STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2011AP1653-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

CARLOS A. CUMMINGS,

Defendant-Appellant-Petitioner.

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT IV, AFFIRMING A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, BOTH ENTERED IN THE CIRCUIT COURT FOR PORTAGE COUNTY, HONORABLE THOMAS T. FLUGAUR, PRESIDING

BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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ISSUES PRESENTED

1. Was the Petitioner's post-arrest request to be taken out of a police interrogation room to his cell a valid invocation of his constitutional right against self-incrimination?

   How the circuit court decided this issue: The circuit court ruled that the Petitioner's request was equivocal.

   How the court of appeals decided this issue: The court of

appeals held that the Petitioner's request was ambiguous "because a competing, and indeed more compelling, interpretation is that he was merely attempting to obtain more information from the police about what his co-conspirators had been saying." *State v. Cummings,* 2011AP1653-CR (unpublished opinion January 10, 2013) (table at 2013 WI App ___, 346 Wis.2d 279, ___ N.W.2d ___) at 5.

What the Supreme Court should decide: The Court should decide that the Petitioner's statement, "Take me to my cell" was neither ambiguous nor equivocal, and clearly communicated to the police that the Petitioner wanted to terminate the interview.

2. Was a near-maximum sentence unduly harsh in view of its length and the circuit court's *sua sponte* denial of a Risk Reduction Sentence?

How the circuit court decided this issue: The circuit court ruled that the conduct was egregious in that the Petitioner was the "mastermind" of a murder plot, and that a Risk Reduction Sentence was not appropriate.

How the court of appeals decided this issue: The court of

appeals held that the twenty-four year sentence did not shock the conscience of the court. *See Cummings,* 2011AP1653-CR at 5-7.

What the Supreme Court should decide: The Court should decide that a 24 year sentence (out of a possible 25) is the sort of near-maximum sentence that this Court contemplated as being potentially unduly harsh in *State v. Wuensch,* 69 Wis. 2d 467, 230 N.W.2d 665 (1975).

POSITION ON ORAL ARGUMENT AND PUBLICATION

The Court's granting review implies that this case merits oral argument and publication.

STATEMENT OF THE CASE

This is a review of a direct appeal of a conviction in a criminal felony matter. The facts as stated in the decision of the court of appeals are essentially correct and not in dispute. *See State v. Cummings,* 2011AP1653-CR (unpublished opinion January 10, 2013) (table at 2013 WI App ___, 346 Wis.2d 279, ___ N.W.2d ___) at 2,4-5.

Mr. Cummings entered a no contest plea to the charge of First Degree Reckless Injury, in violation of Wis. Stat. §940.23(1), as a party to a crime. *See* Wis. Stat. § 939.05.

Statement of Facts

This case started with the filing of a criminal complaint in the circuit court for Portage County on December 2, 2008, charging Mr. Cummings, along with co-defendants Linda Dietze and Carla Glodowski, of Attempted First Degree Intentional Homicide (R2).[1]

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[1]References to the record in the brief will follow this format: item number followed by page number, if any, both in parentheses. Thus, for example, a reference to the first page of the criminal complaint, document #2, will be noted as (R2:1).

The charges stemmed from an alleged "murder for hire" scheme involving an adulterous wife, a deceived husband, a demented shooter, and Mr. Cummings, the alleged "mastermind." According to the complaint, on November 18, 2008, Stevens Point police contacted James Glodowski, who told the police that a woman named Linda had shot him in the head with a .22 caliber handgun (R2:2). Mr. Glodowski told police that Linda had called him and told him to meet her at Zenoff Park in order to pay him back $600 because Mr. Glodowski had paid her rent (R2:3-4). On his way to the park, Mr. Glodowski received a call from one Carlos (R2:4). Carlos said he was calling for Linda, and Carlos asked Mr. Glodowski where he was, as Mr. Glodowski was supposed to be at Zenoff Park (id.). Mr. Glodowski recalled that Linda had complained to him about Carlos in the past, so Mr. Glodowski told Carlos that Mr. Glodowski's location was none of Carlos's business (id.).

When Mr. Glodowski got to the park, Linda approached his truck and handed him a VHS videotape that she said showed Mr. Glodowski's wife, Carla, having an affair with Carlos (id.). Linda then pulled out a gun, shot him three times, and ran away

(id.). Mr. Glodowski received a shot in the left cheek, and two shots in the shoulder (id.). The bullet to the cheek lodged in the back of his head by the brain stem (id.). It caused him to lose sight in one eye (R49:45, R56:12).

Mr. Glodowski told police that he and his wife had been having marital difficulties primarily stemming from his wife's giving away about $10,000 to Linda and Carlos (id.). Carla Glodowski verified that she had helped Linda Dietze to get an apartment by co-signing the lease (id.).

According to the complaint, Detective Kussow interviewed Mr. Cummings at the Stevens Point Police Department the day of the shooting, and Mr. Cummings told the detective that on November 18, while Mr. Cummings was near Ms. Dietze's house, he received a text from Carla Glodowski saying that Mr. Glodowski had been shot (R2:5). Mr. Cummings denied involvement in the shooting (id.). After a lengthy interrogation, Mr. Cummings admitted to police that he drove Ms. Dietze to the scene of the shooting, and waited for her to return to his car, although he denied that he knew beforehand that she was planning to shoot Mr. Glodowski (R2:7).

The police interviewed Ms. Dietze, who confessed that

she had shot Mr. Glodowski (R2:6). Her version of events was that Mr. Cummings had driven her to a gas station payphone, from which she called Mr. Glodowski (id.). She later admitted that she actually called from Mr. Cummings's cellphone (R2:7). She said that Mr. Cummings came up with the idea that she should tell Mr. Glodowski to meet her in the park (id.).

