of his confession by cross-examining a witness in a manner designed to mislead the jury about the adequacy of the police investigation into the victim's death.

The question presented is:

Can a criminal defendant's cross-examination of a witness for the State, designed to mislead the jury, open the door to the introduction of the defendant's voluntary confession when that confession was previously excluded due to an invalid *Miranda* waiver?

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

RELATED PROCEEDINGS

State v. Garcia, No. 2018AP2319-CR, Wisconsin Supreme Court. Judgment entered September 24, 2021.

State v. Garcia, No. 2018AP2319-CR, Wisconsin Court of Appeals. Judgment entered October 7, 2020.

State v. Garcia, No. 2010CF365, Racine County Circuit Court. Judgment of conviction entered September 11, 2014.

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The opinion of the Wisconsin Court of Appeals reversing Garcia's conviction is reported as *State v. Garcia*, 2020 WI App 71, 394 Wis. 2d 743, 951 N.W.2d 631. (App. 4a–22a.)

The oral decision of the Racine County Circuit Court admitting Garcia's confession and Garcia's judgment of conviction in Racine County Case No. 2010CF365 are unreported. (App. 47a–64a.)

JURISDICTION

The Wisconsin Supreme Court entered judgment on September 24, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

"No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

INTRODUCTION

While caring for his girlfriend's two-year-old son, J.E.M.[2], Manuel Garcia grew angry with the child, hit him several times, and threw him against a wall, causing internal injuries that ultimately caused the child's death. Police interviewed Garcia, beginning the interview by reading him the *Miranda* warnings. Garcia agreed to talk to police and admitted to inflicting the injuries that killed J.E.M.

The State charged Garcia with the child's death, and during the lead-up to trial, Garcia challenged the admissibility of his confession. He argued both that the confession was involuntary and that his *Miranda* waiver was invalid because of his limited English proficiency. After a series of hearings, the trial court ruled that Garcia's confession was voluntary, but further ruled that his *Miranda* waiver was not valid due to his limited English proficiency. The court determined that the confession would not be admissible during the State's case-in-chief.

At trial, the defense sought to take advantage of the exclusion of Garcia's confession by suggesting that the investigation into J.E.M.'s death, which focused on Garcia after his confession, was shoddy. Following cross-examination of the lead investigator in which defense counsel asked a series of questions about avenues of investigation the investigator did not follow, the State sought and received permission to introduce Garcia's confession on re-direct. The State's

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[2] Consistent with the briefing in Wisconsin's state courts, the State uses the child victim's initials to identify him in this petition.

rationale was that the defense's cross-examination had opened the door to Garcia's confession because the confession was the reason for police not investigating other possible causes for the child's injuries. A jury convicted Garcia as charged.

Garcia appealed, and the Wisconsin Court of Appeals reversed his conviction. In a published opinion, the court held that because the impeachment exception to the exclusionary rule applies only when a defendant himself takes the stand, the State could not use a previously excluded confession during re-direct examination, no matter the reason. The State petitioned the Wisconsin Supreme Court for review, and although the court granted review, an equally divided court summarily affirmed the court of appeals without opinion.

This Court should grant certiorari review of this case to address a straightforward issue: does the exclusion of a defendant's un-Mirandized, voluntary statement allow that defendant to exploit the fact of exclusion to deliberately mislead a jury? Or can a defendant's cross-examination of a State's witness—strategically designed to create a misimpression about that witness's testimony—open the door to the introduction of the statement where the statement provides the context necessary to correct the misimpression? The court of appeals' decision dismissed the latter possibility and embraced the former, implicitly holding that the impeachment exception to the exclusionary rule is the *only* way in which a defendant's un-Mirandized but voluntary statement can ever be admitted at trial. But this Court's jurisprudence, as well as cases from around the country, indicate that such a holding cannot be correct,

particularly where a prophylactic rule such as *Miranda* is involved. Yet this Court has never addressed this question head on. A holding from this Court would thus provide much-needed clarity in Fifth Amendment law.

STATEMENT OF THE CASE

In the early morning hours of Friday, March 12, 2010, Racine Police Investigator Brad Spiegelhoff responded to a call of a deceased 26-month-old child—J.E.M., the son of Garcia's girlfriend—at Wheaton Franciscan Hospital. (R. 1:1.)[3] During his investigation into the child's death, Spiegelhoff learned from Racine County Medical Examiner Tom Terry and forensic pathologist Dr. Linda Biedrzycki that J.E.M. had experienced kidney failure, perforated intestines, a lacerated liver and pancreas, and broken ribs. (R. 1:1; 56:15.) Dr. Biedrzycki told Spiegelhoff that the injuries were caused by blunt force trauma to the chest and abdomen and that a simple fall could not have caused injuries that significant. (R. 1:1.) Knowing that J.E.M. had been in Garcia's care shortly before his death, Spiegelhoff went to Garcia's home and took him into custody. (R. 1:2; 56:17.)

At the police station, Spiegelhoff had Garcia read a notification and waiver of rights form. (R. 56:19.) After reading the form, Garcia signed it, indicating that he understood his rights and wished to speak with Spiegelhoff. (R. 1:2; 56:30.) "Within a couple of minutes, Garcia was crying and apologizing

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[3] Citations to "R." refer to the record in Wisconsin appeal number 2018AP2319-CR.

for what had happened." (R. 1:2.) Garcia admitted that he became frustrated with J.E.M. while trying to get ready for work on Thursday and punched J.E.M. two or three times, then threw him onto a mattress before punching him again. (R. 1:2.) Garcia said he punched J.E.M. in the chest, on the back by his kidneys, on the side of his body, and on the front right side of his abdomen. (R. 1:2.)

The State charged Garcia with first-degree reckless homicide on April 1, 2010. (R. 3:1.) During pretrial proceedings, the State moved to admit Garcia's confession at trial. (R. 9:1.) The circuit court held a series of hearings over the course of the next two years to determine whether Garcia's statements were admissible under *Miranda* and *Goodchild*[4]. (R. 56; 57; 58; 59; 62.) The hearings included testimony from Spiegelhoff (R. 59:7–9) and Garcia (R. 59:9–11), as well as expert testimony related to Garcia's capacity to understand the English language (R. 59:15–28).

Following the hearings and written arguments, the circuit court delivered an oral ruling. (R. 59:1.) The court reviewed the voluminous testimony collected during the hearings and concluded that the State had made a prima facie showing that Garcia waived his *Miranda* rights, but further determined that Garcia had successfully rebutted the State's showing and demonstrated that he did not understand his rights when he waived them. (R. 59:35.) The court therefore denied the State's motion

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[4] *State ex rel. Goodchild v. Burke*, 27 Wis. 2d 244, 133 N.W.2d 753 (1965) (addressing the procedure for determining the voluntariness of a confession).

to use Garcia's confession as a part of its case-in-chief. (R. 59:35.) The court noted, however, that its ruling had "no effect upon use for rebuttal purposes." (R. 59:36.)

A jury trial began on September 8, 2014. (R. 76:1.) On the second day of trial, Spiegelhoff testified about his involvement with the case and the investigation into J.E.M.'s death. (R. 77:142.) While cross-examining Spiegelhoff, defense counsel asked questions to elicit admissions that police investigators did not follow up on an incident at a laundromat in which J.E.M. allegedly fell from a laundry cart. (App. 24a–29a.) Defense counsel also asked questions suggesting that the police did not investigate anything that happened the Wednesday before J.E.M.'s death, and that they did not thoroughly investigate a claim by Garcia that J.E.M. fell down some stairs before his death. (App. 29a–41a.)

After Garcia completed cross-examination, the State requested a sidebar. (App. 42a.) Outside the jury's presence, the State argued that Garcia had "gone to great lengths to challenge the credibility and the job done by Investigator Spiegelhoff." (App. 42a.) The State argued that this questioning "opened the door" to Garcia's confession because explaining why the police did not investigate certain incidents—they already had Garcia's confession—was the only way to rehabilitate Spiegelhoff's credibility as a witness. (App. 42a–43a.) The court noted that it was concerned by some of Garcia's questions. (App. 43a.) The court deferred ruling on the State's request until it had the opportunity to review the transcript.

The next morning, the court returned to the State's request. (App. 47a.) The court began by reciting Garcia's cross-examination of Spiegelhoff. (App. 48a–51a.) The court then commented that it was "absolutely proper cross-examination." (App. 51a.) The court noted that the State did not object to the questioning, but further explained that the issue was whether the questioning "opened the door or, [to] put it in legal terms, put the issue into controversy as to whether or not the investigator can explain why he didn't investigate these things." (App. 51a–52a.)

The court then reviewed the transcript of Garcia's confession. (App. 53a–57a.) The court noted that Judge Marik's initial ruling on the admissibility of the confession did not mention the *Goodchild* portion of the inquiry related to voluntariness. (App. 58a.) The court further acknowledged Judge Marik's statement that the court's ruling had "no effect upon use for rebuttal purposes." (App. 58a.) The court continued, "So Judge Marik's aware of the *Miranda*/*Goodchild* law rules. And he indicated no effect upon use for rebuttal purposes which again leads me to conclude that Judge Marik had no issue with the voluntariness of the statement." (App. 58a.) Finally, the court noted, "The reason that's important again is because if it's nonvoluntary, it doesn't matter how the State seeks to use it. If it's voluntary, the State can use it under certain circumstances." (App. 58a.) The court agreed with Judge Marik's determination that the confession was voluntary. (App. 59a.)

The court concluded that while Garcia's questioning of Spiegelhoff was proper, "from a fundamental fairness perspective to not allow the

jury, and they are the fact finders, to hear Investigator Spiegelhoff's reasoning or rationale behind his decision to not investigate further would cause the jury to be misled. Period." (App. 60a.) The court called it offensive "that a jury would be misled into believing that somehow the investigator did not do his job when that is really at the behest of the defense to not allow him to explain why he took the actions that he did." (App. 60a.) The court continued, "the only way for him to do that is to explain that he had this statement in hand, what the statement said, and he felt he didn't need to go any further with looking for other potential causes." (App. 60a.) The court therefore ruled that the State would be allowed to recall Spiegelhoff as a witness and ask questions related to Garcia's confession. (App. 60a.)

The State recalled Spiegelhoff, who testified that he did not follow up on certain aspects of the investigation because he had already received a "plausible explanation of the injuries" from Garcia and described Garcia's confession. (App. 66a.) The State then played a portion of Garcia's videorecorded interview with police for the jury. (App. 69a)

In due course, the jury found Garcia guilty of first-degree reckless homicide. (R. 80:86.) The court sentenced Garcia to 40 years of initial confinement and 10 years of extended supervision. (R. 35:1.)

Garcia appealed his conviction. Following an initial round of briefing, the court of appeals ordered supplemental briefing on the applicability of *Harris v. New York*, 401 U.S. 222, 225–26 (1971), to this case in light of the evidence being introduced during the state's case-in-chief, not to impeach the defendant's

testimony. The court of appeals also ordered the parties to discuss whether a defendant may open the door to the admission of previously excluded evidence, as discussed in *State v. Brecht*, 143 Wis. 2d 297, 313–14, 421 N.W.2d 96 (1988), and, if so, whether "opening the door" is limited by *Harris* and its progeny. The parties filed supplemental briefs as ordered.

On October 7, 2020, the court issued a decision reversing Garcia's conviction and remanding the case to the circuit court. The court of appeals wrote that "[t]he issue presented [was] clear and straightforward: may the State invoke the impeachment exception to the exclusionary rule during the State's case-in-chief to 'rehabilitate' one of its witnesses?" *State v. Garcia*, 2020 WI App 71, ¶ 1, 394 Wis. 2d 743, 951 N.W.2d 631. (App. 4a.) The court "conclude[d] that a defendant's statements obtained in violation of *Miranda* may be used to impeach only the defendant's testimony, and, accordingly, may not be used during the State's case-in-chief." *Id.* ¶ 14. (App. 19a.)

The State petitioned the Wisconsin Supreme Court for review of the case. The court granted review, but after briefing and oral argument, an equally divided court affirmed the court of appeals' decision without opinion. (App. 3a.)

