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

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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ARGUMENT

I. "Take Me to My Cell" Is an Unambiguous Request to End a Police Interrogation.

A. The Court should not adopt a test that manufactures ambiguity.

"Once warnings have been given, the subsequent

procedure is clear. If the individual indicates *in any manner*, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Miranda v. Arizona,* 384 U.S. 436, 473-474 (1966) (emphasis added).[1] Courts may differ in how "in any manner" is to be interpreted, but the police must honor a request by a prisoner to be removed from the interrogation room. *See, e.g., Shorter v. State,* 98 So.3d 685, 689 (Fla. App), *review denied* 2014 WL 185666 (Fla. January 15, 2104) (request to return to jail cell is articulate statement of

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[1]Here is the context of this quotation:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.

Id.

sufficient clarity). "Throw me in jail" or "take me to my cell" both clearly mean the speaker does not want to remain in the interrogation room. Holding that a request to be removed from the interrogation room needs to be taken at face value is in line with keeping the procedure clear.[2]

The parties to this suit have some common ground in that they agree that there is problematic language in *State v. Ross*, 203 Wis.2d 66, 78, 552 N.W.2d 428 (Ct. App. 1996), that the Court ought not to adopt. State br. 12. The State asks the Court to disavow language in *Ross* and also in *State v. Markwardt*, 2007 WI App 242, 306 Wis.2d 420, 742 N.W.2d 546, making a suspect's intent part of the area of inquiry. State br. 13. The State's proposed solution in that the Court adopt the "unequivocal rule" of *Ross* and *Markwardt,* but with some modification.

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[2]Mr. Cummings notes that the State excludes from its quotation from *State v. Goetsch*, 186 Wis.2d 1, 6, 519 N.W.2d 634 (Ct. App. 1994), the sentence immediately following, "I just want to get out of here," to-wit: "*Throw me in jail*, I don't want to think about this." *Id.* (emphasis added). *See* State br. at 19. Given the State's opposition to a bright-line rule, it is not surprising that the State cut off the quotation where it did.

The parties strongly disagree on whether the particular utterance at issue here,"Take me to my cell," is an unequivocal invocation of the right to remain silent that police need to honor. The State's position is that "because another reasonable interpretation [of "take me to my cell"] exists that is incompatible with an assertion of [the right against self-incrimination,]" that this statement was not legally effective to halt the interview. State br. 14. The State insists that it has special knowledge that Mr. Cummings really wanted to continue the interview even though he asked the detective to take him to his cell. What the State is really asking for is that the Court approve the subjective test through the back door. Mr. Cummings doubts that doing so would ever pass muster under *Davis v. United States,* 512 U.S. 452 (1994), and *Berghuis v. Thompkins*, 560 U.S. 370 (2010).

The essence of the State's argument on this question is, first, that another reasonable interpretation exists that is incompatible with assertion of right to remain silent, and second, that the interpretation that favors the State is more reasonable. State br. 14. The test that the State proposes is unworkable because it requires police to guess and speculate. Under the

State's proposed test, if a suspect says "take me to my cell," the officer must then try to figure out what a suspect "really" means. Even if a detective has a degree in psychology, it is still impractical to have the detective delve into the suspect's possible motives. Besides, a police detective has a potential bias towards always finding that the suspect did not really mean it when the suspect said, "Take me to my cell."

The State would have the Court find that by examining "nonverbal cues," the Court may determine that Mr. Cummings was not actually asking to be returned to his cell. State br. 18-19.[3] This is a slippery slope. So-called "non-verbal" cues are

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[3]The State quotes *Dorsey v. State,* 868 So. 1192, 1210 (Fla. 2003) (Bell, J., dissenting), without acknowledging that the quotation is from a dissenting opinion. State br. 19 n. 8. The holding of *Dorsey* runs quite contrary to the State's argument that courts should rely on subjective interpretations of non-verbal communication:

> [W]e adhere to the essential principles of [past Florida cases] by holding that a potential juror's nonverbal behavior, the existence of which is disputed by opposing counsel and neither observed by the trial court nor otherwise supported by the record, is not a proper basis to sustain a peremptory challenge as genuinely race neutral.

