STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2011AP1653-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CARLOS A. CUMMINGS,

Defendant-Appellant-Petitioner.

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT IV, AFFIRMING A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR PORTAGE COUNTY, THE HONORABLE THOMAS T. FLUGAUR, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT AND SUPPLEMENTAL APPENDIX

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case is scheduled to be argued with *State of Wisconsin v. Adrean L. Smith*, 2012AP520-CR, on March 19, 2014, at 1:30 p.m. This court ordinarily publishes its decisions.

STATEMENT OF THE CASE

Carlos A. Cummings was charged in Portage County Circuit Court with attempted first-degree intentional homicide as a party to a crime, and two counts

of aiding a felon as a habitual criminal, in the November 18, 2008 shooting of J.G.[1] (2:1; 6:1-2). The criminal complaint alleged that Cummings and J.G.'s wife, Carla G., conspired to kill J.G. (2:1, 9-10). Cummings recruited a third person, Linda Dietze, to carry out the shooting (*id.*).

Motion to suppress and order denying the motion

Cummings moved to suppress statements he made in his second custodial interview with investigators (15:1; 54:5-6). Cummings argued that, after validly waiving his *Miranda*[2] rights and agreeing to talk to investigators, he later unequivocally invoked his right to remain silent in the middle of the interview by asserting, "Well then, take me to my cell. Why waste your time? Ya know?" (16:1; 54:49-50).[3]

At the suppression hearing, the State called Officer Robert Kussow of the Stevens Point Police Department (54:23).[4] Cummings did not testify (54:2).

Officer Kussow testified that he and his colleague Detective Bean conducted the second interview of Cummings (54:27). Officer Kussow testified Cummings

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[1] In this brief, the State refers to the victim by his initials, consistent with a proposed rule to protect the privacy of crime victims in appellate filings submitted recently by the Wisconsin Judicial Council. *See* Rules Petition 14-1, creating Wis. Stat. § (Rule) 809.86, filed January 21, 2014, *available at* http://www.wicourts.gov/scrules/1401.htm The State also refers to the victim's wife by her first name and last initial.

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

[3] Cummings also sought suppression of statements made in the second interview before *Miranda* rights were read to him (54:5-6, 53). The court suppressed these pre-*Miranda* statements, and this ruling is not at issue here (54:55-63; A-Ap. 12-20).

[4] The State also called Detective Kent Lepak, who took Cummings into the station for the second interview but did not participate in the interview (54:8-18).

was "very talkative" during the interview, and that "you could tell that he was trying to get information from us to find out what we knew already about the case" (54:31).

Officer Kussow testified that he had left the room to talk further with Dietze before Cummings allegedly attempted to cut off the interview (54:38). Reviewing the video recording, Officer Kussow testified he viewed Cummings' statement, "Well, then, take me to my cell. Why waste your time?" to be a part of the "thrust-and-parry, back and forth" of the interview, and that Cummings "was trying to get more information of what we knew" (54:39).

Relevant portions of the video recording of the interview were played for the court at the suppression hearing (19:Ex.5; 54:47-48).[5] Excerpts from this exchange are provided later in Part I of the Argument section of this brief.

Officer Kussow testified that, upon returning to the interview room, he confronted Cummings with new information acquired from Dietze, and Cummings began to change his story (54:38). After having previously denied any involvement in the crime, Cummings soon acknowledged driving Dietze to the gas station near where the shooting occurred and picking her up after the shooting, although Cummings continued to maintain that he did not know that Dietze was going to shoot J.G. (16:49, 55-56, 58 19:Ex.5 at 19m:25sec—20m:31s,

[5] The video recording of this interview (Cummings' second with police) was received into evidence at the suppression hearing as Exhibit 5 (54:47-48). Exhibit 2, a transcript of the second interview, was referred to extensively during the examination of Detective Robert Kussow, but was not received into evidence (54:29-48). Cites in this brief to the transcript of the interview are to Record 16, which contains transcripts of both Cummings' first and second interviews (16:3-65). The transcript of the second interview begins at Record 16:43.

33m:40s—34m:23s, 36m:30s—59s, 40m:15s—59s).[6] Cummings also acknowledged that Dietze gave him the backpack she had taken to and from the shooting, and that he knew that J.G. had a substantial life insurance policy (16:58, 65; 19:Ex.5 at 41m:00s—30s, 56m:42s—59s).

In a bench ruling, the court denied Cummings' motion to suppress statements made after Cummings allegedly attempted to cut off questioning. (54:63-64; A-Ap. 20-21). The court concluded that Cummings' claimed invocation of the right to remain silent was an "attempt[] to get information from the detectives," and a part of the "give-and-take" and "thrust-and-parry" between Cummings and the detective (54:63-64; A-Ap. 20-21).

No-contest plea and postconviction motion

Pursuant to a plea agreement, an amended information was filed, and Cummings pled no-contest to the lesser charge of first-degree reckless injury; the two counts of aiding a felon were dismissed but read-in (29:1-2; 44:1-2; 55:3-4; A-Ap. 7-8). The circuit court sentenced Cummings to 24 years of imprisonment, consisting of 14 years of initial confinement and 10 years of extended supervision (44:1-2; A-Ap. 7-8).

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[6] The State provides cites to relevant portions of the video recording of the interview (19:Ex.5). By way of example, the cite 19:Ex.5 at 36m:30s—59s refers to the portion of the video recording starting at 36 minutes and 30 seconds, and ending at 36 minutes and 59 seconds.

Record 19, Exhibit 5 contains four files. These include the AVI file of the interview and an add-on application. To view the recording of the interview, insert the disc, and select "Open folder to view files" from the pop-up menu. From the list of files, select the AVI file and open it with Windows Media Player. If the playback has sound but no video, close Windows Media Player, and open the application file from the disc entitled "set-up." This will install an add-on to Windows Media Player that should allow you to play both video and audio. Undersigned counsel was able to view video of the interview only after installing the add-on.

Cummings filed a motion for postconviction relief pursuant to Wis. Stat. § (Rule) 809.30, seeking an order modifying his sentence on the grounds it was unduly harsh, and because the court denied a risk reduction sentence where trial counsel failed to request such a sentence (40:1-2). Following an evidentiary hearing, the circuit court denied Cummings' motion to modify sentence, except to vacate the DNA surcharge previously imposed at sentencing (43:1; 57:28-39; A-Ap. 9). Additional facts from Cummings' sentencing and the postconviction hearing are provided in Part II of the Argument section of this brief.

Court of appeals' decision

On appeal, Cummings argued the trial court erred in denying his suppression motion, and that it erroneously exercised its discretion in denying his request for sentence reduction. In a *per curiam* decision and order, the court of appeals rejected these arguments and affirmed the judgment of conviction. *State v. Cummings*, No. 2011AP1653-CR, unpublished slip op. (WI App Jan. 10, 2013) (A-Ap.; R-Ap. 101-07).