REASONS FOR GRANTING THE PETITION

The Wisconsin Court of Appeals' decision framed the issue in this case as being related to the impeachment exception to the exclusionary rule. The court in effect concluded that the impeachment exception is the *only* exception to the exclusionary rule

for un-Mirandized statements. That is to say, under the court of appeals' formulation, the only way that an un-Mirandized, voluntary statement by a defendant can ever be used by the prosecution is if the defendant himself testifies. But no case, save for the opinion below, has ever announced such a holding. Indeed, holdings from around the country suggest the opposite: that a defendant's cross-examination of a witness for the prosecution can open the door to previously excluded evidence. This case thus raises an important question of federal law that this Court should resolve.

I. Certiorari is warranted on the question of whether—consistent with the fifth amendement—a defendant's misleading cross-examination of a state's witness can open the door to a previously excluded, un-mirandized confession.

The decision below[5] rejected the proposition that *Robinson*[6] and its progeny allow for the introduction of a defendant's un-Mirandized statements when the defendant's cross-examination of a witness for the prosecution opens the door to their use by misleading the jury. This Court should grant certiorari to answer whether *Robinson* extends to such a situation.

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[5] This petition refers to the Wisconsin Court of Appeals' decision as the decision below, although the decision under review is the Wisconsin Supreme Court's decision, because the Wisconsin Supreme Court's decision was without opinion.

[6] *United States v. Robinson*, 485 U.S. 25 (1988).

A. This Court has not directly settled this important question of federal law, but it should.

Statements made in response to custodial interrogation by a defendant who has not received the *Miranda* warnings are generally inadmissible in the State's case-in-chief. *Harris v. New York*, 401 U.S. 222 (1971). However, voluntary statements obtained in violation of *Miranda* are admissible in certain circumstances because the exclusionary rule is not absolute; it is tied to the public interest, and its application requires a balancing of the relevant interests." *See id.* at 224–26; *United States v. Leon*, 468 U.S. 897, 907 (1984); *cf. Oregon v. Elstad*, 470 U.S. 298, 312 (1985) (expansive reading of *Miranda* "comes at a high cost to legitimate law enforcement activity, while adding little desirable protection to the individual's interest in not being *compelled* to testify against himself.").

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

Robinson demonstrates why a defendant must not be allowed to use his constitutional protections to manipulate the jury and sandbag the justice system. It involved a prosecutor's comments during summation on the defendant's decision not to testify. *Robinson*, 485 U.S. at 26. During the defendant's own

summation, he claimed multiple times that he had been denied the opportunity to explain his actions. *Id.* at 27. The prosecutor then sought and received permission from the trial court to argue to the jury that the defendant could have taken the stand and explained his actions if he wished. *Id.* at 27–29. This Court concluded that the prosecutor's comments on the defendant's decision not to testify did not violate his Fifth Amendment rights:

> It is one thing to hold, as we did in *Griffin,*[7] that the prosecutor may not treat a defendant's exercise of his right to remain silent at trial as substantive evidence of guilt; it is quite another to urge, as defendant does here, that the same reasoning would prohibit the prosecutor from fairly responding to an argument of the defendant by adverting to that silence. There may be some "cost" to the defendant in having remained silent in each situation, but we decline to expand *Griffin* to preclude a fair response by the prosecutor in situations such as the present one.

Id. at 34.

Not long after *Robinson*, the Wisconsin Supreme Court cited the decision in its discussion of the "opening the door" exception in *State v. Brecht*, 143 Wis. 2d 297, 313, 421 N.W.2d 96 (1988). There, the State was allowed to present testimony about the defendant's pre-*Miranda* silence because his lawyer "opened the door" to that issue while cross-examining

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

a police officer who had arrested the defendant. Defense counsel had elicited testimony that the defendant had told the arresting officer that he "wanted to talk to someone," and that "it was a 'big mistake,'" though he did not explain to the officer what he meant by "big mistake." *Id.* at 313–14. On redirect, the State asked about Brecht's pre-*Miranda* silence. Although such testimony is generally inadmissible during the State's case-in-chief, the Wisconsin Supreme Court, relying on *Robinson*, held that under the circumstances the redirect testimony was permissible. *Id.* "Because Brecht's counsel initially raised the issue of Brecht's silence when under arrest [on cross-examination], the State was free to subsequently elicit [the officer's] testimony on Brecht's silence during arrest on redirect." *Id.* at 314. The Court suggested that the State's redirect was a "fair response" to Brecht's line of questioning. *Id.* (quoting *Robinson*, 485 U.S. at 34).

The principle that certain lines of defense may allow otherwise inadmissible evidence to be introduced as a "fair response" is consistent with other holdings in Wisconsin and across other jurisdictions. For example, the Wisconsin Supreme Court in *Doss* adopted a three-factor test—based on this Court's holding in *Robinson*—for the admissibility of references to a defendant's failure to testify. *State v. Doss*, 2008 WI 93, ¶ 81, 312 Wis. 2d 570, 754 N.W.2d 150.

Federal courts agree. The Fifth Circuit, for example, has held that "where the defendant had 'opened the door' respecting his post-arrest interaction with the authorities 'he discarded the shield which the law had created to protect him' from comment on his post-arrest silence." *United States v. Martinez-*

Larraga, 517 F.3d 258, 268 (5th Cir. 2008) (quoting *United States v. Fairchild*, 505 F.2d 1378, 1383 (5th Cir. 1975)). *Fairchild* offers a similar holding. During Fairchild's trial, his counsel tried to create the impression that he had cooperated fully with investigators. *See Fairchild*, 505 F.2d at 1383. In response, the government "was allowed to elicit from a government witness . . . the fact that Fairchild had refused to make a statement after he had been read his *Miranda* rights." *Id.* at 1382.

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

The Seventh Circuit addressed a similar situation in *United States v. Shue*, 766 F.2d 1122 (7th Cir. 1985). During Shue's trial for a series of bank robberies, he testified that he cooperated with authorities after his arrest by providing hair samples, writing samples, fingerprint specimens, and by participating in lineups. *Id.* at 1129. On cross-examination, however, Shue admitted that he refused to make a statement to FBI agents while he was in custody. *Id.* at 1128. Shue complained on appeal that the government's cross-examination improperly raised his silence. *Id.* at 1127–28.

The Seventh Circuit "agree[d] with the government that, although appellant never directly claimed to have cooperated fully with the authorities after his arrest, [the] exchange did create the impression of general cooperation." *Id.* at 1129. The court went on to say that "[a] defendant should not be permitted to twist his *Miranda* protection to shield lies or false impressions from government attack." *Id.* Thus, the court reasoned, "[w]hen a defendant has alleged or created an impression of general cooperation with police after arrest, a court may allow the prosecution to elicit testimony of the defendant's post-arrest silence to rebut the impression of full cooperation." *Id.* The court reversed Shue's conviction, however, because it concluded that the government's treatment of Shue's silence went beyond correcting the misimpressions created by his testimony and instead invited the jury to use his silence as substantive evidence of guilt. *Id.* at 1130.

These cases, and others like them, clearly establish that where a defendant's trial strategy creates a misimpression, evidence that is otherwise

inadmissible—including evidence inadmissible for constitutional reasons—may become admissible. *Fairchild*, for example, involved two separate arguments in favor of admissibility: one was impeachment, and the other was fair response. *See Fairchild*, 505 F.2d at 1382. The Fifth Circuit, too, treated the arguments separately. *See id.* at 1382–83. That is to say, courts recognize that a defendant "opening the door" or the prosecution offering a "fair response" to a defendant's argument is conceptually distinct from simply impeaching him.

While it is true that the cases discussed above generally involve a defendant's silence as opposed to his un-Mirandized statements, the same principles still apply. *Miranda* itself concerned both a defendant's silence and his statements to police. *See Miranda v. Arizona*, 384 U.S. 436, 467 n.37 & 478–79 (1966). Moreover, it is important to remember that a suspect's "*Miranda* rights" are not directly provided by the Constitution. Rather, *Miranda* created a prophylactic rule designed to protect suspects' rights afforded by the Fifth Amendment. *See id.* at 467. Commentary on a defendant's silence and the use of his un-Mirandized, custodial statements thus each implicate his rights under the Fifth Amendment. Logically, a rule that allows for the introduction of evidence implicating a defendant's Fifth Amendment rights should extend to the different ways in which that right might be implicated.

Some cases have also discussed the implication of commentary on a defendant's post-*Miranda* silence on his due process rights, reasoning that it would be fundamentally unfair to inform a suspect that he has the right to remain silent but then use that silence

against him. *See, e.g.*, *Doyle v. Ohio*, 426 U.S. 610, 611 (1976). Nevertheless, courts have found that the "open door" exception or "fair response" doctrine applies to such due process violations, as well. *See Shue*, 766 F.2d at 1129. Thus, "opening the door" applies to more than just commentary on a defendant's silence under the Fifth Amendment. Indeed, "opening the door" can extend beyond issues of a defendant's right to remain silent into illegally seized evidence. *See* 6 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 11.6(b) (6th ed. 2021) ("[D]efense tactics are most likely to be found to have opened the door if they involved a calculated effort to create a high degree of confusion based upon knowledge that any adequate explanation would require some reference to evidence previously suppressed.") (citing *Walder v. United States*, 347 U.S. 62 (1954); *United States ex rel. Castillo v. Fay*, 350 F.2d 400 (2d Cir. 1965)).

Despite this body of case law, however, this Court has never directly addressed whether "opening the door" or "fair response," as described in *Robinson* and similar cases, can apply to a situation where a defendant seeks to exploit the fact that his voluntary confession was excluded and mislead the jury deciding his guilt. Thus, this case involves "an important question of federal law that has not been, but should be, settled by this Court." U.S. Sup. Ct. R. 10(c).

B. The decision below is wrong.

The issue presented is not merely academic. The answer to the State's question would be the difference in whether the State must re-try Garcia for J.E.M.'s killing. Resolving this case would involve

determining whether the trial court was correct when it concluded that Garcia's cross-examination of Spiegelhoff opened the door to the use of Garcia's un-Mirandized statements. It was. This Court should therefore grant the petition for a writ of certiorari and reverse the Wisconsin Supreme Court's decision.

To begin, it is helpful to revisit the circuit court's reasoning underlying its decision to allow admission of the statements. The court started by reviewing the exchange between Garcia and Spiegelhoff during cross-examination. (App. 48a–51a.) The court commented that the questioning put Garcia in a position to argue that the police had conducted a "completely shoddy" investigation without giving the State the opportunity to explain to the jury why Spiegelhoff did not conduct a more thorough investigation. (App. 52a.) The court then reviewed Garcia's confession to confirm that Garcia gave it voluntarily, thus verifying that it would be admissible under the right circumstances. (App. 53a–58a.)

With all of that in mind, the court turned to the public interest in not allowing Garcia to mislead the jury. (App. 60a.) The court stated, "from a fundamental fairness perspective to not allow the jury, and they are the fact finders, to hear Investigator Spiegelhoff's reasoning or rationale behind his decision to not investigate further would cause the jury to be misled. Period." (App. 60a.) The court went on to state its belief that "it would be manifestly unfair to have the jury hear just that side of it and not allow the investigator, because of Judge Marik's ruling, to explain it." (App. 60a.) The court noted that Garcia made a strategic decision to attack

the investigation, and that it did not have to be "an issue in controversy." (App. 60a.) The court called it offensive "that a jury would be misled into believing that somehow the investigator did not do his job when that is really at the behest of the defense to not allow him to explain why he took the actions that he did," and stated that the only way for Spiegelhoff to explain himself was by allowing him to tell the jury that he already had Garcia's confession in hand. (App. 60a.)

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

It is important to remember that it is Garcia—not the State—who created the situation the State now presents to this Court. Garcia opened the door to

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

The introduction of Garcia's statements was proper. This Court should grant the State's petition.

II. This case is an appropriate vehicle.

Although the Wisconsin Supreme Court's decision without opinion affirming the Wisconsin Court of Appeals decision is the one under review, this Court should grant certiorari review to address the issue presented by the Wisconsin Court of Appeals' opinion. Two reasons support review under these circumstances. First, even though the opinion below is not an opinion of the Wisconsin Supreme Court, it is nevertheless published and precedential in the State of Wisconsin, despite the fact that it was affirmed without a majority. Moreover, as a published case, the opinion below may be cited as persuasive authority in other jurisdictions confronted with this question.