Ms. Dietze said that once Mr. Glodowski arrived at the park in his truck, she handed him the tape and then shot him in the head five times with a .22 caliber pistol (id.). She picked up casings from the ground as Mr. Glodowski, screaming and bleeding, got out of his truck (id.). Ms. Dietze apologized to Mr. Glodowski and then told him it was his wife's fault that he had been shot (id.). Ms. Dietze subsequently ran from the scene on foot, until Mr. Cummings picked her up on the roadway and drove her back to the gas station. (id.). As Mr. Cummings dropped Ms. Dietze off, she put the gun and the casings into her backpack and she asked Mr. Cummings to get rid of the pack for her (R2:7).

Mr. Cummings eventually admitted to police that he had taken the backpack for her, although he claimed he did not see a gun in it, only a wallet and keys belonging to Ms. Dietze (id.).

The police searched Mr. Cummings's house and in the basement they found unfired .22 caliber cartridges (but no casings), a box for a pistol and a .22 semi-automatic pistol cartridge magazine (id.). Following this find, the police again confronted Mr. Cummings, who admitted to police that there was a gun in his garage (id.). The police entered the garage and there found an unloaded .22 semi-automatic pistol, without a magazine (R2:9).

Carla Glodowski told police during her interview that she loved Mr. Cummings, and that she and Mr. Cummings hatched a plot to kill Mr. Glodowski (id.). Ms. Glodowski said that Mr. Cummings told her he had a friend who could get a gun, and who would shoot Mr. Glodowski for $8,000 (id.). According to Ms. Glodowski, she and Mr. Cummings had $8,000 jointly in a safety deposit box (id.).[2]

Ms. Glodowski said that the plan was to kill Mr. Glodowski, and then for Ms. Glodowski and Mr. Cummings to collect the insurance money and run away together (id.).

A joint preliminary hearing with all three defendants was

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[2]According to an officer who testified at the preliminary hearing, there was no money in the box, and Ms. Glodowski's name was not on the rental agreement for the box (R49:16,18).

held on December 17, 2008 (R49-R50). All three defendants were bound over for trial (id.). The state filed an information charging Mr. Cummings with Attempted First Degree Intentional Homicide (as a party to a crime), with a penalty enhancer for use and possession of a dangerous weapon (R6). There were also two counts of Aiding a Felon (id.). All counts had habitual criminality enhancers attached due to a 2006 worthless check case in which Mr. Cummings had been convicted of three misdemeanors (id.).

Mr. Cummings filed a motion to suppress the use of his statements to the police (R15). A hearing on that motion took place on December 2, 2009 (R53-R54).

After hearing testimony and argument, the trial court found that Mr. Cummings was at the Stevens Point Police Department on November 18, 2008, at around 5 p.m., speaking with Detective Kussow (R54:56). Detective Kussow left in order to interview Ms. Dietze, who had been arrested in nearby Plover, and Mr. Cummings returned home (id.). At 10 p.m., police came over to Mr. Cummings's house and searched it with his consent (R54:57). Detective Lepak requested Mr. Cummings to return to the police station for more questioning,

telling him he was not under arrest, but would need to be handcuffed for officer safety during the ride because there was no barrier in the squad car (id.). The handcuffs were removed at the police station (R54:8). Detective Kussow told Mr. Cummings, "I'm gonna read you your rights," at which point a conversation ensued, which included statements from Mr. Cummings concerning his giving a ride to Ms. Dietze (R54:58-59).

The circuit court judge concluded that this was a "hybrid" situation, in which there was an interrogation going on before *Miranda*[3] rights were read (R54:60).

Continuing his fact-findings, the circuit court judge found that Mr. Cummings asked, "So I can have a lawyer present at any time?" to which Detective Kussow replied, "If you'd like, yes" (R54:61). Mr. Cummings then asked, "So, am I under arrest?" to which the detective responded, "As of right now, you are under arrest" (id.).

Part of the trial judge's ruling favored Mr. Cummings: the circuit court held that the statements Mr. Cummings made

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

prior to the completion of the advisement of rights should be suppressed, finding that Mr. Cummings was in custody and subjected to interrogation (R54:62). The judge, however, denied suppression of the bulk of Mr. Cummings's statements.

One point of contention at the suppression hearing was whether Mr. Cummings's statement, "Well, then, take me to my cell. Why waste your time? Ya know?" was an unequivocal demand to terminate the interrogation (R16:1, R54:63). Here is the segment of this conversation quoted in the court of appeals's opinion:

> [OFFICER]: ... This is your opportunity to be honest with me, to cut through all the bullshit and be honest about what you know.
> [CUMMINGS]: I'm telling you.
> [OFFICER]: So why then do we got [the victim's wife] and [the shooter] telling us different?
> [CUMMINGS]: What are they telling you?
> [OFFICER]: I'm not telling ya! I'm not gonna fuckin' lay all my cards out in front of you Carlos and say, "This is everything I know!"
> [CUMMINGS]: *Well, then, take me to my cell. Why waste your time? Ya know?* (Emphasis added.)
> [OFFICER]: Cuz I'm hoping ...
> [CUMMINGS]: If you got enough ...
> [OFFICER]: ... to get the truth from ya.
> [CUMMINGS]: If you got enough to fucking charge me,

> well then, do it and I will say what I have to say, to whomever, when I plead innocent. And if they believe me, I get to go home, and if they don't ...
> [OFFICER]: If who believes you?
> [CUMMINGS]: ... and if they don't, I get locked up.
> [OFFICER]: And you're okay with that?
> [CUMMINGS]: No! I'm not okay with that! I don't want to be in that predicament, but right now, I'm under arrest. That's how I see it.

Cummings, 2011AP1653-CR at 4-5.