The District IV panel concluded that Cummings' claimed invocation of the right to remain silent during the custodial interview was not unequivocal. *Cummings*, No. 2011AP1653-CR, slip op. ¶¶ 7-9 (A-Ap.; R-Ap. 103-05). Rather, the appellate court determined that the "more compelling [] interpretation" of Cummings' statement was that it was a part of his effort to obtain information from the police:

> We fully agree with the circuit court's conclusion that Cummings' request to be taken to his cell was not an unequivocal invocation of Cummings' right to remain silent.
>
> ¶ 9 Cummings' 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.

Cummings, No. 2011AP1653-CR, slip op. ¶¶ 8-9 (A-Ap.; R-Ap. 104-05).

The court of appeals concluded the sentence was not unduly harsh where the circuit court found that Cummings was "involved [in] a 'cruel plan' to commit a premeditated homicide primarily for financial benefit [insurance money]" and "Cummings manipulated a cognitively impaired woman [Dietze] with an IQ in the 60s into being the shooter" *Id.* ¶ 13 (A-Ap.; R-Ap. 106-07).

ARGUMENT

I. CUMMINGS DID NOT UNEQUIVOCALLY INVOKE HIS RIGHT TO REMAIN SILENT AFTER WAIVING THE RIGHT AND AGREEING TO SPEAK TO POLICE.

A. Introduction.

On review, Cummings maintains that, after validly waiving his *Miranda* rights, he sought to cut-off questioning in the middle of the interview by unequivocally invoking his right to remain silent (Cummings' br. at 20-37). *See Berghuis v. Thompkins*, 560 U.S. 370, 381-82 (2010) (suspect seeking to invoke right to remain silent mid-interview must do so unequivocally). The video recording and transcript of the interview show that Cummings plainly did not make an unequivocal invocation of the right to remain silent.

At approximately 22 minutes into the video recording, the following exchange occurred between Cummings and Detective Bean of the Stevens Point Police Department:

> Detective: . . . . 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.
>
> Detective: So why then do we got Carla and [Dietze] telling us different?
>
> Cummings: What are they telling you?
>
> Detective: 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?

(16:50; 19:Ex.5 at 21m:58s—22m:20s; A-Ap. 10).

One reasonable interpretation of Cummings' statement—indeed, the most reasonable—is that Cummings was attempting to obtain information from the detective about what his co-conspirators, Dietze and Carla G., had told police. Cummings' statement was in response to the detective's refusal to provide this information, and suggested it would be a waste of *the detective's time* for the detective to continue questioning Cummings without giving Cummings some information. Cummings' nonverbal cues on the video recording—which show him gesturing casually with an open hand as he makes the statement—plainly confirm this interpretation (19:Ex.5 at 22m:15s—20s).

Cummings focuses almost exclusively on the words "take me to my cell," and appears to argue that

these words, regardless of context, constitute an unequivocal invocation of the right to remain silent (Cummings' br. at 26-37). However, based on the statement itself, the context in which it was uttered, and Cummings' nonverbal cues, the State submits that no reasonable officer sitting across from Cummings in the interview would have viewed Cummings' statement to be an unequivocal invocation of the right to remain silent.

B. The legal standard.

1. Under *Thompkins*, *Ross* and *Markwardt*, a suspect who has validly waived *Miranda* rights and seeks to cut-off questioning mid-interview and invoke the right to remain silent must do so unequivocally.

The rights to remain silent and to counsel are provided in the Fifth Amendment to the United States Constitution and Article 1, Section 8 of the Wisconsin Constitution. *State v. Jennings*, 2002 WI 44, ¶¶ 37-42, 252 Wis. 2d 228, 647 N.W.2d 142. In *Miranda*, the Supreme Court adopted a set of procedural guidelines intended to protect the Fifth Amendment rights to remain silent and to counsel during custodial questioning. *See State v. Harris*, 199 Wis. 2d 227, 237–38, 544 N.W.2d 545 (1996).

The right to remain silent includes the right to cut off custodial questioning. *Michigan v. Mosley*, 423 U.S. 96, 103 (1975). "'[T]he admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his [or her] "right to cut off questioning" was "scrupulously honored."'" *State v. Ross*, 203 Wis. 2d 66, 74, 552 N.W.2d 428 (Ct. App. 1996) (*citing Mosely*, 423 U.S. at 103) (citation omitted).

Addressing the invocation of the right to *counsel*, the United States Supreme Court in *Davis v. United States*, 512 U.S. 452, 459-62 (1994), held that a suspect who has made a valid waiver of the right and agreed to talk to police without counsel must make the invocation "unambiguously." The Court explained that, if it were to require questioning to cease whenever a suspect makes a request that *might* be an invocation of counsel, "[p]olice officers would be forced to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he has not said so, with the threat of suppression if they guess wrong." *Davis*, 512 U.S. at 461. Further, the Court declined to require police to ask clarifying questions whenever a suspect makes an "ambiguous" or "equivocal" request for counsel. *Davis*, 512 U.S. at 461-62. The test under Davis is objective: whether a reasonable officer would regard the suspect's statements and non-verbal cues to be an unequivocal invocation of the right to remain silent. *See Davis*, 512 U.S. at 458-59.

In *Ross*, 203 Wis. 2d at 75-79, the Wisconsin Court of Appeals adopted *Davis*'s unequivocal invocation rule to assertions of the right to *silence* during a Mirandized custodial interview. In requiring unequivocal invocation of the right to silence, *Ross* followed the "nearly unanimous lead of other jurisdictions," state and federal, on the subject. *Ross*, 203 Wis. 2d at 75-76 & n.4. The court of appeals established the following standard in *Ross*: "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." *Id.* at 77.

"Similar to an invocation of the right to counsel, "'a suspect need not speak with the discrimination of an Oxford don,'" but must articulate his or her desire to remain silent or cut off questioning 'sufficiently clearly 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 (*quoting Davis*, 512 U.S. at

459) (citation omitted). If the suspect does not unambiguously invoke his or her right to remain silent, the police need not cease their questioning of the suspect, and need not ask clarifying questions if the suspect makes an ambiguous request to remain silent. *Ross*, 203 Wis. 2d at 77-78.

Since 1996, it appears that the court of appeals has applied the *Ross* standard in three published decisions involving the right to cut-off questioning, most notably in *State v. Markwardt*, 2007 WI App 242, ¶¶ 35-36, 306 Wis. 2d 420, 742 N.W.2d 546. *See also State v. Hampton*, 2010 WI App 169, ¶¶ 47-48, 330 Wis. 2d 531, 793 N.W.2d 901; *State v. Hassel*, 2005 WI App 80, ¶¶ 17-19, 280 Wis. 2d 637, 696 N.W.2d 270.