Second, the issue presented here is a legal one concerning the breadth of exclusion under *Miranda* and the Fifth Amendment. As such, it will have nationwide impact. Thus, the issue is "an important question of federal law that has not been, but should be, settled by this Court." U.S. Sup. Ct. R. 10(c).

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Dated this 23rd day of December 2021.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

JOHN A. BLIMLING*
Assistant Attorney General

Attorneys for Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-3519
(608) 294-2907 (Fax)
blimlingja@doj.state.wi.us
**Counsel of Record*

APPENDIX

APPENDIX A

SUPREME COURT OF WISCONSIN

CASE NO.: 2018AP2319-CR

Complete Title:

State of Wisconsin, Plaintiff-Respondent-Petitioner,

v.

Manuel Garcia, Defendant-Appellant.

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COURT: Circuit
COUNTY: Racine
JUDGE: Michael J. Piontek

JUSTICES:

Per Curiam.
NOT PARTICIPATING:
HAGEDORN, J.

ATTORNEYS:

For the plaintiff-respondent-petitioner, there were briefs filed by *John A. Blimling*, assistant attorney general; with whom on the brief was *Joshua L. Kaul*, attorney general. There was an oral argument by *John A. Blimling*.

For the defendant-appellant, there was a brief filed by *Emma Jewell, Sean O'Donnell Bosack,* and *Godfrey & Kahn, S.C.*, Milwaukee. There was an oral argument by *Emma Jewell*.

An amicus curiae brief was filed on behalf of the Wisconsin State Public Defender by *Katie R. York*, assistant state public defender.

No. 2018AP2319-CR

(L.C. No. 2010CF365)

STATE OF WISCONSIN

IN SUPREME COURT

State of Wisconsin,
Plaintiff-Respondent-Petitioner

v.

Manuel Garcia,
Defendant-Appellant

Filed September 24, 2021

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

¶1 PER CURIAM. The court of appeals' decision is affirmed by an equally divided court.

¶2 BRIAN HAGEDORN, J., withdrew from participation.

APPENDIX B

COURT OF APPEALS OF WISCONSIN
DECISION
DATED AND FILED

October 7, 2020

Shelia T. Reiff
Clerk of Court of Appeals

Appeal No. 2018AP2319-CR
STATE OF WISCONSIN

IN COURT OF APPEALS DISTRICT II

STATE OF WISCONSIN, PLAINTIFF-RESPONDENT,
V.
MANUEL GARCIA, DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: MICHAEL J. PIONTEK, Judge. *Reversed and cause remanded.*

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 REILLY, P.J. The issue presented is clear and straightforward: may the State invoke the impeachment exception to the exclusionary rule during the State's case-in-chief to "rehabilitate" one of its witnesses? We conclude that under *Harris v. New York*, 401 U.S. 222 (1971), *James v. Illinois*, 493 U.S.

307 (1990), and their progeny, the State may not utilize a defendant's voluntary statement, taken in violation of *Miranda v. Arizona,* 384 U.S. 436 (1966),[1]

[1] "[O]ur constitutional protection against self-incrimination is called to duty whenever the State interrogates a suspect in police custody" and "is one of the nation's 'most cherished principles.'" *State v. Harris*, 2017 WI 31, ¶¶11-12, 374 Wis. 2d 271, 892 N.W.2d 663 (citing *Miranda v. Arizona*, 384 U.S. 436, 458, 478-79 (1966)). While in police custody and prior to conducting an interrogation, agents of the state are required "to formally instruct the suspect of his [or her] constitutional rights and then conduct themselves according to how he [or she] elects to preserve or waive them." *Id*., ¶13.

> He [or she] must be warned prior to any questioning that he [or she] has the right to remain silent, that anything he [or she] says can be used against him [or her] in a court of law, that he [or she] has the right to the presence of an attorney, and that if he [or she] cannot afford an attorney one will be appointed for him [or her] prior to any questioning if he [or she] so desires. Opportunity to exercise these rights must be afforded to him [or her] throughout the interrogation. After such warnings have been given, and such opportunity afforded him [or her], 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 [or her].

during its case-in-chief. We reverse as the impeachment exception applies only to the specific circumstance where a *defendant* testifies contrary to statements he or she made within an inadmissible statement.

FACTS

¶2 Manuel Garcia appeals from a judgment convicting him of first-degree reckless homicide and an order denying his postconviction motion. Garcia was charged with and found guilty by a jury of first-degree reckless homicide in the death of his girlfriend's two-year-old son who died of "blunt trauma to the abdomen." During a custodial police interrogation, and after signing a waiver of rights form, Garcia confessed that he struck the child multiple times and threw the child onto a mattress.[2]

Miranda, 384 U.S. at 479; *see also Harris*, 374 Wis. 2d 271, ¶¶13-14.

[2] The record does not contain either the DVD or the transcript of Garcia's statement. A supplementary incident report created by law enforcement indicates that Garcia admitted to being very angry with the child's behavior and he "threw [the child] onto the mattress on the floor where he sleeps" and "punched him one time, and then threw him back on the mattress." Garcia's first appellate counsel had a responsibility to ensure completion of the appellate record. *See State v. McAttee*, 2001 WI App 262, ¶5 n.1, 248 Wis. 2d 865, 637 N.W.2d 774. The DVD/transcript is not determinative given our conclusion of law.

Upon motions, and following *Miranda/Goodchild*[3] hearings, the court found that Garcia's statements were voluntary but not knowing, as Garcia, not a native English speaker, did not understand his *Miranda* rights when he waived them.[4] The court

[3] Our supreme court has explained that

> [t]he hearings considering the admissibility of confessions are known as Miranda-Goodchild hearings after *Miranda v. Arizona*, [384 U.S. 436 (1966)], and *State ex rel. Goodchild v. Burke,* 27 Wis. 2d 244, 133 N.W.2d 753 (1965). As a rule, the hearings are designed to examine (1) whether an accused in custody received Miranda warnings, understood them, and thereafter waived the right to remain silent and the right to the presence of an attorney; and (2) whether the admissions to police were the voluntary product of rational intellect and free, unconstrained will.

State v. Jiles, 2003 WI 66, ¶25, 262 Wis. 2d 457, 663 N.W.2d 798.

[4] The Honorable Wayne J. Marik originally ruled on the admissibility of the confession. Prior to trial, the Honorable Michael J. Piontek was assigned to the case. Judge Piontek reviewed Judge Marik's ruling in the context of Garcia's motion in limine, which asked that the State be prohibited from having any witnesses testify directly or indirectly as to Garcia's confession. In reviewing Judge Marik's decision, Judge Piontek noted that there was no finding of misconduct by the police and that "Mr. Garcia made a voluntary statement." Neither Judge Marik's nor Judge Piontek's rulings on these issues are being challenged on appeal.

denied the State's request to use Garcia's statements at trial in its case-in-chief.

¶3 The investigating officer testified at trial regarding his investigation without any discussion of Garcia's custodial statements. The officer had been told by Garcia at the hospital that the child had injuries from two accidents in the week prior to the child's death: slipping on some stairs and jumping out of a vehicle.[5] On cross-examination, trial counsel questioned the officer at length as to why the officer did not investigate other ways, aside from the stairs and the vehicle, that the child may have been injured. In response to these questions, the State moved the court to allow the officer to be rehabilitated by utilizing Garcia's excluded statements to explain why the officer did not investigate other incidents, to wit, he did not continue his investigation as Garcia confessed to hitting and throwing the child during his custodial interrogation. The State argued that counsel had "opened the door to the confession."

¶4 The court granted the State's request on the ground that while Garcia's cross-examination was proper, it was likely to mislead the jury if the State could not rebut Garcia's implication that the officer did not do a full investigation.[6] A portion of Garcia's

[5] There is no dispute that these were non-custodial statements by Garcia and properly admitted as evidence.

[6] The circuit court took the matter under advisement, ordered a copy of the transcript of trial counsel's cross-examination, and issued its ruling the next morning.

videotaped statements were shown to the jury in which Garcia admitted to punching and throwing the child. In response, trial counsel argued that Garcia was being forced to testify: "[G]iven the Court's previous ruling earlier today … I will have to put Mr. Garcia on the stand to explain many of the things that came up during his statements…. [Garcia] feels that he now is in a position where he must testify." Garcia's testimony centered on explaining that he did not understand the difference between the word "punch" and "spank" due to English not being his primary language and that he only "spank[ed]" the child as a form of punishment on his back, butt, or side. Garcia testified that he never touched the child in the stomach/abdomen and never punched him with a closed fist. The officer testified that Garcia never "directly" told him that he touched the child in the abdomen.

¶5 The jury found Garcia guilty of first-degree reckless homicide and he received a lengthy prison sentence. Garcia filed a postconviction motion arguing that the circuit court erred when it allowed Garcia's confession to be used during the State's case-in-chief and, in the alternative, that trial counsel failed to provide effective assistance of counsel in its cross-examination of the investigating officer.[7] The

[7] Garcia does not reassert his ineffective assistance of counsel claim on appeal. We, therefore, deem it abandoned. *Reiman Assocs., Inc. v. R/A Adver., Inc.*, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981).

circuit court denied the motion without a hearing. Garcia appeals.[8]

¶6 On appeal, Garcia argues that the circuit court violated his constitutional rights when it allowed the State, during its case-in-chief, to introduce his previously excluded and inadmissible statements for the purpose of rehabilitating one of its witnesses. The State counters that "when a defendant seeks to use the exclusion of his inculpatory statements from the State's case-in-chief to mislead the jury about the nature of a police investigation, the rule established in *Harris* and its progeny permits the trial court to admit the confession during the State's case-in-chief in order to rehabilitate a witness."[9] As we conclude that *Harris* and its progeny do not allow the State to use the impeachment exception to rehabilitate its own witness during its case-in-chief, we reverse.

[8] We ordered supplemental briefing and scheduled oral argument in this case. In the interim, Garcia's appointed counsel withdrew from representation for good cause, and new counsel was appointed. Due to the COVID-19 pandemic, oral argument was delayed, and after reviewing the supplemental briefs, this court determined that oral argument was no longer necessary, and it was not rescheduled.

[9] The State, in its supplemental brief, concedes that the rule of completeness, codified in WIS. STAT. § 901.07, "does not control the outcome in this case." We deem any argument on the rule of completeness waived.

STANDARD OF REVIEW

¶7 Although determinations regarding the admission of evidence at trial are issues generally "left to the discretion of the circuit court," *State v. Dunlap*, 2002 WI 19, ¶31, 250 Wis. 2d 466, 640 N.W.2d 112, the parties agree that the standard of review for claims of constitutional error is applicable under the circumstances.[10] With respect to constitutional claims, we "employ a two-step process." *State v. Harris*, 2017 WI 31, ¶9, 374 Wis. 2d 271, 892 N.W.2d 663; *State v. Martwick*, 2000 WI 5, ¶16, 231 Wis. 2d 801, 604 N.W.2d 552. "First, we review the circuit court's factual findings and uphold them unless they are clearly erroneous." *Harris*, 374 Wis. 2d 271, ¶9. Second, we "independently apply constitutional principles to those facts" to determine whether there was a constitutional violation. *State v. Hogan*, 2015 WI 76, ¶32, 364 Wis. 2d 167, 868 N.W.2d 124; *State v. Tullberg*, 2014 WI 134, ¶27, 359 Wis. 2d 421, 857 N.W.2d 120. In this case, Garcia does not dispute the underlying facts; therefore, only the second step is at issue.

[10] The State, in its supplemental brief, indicated that it "described the standard of review for circuit courts' discretionary decisions based on Garcia's framing of the issue [in his brief-in-chief]. To the extent this Court resolves this case on constitutional grounds, the standard of review differs from that discussed in the parties' previous briefs."

DISCUSSION

¶8 We allow illegally obtained evidence to be introduced at trial only under narrow exceptions and specific circumstances, and the impeachment exception under *Harris* does not allow the introduction of a statement obtained in violation of *Miranda* during the State's case-in-chief to rehabilitate the State's witness. The impeachment exception to the exclusionary rule applies only to the defendant's testimony.

