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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2011AP1653-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

CARLOS A. CUMMINGS,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION, AND A MOTION DENYING POSTCONVICTION RELIEF, BOTH ENTERED IN THE CIRCUIT COURT, FOR PORTAGE COUNTY, HONORABLE THOMAS T. FLUGAUR PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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BRIEF OF DEFENDANT-APPELLANT

Questions Presented

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

2. Did circuit court err in finding that there was a valid waiver of *Miranda* rights where the appellant requested to be taken to his cell in the middle of the interrogation?

Statement on Oral Argument And Publication

Mr. Cummings does not request publication or oral argument at this time, but may ask leave to alter his position after reading the state's brief.

Statement of the Case

The Defendant-Appellant, Carlos Cummings, appeals from a conviction and sentence following his no contest plea to the charge of First Degree Reckless Injury, in violation of Wis. Stat. § 940.23(1), as party to a crime, *see* Wis. Stat. § 939.05. This conviction and sentence took place in the circuit court for Portage County, the Honorable Thomas T. Flugaur, circuit court judge, presiding.

This case started with the filing of a criminal complaint

on December 2, 2008, charging Mr. Cummings, along with co-defendants Linda Dietze and Carla Glodowski, of Attempted First Degree Intentional Homicide (R2).[1]

Statement of facts

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 Linda had complained to him about Carlos in the past, so Mr. Glodowski told Carlos it was none of Carlos's business where

[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).

Mr. Glodowski was (id.).

When Mr. Glodowski got to the park, Linda approached his truck and handed him a VHS videotape that she said showed that Mr. Glodowski's wife, Carla, was having an affair with Carlos (id.). She then pulled out a gun, shot him and ran away (id.). Mr. Glodowski received one gunshot wound to the left cheek, and two 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 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 that she planned 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, which she used to call Mr. Glodowski (id.). She later admitted that it was not a payphone, but rather, Mr. Cummings's cellphone that she used (R2:7). She said that Mr. Cummings was the one who suggested she 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 found unfired .22 caliber cartridges, rather than casings, a box for a pistol and a .22 semi-automatic pistol cartridge magazine in Mr. Cummings's basement (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 there found an unloaded .22 semi-automatic pistol, without a magazine, in the garage (R2:9).

For her part, Carla Glodowski told police 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.). In fact, there was no money in the box, and Ms. Glodowski's name was not on the rental agreement for the box, according to an officer who testified at the preliminary hearing (R49:16,18).

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 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, when Detective Kussow left in order to interview Ms. Dietze , who had been arrested in nearby Plover (R54:56). Mr. Cummings returned home, until 10 p.m., when

police came over to his house and searched his home 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*[2] 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 judge's ruling favored Mr. Cummings. Judge

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

Flugaur held that the statements that Mr. Cummings made 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).

The circuit court judge found that this remark was not an unequivocal invocation of the right to remain silent.[3]

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[3]To give some 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 were in the room:

Detective Bean: "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? This is your opportunity to be honest with me, to cut through all the bullshit and be honest about what you know."
Mr. Cummings: "I'm telling you"
Detective Bean: "So why then do we got Carla and Linda telling us different?"
Mr. Cummings: "What are they telling you?"

Comparing 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

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Detective Bean (increasing volume and gesturing): "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."
Mr. Cummings: "Well, then, take me to my cell. Why waste your time? Ya know?"
Detective Bean: "Cuz I'm hopin'..."
Mr. Cummings: "If you got enough..."
Detective Bean: "...to get the truth from ya."
Mr. 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 Bean: "If who believes you?"
Mr. Cummings: "...and if they don't, I get locked up."
Detective Bean: "And you're okay with that?"
Mr. 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."

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 undersigned is unclear as to why the transcript was withdrawn rather than received as an exhibit. *See* R18 (noting withdrawal of exhibits).

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 statements that Mr. Cummings made prior to completion of the advisement (R54:64).

The parties reached a plea agreement. On January 8, 2010, pursuant to the plea 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.[4] The court *sua sponte* denied a Risk Reduction Sentence, and also found Mr. Cummings ineligible for both the Challenge Incarceration Program and for earned release.[5] Restitution was ordered in the

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[4]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.