In 2010, the United States Supreme Court in *Thompkins* adopted *Davis*'s "unequivocal invocation rule" for mid-interview assertions of the right to remain silent. *Thompkins*, 560 U.S. at 381-82. Relying on *Davis*, the *Thompkins* Court discussed some of the "good reason[s] to require an accused who wants to invoke his or her right to remain silent to do so unambiguously":

> A requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that "avoid[s] difficulties of proof and . . . provide[s] guidance to officers" on how to proceed in the face of ambiguity. *Davis*, 512 U.S., at 458–459 []. If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression "if they guess wrong." *Id.*, at 461[].

Thompkins, 560 U.S. at 381-82.

2. This court should adopt but clarify the legal standard established by the Wisconsin Court of Appeals in *Ross* and *Markwardt*, which, as clarified, is consistent with the United States Supreme Court's standard in *Davis* and *Thompkins*.

Cummings does not dispute that the unequivocal invocation rule set forth by the United States Supreme Court in *Davis* and *Thompkins*, and by the Wisconsin Court of Appeals in *Ross* and *Markwardt*, should be adopted by this court in determining the adequacy of a Mirandized suspect's attempt to cut off questioning and invoke the right to remain silent (Cummings' br. at 26).

Cummings does not argue that the Wisconsin Constitution should be read to provide greater protection than the United States Constitution in this area (Cummings' br. at 22-24). As Cummings correctly notes, this court has usually construed article 1, section 8 of the state constitution to provide the same protections as the Fifth Amendment of the federal constitution. *See, e.g.*, *State v. Edler*, 2013 WI 73, ¶ 30, 350 Wis. 2d 1, 833 N.W.2d 564; *Jennings*, 252 Wis. 2d 228, ¶ 42; *State v. Agnello*, 226 Wis. 2d 164, 180-81, 593 N.W.2d 427 (1999); *State v. Sorenson*, 143 Wis. 2d 226, 259-60, 421 N.W.2d 77 (1988). While Cummings observes there are exceptions to this rule, most notably *State v. Knapp*, 2005 WI 127, ¶¶ 55-56, 73, 285 Wis. 2d 86, 700 N.W.2d 899, he does not argue that this court should construe article 1, section 8, to be anything other than coextensive with the Fifth Amendment in this instance.

Further, this issue was essentially decided in *Jennings*, 252 Wis. 2d 228, ¶¶ 37-42. There, this court recognized that its decision in *State v. Walkowiak*, 183

Wis. 2d 478, 486-87, 515 N.W.2d 863 (1994), was contrary to *Davis*, and expressly overruled *Walkowiak*. *Jennings*, 252 Wis. 2d 228, ¶ 35. *Walkowiak* had held that police must immediately cease questioning when a suspect makes an equivocal or ambiguous request for counsel in the middle of an interview, except to ask questions clarifying whether the suspect, in fact, wants an attorney. *Walkowiak*, 183 Wis. 2d at 486-87. The *Jennings* court refused to save *Walkowiak*'s rule under article 1, section 8 of the Wisconsin Constitution. *Jennings*, 252 Wis. 2d 228, ¶¶ 37-42. *Jennings*' rejection of a more protective standard under the state constitution for mid-interview invocations of the closely-related *Miranda* right to counsel should preclude adoption of a more protective standard under the state constitution for invocations of the right to remain silent.

Cummings does argue, however, that "[t]here could be a problem" with certain language in *Ross* suggesting that the test for determining whether a suspect has unequivocally invoked his or her right to remain silent is both objective *and subjective* (Cummings' br. at 25). Cummings points to language in *Ross* indicating that the test focuses on the suspect's intent as well as the facts observable to the officer: "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." *Ross*, 203 Wis. 2d at 78 (emphasis added).

The State agrees with Cummings that language in *Ross* referring to the suspect's subjective intent is problematic. As Cummings observes, the test in *Davis* (and *Thompkins*) is objective: whether a suspect has unequivocally invoked his or her rights under *Miranda* is "an objective inquiry that 'avoid[s] difficulties of proof and . . . provide[s] guidance to officers' on how to proceed in the face of ambiguity." *Thompkins*, 560 U.S. at 381-82 (*quoting Davis*, 512 U.S. at 458-59). To the extent that *Ross* suggests that courts and police must consider a

suspect's subjective intent, as well as his or her statements and non-verbal cues, in determining whether an unequivocal invocation has been made, *Ross* is inconsistent with *Davis* and *Thompkins*. The State asks the court to address this issue in its opinion, and explicitly disavow language in *Ross* referring to the suspect's intent, which was also cited in *Markwardt*, 306 Wis. 2d 420, ¶ 28, and *Hampton*, 330 Wis. 2d 531, ¶ 46.

However, while *Ross*, *Markwardt* and *Hampton* contained this language, the *analysis* of the court in each of these cases appears to have been proper, focusing on the objective facts. *See Hampton*, 330 Wis. 2d 531, ¶¶ 47-48; *Markwardt*, 306 Wis. 2d 420, ¶¶ 35-36; *Ross*, 203 Wis. 2d at 79. Accordingly, this court should look to these cases, as well as to *Davis* and *Thompkins*, in determining whether Cummings made an unequivocal invocation of his right to remain silent.

Subject to the clarification requested above, this court should therefore adopt the unequivocal invocation rule set forth in *Ross* and *Markwardt* for mid-interview assertions of the right to remain silent. As clarified, the test in *Ross* and *Markwardt* is wholly consistent with the standard set forth by the United States Supreme Court in *Davis* and *Thompkins*.

C. Standard of review.

Whether Cummings sufficiently invoked his right to remain silent midway through his custodial interview is a question of constitutional fact reviewed under a two-part standard. *See Jennings*, 252 Wis. 2d 228, ¶ 20. First, this court must uphold the trial court's findings of historical or evidentiary fact unless they are clearly erroneous. *Id.* Second, this court independently reviews the trial court's application of constitutional principles to those facts. *Id.*

D. Where a reasonable interpretation of Cummings' statement—in fact, the most reasonable interpretation—is that he was seeking information about what his co-conspirators had told police, Cummings did not unequivocally invoke his right to remain silent.

Cummings' statement, "Well, then, take me to my cell. Why waste your time? Ya know?" is not an unequivocal invocation of the right to remain silent because another reasonable interpretation exists that is incompatible with an assertion of the right.