The circuit court judge found that this remark was not an unequivocal invocation of the right to remain silent.[4] Comparing

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[4]To give some additional context to the "take me to my cell" request, it occurred at a point in the interrogation where one detective had left the room, leaving only Detective Bean and Mr. Cummings in the room, with Detective Bean saying, "You've got a lot to lose, and at his point, I'm telling you right now Carlos, no, all bullshit aside, there's enough to charge you right now! Okay?" The segment that the court of appeals quoted then followed. R16 at 2079 (transcript prepared by the Stevens Point Police Department, attached to defense counsel's affidavit in support of the motion to suppress). This part of the interrogation is found at 21:50-22:48 on R.19: Exh. 5 (DVD video/audio recording). The transcript was withdrawn rather than received as an exhibit. *See* R18 (noting withdrawal of exhibits).

this case to *State v. Markwardt,* 2007 WI App 242, 306 Wis.2d 420, 742 N.W.2d 546, the circuit court judge held that Mr. Cummings's request to be taken to his cell was similar to Ms. Markwardt's statement, "Then put me in jail. Just get me out of here. I don't want to sit here anymore, alright? I've been through enough today" (R54:63). *See Markwardt,* 2007 WI App 242 at ¶1. Consequently, the circuit court denied the defense's motion to suppress except for those statements that Mr. Cummings made prior to completion of the *Miranda* advisement (R54:64).

The parties reached a plea agreement. On January 8, 2010, pursuant to the agreement, the State filed an amended information changing the first count from Attempted First Degree Intentional Homicide, a class B felony, per the original information, to First Degree Reckless Injury, a class D felony, with no sentence enhancer, to which count Mr. Cummings pleaded no contest (R29, R30, R55:5). As part of the plea agreement, the State moved to dismiss the two remaining counts charging Harboring a Felon and Aiding a Felon, with the understanding that those counts would be read-in for sentencing purposes (R32:2, R55:3-4). The court accepted Mr. Cummings's

no contest plea and ordered that the probation department prepare a presentence investigation report (R32, R55:17-18).

Sentencing took place on March 5, 2010 (R32-R39, R56). The judge imposed a sentence of twenty-four years, that is, fourteen years of initial confinement (one year less than the legal maximum incarceration period possible for a class D felony) followed by ten years extended supervision (the maximum amount of extended supervision possible for a class D felony) (R33, R36, R56:). Neither party argued either for or against a Risk Reduction Sentence.[5] The court *sua sponte* denied a Risk Reduction Sentence, and also found Mr. Cummings ineligible for both the Challenge Incarceration

[5]At the time that Mr. Cummings was sentenced, a Risk Reduction Sentence was a discretionary option for Wisconsin sentencing courts in certain cases. *See* Wis. Stat. §§ 302.042(1) and 973.031 (2009-2010), repealed by 2011 Wisconsin Act 38, § 13. At the same time that the legislature repealed these statutes, it also enacted Wis. Stat. § 302.043, which provides for early release of inmates who had been granted a Risk Reduction Sentence before the repeal. *See* 2011 Wisconsin Act 38, § 14M.

Program and for earned release.[6] Restitution was ordered in the amount of $110,188.37 (R36).

The circuit court amended the judgment of conviction on April 28, 2010, to reflect that the count of conviction was a class D felony, rather than a class B felony as reflected in the original judgment (R36, R39).

Mr. Cummings filed a timely motion for postconviction relief seeking modification of the sentence based in part on the circuit court's denial of Risk Reduction Sentence, alleging that the failure of counsel to advocate for a Risk Reduction Sentence was ineffective assistance of counsel, and that Mr. Cummings's willingness to submit to assessment and treatment was a new factor justifying modification of sentence (R40). The motion also alleged that the sentence was unduly harsh (id.).

The circuit court held an evidentiary hearing on the

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[6]The denial of Challenge Incarceration and earned release was not discretionary because the charge of conviction was a chapter 940 conviction, which rendered Mr. Cummings statutorily ineligible both for both programs. *See* Wis. Stat. §§302.045(2)(c) and 302.05(3)(a)1. The legislative changes to § 302.05 included a name change. That statute is now entitled, "Wisconsin Substance Abuse Program."

motion on July 1, 2011 (R57). At that hearing, trial counsel testified that he did not request a Risk Reduction Sentence because he did not think of it (R57:5). He also expressed that to do so would have been in his opinion "a complete waste of time" (id.).

In his ruling, the circuit court judge said, regarding whether the sentence was unduly harsh,

> [T]his court rarely gives a sentence that is maximum or something close to the maximum. But in this case, it felt that is was required, it was necessary, or it would unduly depreciate the seriousness of the offense, and there was a real need to protect the public. When the court finally learned what the motive was behind this, it was rather shocked that Mr. Cummings was using two women who were basically cognitively disabled for financial gain.

(R57:30).

Regarding the allegation that it was ineffective assistance of counsel for trial counsel not to request a Risk Reduction Sentence, the circuit court judge said,

> I think it's really a moot point because the court brought it up and [trial counsel's] testimony here today was correct. He felt it would be a waste of time [to request a Risk Reduction Sentence]. And, I can tell you, it would be a waste of time ... This court would not have and did not

> entertain a twenty-five percent reduction of confinement time in a case that was this grave and a fact scenario that was so egregious ... [T]his is not the type of case that this court would ever entertain a reduced sentence on ...[7]

(R57:34).

Mr. Cummings appealed from the judgment of conviction and sentence as well as the denial of his motion for postconviction relief.

In its decision filed on January 10, 2013, the court of appeals affirmed the judgment and order. Regarding the issue of whether Mr. Cummings's request to go to his cell was an ambiguous demand to end the interrogation, the court of appeals held,

> Cummings's statement was ambiguous because a competing, and indeed more compelling, interpretation is that he was merely attempting to obtain more information from the police about what his co-conspirators had been saying. That is, the suggestion that the police would be

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[7]Upon prompting by the prosecutor, the judge amended this remark, saying, "And I did ... misspeak. I certainly meant [I] would not grant [a Risk Reduction Sentence, as opposed to not considering it]. And it was fully considered and I considered it in this case" (R57:39).