Dorsey, 868 So. at 1202.

misleading.

The State makes much of Mr. Cummings's "body language" during the interrogation, and concludes that, based on the State's observation of Mr. Cummings's "leaning back in his chair and gesturing easily with upturned hands," the State perceives that Mr. Cummings did not really mean it when he said, "Take me to my cell." When the undersigned attorney viewed the video of the interrogation, he noticed that Mr. Cummings favored a repeated waving movement with his right hand throughout much of the interview. This motion is not at all particular to the moment when Mr. Cummings said, "Take me to my cell. Why waste your time?" 19:Ex. 5 at 22 minutes and 15 seconds.[4] Mr. Cummings may appear somewhat relaxed in the video, but that does not affect the conclusion that his request to be taken to his cell should have been honored. Mr. Cummings may have been relaxed because he believed, as he told the detective, that the court would eventually free him. "If you got enough to fucking charge me, well then, do it and I will

[4] This time marking is according to a RealPlayer® media player. The embedded time on the video reads 23:37 at this juncture.

say what I have to say, to whomever, when I plead innocent." Mr. Cummings indicates by this an intent to end the police interview, and to save his statement-making for court.

Even if Mr. Cummings acted relaxed in an attempt to try to convince the officer of his innocence, this should not change the outcome. A suspect may be the most relaxed person in the world (and be guilty although "seeming innocent") or the most tightly wound person in the world (and be innocent although "seeming guilty"), but the suspect's request to be taken to a cell must be honored regardless. The test for invocation of the right against self-incrimination is essentially a verbal one. *See Thompkins,* 560 U.S. at 381 (merely remaining silent insufficient to invoke right against self-incrimination). *See Ross*, 203 Wis.2d at 77-78 ("[A] suspect's silence, standing alone, is insufficient to unambiguously invoke the right to remain silent.").

Ross discusses the option of a suspect's invoking the right against self-incrimination non-verbally. *Id.* at 78. ("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.") *Thompkins* seems to favor the view that of preference such assertions would be verbal, since merely not speaking would be insufficient to invoke the Fifth Amendment. ("[A] waiver of *Miranda* rights may be implied through 'the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver.'" *Thompkins*, 130 S. Ct. at 2261, quoting *North Carolina v. Butler*, 441 U.S. 369, 373 (1979).

If suspects have to say or do something affirmative to invoke the right against self-incrimination, then the Court ought not to adopt a test based on facial expressions or blinking. We can at least try to know what words mean, so the test should be based on words. This is not to denigrate the argument that certain gestures could and will generally be seen as invocations of the right against self-incrimination. *See, e.g.,* Robert Sherrill, FIRST AMENDMENT FELON: THE STORY OF FRANK WILKINSON, HIS 132,000 PAGE FBI REPORT AND HIS EPIC FIGHT FOR CIVIL RIGHTS AND LIBERTIES (2005) at 129, and "Taking the Fifth in Jersey and History — News Works," available, *intra alia* at http://www.newsworks.org/index.php/local/national-interest/64614-qtaking-the-fifthq-in-jersey-and-history ("Jimmy Hoffa ...

sitting among the spectators, would waggle five fingers and say, 'Take five!'") (viewed February 24, 2014).[5]

The State takes issue with Mr. Cummings's argument that language in *Markwardt* goes too far in making"competing inferences" central to the test. State br. 21. Simply put, the defense's suggestion of a bright-line test is more workable, and officers can easily understand and apply it. To paraphrase *Davis*, in considering how a suspect must invoke the right against self-incrimination, a court must consider the other side of the *Miranda* equation: the need for effective law enforcement. *See Davis,* 512 U.S. at 461. "Although the courts ensure compliance with the *Miranda* requirements through the exclusionary rule, it is police officers who must actually decide