That reasonable interpretation of Cummings' statement—the most reasonable interpretation—is that he wanted to *continue* the interview in hopes of obtaining information from the detective about what Carla G. and Dietze had told police so that his story would fit their versions.

The record shows Cummings engaging in a vigorous back-and-forth with the detective, attempting to extract information about what his co-conspirators had said.

Approximately twenty-two minutes into the video recording of the interview, the discussion turned to the evidence police had against Cummings. Cummings told Detective Bean that he (Bean) "*look*[ed] like" he was "frustrated." (16:50; 19:Ex.5 at 21m:05s; A-Ap. 10). Moments later, the detective said to Cummings that his story was inconsistent with what Carla and Dietze had told police (16:50; 19:Ex.5 at 22m:04s; A-Ap. 10). An animated Cummings asked the detective what Carla and Dietze had told him (16:50; 19:Ex.5 at 22m:08s; A-Ap. 10). When the detective declined to offer up this information, Cummings responded: "Well, then, take me

to my cell. Why waste your time? Ya know?" (16:50; 19:Ex.5 at 22m:15s; A-Ap. 10).

The full transcript of this portion of the interview is as follows:

> Cummings: . . . . Check the phone records. I'm sure you didn't get your hands on those yet.
>
> Detective: Not the phone records. We've got the phones.
>
> Cummings: Well, that'll clear up some of your frustration.
>
> Detective: I don't have any frustration Carlos.
>
> Cummings: You *look* like you're frustrated.
>
> Detective: If I look like I'm frustrated, it's because I've been here since 8:30 this morning. It's because I've been dealing with this case for the last nine hours. It's because I've listened to people lie to me.
>
> Cummings: That's not good.
>
> Detective: It's taken me this long to get to you. There's more people to interview. Okay? I want the gun.
>
> Cummings: I don't have a gun.
>
> Detective: I know you don't. It's gone now. Where did it go? Every . . . The information we have . . . The last person that was in possession of that gun was you. Now you got a lot of shit to lose. You've got an eight-month [old] little kid. You gotta wife at home.

Cummings: (*Inaudible*) I know, I know.

Detective: You've got a lot to lose, and at this point, I'm telling you right now Carlos, no . . all bullshit aside, there's enough to charge you right now! Okay? 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.

Detective: So why then do we got Carla and [Dietze] telling us different?

Cummings: What are they telling you?

Detective: 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?

Detective: Cuz I'm hopin' . . .

Cummings: If you got enough . . .

Detective: . . . to get the truth from ya.

Cummings: If you got enough to fuckin' 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 . . .

Detective: If who believes you?

Cummings: . . . and if they don't, I get locked up.

> Detective: 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.
>
> Detective: What's your relationship with Carla?
>
> Cummings: You already know.
>
> Detective: Let me hear it from you so I know that you're man enough to say it.
>
> Cummings: She's a friend.

(16:50; 19:Ex.5 at 21m:01s—22m:57s; A-Ap. 10).

Considering the full exchange of which Cummings' statement was a part, a reasonable officer sitting across from Cummings in the interview room plainly would not have concluded that Cummings was attempting to end the interview and assert his right to remain silent when he said, "Well, then, take me to my cell. Why waste your time? Ya know?"

An officer in this circumstance would have reasonably concluded that Cummings wanted information about what his co-conspirators had told police. That officer would have interpreted Cummings' statement for what it clearly was: a suggestion that *the officer* might as well end the interview now—"Why waste *your* time? Ya know?"—because Cummings was not going to be more forthcoming in the interview unless the officer told Cummings what he wanted to know.

Cummings focuses narrowly on the words "take me to my cell," appearing to suggest that these words alone must be construed to be an unequivocal invocation of the right to remain silent, regardless of context (Cummings' br. at 27-30). First, Cummings soft-pedals the sentences

that immediately follow: "Why waste your time? Ya know?" Obviously, these two sentences are questions, not statements. They do not seek to end the conversation, they encourage a response from the detective. Moreover, Cummings is concerned about *the detective's time*, not Cummings' own. Cummings suggests that continuing the interview will be a waste of the detective's time because Cummings will not provide additional useful information unless the detective plays ball and provides him with the requested information.

Second, the exchanges immediately preceding Cummings' statement would be highly relevant to a reasonable officer's understanding of what Cummings was conveying. Context, of course, is important to understanding the meaning of any communication—particularly a conversation between two people.[7] As the district court in *Saeger v. Avila*, 930 F. Supp. 2d 1009, 1018 (E.D. Wis. 2013), recognized, "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." Here, what was said immediately before Cummings' statement would have led any reasonable officer to conclude that the statement was part of Cummings' effort to obtain information so that his story would fit with his co-conspirators' stories.

The video recording of the interview shows Cummings leaning back in his chair and gesturing easily with upturned hands as he says, "Well, then, take me back to my cell. Why waste your time? You know" (19:Ex.5

[7] In addressing the role of context in determining whether an unequivocal invocation has been made, Cummings includes the following quote, which he attributes to *Davis v. United States*, 512 U.S. 452, 459 (1994): "Using 'context' to transform an unambiguous invocation into open-ended ambiguity defies both common sense and established Supreme Court law." This quote is not found in *Davis*, which does not mention context. It appears to be from *Anderson v. Terhune*, 516 F.3d 781, 787 (9th Cir. 2008).

at 22m:15s—20s). Cummings' nonverbal cues—which a reasonable officer would certainly take into account in assessing whether Cummings was making an unequivocal invocation of the right to remain silent—confirm that he was not invoking the right, but rather was engaging in gamesmanship to obtain information from the detective.[8]

Additionally, Cummings' statement after the claimed request to end the interview—"If you got enough to fuckin' charge me, well then, do it and I will say what I have to say, to whomever, when I plead innocent"—does not itself constitute an unequivocal invocation of the right to remain silent, and Cummings does not assert otherwise. Further, it plainly does not undermine the reasonableness of the view that Cummings was engaging in back-and-forth with the detective to obtain information from him. In fact, Cummings showed some relish for the thrust-and-parry with the detective. Moments before issuing the statements at issue, Cummings goaded the detective: "You *look* like you're frustrated." (16:50; 19:Ex.5 at 21m:10s; A-Ap. 10). This statement is not that of a person who wishes to end an interview.

Cummings discusses *State v. Goetsch*, 186 Wis. 2d 1, 6, 519 N.W.2d 634 (Ct. App. 1994), the case in which the defendant, who had shot and killed his mother with a bow-and-arrow, told police: "I don't want to talk about this any more. 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." The court of appeals concluded that these statements constituted an unequivocal invocation of the right to remain silent. *Id.* at 7-9. However, Cummings does not argue that *Goetsch* supports his argument, and *Goetsch*—in which the exhausted defendant was clearly not "fencing" with the investigators, and the statements

[8] "Most experts estimate that more than sixty percent of all communication is nonverbal, while some experts claim the figure is as high as ninety percent." *Dorsey v. State*, 868 So. 2d 1192, 1210 (Fla. 2003) (citing Roberto Aron et al., *Trial Communication Skills* § 42:05 (2d ed. 1996)).

unambiguously evinced a desire to end the interview—is plainly distinguishable from Cummings' case (Cummings' br. at 29-30).