> wasting their time if they were not willing to engage in a two-way flow of information could be taken as an invitation for more discussion, not a termination of the interview.

State v. Cummings, 2011AP1653-CR at ¶9.

Regarding Mr. Cummings's argument that his sentence was unduly harsh, the court of appeals had this to say:

> Here, Cummings contends that his sentence was unduly harsh because: (1) the circuit court failed to give adequate consideration to Cummings's "horrible childhood," his "significant" drug and alcohol issues, and his mental health problems; (2) the court refused to impose a Risk Reduction Sentence; and (3) Cummings's role in the offense did not justify a term of initial confinement that was twice as long as that given to the shooter. None of these arguments is persuasive.
>
> First of all, the record shows that the circuit court did explicitly acknowledge Cummings's difficult childhood, attention disorder, and AODA issues. However, the court also noted that Cummings was articulate and appeared capable of contributing to society if he would put his abilities to good use rather than criminal use. Instead, Cummings not only continued to commit offenses, but he also lied to police and attempted to manipulate the testimony of a co-conspirator. The court was entitled to decide what weight to give these various aspects of Cummings's character in assessing his amenability to rehabilitation and risk to reoffend, and

> deciding whether he was an appropriate candidate for a Risk Reduction Sentence.
>
> Moreover, regardless of how the court viewed Cummings's character, the circuit court also noted that Cummings had already been given "considerable consideration" with respect to the reduction of the charge. The circuit court further reasoned that the offense was serious enough to warrant a sentence close to the maximum not only because it involved a "cruel plan" to commit a premeditated homicide primarily for financial benefit, but also because Cummings manipulated a cognitively impaired woman with an IQ in the 60's into being the shooter. The circuit court's assessment as to the relative culpability of the parties was based upon its own observations of Cummings, as well as information about the shooter's cognitive difficulties.
>
> In sum, a sentence of fourteen years of initial confinement and ten years of supervision, for involvement in an offense that left the victim with the loss of an eye and a bullet lodged near his brain stem, does not shock the conscience of this court.

Id. at ¶¶ 11-14.

Mr. Cummings filed a timely petition for review, which this Honorable Court granted on December 17, 2013.

ARGUMENT

I. "Take Me to My Cell" Was an Unambiguous Request by the Petitioner to End the Conversation with the Police.

Invocation of the right against self-incrimination and waiver of that right against self-incrimination are "entirely distinct inquiries, and the two must not be blurred by merging them together." *Smith v. Illinois*, 469 U.S. 91, 98 (1984). When analyzing the question of invocation, a court must take care not to confuse the issue with the question of whether there was a valid waiver. Nonetheless, as discussed below, some of the concepts ruling determination of waiver apply to the analysis of whether invocation occurred.

For example, regarding waiver, "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination." *Miranda v. Arizona,* 384 U.S. 436, 475 (1966). In parallel fashion, "the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.'" *Id.* at 474.

Courts must presume that a defendant did not waive the right against self-incrimination and the prosecution's burden is great. "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *North Carolina v. Butler,* 441 U.S. 369, 373 (1979). To be valid, a waiver of the right to silence during a police interrogation must be proved to be knowing, voluntary and intelligent. *See State v. Ward,* 2009 WI 60, ¶30, 318 Wis.2d 301, 767 N.W.2d 236.

Regarding the issue of invocation of the right against self-incrimination, the Wisconsin Supreme Court employs a two-part test to determine as a matter of constitutional fact whether a defendant effectively invoked this right. *State v. Hambly,* 2008 WI 10, ¶ 16, 307 Wis.2d 98, 745 N.W.2d 48.[8] The Court upholds the circuit court's findings of facts unless those findings are clearly erroneous. *Id.* Second, the Court

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[8]The same standard applies to requests for counsel. *State v. Edler*, 2013 WI 73, ¶20, 350 Wis.2d 1, 833 N.W.2d 564.

independently applies constitutional principles to those facts, benefitting from the circuit court's interpretation. *Id.*

Where the relevant facts are not in dispute, the Court must answer the question of whether the statements should be suppressed under either the United States or Wisconsin constitutions. *State v. Knapp,* 2005 WI 127, ¶ 20, 285 Wis.2d 86, 700 N.W.2d 899. The Fifth Amendment of the United States Constitution and Article I, section 8 of the Wisconsin Constitution contain provisions that are virtually identical regarding the right against self-incrimination. They read as follows: "[N]or shall [any person] be compelled in any Criminal Case to be a witness against himself ..." U.S. Const. Amend. V. And "nor may [any person] be compelled in any criminal case to be a witness against himself or herself." Wis. Const. Art. I, § 8. This textual similarity often results in the Wisconsin Supreme Court construing Article I, section 8 consistently with the United States Supreme Court's construction of the Fifth Amendment. *See, e.g., State v. Agnello,* 226 Wis. 2d 164, 593 N.W.2d 427 (1999):

> Where, however, the language of the provision in the state constitution is "virtually identical" to that of the federal

> provision or where no difference in intent is discernible, Wisconsin courts have normally construed the state constitution consistent with the United States Supreme Court's construction of the federal constitution. Here, the language in Article I, section 8 of the state constitution is nearly identical to that contained in the Fifth Amendment to the federal constitution.

Id. at 180-81 (citations omitted).