¶9 Statements obtained in violation of *Miranda* are normally inadmissible. *Miranda,* 384 U.S. at 478-79; *see also State v. Knapp*, 2003 WI 121, ¶¶111-14, 265 Wis. 2d 278, 666 N.W.2d 881, vacated and remanded by 542 U.S. 952 (2004), reinstated in material part by 2005 WI 127, ¶2 n.3, 285 Wis. 2d 86, 700 N.W.2d 899. However, "[a] statement of the defendant made without the appropriate *Miranda* warnings, although inadmissible in the prosecution's case-inchief, may be used to impeach the defendant's credibility if the defendant testifies to matters contrary to what is in the excluded statement." *State v. Mendoza,* 96 Wis. 2d 106, 118, 291 N.W.2d 478 (1980) (collecting cases); *see also Michigan v. Harvey*, 494 U.S. 344, 345-46, 350-51 (1990) ("We have already decided that although statements taken in violation of only the prophylactic *Miranda* rules may not be used in the prosecution's case in chief, they are admissible to impeach conflicting testimony by the defendant."); *Harris*, 401 U.S. at 223-26; *State v. Franklin*, 228 Wis. 2d 408, 412-16, 596 N.W.2d 855 (Ct. App. 1999). This impeachment exception is applicable only if the excluded statements are found

to have been made voluntarily.[11] *Mendoza*, 96 Wis. 2d at 118-19; *see also Franklin*, 228 Wis. 2d at 412.

¶10 The impeachment exception as it applies to statements made in violation of *Miranda* was first introduced by the United States Supreme Court in *Harris*. There, after the defendant testified at trial in his own defense and denied all the charges, he was impeached with statements he made to the police without being provided *Miranda* warnings. *Harris*, 401 U.S. at 223-24. The *Harris* Court upheld the trial court's impeachment exception ruling, explaining that

> *Miranda* barred the prosecution from making its case with statements of an accused made while in custody prior to having or effectively waiving counsel. It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards.

[11] "Whether a statement is voluntary or involuntary depends on whether it was compelled by coercive means or improper police practices." *State v. Franklin*, 228 Wis. 2d 408, 413, 596 N.W.2d 855 (Ct. App. 1999). Here, as addressed above, the circuit court concluded that Garcia's confession was voluntarily made, but not knowing and intelligent.

Harris, 401 U.S. at 224. An exception, the Court concluded, was admission of the statements where the defendant commits perjury[12]:

> Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury….
>
> The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.

[12] The Court in *Harris v. New York*, 401 U.S. 222, 224 (1971), relied on its previous holding in *Walder v. United States*, 347 U.S. 62, 66 (1954), a Fourth Amendment case, where the Court carved out a narrow exception to its earlier holding in *Agnello v. United States*, 269 U.S. 20, 35 (1925), that illegally seized evidence must be excluded for all purposes. The *Walder* Court created an exception, which allows the government to introduce unlawfully seized physical evidence in the specific circumstance where a defendant offers contrary (perjured) testimony so as to impeach the credibility of the defendant: "It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths." *Walder*, 347 U.S. at 65. The *Walder* physical evidence impeachment exception was extended by *Harris* to statements made in violation of *Miranda*.

Harris, 401 U.S. at 225.[13]

¶11 The United States Supreme Court revisited the impeachment exception nineteen years later in *James*. James was a suspect in a murder, and police arrested him at a hair salon while he was in the process of altering his appearance. *James*, 493 U.S. at 309. James told officers that "the previous day his hair had been reddish brown, long, and combed straight back" and that "he had gone to the [hair salon] in order to have his hair 'dyed black and curled in order to change his appearance.'" *Id.* James' statements to police were suppressed as fruits of an unlawful arrest. *Id.* at 309-10. At trial, James did not testify, but a family friend testified for the defense that on the day of the shooting James' hair had been black, not reddish as witnesses said it was on the day of the crime. *Id.* at 310. The State argued that the impeachment exception should be extended to defense witnesses, and the trial court, over James' objection and after determining that the suppressed statements were voluntary, permitted the

[13] The holding of *Harris* has also been applied in other similar circumstances. *See, e.g.*, *Michigan v. Harvey*, 494 U.S. 344, 345, 351 (1990) (allowing statement to police taken in violation of Sixth Amendment right to counsel to be used to impeach defendant's testimony); *United States v. Havens*, 446 U.S. 620, 627 (1980) (applying impeachment exception to illegally seized evidence used to impeach the defendant's credibility as to statements he made on cross-examination); *Oregon v. Hass*, 420 U.S. 714, 722-24 (1975) (applying impeachment exception where defendant was given *Miranda* warnings but failed to honor his invocation of the right to counsel and he subsequently made incriminating statements).

prosecution to offer James' suppressed statements to impeach his friend's credibility. *Id.*

¶12 The Court reversed and refused to extend the impeachment exception to "defense witnesses." *Id.* at 313. The Court explained that the impeachment exception is appropriate as a way to prevent a defendant from "perverting the exclusionary rule 'into a license to use perjury by way of a defense.'" *Id.* at 313 (quoting *United States v. Havens*, 446 U.S. 620, 626 (1980)). The Court provided two reasons for refusing to extend the impeachment exception to witnesses beyond the defendant: (1) "the mere threat of a subsequent criminal prosecution for perjury is far more likely to deter a witness from intentionally lying on a defendant's behalf than to deter a defendant, already facing conviction for the underlying offense, from lying on his own behalf," and (2) expanding the exception to all defense witnesses "likely would chill some defendants from presenting their best defense and sometimes any defense at all—through the testimony of others." *Id.* at 314-15. The Court was concerned that if the exception was extended beyond just the defendant that a defendant would fear that a defense witness, "in a position to offer truthful and favorable testimony, would also make some statement in sufficient tension with the tainted evidence to allow the prosecutor to introduce that evidence for impeachment." *Id.* at 315. The Court concluded that "[s]o long as we are committed to protecting the people from the disregard of their constitutional rights during the course of criminal investigations, inadmissibility of illegally obtained evidence must remain the rule, not the exception." *Id.* at 319.

¶13 Two years later, the Eastern District of Wisconsin decided *Kuntz v. McCaughtry*, 806 F. Supp. 1373 (E.D. Wis. 1992), a federal habeas case, which presented a similar issue to the one before this court. There, the government and the courts assumed that Kuntz's interrogation constituted a violation of his rights under *Miranda* and *Edwards*,[14] but Kuntz's statements were found to be voluntary and trustworthy. *Kuntz*, 806 F. Supp. at 1378. The illegally obtained statements were then used at trial to impeach the state's witness, who was a friend of Kuntz.[15] *Id.* at 1379. The court concluded that the admission of the illegally obtained statement was in error. According to the *Kuntz* court:

[14] *Edwards v. Arizona*, 451 U.S. 477 (1981).

[15] The *Kuntz* case began in our state courts. *See State v. Kuntz (Kuntz I),* No. 88-1565- CR, unpublished slip op. at *9-11 (WI App Dec. 21, 1989) (agreeing with the state and reading *Harris* to mean that defendant's statements to police may be used to attack the veracity of "any witness," but acknowledging that the United States Supreme Court had just heard oral arguments in *James*, and determining that even if the *James* Court disagreed, harmless error applied). On appeal, our supreme court did not reach the issue, concluding instead that "nothing in the illegally obtained statement of the defendant that was admitted contradicts [the state's witness'] testimony or calls into question her credibility" and it was at most "cumulative" and "harmless beyond a reasonable doubt." *State v. Kuntz (Kuntz II)*, 160 Wis. 2d 722, 744, 467 N.W.2d 531 (1991); *see also Kuntz v. McCaughtry*, 806 F. Supp. 1373, 1379-80 (E.D. Wis. 1992). Kuntz subsequently filed a petition for a writ of habeas corpus in federal district court.

Evidence that has been illegally obtained "is inadmissible on the government's direct case, or otherwise, as substantive evidence of guilt." [*Havens*, 446 U.S. at 628]. Under *Havens,* use of an illegal statement is thus prohibited during any part of the state's case, even if used to impeach its own witness. If impeachment of other defense witnesses by use of an illegally obtained statement is prohibited, as it is under *James*, use of the statement to impeach prosecution witnesses is foreclosed a fortiori. The Court's concern in *James* was the chilling effect on presentation of other defense witnesses. That concern about a fair trial is magnified in regard to prosecution witnesses. Allowing the prosecution to use the illegal statement during the presentation of its case—even if used to impeach its own witness—would virtually negate the exclusionary rule altogether. The prosecution would have free reign to present witnesses just for their impeachment value in order to get the illegal statement before the jury. Although defendants should not be able to "'pervert' the exclusion of illegally obtained evidence into a shield for perjury,… it seems no more appropriate for the State to brandish such evidence as a sword…." *James*, [493 U.S. at 317].

Kuntz, 806 F. Supp. at 1380. The court determined "under the rules and reasoning of *Harris* and *James*, impeachment use of an illegal statement is allowed against the defendant alone." *Kuntz*, 806 F. Supp. at 1380 (emphasis added); *see also Smiley v. Thurmer*, 542 F.3d 574, 579 n.2 (7th Cir. 2008) ("The Supreme Court has limited the impeachment exception to *Miranda*, first articulated in [*Harris*], to situations in which the defendant elects to testify at trial." (emphasis added; collecting cases)).[16]

¶14 It is on this basis that we conclude that a defendant's statements obtained in violation of *Miranda* may be used to impeach only the defendant's testimony, and, accordingly, may not be used during the State's case-in-chief. The State presents no case law holding to the contrary. Instead, the State argues that "[a] multitude of courts … have expanded the lessons of *Harris* to other situations," suggesting that if we are engaged in a search for the truth and if a statement is reliable (voluntary and uncoerced), then Harris allows the impeachment exception to be used during the State's case-in-chief. We disagree. *Harris*, *James*, and their progeny all hold that the impeachment exception is allowed only as to the defendant.

[16] Courts have made a narrow exception to the *Harris*/*James* rule in cases where the defendant uses an insanity defense. In these types of cases, the psychiatrist's testimony/opinions are based on statements made to him or her by the defendant; therefore, the statements that are actually being impeached are those of the defendant and not the witness. *See United States v. Rosales-Aguilar*, 818 F.3d 965, 970 (9th Cir. 2016); *Wilkes v. United States*, 631 A.2d 880, 889- 90 (D.C. 1993).

¶15 The State offers "fairness" as its basis to overcome the holdings in *Harris* and *James* and points to *State v. Brecht,* 143 Wis. 2d 297, 421 N.W.2d 96 (1988),[17] to support its fairness argument. The State argues that under Brecht, Garcia "opened the door" to admitting his statement by counsel's cross-examination of the police officer. *See id.* at 313. According to the State, "*Brecht* mentioned the permissibility of a comment on the defendant's silence when it was a 'fair response to a claim made by defendant or his counsel,'" *see id.* at 314 (citation omitted), and "fairness" was a concern to the Court in both *Harris* and *James*. We agree that "fairness" is a concern, but we also recognize that *Harris, James*, and their progeny all considered "fairness" in coming to the categorical conclusion that fairness and constitutional concerns dictated that the impeachment exception may only be used against the defendant when the defendant testifies contrary to his or her inadmissible, but voluntary statement.