[5]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. In the last year, there have been changes to § 302.05, including a name change. It is now

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 motion on July 1, 2011 (R57). At that hearing, defense 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

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entitled, "Wisconsin Substance Abuse Program."

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 ...[6]

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[6]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).

(R57:34).

Mr. Cummings requested waiver of the previously ordered DNA surcharge, which the circuit court granted, amending the judgment so as no longer to require payment surcharge (R57:38; R44). However, the court upheld the rest of the sentence, denying all postconviction relief except for the DNA surcharge waiver. To this effect, Judge Flugaur signed an order in part granting and in part denying postconviction relief on July 11, 2011, which order the clerk filed on July 13, 2011 (R43). Mr. Cummings filed a timely notice of appeal on July 15, 2011 (R45).

Argument

I. The Near-Maximum Sentence Was Unduly Harsh.

The Court of Appeals reviews sentences deferentially, determining whether the circuit court erroneously exercised discretion. *McCleary v. State*, 49 Wis. 2d 263, 277–278, 182 N.W.2d 512 (1971). The sentence is presumed to be reasonable, as public policy dictates against upsetting the sentencing court's determination. *State v. Wickstrom*, 118 Wis. 2d 339, 354, 348 N.W.2d 183 (Ct. App. 1984).

Near-maximum sentences may get somewhat greater scrutiny than sentences well within the normal statutory limits, as under certain circumstances, such sentences may be due to the erroneous exercise of discretion. *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).

The period of incarceration imposed must be the least length of confinement consistent with the gravity of the offense, the rehabilitative needs of the accused, and society's need for protection. *McCleary*, 49 Wis. 2d at 276; reaffirmed in *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."). Although *Gallion* did not change the appellate standard of review, the Wisconsin Supreme Court in *Gallion* announced that it would require appellate courts to scrutinize the record more closely to ensure that discretion was in fact exercised by sentencing courts and that the basis of the exercise of discretion was set forth in the

record. *Gallion*, 2004 WI 42 at ¶4.

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. Ralph*, 156 Wis. 2d 433, 438, 456 N.W.2d 657 (Ct. App. 1990); *State v. Harbor,* 2011 WI 28, ¶35 n. 8, 333 Wis.2d 53, 797 N.W.2d 828.

In this case, the near-maximum sentence was not the minimum amount of confinement consistent with the main goals of sentencing. The sentencing judge said that "this case, based on the gravity of it and this individual's personal characteristics cries out for a sentence that is very close to the maximum" (R56:43).

There is little question that this was a grave offense, and Mr. Cummings does not argue that he should have received probation or a county jail sentence. However, Mr. Cummings contests that his individual characteristics cry out for a near-

maximum sentence. In fixing a near-maximum sentence, the sentencing court did not give adequate weight to Mr. Cummings's personal history, including his "horrible childhood" and his "significant alcohol and drug issues" and "mental health issues" (R56:37-38).

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 than the court could 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 December 14, 2011). Neither of those circumstances

were 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 benefit from Mr. Cummings's risky habits being treated.

Trial counsel and the trial court stated that it would have been a waste of time for Mr. Cummings to have requested a Risk Reduction Sentence. For the purposes of this appeal, Mr. Cummings does not persist in the arguments that there was a new factor justifying sentence modification, or that the sentence was the result of ineffective assistance of counsel. Rather, Mr. Cummings simply points to the denial of a Risk Reduction Sentence as further indication of the undue harshness of the sentence. As the presentence investigation report points out, Mr. Cummings clearly has many personal challenges (42:7-11).

Counsel for the two co-defendants 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 knew could be used against him in court and did not request a lawyer even when being told he could have one (*see* Argument II, *infra*). 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 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 the woman who pulled the trigger.

In short, it was unduly harsh to sentence Mr. Cummings to a near-maximum period of confinement. The Court of Appeals should reverse the order of the sentencing court

denying a modification of the sentence.

II. The Circuit Court Erred in Not Suppressing Mr. Cummings's Post-*Miranda* Statements to Police.

The circuit court declined to suppress those statements of Mr. Cummings which he made after the completion of the advisal of rights. The essence of the circuit court's finding was that Mr. Cummings waived his right to silence knowingly and intelligently.