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[5]The late Justice William J. Brennan meant something entirely different when he would waive five fingers. *See, e.g.,* http://justicebrennan.com/blog/?p=130 ("[I]t's not entirely clear what exactly Brennan meant when he held up his hand. Was he laying out the basic assumption underlying an aggressively activist judicial vision: that you could do anything you want at the Court if you have five votes? Or was it a more pragmatic explanation that, unless you have five votes, you can't get anything done at the Court?").

whether or not they can question a suspect." *Id.* The rule Mr. Cummings proposes, that is, that questioning must cease if the suspect asks to be taken to a cell, is a bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information. *See id.* But clarity and ease of application would be lost if police officers would be forced to make difficult judgment calls about whether the suspect in fact wants to be removed from the interrogation room based on a subtle analysis of context or gestures or facial expression. *See id.*

The basic equation that Mr. Cummings proposes is: "take me to my cell" = "let us end this interrogation." There certainly can be competing justifications for saying "take me to my cell," but the Court ought not to burden officers with making these interpretations. Whether or not a person is engaged in "thrust-and-parry" has little to do with whether the person has asked to be removed to a cell. A suspect may want both to dig information out from police and to stop giving information to the police. It is not uncommon that a suspect (or an officer or an attorney, for that matter) may want something in exchange for nothing.

The State's proposed interpretation of Mr. Cummings statement as expressing concern over the detective's time ("Why waste your time?") is really a red herring. It is a rhetorical question, not one that encourages a response from the detective. Most people are less concerned with wasting the time of others than they are with wasting their own. If we get into reading tea leaves on context, in any case, "Why waste your time?" could be a colloquial way of saying, "Why should I waste my time?" Whenever a caller ends a conversation by saying, "Thank you for your time," it undoubtedly means she or he is not content with the return she or he has experienced from her or his own personal investment of time in the conversation.

Mr. Cummings agrees with the State that "lower federal courts exercise no appellate jurisdiction over state tribunals [and] decisions of lower federal courts are not conclusive on state courts." *State v. Mechtel,* 176 Wis.2d 87, 85, 499 N.W.2d 662 (1993). State br. 22. Nonetheless, Judge Griesbach's opinion in *Saeger v. Avila*, 930 F.Supp.2d 1009 (E.D. Wis. 2013), is persuasive and the Court should adopt his analysis.

II. That Mr. Cummings was Permitted to Plead Guilty to a Reduced Charge Does Not Guarantee that the Sentence Lacked Undue Harshness.

The parties agree that the trial court denied *sua sponte* a Risk Reduction Sentence (RRS). The State would have the Court hold that this does not increase the harshness of the sentence. Because the denial resulted in a longer period of incarceration, there can be no doubt that the denial increased the harshness of the sentence. The only question is whether such denial rendered the sentence unduly harsh or contributed to the sentence's being unduly harsh.

Mr. Cummings accepted a plea bargain for a plea to a reduced charge. This does not eliminate the possibility that the sentence received would be unduly harsh. Certainly, the mere fact that there was significant disparity between the sentences of the co-defendants does not necessarily render a particular sentence excessive. *See Ocanas v. State*, 70 Wis.2d 179, 186-187, 233 N.W.2d 457 (1975). Further, a sentencing court may impose a near-maximum or even a maximum sentence in the appropriate cases, giving its reasons for such a sentence. *See McCleary v. State,* 49 Wis. 2d 263, 282, 182 N.W.2d 512

(1971). In this case, however, a near-maximum sentence was unduly harsh given the disparity, the mitigation and the *sua sponte* denial of an RRS.

CONCLUSION

For the reasons set forth above, as well as those reasons stated in Mr. Cummings's main brief, the Court should reverse the decision of the Wisconsin Court of Appeals.

Respectfully submitted this 24th day of February, 2014.

/s/ David R. Karpe

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SECTION 809.19(8) CERTIFICATE

I hereby certify that this reply brief 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 2,903 words.

Signed,
/s/ David R. Karpe

_____
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