¶16 While the State acknowledges that *Harris*/*James* prohibits the use of the impeachment

[17] In *State v. Brecht,* 143 Wis. 2d 297, 307-08, 313, 421 N.W.2d 96 (1988), the issue was whether Brecht's constitutional rights were violated by the state's elicitation of testimony from a police officer pertaining to Brecht's pre-*Miranda* silence during the state's case-in-chief. Our supreme court allowed the testimony as counsel had "opened the door" to the evidence when counsel raised the issue of Brecht's silence on cross-examination; accordingly, the state was free to elicit the testimony on redirect. *Id.* at 313-14. We distinguish *Brecht* as the case did not involve statements excluded in violation of *Miranda*, nor did the court address *Harris*.

exception against defense witnesses and acknowledges the *Kuntz* decision, it argues that the "lesson" of "all these cases" is that we have "four primary concerns" when dealing with the admissibility of previously excluded evidence: (1) is the evidence reliable; (2) does admission of the evidence ensure proper deterrence against government misconduct; (3) does the admissibility of previously excluded evidence stem from something in the defendant's control so as not to preclude the defendant from presenting his best case; and (4) does the evidence serve the court's fact finding function. If the evidence meets these criteria, argues the State, then the evidence should be admitted. The State does not cite any case applying its four-part test. The State's policy argument may have merit, but we are obligated to follow precedent rather than make new law. We are an error correcting court, not a policy making court. *Harris*, *James*, and their progeny allow the narrow impeachment exception to be used only in the specific circumstance where a defendant testifies contrary to an earlier voluntary, but inadmissible statement.

CONCLUSION

¶17 Garcia's inadmissible statement was not admitted in response to Garcia's testimony; Garcia's statement was admitted during the State's case-in-chief in order to rehabilitate a prosecution witness in response to relevant and proper cross-examination by defense counsel. The circuit court erred in admitting Garcia's statements, and Garcia is entitled to a new

trial.[18] By the Court.—Judgment and order reversed and cause remanded.

[18] While there is a "limited class" of constitutional errors that are considered "structural," which require "automatic reversal," "most constitutional errors can be harmless." *Neder v. United States*, 527 U.S. 1, 8 (1999) (citation omitted). The error complained of here is subject to a harmless error analysis. *See Kuntz*, 806 F. Supp. at 1380-81; *Kuntz II*, 160 Wis. 2d at 744. The harmless error test is

> whether there is a reasonable possibility that the error contributed to the conviction. If it did, reversal and a new trial must result. The burden of proving no prejudice is on the beneficiary of the error, here the state. The state's burden, then, is to establish that there is no reasonable possibility that the error contributed to the conviction.

State v. Alexander, 214 Wis. 2d 628, 652-53, 571 N.W.2d 662 (1997) (quoting *State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985)). Here, the State, as the beneficiary of the error, carried the burden. The State failed to address harmless error in either its response or supplemental briefs and, therefore, failed to meet its burden. We conclude that the error in admitting Garcia's statements at trial was not harmless.

APPENDIX C

IN THE CIRCUIT COURT OF RACINE COUNTY

STATE OF WISCONSIN

STATE OF WISCONSIN,

vs.

MANUEL GARCIA,

Case No. 10-CF-0365

JURY TRIAL

The Honorable Michael J. Piontek Presiding

Tuesday, September 9, 2014

Reported by Rose Coulthart, RPR, CRR, CCP

APPEARANCES:

Ms. Maureen Martinez, Assistant District Attorney, and Ms. Patricia Hanson, Deputy District Attorney, appearing on behalf of the State of Wisconsin.

Mr. David Saldana, Attorney at Law, appearing on behalf of the Defendant. Defendant is present.

[Beginning of Excerpt]

C R O S S - E X A M I N A T I O N

BY MR. SALDANA:

Q I'll start off with the laundromat incident. You just testified that you had spoken with the doctor, the Waukesha pathologist, about what Lawanda had told you about the laundromat incident. Is that what you said?

A No. I learned about the laundromat incident after I [77-163] spoke to Dr. Biedrzycki.

Q Well, you learned about the laundry incident the very same day that the child died; did you not?

A Correct.

Q And when you interviewed Lawanda, the subject came up and she said she was playing with her, or excuse me, that Jovani was playing with the brother; is that correct?

MS. HANSON: Your Honor, I'm going to object that there were two interviews. I would just ask that that be clarified.

MR. SALDANA: The interview --

THE COURT: Just so there's no argument, it's cross-examination. I'm going to -- this witness is capable of correcting the question if he needs to. You can answer it if you can, sir.

BY MR. SALDANA:

Q The interview that you had with Lawanda, first of all, took place the day -- later in the day when the child died; am I right?

A Yes. Both interviews of Lawanda took place on the same day that Jovani died.

Q Okay. Now, isn't it true that Lawanda had told you and Mr. Terry, who was with you when you went to take photographs, about the incident at the laundromat? [77-164]

A I recall talking about the laundromat, but I do not recall her telling me about any injury that occurred at the laundromat at the initial first interview in the hospital.

Q Well, did you -- what notes or report do you have concerning the discussion you had with Lawanda at the laundromat?

A That would have been the recorded interview which I believe was also transcribed.

Q Okay. I'm asking you what notes you have -- did you have -- did you take notes?

A Oh, I probably did, yes.

Q Okay. Do you have those notes with you?

A No, I do not.

Q Well, do you remember exactly what she told you back then?

A No, I do not. I would let the transcripts or the video of the interview speak for itself.

Q According to the interview, isn't it true that when you had the discussion with Lawanda, you had referred to the fact that, oh, yeah, you mentioned that earlier but I don't have my notes with me; do you remember that?

A If that's in the transcribed, then, yes, I did say that.

Q And I'm asking you what did those notes say? [77-165]

A I don't recall. I -- in reviewing this case before trial, I can remember something occurred at the laundromat. But I don't remember any injury occurring. I just remember them being at the laundromat.

Q Well, what happened to the notes?

A When I do cases, I use my notes to make my report. And then after that I put my notes in the shredder.

Q So then if you took notes about the laundromat incident, then it should be in your report?

A I -- some of my report is a summary of what I spoke to somebody, an individual, about, whether it's a victim or witness, what have you. It doesn't include absolutely everything that was spoken about in that interview.

Q Can you show me in any of your reports -- any of your reports where you mention anything about the laundromat incident?

A In the transcribed notes, which I reviewed before this trial, Lawanda talks to me about Jovani falling or something out of the laundry cart.

Q Maybe I'm not making myself clear on this.

A Okay.

Q All I'm asking you, sir, is is there any report that you wrote where you mention at all Lawanda telling you that the child fell out of the laundry basket the day [77-166] before he died?

A I don't believe so.

Q You just said a minute ago that you did speak with the pathologist and told her about that laundromat incident; is that correct?

A No.

Q You didn't say that?

A No.

Q Okay. So you never even spoke to the pathologist about the basket incident?

A No, I did not.

Q So then the pathologist has no idea, as far as you know, that -- let me rephrase that. You've never spoke to the pathologist about the incident at the laundromat?

A No. I personally have not spoke to her.

Q So you were not -- you didn't take any -- did you do any investigation of the laundromat?

A No, I did not.

Q Did anyone from the Racine Police Department go to the laundromat?

A Not to my knowledge.

Q Did anyone from the Police Department take any photographs of the basket?

A Not to my knowledge. [77-167]

Q Did anyone at the -- from the Police Department go and interview the boy that was pushing Jovani when he fell out of the basket?

A I believe Nabor was interviewed.

Q Is there -- do you have a report of that?

A I would have to check my notes. I believe he was – I believe he was interviewed. But I don't know if the details of the laundromat were in that interview.

Q What I'm asking you is did anyone specifically interview any -- specifically Nabor who pushed him - as to what -- well, let me rephrase. You now know that Nabor was pushing Jovani around in a basket, right?

A Well, I believe in the transcripts that I read I'm not sure which boy was pushing which. But sitting here in testimony listening to Lawanda, I did learn that, yes, it was Nabor that was pushing Jovani in the cart.

Q But back then when you knew about it, that was the end of it. It wasn't investigated any further. Am I right?

A Correct.

Q And the only thing you presented to the pathologist is the two incidences in which you asked Manuel about in terms of any injuries that the child may have sustained recently; am I right? [77-168]

A Correct.

Q So you didn't go back to -- did you ask him, for example, that Friday preceding the child's death, did you -- did you inquire from Lawanda or from Manuel or from any family members regarding that Friday, anything that may have happened specifically that Friday?

A I guess I don't understand your question.

Q Okay. The child died on a Thursday, correct? March 12.

A Yes.

Q The Friday preceding was there any investigation done regarding what may have done -- what happened with the child that day?

A Which day?

Q Okay. The child died on Thursday, March 12.

MS. HANSON: Actually, Judge, March 12 is a Friday so if he could just be clear?

BY MR. SALDANA:

Q Okay. Other than the two incidences in which Manuel told you about, the stairs and the car, was there any inquiry as to or any investigation done regarding anything else during the week preceding his death?

A Other than the laundromat, I was not given any other injury or any other thing to investigate.

Q Did you go and talk to Lawanda's mother and ask her [77-169] about anything that may have happened at the house?

A Other officers spoke to her, but I don't know. But I did not. And I don't know what the other investigators spoke to her about.

Q You were the head investigator though, right?

A Correct.

Q Well, to your knowledge, was there an interview done of these other -- of the family members at Lawanda's mother's house?

A No. Other children were interviewed separately. I believe Tacora. But I don't believe any or any mechanism of injury or any accident or anything came out of any of those interviews.

Q Well, what I'm asking you is was it investigated as to whether or not anything may have taken place at that at Lawanda's mother's house? That's all I'm asking.

A Several of the children I spoke to interviewed forensically. I don't typically interview children. We allow the Child Advocacy Center to do that with a trained forensic interviewer. And out of those interviews, no other means or accident or anything occurred that I'm aware, that came out of those interviews that I'm aware of.

Q Okay. Well, so, again, I just want to be clear here, did they go and ask specifically about, okay -- well, [77-170] let me go back. You were asking -- when you interviewed Lawanda you were asking about things that had transpired, correct, recently?

A Yes.

Q Okay. How many days were you inquiring about?

A The week. You know, the week of the incident leading up to his death on Friday morning.

Q So the week would mean beginning when, Monday?

A Yes. I guess that's where I started the vast majority of my interviews was Monday.

Q Okay. So you started with Monday. And that's where your inquiry began, as of Monday, correct?

A Yes.

Q So you didn't ask anything about what happened Sunday or Saturday or Friday before that Monday?

A No.

Q Then as far as Monday, you've testified that you learned that Manuel was watching the child in the day; is that correct?

A The Monday before.

Q Yeah. The Monday before the death.

A Yes.

Q And that Monday night then it was both of them, correct? [77-171]

A Yes.

Q Now, Tuesday, again before the death of the child, Manuel had the child during the day and then at night it was both Lawanda and Manuel?

A Yes.

Q Okay. And then came Wednesday, the day before the child died. And on that Wednesday Manuel had him in the morning or during the day. And then in the evening where did -- where did your investigation take you in terms of Wednesday, the day before the child died, in terms of when Manuel was done watching the child, what did Manuel do with the child that --

A Manuel dropped him off at Wanda's house.

Q At Wanda's house?

A Or apartment, yes.

Q Is that -- is Wanda Lawanda's mother?

A Correct.

Q Okay. The lady that testified earlier?

A Yes.

Q So the child was dropped off there Wednesday. From your investigation, what time did Jovani get dropped off at Wanda's house?

A I think I noted that Lawanda said that, when I asked her that, between 12 and one. But I don't know actually when they were dropped off. [77-172]

Q So sometime between 12 and one the Wednesday before the child died, Manuel dropped the child off at Lawanda's mother's house?

A Per Lawanda, yes.

Q Okay. And is that the evening -- that same evening that Lawanda told you that she went to go get her laundry?

A Yes.

Q And did she tell you the reason she got -- the laundry was at the house was because she had been staying there?

A Yes.

Q Okay. So she had been staying there and Jovani had been staying there, right?

A Yes.

Q Okay. So that's why she had to go Wednesday night to pick up her stuff to go and get it washed, right?

A Yes. She had many things there. And most of their clothes were there.

Q So most of the clothes there. Based on your experience as an investigator, if someone's clothes are mostly at someone's place, does that suggest to you that they are probably living there?

A They were staying there off and on, yes.

Q Okay. And so Wednesday night Lawanda goes and picks up [77-173] the laundry and she goes to the laundromat, correct?

A Correct.

Q And you learned of that the following, what, two days after the child died, soon thereafter during the interview you learned about that incident?

A Yes.

Q And, again, you had learned about it while you were at the house taking photographs as well because she mentioned it to you then and to Mr. Terry at that time; is that correct?

A I don't recall it being mentioned to us.