Rather, Cummings raises questions about *Markwardt*, the case on which the court of appeals and circuit court relied in concluding that Cummings failed to unequivocally invoke his right to remain silent (Cummings' br. at 30-31, 33).

In *Markwardt*, a suspect who had waived her *Miranda* rights and agreed to talk provided three different versions of events to investigators during the course of an interview. *Markwardt*, 306 Wis. 2d 420, ¶¶ 12-19. About twenty-five minutes into the interview, Markwardt abandoned her first version of events after being confronted with inconsistencies. *Id.* ¶ 14. When police told Markwardt that her second version of events was also inconsistent with what four other witnesses had told them, Markwardt asserted: "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." *Markwardt*, 306 Wis. 2d 420, ¶¶ 15-16.

The court concluded that Markwardt's statement was not an unequivocal invocation of the right "because Markwardt's comments permit reasonable competing inferences." *Id.* ¶ 36. "A reasonable interpretation of Markwardt's comments," the court explained, "could be that she was invoking her right to remain silent. However, an equally reasonable understanding of her comments could be that she was merely fencing with [the investigator] as he kept repeatedly catching her in either lies or at least differing versions of the events." *Id.*

The court concluded: "Markwardt's comments are equivocal as a matter of law because there are reasonable competing inferences to be drawn from them" *Id.*

Cummings first notes that the dissent in *Thompkins* listed *Markwardt* in a footnote among several other lower

court decisions the dissent believed were wrongly decided. *See Thompkins*, 560 U.S. at 411 n.9 (Sotomayor, J. dissenting). However, the dissent did not engage in a thorough analysis of *Markwardt*; it simply included the case in a list that the dissent believed "have rejected as ambiguous . . . statements whose meaning might otherwise be thought plain." *Id.* at 411 (Sotomayor, J. dissenting).

Further, while it is certainly difficult to glean much from the *Thompkins* majority's "silence" regarding a Wisconsin Court of Appeals' decision mentioned in a footnote by the dissent (Cummings' br. at 31), a brief unfavorable treatment in the dissenting opinion hardly calls *Markwardt* into question.[9]

Cummings then suggests that language in *Markwardt* on which the court of appeals relied in his case "might be problematic" (Cummings' br. at 32-33). Cummings questions the correctness of the statement in *Markwardt*, 306 Wis. 2d 420, ¶ 36, that an assertion of the right to remain silent is "equivocal as a matter of law [when] there are reasonable competing inferences to be drawn from them."

Cummings does not explain what might be wrong with this passage in *Markwardt*, which is merely a logical restatement of the rule set forth in *Ross*, *Davis* and *Thompkins*. By definition, an unequivocal assertion is one from which no reasonable, competing inferences may be drawn. Similar language from *Markwardt* was cited with approval in the partial concurrence and dissent in *Edler* last year. *Edler*, 350 Wis. 2d 1, ¶ 80 n.7 (quoting *Markwardt*, 306 Wis. 2d 420, ¶ 36: "'[A]n assertion that permits reasonable competing inferences demonstrates that a suspect did not sufficiently invoke the right to remain silent.'") (Ziegler, J., concurring in part, dissenting in part).

[9] "A dissent is what the law is not." *State v. Perry*, 181 Wis. 2d 43, 49, 510 N.W.2d 722 (Ct. App. 1993).

Cummings also argues that *Markwardt* was called into doubt by the federal district court's opinion in *Saeger*. Cummings asserts: "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." (Cummings' br. at 34). This is highly misleading.

Nothing in *Saeger*—on page 1013 or anywhere else—suggests that the legal standard in *Markwardt* runs afoul of *Davis* and *Thompkins*, the applicable United States Supreme Court precedents. *See Saeger*, 930 F. Supp. 2d at 1009-1022. The federal district court in *Saeger* did not hold that the state court of appeals misapplied these cases by relying on the standard stated in *Markwardt*, and the *Saeger* court said nothing about the correctness of *Markwardt*'s result. *Id.* Rather, the *Saeger* court merely concluded that the state court of appeals' decision in *Saeger*'s case was an unreasonable application of United States Supreme Court precedent because, in the district court's view, Saeger's assertion of the right to remain silent was unequivocal and unambiguous. *Id.* at 1015.

Regarding *Saeger*, the State makes three points.

First, the district court's decision vacating Saeger's state court decision on habeas review was carefully focused on the facts of Saeger's case. For this reason, and the fact it is a federal district court decision, its precedential value is limited. *See State v. Mechtel*, 176 Wis. 2d 87, 95, 499 N.W.2d 662 (1993).

Second, the State submits that the state court of appeals' opinion in *Saeger* is more persuasive than the district court's opinion.

The Wisconsin Court of Appeals in its *Saeger* decision concluded that Saeger's mid-interview statement, "I got nothin[g] more to say to you. I'm done. This is

over," was not an unequivocal invocation of the right to remain silent. *State v. Saeger*, No. 2009AP2133-CR, unpublished slip op. ¶¶ 3, 11 (WI App Aug. 11, 2010) (R-Ap. 109-10, 113-14). The court concluded that, while Saeger's statement could reasonably be regarded as an assertion of the right to remain silent, it could also reasonably be viewed as a strategic threat or "a fencing mechanism to get a better deal." *Saeger*, No. 2009AP2133-CR, slip op. ¶ 11 (R-Ap. 113-14). The court noted that Saeger's statement was made shortly after investigators had told Saeger that federal gun charges could be filed against him, and Saeger was fearful of such charges. *Id.* (R-Ap. 113-14). Saeger's statement was made in an "outburst" in response to the threat of federal charges. *Id*. (R-Ap. 113-14).

The federal district court concluded on habeas review that Saeger's assertion of the right to remain silent was unambiguous, and that the state appellate court ignored what Saeger actually said in reaching its conclusion. *Saeger*, 930 F. Supp. 2d at 1015. The district court then argued that the court of appeals "looked not to the words Saeger used, or even the context in which he spoke them," but rather "manufactured" ambiguity "by examining a suspect's possible motive." *Id.* at 1019.

The State respectfully submits that this is not what the court of appeals did in this case. Rather, the court put itself in the position of a reasonable officer in the circumstances, who would have considered the exchanges that came immediately before in assessing whether an invocation was made. Where the assertion was made in an outburst in response to a threat of federal charges, an officer could reasonably infer that the statement was a strategic threat intended to extract a promise that he would not face federal charges.