The state has the burden of proving by a preponderance of the evidence that the waiver was a free and deliberate choice rather than the product of intimidation coercion or deception. *State v. Santiago,* 206 Wis.2d 3, 28, 556 N.W.2d 687 (1996); *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

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.

The Court of Appeals reviews *de novo* the question of whether the state has met its burden of showing that there was a valid waiver. *Santiago,* 206 Wis.2d at 18. Whether there was a valid waiver is an "ultimate issue[] of constitutional fact." *Id.*

The circuit court found that Mr. Cummings's request to be taken to his cell ("Well, then, take me to my cell. Why waste your time? Ya know?") was an equivocal request to end the interrogation. This was error.

The right to remain silent includes the right to terminate questioning at any point. *State v. Ross,* 203 Wis.2d 66 , 74, 552 N.W.2d 428 (Ct. App. 1996). Wisconsin follows the "clear articulation" rule in determining whether an arrestee's right to cut off questioning has been invoked. *Id.* at 71. *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 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.

The validity of *Ross'*s holding that silence itself is ambiguous is supported by the holding in *Berghuis v. Thompkins,* 560 U.S. ___, 130 S.Ct. 2250 (2010), where, again, throughout most of the interview, the suspect said nothing.

In the case at bar, the circuit court applied *State v. Markwardt*, 2007 WI App 242, 306 Wis.2d 420, 742 N.W.2d 546. In *Markwardt,* the defendant said to her captors,"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." *Id.* at ¶1. The Court of Appeals held in that case,

> While it is reasonable to conclude that this was such an invocation, it would also have been reasonable to conclude that her statement was just part of the "thrust-and-parry" going on between her and her interrogator in regard to the interrogator's claims that she was lying. Because more than one reasonable inference can be drawn from Markwardt's statement, the law requires that it not be considered an "unequivocal" invocation of the right to remain silent.

Id.

Markwardt is distinguished because in *Markwardt*, the primary concern of the defendant was that she was tired of sitting in the interrogation room ("I don't want to sit here anymore, alright? I've been through enough today"). The case at bar is closer to *State v. Goetsch*, 186 Wis. 2d 1, 519 N.W.2d 634 (Ct. App. 1994). The defendant in Goetsch told the police, "I don't want to talk about this anymore. I've told you, I've told you everything I can tell you." *Id.* at 7. Like the defendant in *Goetsch,* Mr. Cummings's expression, was, in the context of this interrogation, an unequivocal invocation of the right to remain silent. Mr. Cummings's statement was not that he was tired, but

rather than he wanted to be taken to his cell because it was a waste of time for the conversation to continue. It was unambiguously a signal that the conversation was over. Immediately before this invocation, Detective Bean, who was then alone in the room with Mr. Cummings, became very loud in response to Mr. Cummings's asking about what the co-defendants had told the police. ("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.") Mr. Cummings expressed that it was futile to continue the conversation: "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 ... I get locked up." Mr. Cummings was clearly expressing that he did not want to talk to the officer, and that he wanted to speak to the trier of fact. Earlier on in the conversation, Mr. Cummings may have thought he could talk the police out of detaining him, but by this point in the conversation, he clearly realized that nothing he could say to the officer was going to result in his release.

In *Markwardt*, the Court of Appeals concluded that it would have "been reasonable to conclude that her statement was just part of the 'thrust-and-parry' going on between her and her

interrogator in regard to the interrogator's claims that she was lying." *Markwardt*, at ¶ 1. In the case at bar, such was not a reasonable conclusion. Here, Mr. Cummings realized that he was making no progress by talking to the officers, and he was unambiguously expressing that he wanted to save his protestations of innocence for court.

CONCLUSION

For the reasons stated above, the Court of Appeals should reverse the decision of the circuit court denying the defense motions to modify sentence and to suppress the appellant's statements to police.

Respectfully submitted this 15th day of December, 2011.

/s/David R. Karpe

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ATTORNEY FOR DEFENDANT-APPELLANT

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 5,643 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