Q Okay. Fair enough. Did you do anything in terms of investigation as to Wednesday afternoon once Manuel left the child off at Wanda's house in

terms of anything that may have happened just specifically where the child may have been injured?

A Not specifically, no.

Q So did you know that that Wednesday that -- who was staying at Wanda's house, that there were four children there and another adult that were all residing there?

A Yeah. I knew that school was going on. But that there those children there as well as an adult off and on, her boyfriend at the time I believe, right.

Q Okay. And then so that when you go -- and so then that night Lawanda explained to you after she did the wash, [77-174] she took the clothes and Jovani either to her mom's house or back to Manuel's house, one of the two, right? Is that a yes?

A I believe it's to -- back to Manuel's house.

Q Okay. Now, and then Thursday Manuel described or you learned through your investigation that Manuel was with the child during the day, and then that night he dropped the child off at work; Lawanda was working?

A Correct.

Q And that happened at what time?

A Well, she gets out of the work at 3:30 so shortly after 3:30.

Q Okay. And that's when Lawanda took the child to her mother, Wanda's, house?

A Yes.

Q And that's when the child, according to Wanda, began to display symptoms of some sort of injury?

A Yes.

Q And then that night Lawanda took the child back home. And it was after Manuel got home late at night that the child then started displaying more symptoms of an injury?

A Yes.

Q And it was at that point that Manuel tried to revive the child with CPR before taking him to the hospital? [77-175]

A Yes.

Q Did you have -- did you do any investigation related to the -- you know that the child -- by now you know that the child had some fractured ribs, correct?

A Yes.

Q Did you do any investigation in terms of -- well, strike that. Did you learn that some of the fractured ribs were recent and some were later?

A Yes.

Q Both having happened before the abdominal injuries causing the death?

A Yes.

Q Now, knowing that, that some were recent and some were older, what, if anything -- was there any investigation done in terms of going back to the home of Wanda to determine -- because they were going on and off, they were living back and forth -- that something may have occurred while living with Wanda?

A Well, the children, Tacora (phonetic) -- Tacora, Nabor, were interviewed--

Q I'm just -- let me -- before you answer that

A Okay.

Q -- I'm asking you --

THE COURT: Just a minute, counsel. You [77-176] asked him a question. Let him give his full answer.

THE WITNESS: But a part of investigating the prior fracture, we went to the children, the older children, Nabor and Tacora, in an attempt to see what they saw, you know, over the course of the last month or so.

BY MR. SALDANA:

Q Okay. Now, was there any indication at all – strike that. I wanted to ask you another question concerning what happened. You -- when you took the child or you saw the child, correct?

A Yes.

Q -- at the -- at the -- when he was at the hospital?

A Yes.

Q And in one of your reports you note that there was no outward sign of injury; am I correct?

A Correct. There was bumps and bruises like you would normally see on a two-year-old and a distended stomach. Those are the things I noted.

Q Okay. You were present when the -- both you and the medical examiner, Tom Terry, interviewed both Lawanda and Manuel, right?

A Correct.

Q Do you remember Lawanda saying something along the [77-177] lines of that she sometimes lives with her fiance?

A I don't know what words she used. But I know that she was living sometimes with Manuel and sometimes at Wanda's.

Q Okay. The last question, sir. The -- when you were present with the Tom Terry, isn't it true that also Manuel had told you that the child had thrown up on at least three occasions that day?

A In reviewing my reports, I do -- that was not in my report. But I do remember him saying that the child did throw up at least once.

Q Okay. Now, during the course of your investigation, did you also learn that Lawanda is pretty fluent in Spanish?

A I know that she speaks Spanish. I don't speak Spanish so I could not talk to her to measure her

ability to. So I have never listened to her speak Spanish.

Q Okay. When you talked to Manuel at the house where he was residing -- when you spoke to him at the house, he was explaining to you at that point about the stairway; is that correct?

A He brought Officer Euler and I around to show us, you know, where these stairs were, where their bedroom was and where this vehicle was.

Q Okay. And you said that he fell down the last three [77-178] stairs. You looked at the photograph, right?

A Yes.

Q Okay . That Manuel had said that he fell down the three stairs. Do you have them up there?

A No, I do not.

MS. HANSON: They're on the table there.

THE WITNESS: Oh, yes.

BY MR. SALDANA:

Q I'm now showing you what's Exhibit 6 and 5 (sic). Did Manuel explain to you that he fell down these three stairs which would be like stair six, five and four going down or would it be the three, two, one going down?

A I don't recall which three steps that he -- I know it was near the landing or on the landing. But I do not remember which particular stairs.

Q Okay. And I know it may be difficult to tell from this, Investigator, but do you recall whether or not these steps looked kind of slick and slippery?

A They were hardwood steps, so, yes, they were.

Q They look fairly shiny in here, correct?

A Yes.

Q Oh, I'm sorry. Thank you. So is it possible that because of the language barrier between yourself and Mr. Garcia that maybe it was quite not clear in terms [77-179] of which stairs he fell down?

A I don't recall the reason why I don't remember which step he spoke to me about. But I -- I was able to converse with Mr. Garcia very easily.

Q So you had -- you did converse okay?

A Yes.

Q All right. So you don't think there was any misunderstanding there is what you're saying?

A I just -- correct. I do not believe. I just don't believe I recorded, you know, by note taking what particular -- if he pointed at which particular two stairs, I don't believe I recorded what particular three stairs he was talking.

Q Now, he also pointed out to you about the vehicle, right?

A Yes.

Q And he showed you the vehicle from which he said that the child jumped from here and went forward, correct?

A Correct.

Q And did he describe to you that as the child went forward that he tried to catch him, right?

A I don't recall.

Q Okay. Did he indicate to you whether or not the child fell flat on his face or on his stomach at that time or no? [77-180]

A Yeah. He was trying to jump all the way down to the ground, but he believes he hit that side step which kind of made him fall more flat on the ground.

Q And do you remember him telling you that he ended up falling down or did he catch him in the process or don't you remember?

A I don't recall.

Q So, again, those were the only two incidences in which you brought to the examiner, to the pathologist?

A When I spoke to her on the phone that morning those are the two I brought up to her at the time.

Q Nothing about the laundromat?

A Correct.

Q And so you heard while you're sitting here today that Lawanda didn't even tell Manuel about

that incident; she didn't even mention it to him as well?

A I believe that's what she said. Yes.

Q So Manuel, he didn't know about the laundromat incident. He couldn't have told you about it; isn't that right?

A Correct.

Q In fact, when you -- what he told you was that he thought that the child had cut his lip from the fall out of the car?

A Correct. [77-181]

MR. SALDANA: I don't have any other questions. Thank you.

THE COURT: Redirect?

MS. HANSON: Judge, can we have a sidebar?

THE COURT: Yes.

(Off-the-record discussion.)

THE COURT: Why don't we take a break? As I said earlier, sometimes we have these where we need to talk. So we'll take ten minutes.

(Jury exits the courtroom.)

THE COURT: Okay.

MS. HANSON: Your Honor, Mr. Saldana has gone to great lengths to challenge the credibility and the job done by Investigator Spiegelhoff. And the only way I

can rehabilitate that is I believe he's opened the door to the confession. Why he didn't continue on his investigation was because Mr. Garcia told him he did it. I think that door is wide open. And I would like to be able to pursue that in my redirect of Investigator Spiegelhoff based on the line of questions to reestablish Investigator Spiegelhoff's credibility.

MR. SALDANA: Your Honor, I asked Investigator Spiegelhoff if he -- I asked specifically did he investigate anything that may have happened at the house, at Wanda's house. That does not open up the [77-182] door. That's all I asked for, if there was anything done to investigate what may have happened at the house at Wanda's. That's it. That does not open up the door to that.

THE COURT: Okay. I heard some things too that caused me concern that you were getting there, and it didn't have so much to do with your questions about what happened at the house. It had to do with what he talked to the medical examiner about, particularly the only incidents you asked about to the medical examiner. You asked general questions like that. So I'm going to look at the transcript a little bit before I rule on that.

INTERPRETER: Excuse me, your Honor. So what?

THE COURT: I'm going to look at the transcript a little bit before I rule on that, and I have to talk to the reporter about that. So I need her to read back a couple questions to me.

MS. MARTINEZ: So we should take a break while you do that?

THE COURT: You should.

MS. MARTINEZ: Okay.

(Recess.)

THE COURT: All right. We'll go back on the [77-183] record before the jury comes in. I'm not -- as I understand, the State's position is essentially that Mr. Saldana has opened the door during his cross-examination to the State inquiring why the investigator took certain action. And if I understand the argument, essentially it's that.

MR. SALDANA: Judge, I'm sorry. The interpreters aren't here. They're just setting up.

THE COURT: Okay.

MR. SALDANA: I'm sorry, your Honor. I didn't realize until I saw them walk in.

(Recess.)

THE COURT: All right. Back on the record. I'll repeat what I just said. Essentially the State asked for a sidebar, and when I excused the jury, raised the issue of whether or not through cross-examination the defense had opened the door as that term is used to them now being able to use the defendant's statements which were suppressed by Judge Marik. I'm not so convinced that his cross-examination about what the officer did with respect to interviewing some of these younger folks and specifically asking

questions at that other house directly bears on opening the door. [77-184]

The State has suggested that the reason that occurred was because after the interview of the defendant in which he made an incriminating statement but that statement was suppressed by Judge Marik due to a language issue, that the State would like to, for reasons of fairness, be able to go into why he didn't do additional investigation. The problem I have at this point is, No. 1, I don't know exactly when the interview with the defendant which was suppressed was engaged in. I need to look at the file to take a look at that. And I also, because of equipment issues with realtime, can't really look back at specific questions that were asked and answered.

So I'm going to have my reporter prepare a transcript of the cross-examination overnight. And I'm going to take this motion under advisement and look at the questions and the answers and make a decision. So I'm reserving or taking that motion under advisement at this point. And in terms of how we proceed, if I deny the State's motion, there is -there's no issue. If I grant the State's motion, then they can recall the witness. So I'd like to proceed with what we have this afternoon. We'll start a little bit later tomorrow morning. I'll look at the [77-185] transcript, and I'll give you a decision.

[End of Excerpt]

APPENDIX D

IN THE CIRCUIT COURT OF RACINE COUNTY

STATE OF WISCONSIN

STATE OF WISCONSIN,

vs.

MANUEL GARCIA,

Case No. 10-CF-0365

JURY TRIAL

The Honorable Michael J. Piontek Presiding

Wednesday, September 10, 2014

Reported by Rose Coulthart, RPR, CRR, CCP

APPEARANCES:

Ms. Maureen Martinez, Assistant District Attorney, and Ms. Patricia Hanson, Deputy District Attorney, appearing on behalf of the State of Wisconsin.

Mr. David Saldana, Attorney at Law, appearing on behalf of the Defendant. Defendant is present.

[Beginning of Excerpt]

THE COURT: Good morning. The case is on this morning based on the Court taking under advisement a motion that was made by the State yesterday during our cross-examination of Investigator Spiegelhoff specifically. And I've had a transcript prepared of the cross-examination portion of Investigator Spiegelhoff's testimony, specifically to what the State said from Ms. Hanson, "Your Honor, Mr. Saldana has gone through -- has gone to great lengths to challenge the credibility and the job done by Investigator Spiegelhoff. And the only way I can rehabilitate that is I believe he's opened the door to the confession. [79-3] Why he didn't continue on his investigation was because Mr. Garcia told him he did it. I think that door is wide open. And I would like to be able to pursue that in my redirect of Investigator Spiegelhoff based on a line of questions to reestablish Investigator Spiegelhoff's credibility."

Mr. Saldana responded, "Your Honor, I asked Investigator Spiegelhoff if he -- I asked specifically did he investigate anything that may have happened at the house, at Wanda's house. That does not open the door. That's all I asked for, if there's anything if there was anything done to investigate what may have happened at the house at Wanda's. That's it. That does not open up the door to that."

The Court said, "Okay. I heard some things too that caused me concern that you were getting there, and it didn't have so much to do with your questions about what happened at the house. It had to do with

what he talked to the medical examiner about, particularly the only incidents that you asked about to the medical examiner. You asked general questions like that. So I'm going to look at that transcript a little bit before I rule on that."