There are exceptions to this "lock-step" approach to interpretation of Article I, section 8. *See Knapp,* 2005 WI 127 at ¶ 63 ("[B]ecause the rights protected by Article I, section 8 are sacred, [the Wisconsin Supreme Court] construe[s] this provision liberally, in favor of private rights."). However, the Court recently "decline[d] to extend the meaning of Wisconsin Constitution Article I, Section 8 in [the realm of invocation of right to counsel] so as to provide different protection than the Fifth Amendment." *See State v. Edler*, 2013 WI 73, ¶30, 350 Wis.2d 1, 833 N.W.2d 564. In *Edler,* the Court distinguished *Knapp*, and held that broader protection under Article I, Section 8 should be limited to instances of intentional violations of a suspect's rights. *Id.* at ¶¶ 29-30. The Court thus adopted the "14-day break-in-custody" rule of *Maryland v. Shatzer*, 559 U.S.

98 (2010). *Edler*, 2013 WI 73 at ¶ 31. The Court nonetheless upheld the trial court's order suppressing the defendant's statements, holding that the defendant's question to the police, "Can my attorney be present for this?" constituted an unambiguous invocation of the right to counsel. *Id.* at ¶ 36. The Court followed *Davis v. United States,* 512 U.S. 452, 458-459 (1994), and as such, did not need to expand the protection under the Wisconsin Constitution to reach this holding. *Edler*, 2013 WI 73 at ¶34.

Turning now to the main issue in the case at bar, the test currently employed by the court of appeals to determine whether a person has unambiguously invoked the right to remain silent is: "[a] suspect must, by either an oral or written assertion or non-verbal conduct that is intended by the suspect as an assertion and is reasonably perceived by the police as such, inform the police that he or she wishes to remain silent." *State v. Ross,* 203 Wis.2d 66, 78, 552 N.W.2d 428 (Ct. App. 1996), *accord State v. Markwardt,* 2007 WI App 242, ¶28, 306 Wis.2d 420, 742 N.W.2d 546. The Petitioner notes that this language does not seem to have been adopted in this form by the Wisconsin Supreme Court.

There could be a problem with the language in the *Ross* test, "intended by the suspect as an assertion" and "reasonably perceived by the police" because "intended by" and "reasonably perceived" sound like subjective-style language. The test is supposed to be objective: "To avoid difficulties of proof and to provide guidance to officers conducting interrogations, [the question of whether a suspect has invoked his rights under *Miranda*] is an objective inquiry." *Davis,* 512 U.S. at 458-459.

The right to remain silent includes the right to terminate questioning at any point. *Ross,* 203 Wis.2d 66 at 74. According to the court of appeals, Wisconsin follows the "clear articulation" rule in determining whether an arrestee's right to cut off questioning has been invoked. *Id.* at 71.[9] *Ross* involved an interrogation where the suspect remained silent for some time before speaking. *Id.* at 73. The court of appeals held in *Ross* that a suspect must make it sufficiently clear that he or she wants

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[9] One commentator believes the Wisconsin test falls more properly into the what that commentator calls "standard of reasonableness" category. Isa Chakarian, "Earning the Right to Remain Silent After *Berghuis v. Thompkins*," 15 CUNY L. Rev. 81, 107 (Winter 2011).

to cut off questioning so that "a reasonable police officer in the circumstances would understand the statement to be an invocation of the right to remain silent." *Id.* at 78, citing *Davis* 512 U.S. at 459.

To be honored by the Court as an assertion of the right against self-incrimination, the invocation of the right must be unambiguous. *Berghuis v. Thompkins,* 560 U.S. 370, ___, 130 S.Ct. 2250, 2260 (2010) (merely remaining silent and refusing to answer questions is not sufficient to invoke the right). The *Thompkins* analysis tracks that of *Davis,* 512 U.S. at 459 (invocation of the right to counsel must be unambiguous).

In the case at bar, the court of appeals held that the Petitioner's statement "Well, then, take me to my cell. Why waste your time? Ya know?" was ambiguous. *State v. Cummings,* 2011AP1653-CR at ¶9. The court of appeals held that

> the statement was ambiguous because a competing, and indeed more compelling, interpretation is that he was merely attempting to obtain more information from the police about what his co-conspirators had been saying. That is, the suggestion that the police would be wasting their time if they were not willing to engage in a two-way flow of information could be taken as an invitation for

more discussion, not a termination of the interview.

Id. [10]

"Once a court decides whether a defendant's request for counsel is ambiguous, the analysis is easy. Unfortunately, in most cases ... the difficult question is whether the defendant's request for counsel is ambiguous." *United States v. Hunter*, 708 F.3d 938, 942 (7th Cir. 2013). The same might well be said of the invocation of the right against self-incrimination.

"Take me to my cell," is in many contexts, an oral assertion intended by the suspect as an assertion to inform the police that he or she wishes to end the conversation.

First, Mr. Cummings concedes that certain utterances of "Take me to my cell" would not, based on context, be considered invocations of the right against self-incrimination. A James Cagney-like "Go ahead and take me to my cell, coppers. These charges will never stick" would be a prime

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[10]The court of appeals upheld the trial court's finding that "Well, then, take me to my cell" was not an equivocal demand to terminate the interrogation (R54:63-64).

example. Another example of a similar utterance that would not be invocation of the right would be where, prior to arrest and interrogation, a defendant tells an officer at a hospital said "Take me, I shot her. Go ahead and lock me up." *See State v. Thompson,* 215 S.E.2d 371 (N.C. 1975). The former constitutes an attitude of defiance; the latter an admission of guilt. A person who encounters police on the streets, in a hospital, or even in the lobby of the police station may be admitting to criminal conduct by saying, "Take me to jail."