And third, *Saeger* is plainly distinguishable from Cummings' case.

The words Saeger used ("I got nothin[g] more to say to you. I'm done. This is over.") far more definitively assert the right to remain silent than Cummings' statement, "Well, then, take me to my cell. Why waste your time? Ya know?" Further, Cummings' case is one where context matters greatly. Cummings' statement was directly in response to the officer's refusal to provide Cummings the information he requested. Cummings' response suggested it would be a waste of the officer's time to continue the interview unless the officer provided the requested information.[10]

Cummings raises two additional issues at the conclusion of his discussion, which the State addresses in turn.

First, Cummings asks: "Can a suspect simultaneously attempt to negotiate a deal,"—or extract information, as in Cummings' case—"and at the same time mean to end the interrogation . . . ?" (Cummings' br. at 34-35).

The answer to this question must be no. To obtain information from police, one must necessarily continue talking to the police. An attempt to obtain information during an interview is incompatible with a request to end the interview. A statement that can reasonably be viewed as an attempt to extract information cannot also be an unequivocal invocation of the right to remain silent.

Second and finally, Cummings appears to argue that a conclusion that he did not unequivocally invoke his

[10] Of the Wisconsin cases, Saeger's statement is arguably most akin to the statement in *Goetsch* that was found to be an unequivocal invocation: "I don't want to talk about this any more. 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." *State v. Goetsch*, 186 Wis. 2d 1, 6-9, 519 N.W.2d 634 (Ct. App. 1994). It appears that neither party in *Saeger* cited *Goetsch* in their court of appeals' briefs. *See* Wisconsin Supreme Court and Court of Appeals Access Program, *State v. Phillip Saeger*, No. 2009AP2133-CR, case history.

right would necessarily involve speculation about his subjective intent, when the inquiry is an objective one (Cummings' br. at 34-35). This is nonsense. The conclusions of the circuit court and the court of appeals that Cummings did not make an unequivocal invocation were based on *objective facts*—including his statement "Why waste your time? Ya know?", and the exchange in which the detective refused to provide information Cummings requested about his co-conspirators, which triggered Cummings' statement. Cummings' non-verbal cues and demeanor shown on the video recording of the interview are additional observable facts that confirm that Cummings did not make an unequivocal invocation of his right (16:50; 19:Ex.5 at 21m:01s—22m:57s; A-Ap. 10).

Based on the foregoing analysis, this court should conclude, as the circuit court and court of appeals did without difficulty, that Cummings did not unequivocally invoke his right to remain silent in the middle of the interview. Cummings' claimed invocation was plainly not unequivocal because an alternative reasonable interpretation of his statements—the most reasonable interpretation, and one plainly incompatible with an assertion of the right to remain silent—was that he was engaging in gamesmanship to obtain information about what Dietze and Carla G. had told police.[11]

II. CUMMINGS' SENTENCE WAS NOT UNDULY HARSH.

A. Introduction.

Cummings next argues that the near-maximum sentence of 24 years, with 14 years of incarceration, on his conviction for first-degree reckless injury was unduly

[11] The State argued in the court of appeals that any error in admitting Cummings' inculpatory statements was harmless, but does not renew this argument here. The State no longer believes that there is no reasonable possibility that admission of the evidence, if error, contributed to the conviction. *See State v. Semrau*, 2000 WI App 54, ¶ 22, 233 Wis. 2d 508, 608 N.W.2d 376.

harsh. *See* Wis. Stat. §§ 940.23(1) (defining first-degree reckless injury as a Class D felony); 939.50(3)(d) (maximum period of imprisonment for Class D felony is 25 years) (Cummings' br. at 38-44). For the reasons set forth below, the sentence was not unduly harsh, and represented an appropriate exercise of the court's discretion in imposing sentence.

B. General legal principles and standard of review.

A circuit court may modify a sentence on the basis of a new factor "or when it concludes its original sentence was unduly harsh or unconscionable." *State v. Grindemann*, 2002 WI App 106, ¶ 21, 255 Wis. 2d 632, 648 N.W.2d 507 (citations omitted). A sentence will be deemed harsh or unconscionable only when 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). When a defendant alleges that his sentence was unduly harsh in comparison to co-defendants, he "bears the burden of establishing that the disparity in sentences was arbitrary or based upon considerations not pertinent to proper sentencing." *State v. Perez*, 170 Wis. 2d 130, 144, 487 N.W.2d 630 (Ct. App. 1992) (*citing Ocanas*, 70 Wis. 2d at 187).

A circuit court's postconviction conclusion that the sentence it imposed was not unduly harsh or unconscionable will be upheld on review absent an erroneous exercise of discretion. *See State v. Giebel*, 198 Wis. 2d 207, 220, 541 N.W.2d 815 (Ct. App. 1995) (citation omitted).

C. Background.

1. Facts.

The parties stipulated to the facts contained in the criminal complaint at the plea hearing (55:18).

According to the criminal complaint, Carla G. told police that she loved Cummings and wanted to be with him (2:9). Carla said that she and Cummings had talked one month prior to the shooting about "how [she] needed [J.G.] out of her life" and that Cummings "told [her] that [he] had a friend who could get a gun" (2:9). Carla said she knew this meant that "the plan was to have that friend shoot and kill [J.G.]" (2:9).

The complaint alleges in its particulars that Cummings recruited Linda Dietze to carry out the shooting (2:4-6). Dietze was found to have an IQ of between 60 and 70 in the competency proceeding in her own criminal case (56:16).

The complaint alleges that, on November 18, 2008, at approximately 2 p.m., J.G. received a call on his cell phone from Dietze (2:3). J.G. told police that Dietze said she wanted to meet to pay him some money she owed, and to give him a video that she said showed that Carla was having an affair with Cummings (2:3). Dietze asked J.G. to meet her in the parking lot of the Moose Lodge in Stevens Point at around 2:45 p.m. (2:4). On his way there, J.G. received a call from Cummings (2:4). Cummings told J.G. that he (J.G.) was late for the meet up with Dietze, and asked J.G. where he was (2:4).

J.G. told police that, when he arrived at the parking lot, he spotted Dietze and pulled his vehicle up alongside her (2:4). J.G. made contact with Dietze, who handed him the video tape, and then shot J.G. (2:4). A bullet struck J.G.'s left cheekbone just under his eye, and lodged itself at the base of J.G.'s brain stem (2:4). Two other rounds struck J.G. in his left shoulder (2:4).