And I -- we took a pause for me to have the court reporter try to find that portion of it, and [79-4] because we were taking quite a bit of time doing that, I elected to take it under advisement and give you my decision this morning. And as I said, I ordered a copy of the transcript of the cross-examination of Investigator Spiegelhoff so that I could see precisely what the questions were. So I believe the parties have a copy of that as well. On page 6 of the cross-examination the question is: Did anyone from the Racine Police Department go to the laundromat? Answer: Not to my knowledge. Question: Did anyone from the Police Department take any photographs of the basket? Answer: Not to my knowledge. Question: Did anyone from -- at the – from the Police Department go and interview the boy that was pushing Jovani when he fell out of the basket? And the answer was: I believe Nabor was interviewed. Later on that page the question was: What I'm asking you is did anyone specifically interview any -- specifically Nabor who pushed him -- as to what -- And then he said: Well, let me rephrase. [79-5]

Over to page 7. The question – first question on page 7: But back then when you knew it, that was the end of it. It wasn't investigated any further; am I right? And the answer is: Correct. "And the only thing

you presented to the pathologist is the two incidences in which you asked Manuel about in terms of injuries that the child may have sustained recently; am I right?" And he said: Correct. Then there's cross-examination towards the bottom of page 7 about the Friday preceding the investigation, what happened with the child that day. And the first question on page 8: Okay. Other than the two incidences in which Manuel told you about, the stairs and the car, were there -- was there any inquiry or any investigation done regarding anything else during the week preceding his death? And the answer was: Other than the laundromat, I was not given any other injury or any other thing to investigate. Then there's a question: Did you go and talk to Lawanda's mother and ask her about anything that may have happened at the house? And he answered other officers did. [79-6]

But he didn't know what the other investigator spoke to her about. And the question was: You were the lead or the head investigator, right? And he says: Correct. Question at the bottom of that page -- no. I don't think that's got anything to do with the State's part of this. Question on page 10, top of page 10: So you didn't ask anything about what happened Sunday or Saturday or Friday before that Monday? The answer was: No. Question on the bottom of the page: Okay. Then came Wednesday, the day before the child died. And on Wednesday Manuel had him in the morning or during the day. And then in the evening where did where did your investigation take you in terms of Wednesday, the day before the child died, in

terms of what Manuel was done watching the child, what did Manuel do with the child that And the answer was: Manuel dropped him off at Wanda's house. Questions on page 12: And you learned of that the following two days after the child died.

INTERPRETER: Excuse me, your Honor. What [79-7] was that?

THE COURT: And you learned of that -- He's speaking about the laundromat incident to the investigator. Mr. Saldana's question is: And you learned of that following, what, two days after the child died, soon thereafter during the interview you learned about that incident? And he said: Yes. And then there was a question about where he had heard about it. But the last question was: Did you do anything in terms of investigation as to Wednesday afternoon once Manuel left the child off at Wanda's house in terms of anything that may have happened just specifically where the child may have been injured? "Not specifically, no." was the answer. And then the question on Line 16 of page 13 wasn't really precise as to what interview. I mean there were three interviews. There was the interview that occurred on March 12th at about 3 or 3:30 in the morning. And that interview occurred at the hospital shortly after the death of Jovani Martinez. There was a second interview that occurred at the home of the defendant, Manuel Garcia, which [79-8] occurred somewhere as it's been described in the light hours, 8 a.m. to 9 a.m., which is where this stair incident was discussed and apparently photographed. And then there was a third

interview which occurred after the detective or investigator had spoken to the medical examiner who testified yesterday. And that interview was after Mr. Garcia had been arrested and was being held. And that interview was videotaped and was the subject of the motion to suppress evidence which Judge Marik granted on grounds I'll talk about again in a few minutes.

So the question on page 13 is: Okay. Now, and then Thursday Manuel described or you learned through your investigation that Manuel was with the child during the day. And then that night he dropped the child off at work. Lawanda was working? There are other references to the investigation. Page 14: Did you learn that some of the fractured ribs were recent and some were later? Answer: Yes. Question: Both having happened before the abdominal injuries causing the death? The answer was: Yes. Even though it's got a Q there. [79-9] "Now, knowing that some were recent and some were older, what, if anything -- was there any investigation done in terms of going back to the home of Wanda to determine -- because they were going on and off, they were living back and forth -- that something may have occurred while living with Wanda? And then there was an answer to that.

So it's absolutely proper cross-examination. There weren't objections to it. And it is proper to inquire into the investigatory process by which Investigator Spiegelhoff determined what action to take in this case. The question is whether or not

because of those questions, the State's position which is the defense has opened the door or, put it in legal terms, put the issue into controversy as to whether or not the investigator can explain why he didn't investigate these things.

You know, the questions were asked on cross. They can be argued to the jury at closing this investigation was completely shoddy, he never talked to this person, he never talked to that person. All of that's proper. And that may be the case. The question is whether the State has the ability to explain that. And they would explain that [79-10] by, I assume because they've asked for it, putting in that -- putting into evidence that Mr. Garcia admitted to punching the child in the stomach three or four or in the body I should say, not necessarily the stomach, but in the body three or four times. And is that a reasonable explanation then for the jury to consider whether the investigation should have continued, whether that should have halted the investigation, was the officer's reason for not continuing an investigation to look at other possible causes reasonable or not. And that's always the jury issue.

But the question is whether the State has that option based on the questions that were asked and the issue now that has been raised challenging the essentially the investigator. I find no fault with any of the questioning of Mr. Saldana. But I mean he's an absolutely very capable advocate for his client. The question is whether the issue that now is in controversy about this investigation, shoddy

investigation if I could call it that which seems to be the claim by the tone of all of these questions, allows the State to put in the confession which is Statement No. 3 which was suppressed by Judge Marik. [79-11]

Now, I've previously had a hearing on the statement that was made by Mr. Garcia. And that was in response to a motion in limine which the State filed indicating that they wanted some direction, as did the defense, on whether or not I would allow cross-examination potentially of an expert called by the defense, a pathologist, to testify as to cause of death. And while I provided some guidance and indicated that these are the questions and this is the issue, I'm likely to allow the State to cross-examine.

That issue as of yet has not arisen. That is, there's been no testimony by defense expert. There's been no opinions elicited. And there have been no -- there's been no request by the State to cross-examine that person. So while I said this is what I would likely do, I'd consider allowing that in, I have to wait until the questions and the answers have been -- are before me. That is, the issue is ripe, so to speak, for decision. In this case the second request by the State to use it in -- use the confession or suppressed statement in redirect questions to the investigator, the issue is ripe. [79-12] The questions and the answers have been asked. And so I, again, look back to the statement originally made by Mr. Garcia. And by that, I mean the suppressed statement. In that statement, and I am looking at the transcript of the DVD which was Exhibit No. 3 on August 22 of 2011,

there's a question on page 2. Question: Manuel, need water or anything? Answer: Can I use the washroom? Question: Use the bathroom? The answer was: Yes. And that was allowed. On page 4 of the transcript: Where were you born? The answer was: In Mexico. When did you come here to the U.S.? Fourteen years ago, something like that." How much school did you have in Mexico? I finished high school. Started in college. This is all in English. This is without an interpreter. What were you to take? You said I started college. And what were you taking in college? I went like five or six months. In high school or college did you take [79-13] English? And the answer was: No. The question was: Did you learn all your English up here then? And the answer is: Yes. Okay. What I'm going to have you do, we'll see how you do is I want to you read this out loud. Okay. And if you have trouble, I'll help you. Okay. All right. Read from here to here out loud.

Answer, this is this is Mr. Garcia reading: "Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can and will be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions and to have a lawyer with you during the question. If you cannot afford a lawyer, one -- one will be appointed for you before any question if you wish. If you refuse to answer questions, you also have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer." And the question from the officer: Do you understand that?

Okay. Now that you understand, I want the bottom read that -- and it's asking if you want to talk to me. Okay. Can you read that out loud? [79-14]

End of the quote from the officer, well, the question of the investigator. Answer: I have read this statement of my rights, and I understand what my rights are. I'm willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and I know what I'm doing. No promises or threats have been made against me. And no pressure or co -- And that word coercion the officer helped him with. Answer: coercion of any kind has been used against me. And then they went on from there. And in the statement on page 9 of the statement, I'm quoting from about the middle of the page, "He wasn't drinking. And I say drink your milk because we got to go. And he didn't listen to me. And was two things at the same time. And I put him, and I grabbed him again and put him on the bed and I say you got to listen to me, Boy. You know, like talking to him. And I grab him. And when we stop he was, I don't know, he was playing with the milk again, something like that. And I -- I – I punch him in -- in bed, you know, like sit down and just stay there.

Question was: Where did you punch him? [79-15] And the answer was: In the back. Page 13 and the question was: Before you punched him or after you punched him that you were changing him? And the answer was: Before. The question was: Before? And the answer was: No. It was like punching. Then I change him. "So where was he when you punched

him?" The answer: Where? The question: Where was he standing or sitting? And the answer was: Next to me.

I mean there is a complete statement. But I'm looking for whether or not the officer's explanation is called for in redirect, again, looking at the reasonableness of his belief that he didn't need to continue the investigation. On page 15, question: And then you put him and then you threw him on the bed or on his bed, right? Did at that time or the previous time you threw him on the bed did he bounce and hit the wall or anything on either one of those times, the first or the second time you threw him on the bed? And his answer was: I believe the first [79-16] time.

"He hit the wall, was the question. "Do you know what he hit it with, what part of his body." Answer: I can't say like just I was trying to, you know, do two things at the same time. And then on page 16: Did something else happen? Tell me the truth because remember I – the doctor told me all the things that were with Jovani. Answer: They just went like went upstairs. But like I say, he threw up and then before all this. "Before all this?" was the question. Answer: Yeah. He was coughing. He's coughing. And that's when he drank. And he threw up a few times. And then on page 20 the question after kind of a statement by the investigator: I'm trying to -I'm just trying to have you show that you -- you're being truthful in telling us what happened. Was there -- when you punched him, did you punch him more than once possibly or something else? Answer: Yes. I did more

than once. Okay. Where -- where -- right in a row or when did it happen? I did like, um, two times . And then and then I did one to that's when I pulled him and put him on [79-17] the mattress. And then on page 21: Okay. So how many times do you think you punched him then? Answer: I don't know. I say like three or four.

So, you know, that's what the investigator would have known as he continued his investigation. What Judge Marik ruled in his oral ruling January 11th, 2012, was, No. 1, on page 13 it said, By the testimony, the State has in the Court's opinion made a prime facie showing a valid waiver by establishing that Mr. Garcia read his rights himself, that he indicated understanding them by nodding when asked if he did understand them. And he indicated a willingness to make a statement by actually talking with Investigator Spiegelhoff after signing the waiver form.

Mr. Garcia claims, however, that he did not knowingly and intelligently make such a waiver. And he attempted in his testimony to explain why. The reason I'm going to Judge Marik's decision -- and as I said, we talked about this in the motions in limine. But there wasn't a case with facts ripe for decision before me at that time. And a statement that's made by an individual that is not [79-18] voluntary cannot be used for any purposes under the Miranda Goodchild analysis.

The judge's ultimate decision after listening to a number of experts from both sides, both the

prosecution and the defense, concluded on page 34 of his decision: Based upon the application of that objective standard, the Court does conclude that the prima facie showing of a valid waiver has been rebutted on this record. It further concludes that Mr. Garcia did not understandingly, knowingly or intelligently waive his Miranda rights on the date in question. For that reason, the motion of the State to use his custodial statement as evidence as part of its case in chief would be and is denied at this time."

Significant to me was that the Goodchild portion, which is the voluntariness, wasn't mentioned there. And that when asked later on for clarification on page 35, Ms. Hanson: "Judge, just for clarification, your ruling today is that the State cannot use statements in its case in chief. The Court said, Judge Marik said: "That has no effect upon use for rebuttal purposes."