But when a request is by an arrestee during a post-arrest police interview and the request is specifically to be removed from an interrogation room to a cell, that is a different story. Then, it is a request to be physically removed from the interrogation forum. In this country, we do not interrogate people against their will. Guantanamo Bay may be a different story, but Wisconsin is not Guantanamo Bay. Arrested people still have some rights here. The civilian police should take such requests seriously, in contrast to the current practice, which appears to be to ignore such requests. *See, e.g, State v. Terry Smith*, SC11-1076 (Florida Supreme Court) (initial brief of appellant at 21. ("On cross-examination, [the officer] said that

if a suspect says, 'take me to my cell,' but continues answering questions, [the officer] continues the questioning."). http://www.floridasupremecourt.org/clerk/briefs/2011/1001-1200/11-1076_ini.pdf (last viewed January 16, 2014).

Arrestees, by definition, have little freedom of movement. But one freedom that this Court needs to recognize and validate is the freedom to be removed from a police interrogation. "Take me to my cell" is simple, unambiguous, unequivocal. The ability to obtain a change of physical placement from an interrogation room to a jail cell is essential to the concept of ordered liberty, and is tantamount to the freedom to end an interrogation.

The Wisconsin Supreme Court has not previously spoken to the question of whether "Take me to my cell" is an unequivocal invocation of the right against self-incrimination. There are conflicting cases in the court of appeals. In *State v. Goetsch,* 186 Wis.2d 1, 519 N.W.2d 634 (Ct. App. 1994), the defendant's statement was

> I don't know, I don't want to talk about this anymore. I've told you, I've told you everything I can tell you. You just ask me any questions and I just want to get out of here. Throw me in jail, I don't want to think about this.

Id. at 7.

On the other hand, in *Markwardt*, 2007 WI App 242 at ¶1, the court of appeals held as ambiguous the statement, "Then put me in jail. Just get me out of here. I don't want to sit here anymore, alright? I've been through enough today." In a footnote, the *Markwardt* court distinguished *Goetsch,* because Mr. Goetsch had "explicitly said he did not want to talk anymore." *Markwardt*, 2007 WI App 242 at ¶28 n. 8.

In her dissent in *Thompkins*, in which she was joined by three other justices, Justice Sotomayor makes mention of *Markwardt* as being among those decisions of "[a] number of lower courts that have (erroneously, in my view) imposed a clear-statement requirement for invocation of the right to silence have rejected as ambiguous an array of statements whose meaning might otherwise be thought plain." *Thompkins,* 560 U.S. at___, 130 S.Ct. at 2277 and n. 9 (Sotomayor, J., dissenting).[11]

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[11]Justice Sotomayor also takes issue with the holding of a Kansas case, *State v. Speed*, 265 Kan. 26, 961 P.2d 13 (1998), with some similarities to the case at bar. Justice Sotomayor disagrees with the Kansas court's having found as ambiguous

The majority of the *Thompkins* Court neither criticized nor endorsed *Markwardt* and *Speed*. However, it was not necessary for the *Thompkins* Court to discuss the meaning of "Take me to my cell" because Mr. Thompkins did not ask to be taken to his cell. This Court cannot read the United States Supreme Court's silence as approval of *Markwardt*.

Even if *Markwardt* is good law, Mr. Cummings's case is distinguished: the focus of Ms. Markwardt's statement was her being tired of sitting and her having had a tough day. By contrast, Mr. Cummings's motive was to end the conversation because he was frustrated with how the conversation was going.

There is admittedly the difficult question for Mr. Cummings as to whether his statement indicated to the detective that it would have been acceptable to continue the conversation if the detective were to tell Mr. Cummings more about what the other suspects were saying. On the face of it, this might seem

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the statement "since we're not getting anywhere I just ask you guys to go ahead and get this over with and go ahead and lock me up and let me go and deal with Sedgwick County, I'm ready to go to Sedgwick County, let's go." *Speed*, 265 Kan. 26, 37-38, 961 P.2d 13, 24, quoted in *Thompkins,* 130 S. Ct. at 2277 and n. 9 (Sotomayor, J., dissenting).

like it was a conditional request, but in fact, it was not conditional at all, because the detective had made abundantly clear that no such information was forthcoming.

The detective said, "I'm not telling ya! I'm not gonna fuckin' lay all my cards out in front of you, Carlos, and say, 'This is everything I know!'" *Cummings,* 2011AP1653-CR at 4-5. Mr. Cummings clearly wanted to end the conversation and he did not want to give information to the police. For Mr. Cummings to hope that the detective would reverse course suddenly and feed Mr. Cummings some information that would be tactically useful to Mr. Cummings was to hope beyond hope. Anyone who would want to stay in and carry on the conversation with this detective would have had to be a hopeless optimist.

Can a reasonable jurist reasonably infer that Mr. Cummings was just "fencing" and hoping that he could improve his position by sponging information from the police before Mr. Cummings gave the police his version of events? In the decision below, the court of appeals discussed that "if a statement is ambiguous, such that 'any reasonable competing inference can be drawn' as to what the suspect intended, it does not constitute

an unequivocal invocation requiring the police to immediately stop questioning." *Cummings* at ¶7 (quoting *Markwardt,* 2007 WI App 242 at ¶ 36).

This reasoning of the court of appeals and its reliance on *Markwardt* might be problematic. Federal district court Judge Griesbach may have pointed out the deficiency of the principle from *Markwardt* that the court of appeals relied on in the case at bar. *See Saeger v. Avila*, 930 F.Supp.2d 1009 (E.D. Wis. 2013).[12] Maybe a statement ostensibly invoking the right against self-incrimination is *not* equivocal as a matter of law simply because there are "reasonable competing inferences" to be drawn from it. In *Saeger*, Judge Griesbach held, "[T]he Wisconsin court found ambiguity in Saeger's motive for demanding that the interrogation end — it concluded that '[t]aken in context,' reasonable officers might have thought Saeger's statement was simply 'fencing' or a negotiating ploy to get a better deal, and that he did not really mean to end the interrogation." *Saeger*, 930 F.Supp.2d at 1018, quoting *Saeger,*

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[12]*See State v. Saeger,* 2009AP2133-CR (unpublished opinion August 11, 2010) (table at 2010 WI App 135, 329 Wis. 2d 711, 790 N.W.2d 543).