Dietze admitted shooting J.G. and provided information implicating Cummings (2:6-7). Dietze told police that Cummings had picked her up, and that they called J.G. on Cummings' cell phone (2:6-7). Cummings told Dietze to dial *67 before placing the call to block the number from showing up on J.G.'s phone (2:7). Dietze told police she did not know where to meet J.G. so Cummings "whisper[ed] in her ear" the meeting place (2:6). Dietz said that, after the shooting, she ran from the scene through a wooded area to the road, where Cummings was waiting in his vehicle (2:6). Cummings drove her back to the gas station, where he dropped her off (2:6). Dietze told police that she put the gun and the casings in a backpack, which she left with Cummings to dispose of (2:6-7).

The complaint alleges police found in Cummings' residence Dietze's gun case; .22 caliber bullets, magazine and magazine clip; and a .22 caliber Smith and Wesson pistol (2:8-9).

At sentencing, the prosecutor argued that Cummings was the primary actor among the three defendants, and sought the maximum sentence of 25 years (56:11). Cummings' attorney disputed the prosecutor's characterization of Cummings as the primary actor, and requested a sentence "similar to" Dietze's sentence (56:28, 33). The court had previously sentenced Dietze to 20 years of imprisonment, consisting of seven years' incarceration and 13 years' extended supervision (56:36; A-Ap. 23).

The court determined that Cummings was, in fact, the "mastermind" of the plot to kill J.G., and that Cummings had manipulated both Carla to provide him with financial support, and the cognitively-impaired Dietze to carry out the shooting (56:41, 43). The court concluded that Cummings already had been "given considerable consideration" in having his primary charge reduced in the amended information from attempted first-degree homicide to first-degree reckless injury (56:43).

The court went on to explain that it "rarely, if ever, gives a maximum sentence," but that "the gravity of [the offense] and this individual's personal characteristics cries out for a sentence that is very close to the maximum" (56:43). The court then imposed a sentence of 24 years, consisting of 14 years' initial confinement and 10 years' extended supervision (56:43). At the conclusion of its explanation of sentence, the court found that Cummings "is not eligible for the Challenge Incarceration Program or the Earned Release Program, and he is not ordered to serve a Risk Reduction Sentence" (56:46; A-Ap. 33). Additional details from the sentencing hearing are set forth below.

2. Postconviction proceedings and court of appeals' decision.

Cummings filed a motion for postconviction relief, arguing that his near-maximum sentence was unduly harsh (40:1-2). Cummings also noted that the court rejected a Risk Reduction Sentence for Cummings without determining whether Cummings was willing to participate in risk testing, special programming and treatment while in prison (40:2-3). By his attorney, Cummings asserted that he was willing to participate in these programs, and argued that this information, not previously known to the court, constituted a new factor justifying sentence modification (40:3). Cummings also argued that his trial counsel was ineffective for failing to determine if Cummings was willing to participate in risk reduction programs, and for failing to request a Risk Reduction Sentence at sentencing (40:4).

The court held an evidentiary hearing to address Cummings' allegation of ineffective assistance (57:1). Cummings' trial counsel testified at the hearing that he "never thought of asking for a risk reduction sentence" and that it "would [have been] a complete waste of time" (57:5). Counsel added that he did not believe that there were any grounds for a risk reduction because Cummings "had denied he had a drug habit at the time" and that the

PSI was "probably the first time I ever heard" that Cummings had issues with alcohol and drugs (57:5-6).

After the close of testimony, the court heard argument regarding Cummings' ineffective assistance and sentencing claims, and a request to vacate the DNA surcharge (57:8-28). In a bench ruling, the court vacated the surcharge, and denied Cummings' motion in all other respects (57:36-38).

In rejecting the argument that the sentence was unduly harsh, the court reiterated its conclusion that Cummings was "the brains behind" the crime, which left J.G. blind in one eye and with a bullet lodged in his spine (57:31-32). The court restated that Cummings had manipulated the cognitively-impaired Dietze to carry out the shooting, and had manipulated Carla for financial gain (57:29-30). The court also expanded on its findings at sentencing with regard to Cummings manipulation of Carla for financial gain (57:29-31). The court found that Carla "thought there was going to be" a romantic relationship with Cummings and that they "were going to run away together" (57:30). As a result, Carla "was more than willing to do whatever Mr. Cummings was able to manipulate her in to doing," including participating in a plot to kill her husband so that Carla would receive the entire marital estate to share with Cummings (57:31).

Addressing its *sua sponte* decision at sentencing that Cummings was not eligible for a risk reduction sentence, the court agreed with trial counsel that "it would [have been] a waste of time" for counsel to request a risk reduction sentence (57:34). The court concluded that it would not have granted a 25 percent reduction in sentence under the risk reduction program "in a case that was this grave and a fact scenario that was so egregious" (57:34). The court concluded that Cummings' willingness to participate in risk reduction programming did not constitute a new factor for purposes of resentencing (57:36).

The court of appeals rejected Cummings' argument that his sentence was unduly harsh.

> ¶ 11 Here, Cummings contends that his sentence was unduly harsh because: (1) the circuit court failed to give adequate consideration to Cummings' "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' 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.
>
> ¶ 12 First of all, the record shows that the circuit court did explicitly acknowledge Cummings' 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' character in assessing his amenability to rehabilitation and risk to reoffend, and deciding whether he was an appropriate candidate for a Risk Reduction Sentence.
>
> ¶ 13 Moreover, regardless of how the court viewed Cummings' 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 60s 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.
>
> ¶ 14 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.

Cummings, No. 2011AP1653-CR, slip op. ¶¶ 11-14 (footnote omitted) (R-Ap. 106-07).

D. Court's sentence was not unduly harsh where the court reasonably determined that Cummings was the lead actor in the plot to kill J.G., and that he had manipulated a cognitively disabled person to carry out the shooting.

As the court of appeals correctly concluded, Cummings' sentence was not unduly harsh.

At sentencing, the court squarely addressed the fact that the sentence it was imposing approached the maximum sentence for the offense, and thoroughly explained its reasons for the sentence. The court explained that it had imposed the maximum sentence only "rarely, if ever," but "the gravity of [the offense and Cummings' criminal conduct] and this individual's personal characteristics cries out for a sentence that is very close to the maximum" (56:43).

Cummings' offense was indeed grave. While the plea agreement allowed Cummings to plead to first-degree reckless injury, a Class D felony, the facts of the

complaint--that Cummings was a party to a criminal plot to kill another person--supported the far more serious original charge of attempted first-degree intentional homicide, a Class B felony. *See* Wis. Stat. §§ 940.01(1), 939.32(1)(a) (attempted homicide is Class B felony); Wis. Stat. § 939.50(3)(b) (maximum penalty for Class B felony is 60 years' imprisonment). Given the seriousness of Cummings' conduct, the court explained that Cummings had already been "given considerable consideration in the charging of the amended charge in this case" (56:43). The State submits that a period of incarceration of 14 years for an offense in which the defendant is alleged to have been a party to a plot to kill another person plainly does not "shock public sentiment." *See Ocanas*, 70 Wis. 2d at 185.