So Judge Marik's aware of the Miranda Goodchild law rules. And he indicated no effect upon use for rebuttal purposes which again leads me to [79-19] conclude that Judge Marik had no issue with the voluntariness of the statement, just the fact that because of his finding about Mr. Garcia's limited ability to understand effectively the Miranda warning, that the State could not use it in its case in chief. The reason that's important again is because if it's nonvoluntary, it doesn't matter how the State seeks to use it. If it's voluntary, the State can use it under certain circumstances. And we'll get to whether it's appropriate in this case in just a moment.

I also, independently in reviewing the transcripts including the transcript of the DVD, believe that it is a voluntary statement. That is, he wasn't coerced. He wasn't threatened. He wasn't denied water. He wasn't denied use of the bathroom. And particularly the statement itself where he says he makes statements about this incident and he says on page 34: Well, I told her -- he's talking about speaking to the mother that's what I told her, you know, we got to take care of the baby. It's going to sound stupid. But I told her, you know, it's better to correct the baby now. You know, we don't have to wait for something worse. Statements like that are absolutely voluntary. He talks about pens and pencils in the [79-20] hands of -- he talks about sockets of or outlets which pose a danger to a young child. So it's not like hedoesn't understand the questions or understand what he's saying. That's pretty clear. Apparently Judge Marik had trouble with his, you know, his English comprehension and made the ruling that he did which, you know, is -- is the ruling in this case.

So applying those facts, that is, the questions asked by Mr. Saldana which are totally appropriate and proper cross-examination and subject to proper argument at the time the jury hears the closing arguments of counsel, considering the impression that the jury would receive from those questions and that argument, I find that the defense has made a strategic decision on how far it went in cross-examination – and that's totally appropriate -- that is, how to handle various witnesses.

But to -- from a fundamental fairness perspective to not allow the jury, and they are the fact finders, to hear Investigator Spiegelhoff's reasoning or rationale behind his decision to not investigate further would cause the jury to be misled. Period. I believe it would be manifestly unfair to [79-21] have the jury hear just that side of it and not allow the investigator, because of Judge Marik's ruling, to explain it. This did not have to be an issue in controversy. There were other avenues, strategic avenues, that could be explored.

You know, but it offends me that a jury would be misled into believing that somehow the investigator did not do his job when that is really at the behest of the defense to not allow him to explain why he took the actions that he did. And the only way for him to do that is to explain that he had this statement in hand, what the statement said, and he felt he didn't need to go any further with looking for other potential causes. Now, is that still attackable? Absolutely. Is it still arguable? Absolutely. The jury will make the decision on what -- whether that was appropriate by the investigator or not. But it's proper. And I think it now is an issue in controversy. And to not allow it, as I said, would I think be manifestly unfair. So the State is allowed to recall Investigator Spiegelhoff and to redirect him in that area.

MR. SALDANA: May I make my argument? [79-22]

THE COURT: You can make a -- you can make a record.

MR. SALDANA: I will make a record.

THE COURT: I've made my decision.

MR. SALDANA: First of all, it was the State -- and I don't know why we don't have the direct testimony. We need the direct testimony in order to understand what led me to ask my questions on cross-examination. We don't have it. But at the very beginning of this transcript at the cross I say, I'll start off with the laundromat incident. You just testified. Et cetera. So the State had just left off with questioning Investigator Spiegelhoff regarding the laundromat. So I picked up on that.

And to not allow me or the defense to inquire as to what -- basically ask Investigator Spiegelhoff did you investigate any other possibilities with regards to the injury would be unfair then to Mr. Garcia for me not to be allowed to go into that line of questioning. That would be tying my hands and not to allow him questions concerning what else did you do to investigate a possibility to the injury. Now, having said that, when Investigator Spiegelhoff went to interview Manuel, he was there to [79-23] see Manuel about the cause of injury causing the death. That's what he was there to find out. My questioning was along the lines of if he had done any investigation regarding the possibility of the rib injuries that could have occurred at Wanda's home specifically, did you look into that. Now, why that is significant is because when the -- my client was interviewed at the -- at the jail, he had spoken about striking the child in the back. That would only be -- what he said at the jury,

excuse me, during the interview with Investigator Spiegelhoff, the laundromat, was he suggested or stated that he may have hit him four times or three times in the back. Now, that he indicated was in December. That is outside the window of what the doctor testified to in terms of when did those rib injuries could have occurred. She said anywhere from ten days to six weeks out.

Mr. Garcia said that what he was referring to happened in December which would have been way outside of the window. So if he was there to investigate the cause of death in terms of the internal injuries that the child suffered or sustained and the events he died from, that is not what the door was supposedly opened to. I do not believe that the door was opened at all [79-24] only because of the fact that it was the State, the State on direct was asking Investigator Spiegelhoff about the laundromat, the laundromat, the laundromat. And so I followed up on it.

And so to say I am not allowed to ask questions about what did you do to investigate the laundromat incident or anything else, to suggest that that opens the door to them, they could say, well, I didn't investigate any further because he had admitted to it. In fact, he never admitted to hitting him in the stomach. He never says that at all during the interview. And as I said, all he speaks about is striking him in the back or on the side, nothing that would be consistent with the injuries that this child died from according to their expert pathologist. So,

first of all, the State is the one who brought up the laundromat incident and the investigation of that. I'm allowed to then ask questions about what was asked or what was done with regards to investigation. That in no way opens the door to the -- my client's statements that he made to Investigator Spiegelhoff. All I simply was inquiring is what did you do, what else did you do in terms to investigate. That – [79-25]

THE COURT: Make a record, counsel, please.

MR. SALDANA: I've made my record.

THE COURT: You know, I disagree.

MR. SALDANA: Judge, you just - -

THE COURT: I mean the transcript speaks for itself. I read the transcript. I didn't make anything up. You know, what's unfair or fair in this case is subject to, you know, argument and dispute. The reason voluntary statements are allowed in for certain purposes is so the jury is not misled. Because they are deemed to be reliable. In other words, when your client said I punched this two-year-old four times, those statements are deemed to be reliable. They weren't coerced. They weren't threatened. He may not have understood that he didn't have to make the statements, which is what Judge Marik ruled. But they still are reliable.

So what's fair or unfair, you know, I'm sure I could hear all day from different sides. The fact is, you know, I've made my decision. That is my decision. You've made your record. We have a -- we have a

record for appeal if that's necessary. But those are still issues that can be argued and debated, not only amongst, you know, the parties, but with the jury at the appropriate time. [79-26] So--

MR. SALDANA: Well, did the Court not feel that looking at the direct examination of the State would be significant in terms of why I asked my questions?

THE COURT: I quoted your questions. And I told you the reason for my answer.

MR. SALDANA: I'm asking about what the State said on direct that led me to ask my questions.

THE COURT: Your questions challenged the investigator's integrity and his competence in – in conducting the investigation. The State was no where near that on their direct. And the motion that was made was made as to your cross-examination. That's why I looked for a transcript of your cross-examination. Now, you can debate it. But we're done in terms of this motion. So are we ready to go -- to have the jury brought in?

MR. SALDANA: No.

THE COURT: What do you need?

MR. SALDANA: Well, we need to address the newspaper article today.

THE COURT: I'll ask the jury about that. I'm aware of it. [79-27]

MR. SALDANA: Thank you.

INTERPRETER: Your Honor, Spanish Interpreter Rick Kissell. May we have 60 seconds before the jury comes in to make arrangements with the equipment? I need to find out who in the back needs it to get equipment to them.

THE COURT: Sure. Come on up. Let me swear you first.

(Interpreter is sworn.)

INTERPRETER: Yes. State has informed me that apparently there's no one in the audience that needs interpretation. So we're good.

THE COURT: Okay. You don't need equipment?

INTERPRETER: Well, do you want me to inquire in Spanish aloud is there anyone here --

THE COURT: No. There's already been a discussion off the record on that.

INTERPRETER: That's fine.

THE COURT: Okay . Bring the jury in, please.

(Jury is brought into the courtroom.)

THE COURT: All right. Please be seated. Good morning, Ladies and Gentlemen and counsel and other parties present. We had to take some time this morning again with some other matters. I apologize to you, first of [79-28] all, for holding you in there that long. But there was a very nice article in the newspaper today. And my question is did anyone see that article? If you have, raise your hand, please.

Okay. No hands are raised. Let's proceed. State's next witness, please?

MS. HANSON: Your Honor, the State would recall Investigator Brad Spiegelhoff.

(The witness is adminstered the oath.)

THE WITNESS: I do.

THE COURT: Please be seated.

BRAD SPIEGELHOFF, called as a witness herein, having been first duly sworn on oath, was examined and testified as follows:

R E D I R E C T E X A M I N A T I O N

BY MS. HANSON:

Q Investigator Spiegelhoff, you've already given your name and your background information on the record. But there's just a few other questions that I want to ask you. When Mr. Saldana asked you questions on cross-examination, he was asking you about whether or not you followed up this investigation into the laundry basket or you followed up your investigation by interviewing children at Wanda Williams' house. Is there a reason why you did not continue to [79-29] investigate this case as Mr. Saldana suggested?

A Yes. In the afternoon of the Friday, the 12th, I interviewed Mr. Garcia at the Police Department. And while doing so, he gave a plausible explanation of the injuries describing that he punched Jovani several times.

Q And was that interview done at the same time as the interview with Lawanda Martinez at the Police Department?

A At the same general time, yes.

Q So we're approximately 3 o'clock in the afternoon; is that right?

A Yes.

Q And what did Mr. Garcia say about why this happened?

A He was preparing the children to leave the apartment to drop them off at Lawanda's work. And while he was changing the baby Yamilet, Jovani kept coming up on the bed and interfering with him being able to change Yamilet. And based on that interference, he removed Jovani from the bed, putting him back on his mattress. And when he came back up again, he admittedly punched Jovani three or four times.

Q Was that an interview that was recorded?

A Yes.

Q And have you seen the recording of that interview? [79-30]

A Yes.

Q Okay. I'm going to show you what I've previously marked as Exhibit 32. Based on the markings on this DVD, what does it say?

A This is the interview of Manuel Garcia on 3/12 of '10.

MS. HANSON: And, your Honor, I'd like permission then to play from one hour 27 minutes to two hours and 12 minutes of that video.

THE REPORTER: I'm sorry. Can you say the time again?

MS. HANSON: One hour 27 minutes to two hours and 12 minutes.

THE COURT: Mr. Saldana?

MR. SALDANA: Please.

THE COURT: Okay. All right. The record will reflect that the court reporter will not be trying to take down the DVD that's being played.

INTERPRETER: Your Honor? This is the interpreter speaking. I was not going to – do you want me to interpret it as well?

THE COURT: I think you should try to do that.

INTERPRETER: Okay.

THE COURT: What exhibit is that, counsel?

MS. HANSON: Judge, I'm not sure the [79-31]

volume is not coming from the television. I have a way

to amplify this, but it's in my office. I can have

somebody bring that right now.

THE COURT: We'll take ten minutes and get that set up. And then we'll proceed. So we'll take a 10-minute recess.

(Jury exits the courtroom.)

(Recess.)

(Jury enters the courtroom.)

THE COURT: All right. Please be seated. Continue please.

MS. HANSON: All right. Sorry for the delay. The technical difficulties, here. (Video playing.)

BY MS. HANSON:

Q Okay. That's two hours 11 minutes and 20 seconds. So, Investigator Spiegelhoff, then after this interview with Manuel and his demonstration, did you think you understood what had happened?

A Yes. I was convinced that the punches that he did on Jovani caused the injury that Dr. Biedrzycki informed me of over the phone.

Q Okay. And once you knew that, did you feel a need to continue to investigate this laundromat or other possible sources of injury? [79-32]

A No. Based on his confession and the -- what I would imagine a laundry basket height and things like that as well as Dr. Biedrzycki -- Dr. Biedrzycki saying about short falls and such, I did not imagine that that had anything to do with Jovani's injuries.

Q Now, Investigator Spiegelhoff, are you aware that a transcript has been prepared of that interview between you and Mr . Garcia?

A Yes. I'm going to show you what I'm marking now as Exhibit 33.

(Exhibit 33 marked for identification.)

BY MS. HANSON:

Q Does that appear to be the transcript?

A Yes, it does.

MS. HANSON: That's all I have. Thank you.

[End of Excerpt]