2009AP2133-CR at ¶ 11. Mr. Saeger's statement was, "You ... ain't listening to what I'm telling you. You don't want to hear what I'm saying. You want me to admit to something I didn't ... do ... and I got nothin[g] more to say to you. I'm done. This is over." *Saeger,* 2009AP2133-CR at ¶ 3.

The Wisconsin Court of Appeals in *Saeger* misapplied United States Supreme Court case law in holding, "a statement is equivocal as a matter of law when there are reasonable competing inferences to be drawn from it." *Saeger*, 930 F.Supp.2d at 1013. This specifically targets the *Markwardt* language, and by implication, the case at bar, since the court of appeals adopted and quoted this same language. "Fencing" or "thrust-and-parry" is not the analysis that our courts should be using in analyzing the question of invocation of the right against self-incrimination.

Can a suspect simultaneously attempt to negotiate a deal, and at the same time mean to end the interrogation, and if, so, must the police honor the request despite the negotiating stance of the suspect? Mr. Cummings was not trying to negotiate a disposition but Mr. Cummings may have been trying to extract information from the police, which contributed to his decision

to ask to be extracted from the interrogation room. It does not answer the questions of whether the invocation was ambiguous. As Judge Griesbach wrote in *Saeger*, "Such an inquiry into the subjective state of mind of an accused is directly contrary to clearly established federal law, which states that the determination of whether an accused has invoked his rights under *Miranda* is an objective inquiry." *Saeger*, 930 F.Supp.2d at 1019 (citing *Davis,* 512 U.S. 558-559).

There are cases holding that in the absence of explicit invocation, certain circumstances may trigger the protection of the Fifth Amendment. *See, e.g., Garrity v. New Jersey*, 385 U.S. 493, 497 (1967) (no explicit assertion of the Fifth Amendment was required where, in the course of an investigation, such assertion would, by law, have cost police officers their jobs). *See Salinas v. Texas,* 570 U.S. ___, 133 S.Ct. 2174 (2013) (Breyer, J, dissenting) (discussing cases where explicit invocation of right against self-incrimination not required).

"Using 'context' to transform an unambiguous invocation into open-ended ambiguity defies both common sense and established Supreme Court law." *Davis*, 512 U.S. at 459. The context of the invocation is nonetheless relevant:

> A fair reading of [the *Miranda* decision] reveals that the Court never stated that context is irrelevant in determining whether a suspect unambiguously invoked the right to remain silent. An examination of the circumstances or "context" leading up to an articulation of the right to remain silent *may and should* be considered to determine whether a suspect's statement was unequivocal and unambiguous. For example, if a suspect prefaces a statement that on its face invokes his right to remain silent by noting that he is only speaking hypothetically, a law enforcement officer could reasonably conclude that questioning could continue...[C]ontext is important. But consideration of context cannot justify concluding that "no" means "yes" because the suspect may be simply bargaining for a better deal. If this is the rule, then an essential part of *Miranda* might as well be considered gone. No matter how clearly a suspect invokes either the right to remain silent or the right to counsel, it can always be said that he really didn't mean it, that it was intended only as a bargaining chip.

Saeger, 930 F.Supp.2d at 1018-1019 (emphasis in original).

"The court's reasoning in *Saeger*[, 2009AP2133-CR,] demonstrates that one of the biggest problems with the 'standard of reasonableness' is that it tends to operate subjectively." Isa Chakarian, "Earning the Right to Remain Silent After *Berghuis*

v. Thompkins," 15 CUNY L. Rev. 81, 107 (Winter 2011).[13] This note discusses the problematic nature of the court of appeals's acknowledgment in *Saeger* that a reasonable person could interpret the statement made by the suspect to be an invocation of the right to remain silent. The same can be said to the holding of the court of appeals in the case at bar. Mr. Cummings's statement, "Take me to my cell," could have been an invocation of the right to remain silent, or it could have been a fencing mechanism. The point of the article, which is also Judge Griesbach's point, is that when courts question the motives of a suspect when she or he declares an end to the interrogation, there is a grave problem that must be fixed.

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[13]This note argues that the "totality of the circumstances" test is a fairer test that either the "standard of reasonableness" or the "standard of clarity." Id. at 113-115.

II. A Defendant Who Accepts a Plea Bargain for a Plea to a Reduced Charge Should Not Necessarily Receive a Maximum or Near-maximum Sentence on the Reduced Charge

The sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant. *McCleary v. State,* 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971); *see also State v. Gallion*, 2004 WI 42, ¶44, 270 Wis.2d 35, 678 N.W.2d 197 ("In each case, the sentence imposed shall call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant.").

The Wisconsin Supreme Court reviews sentencing decisions under the erroneous exercise of discretion standard. *State v. Frey*, 2012 WI 99, ¶ 37, 343 Wis.2d 358, 817 N.W.2d 436. The Court's analysis begins by presuming that the sentencing court acted reasonably. *Id.* at ¶ 38. Sentencing decisions of the circuit court are generally afforded a strong presumption of reasonableness because the circuit court is best suited to consider the relevant factors and demeanor of the

convicted defendant. *Id.*

Maximum and near-maximum sentences, however, should receive greater scrutiny than sentences well within the normal statutory limits. *See, e.g., State v. Daniels*, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983). *Cf. State v. Scaccio*, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449 (sentence well within limits of maximum cannot be unduly harsh or unconscionable). Such sentences may be due to the erroneous exercise of discretion. *Id.*

A sentence is unduly harsh if it is "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). A sentencing court may modify a sentence if the court determines that the original sentence represented an erroneous exercise of discretion. *See State v. Wuensch,* 69 Wis. 2d 467, 230 N.W.2d 665 (1975); *see also State v. Harbor,* 2011 WI 28, ¶35 n. 8, 333 Wis.2d 53, 797 N.W.2d 828.