To the extent that the circuit court was obligated to justify giving Cummings a longer sentence than Dietze, it did so thoroughly and explicitly on the record. "[T]he overwhelming evidence and the logical conclusion is that [Cummings] was the mastermind behind this failed plot," explained the court, and "[Cummings] is the one who needs to answer more so than Ms. Dietze does" (56:43). Contrary to Cummings' suggestion, he and Dietze were not similarly situated co-defendants who should have received similar sentences.

The facts alleged in the criminal complaint fully support the court's conclusion that Cummings was the mastermind. Carla reported to police that Cummings "told [her] that [he] had a friend who could get a gun," and that Carla knew this meant that "the plan was to have that friend shoot and kill [J.G.]" (2:9). Approximately one month later, Cummings picked up Dietze in his vehicle, gave her his cell phone to call J.G. to arrange a meet, instructed her to dial *67 before entering J.G.'s number, and whispered the meeting place in her ear (2:6-7). When J.G. was late for the meet, an impatient Cummings called J.G. to find out where he was (2:4). Cummings picked up Dietze after the shooting, and Cummings' disposed of the gun and casings (2:6-7).

Based on these facts, the court concluded that "there's really no question that Ms. Dietze was taken advantage of" by Cummings (56:40).[12] The court explained that the PSI report likewise concluded that Cummings "ha[d] a cognitively impaired individual carry out the shooting" and was "a high risk to reoffend and [continued] to be a significant risk to the community due to the appearance of premeditation of this offense" (56:41-42).

Two letters intercepted from Cummings to Dietze at the Taycheedah Correctional Institution offered at sentencing further supported the court's conclusion that Cummings was manipulating Dietze (56:4). In these letters, Cummings discusses a letter Cummings wants Dietze to send to the sentencing judge in which Dietze will take full responsibility for the crime (35:Ex.1, Ex.2; 56:19). Cummings states in his first letter to Dietze that he "made some corrections" to a first letter to the judge, and encloses a corrected version of that letter with instructions for Dietze to copy it in her own handwriting and mail it back to him (35:Ex.1).

At sentencing, the court noted that it had ultimately received a letter from Dietze taking full responsibility for the offense (56:40). The judge said he "didn't believe a word of it," and found that the intercepted letters showing Cummings' involvement in the production of the sentencing letter demonstrated Cummings' continued manipulation of "somebody who is clearly cognitively disabled" (56:40-41).

The court also determined at sentencing that Cummings had manipulated the other co-actor, Carla, for his own financial gain, further justifying the court's

[12] Further, even if Dietze had the intellectual functioning to plan the crime, she lacked any discernible motive. In fact, as the prosecutor noted at sentencing, Dietze was dependent on J.G.'s on-going financial support; for some unknown reason, Carla G. had co-signed Dietze's apartment lease, and J.G. had agreed to pay (and was paying) Dietze's monthly rent (56:16).

sentence in this case (56:41). The criminal complaint alleged that Carla had provided Cummings with on-going financial support in the form of regular $300 to $400 purchases for groceries and household supplies, and that Carla's gifts to Cummings and Dietze had totaled $10,000 (2:4). While Carla told police that she loved Cummings and wanted to be with him, Cummings said that Carla was just a friend (2:9; 16:50; 19:Ex.5 at 22m:57s; A-Ap. 10). When asked if there were any "benefits" associated with this friendship, Cummings told detectives that there was one: "[B]eing able to borrow cash every now and then or to lend the cash" (16:50; 19:Ex.5 at 23m.; A-Ap. 10). Cummings also acknowledged that Carla had mentioned to him that her husband had a substantial life insurance policy (16:65; 19:Ex.5 at 56m:30s).

As the court of appeals noted, the sentencing court explicitly considered Cummings difficult childhood, drug and alcohol issues and mental health problems. Cummings argues that consideration of these facts on the record was not enough, that "all th[is] mitigation" should have resulted in more than a sentence one year less than the maximum (Cummings' br. at 40). But these mitigating factors do not demonstrate that the sentence imposed was unduly harsh in light of Cummings' reprehensible conduct and serious character issues. The circuit court acted within its discretion in imposing sentence, and in denying the motion for sentence modification.

Moreover, the court's decision to deny Cummings a risk reduction sentence[13] does not demonstrate that the

[13] An offender receiving a risk reduction sentence is entitled to be released after completing 75 percent of the initial period of confinement, and completing special programming for at-risk offenders. *See* Wis. Stat. § 302.042(4) (2009-10). Prior to the 2011 repeal of risk reduction sentencing, the court could grant a risk reduction sentence within its discretion "if the court determines that [such a sentence] is appropriate." Wis. Stat. § 973.031; *see* 2011 Wisconsin Act 38, §§ 13, 92 (repealing Wis. Stat. §§ 302.042, 973.031).

court's sentence was unduly harsh, and Cummings does not argue that the court committed error by deciding the issue *sua sponte*.[14] Cummings was not *entitled to* a risk reduction sentence, and he did not request one at sentencing. At the postconviction hearing, defense counsel testified that requesting a risk reduction sentence would have been "a complete waste of time" in this case, and the court concluded that it "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" (57:5, 34; A-Ap. 42). Further, the State questions the relevance of the denial of a risk reduction sentence in assessing whether a penalty is unduly harsh. The *denial* of a risk reduction sentence does not *add* time to an existing sentence; it changes nothing about the existing sentence. Accordingly, the State submits that this court should simply examine the sentence imposed in determining whether it was unduly harsh without regard to the court's denial of a risk reduction sentence.

Based on the foregoing, the court's sentence was not unduly harsh, and was not "arbitrary or based upon considerations not pertinent to proper sentencing." *See Perez*, 170 Wis. 2d at 144.

[14] *See* Judge Richard J. Sankovitz, "Sentencing Toolbox Department: Q & A: Risk Reduction Sentences," The Third Branch at 6 (Winter 2010) (encouraging judges to address *sua sponte* the appropriateness of a risk reduction sentence when not requested by defense in part to head-off potential ineffective assistance of counsel claims).

CONCLUSION

For the reasons set forth above, this court should affirm the judgment of conviction and the court of appeals' decision and order upholding the order denying the motion to suppress evidence, and the order denying the motion for sentence modification.

Dated this 10th day of February, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,190 words.

Dated this 10th day of February, 2014.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

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

Dated this 10th day of February, 2014.

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