This case presents an opportunity to the Court to define limits of discretion for sentencing courts when judges impose

near-maximum periods of confinement. Is merely acknowledging a person's personal history, including a "horrible childhood," "significant alcohol and drug issues" and "mental health issues," enough to show that the sentencing court actually weighed those considerations and factored them into the sentencing equation? Does all that mitigation do is lead to a sentence one year less than the maximum?

The sentencing judge found that Mr. Cummings was at high risk to reoffend "due to the appearance of premeditation of this offense and having a cognitively impaired individual carry out the shooting" (R56:41). The judge also referred to Mr. Cummings's "fail[ure] to be truthful with law enforcement from the beginning" (R56:42). These are certainly elements for a sentencing court to consider, but they do not necessarily justify twenty-four years as opposed to fifteen or twenty.

The harshness of a near-maximum sentence could have been reduced by granting a Risk Reduction Sentence, but the circuit court denied one *sua sponte* at the sentencing hearing, and the judge said that at the postconviction hearing that he would not have granted one even if defense counsel had advocated for it. (R57:34). This particular *sua sponte* denial

distinguishes Mr. Cummings's case from the usual case in which a sentence is alleged to be unduly harsh.

The charge of which Mr. Cummings was convicted permitted a Risk Reduction Sentence at the time that Mr. Cummings was sentenced. *See* Wis. Stat. §§ 302.042(1) and 973.031 (2009-2010), repealed by 2011 Wisconsin Act 38, §13. The sentencing judge did not inquire of Mr. Cummings at the time of the sentencing whether Mr. Cummings would agree to participate in risk testing, special programming and treatment while in prison. Some testing had been done at the presentence investigation stage, and Mr. Cummings co-operated in that testing (R42:11). Mr. Cummings represented to the circuit court through postconviction counsel that he was willing to subject himself to more testing, as well as special programming and treatment while in prison, which was information that was not conveyed to the sentencing court until after sentencing.

A Risk Reduction Sentence would not have been appropriate under certain circumstances, such as if a defendant had been diagnosed with a personality disorder, or if the initial term of confinement had been eighteen months or less. *See, e.g.,* The Third Branch, Sentencing Toolbox Department: Q&A: Risk

Reduction Sentences by Judge Richard J. Sankovitz, www.wicourts-gov/news/thirdbranch/docs/winter10.pdf (last viewed January 16, 2014). Neither of those circumstances was present here. Mr. Cummings's mental illness and drug abuse history are both factors that increase his risk to re-offend. Assessment and treatment might well reduce his future risk to re-offend. Both the community and Mr. Cummings would have benefitted from his being treated for high-risk behaviors.

At the postconviction hearing, trial counsel and the circuit court judge stated that it would have been a waste of time for Mr. Cummings to have requested a Risk Reduction Sentence. The denial of a Risk Reduction Sentence was a further indication of the undue harshness of the sentence. As the presentence investigation report pointed out, Mr. Cummings clearly had many personal challenges (42:7-11). The court of appeals upheld the circuit court's finding that a near-maximum sentence was acceptable because Mr. Cummings had already received consideration from the prosecutor because he was permitted to plead to a reduced charge rather than the original charge. *Cummings,* 2011AP1653-CR at ¶ 13. Although the district attorney in Wisconsin "is endowed with a discretion that

approaches the quasi-judicial," *see, e.g.*, *State ex rel. Kurkierewicz v. Cannon,* 42 Wis.2d 368, 378, 166 N.W.2d 255 (1969), sentencing is solely up to the judge who must exercise her or his own discretion.

Counsel for the two co-defendants in this case succeeded in portraying their own clients as victims of Mr. Cummings's manipulation. Mr. Cummings suffered from the happenstance of being the last defendant to be sentenced in regards to this shooting, and as such, the sentencing judge clearly had his mind set on the proposition that Mr. Cummings was a criminal mastermind. Although Mr. Cummings does show some signs of being manipulative, he clearly was not the criminal genius that the sentencing court made him out to be. Mr. Cummings gave inconsistent statements to the police that he believed would be used against him in court. He did not request a lawyer. Mr. Cummings admitted to police that he had had a relationship with Ms. Glodowski, and he admitted that he had driven Ms. Dietze to the park and picked her up. He admitted Ms. Dietze had given him a backpack either to hold onto or get rid of, and Mr. Cummings consented to police searches of his house, without warrants, knowing that the police would find the pistol, the

magazine and bullets.

Ms. Dietze received a sentence of twenty years, consisting of only seven years confinement followed by thirteen years extended supervision for her role in this offense (R56:36). While there was no requirement that the court impose the same sentence for Mr. Cummings as it did for Ms. Dietze, the record does not support that Mr. Cummings's length of confinement should be twice as long as that received by the woman who pulled the trigger.

Under these circumstances, a defendant who pleads guilty to a lesser crime than the one charged should not have to serve a near-maximum sentence.

CONCLUSION

For the reasons set forth above, the Court should reverse the decision of the Wisconsin Court of Appeals.

Respectfully submitted this 17th day of January, 2014.

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SECTION 809.19 (2) CERTIFICATE

I hereby certify that filed with this brief, as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues. I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency. I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Signed,

/s/ David R. Karpe

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David R. Karpe

SECTION 809.19(8) CERTIFICATE

I hereby certify that this brief and appendix conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,653 words.

Signed,
/s/ David R. Karpe

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David R. Karpe

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Signed,
/s/ David R. Karpe

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David R. Karpe