STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2012AP520-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ADREAN L. SMITH,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District I, Affirming a Judgment of Conviction Entered in the Milwaukee County Circuit Court, the Honorable Thomas P. Donegan, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

ISSUE PRESENTED

During custodial interrogation, did police violate Adrean Smith's constitutional right to remain silent by continuing to question him after he said: "I don't know nothing about this stuff, so I don't want to talk about this"?

The circuit court ruled that Mr. Smith did not unambiguously invoke his right to remain silent.

The court of appeals held that Mr. Smith did not unambiguously invoke his right to remain silent. Further, the court found that insofar as Mr. Smith invoked his right to silence, it was only as to certain subjects, which was an ineffective invocation of the right to silence.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case presents issues of statewide concern, meriting both oral argument and publication.

STATEMENT OF FACTS

While investigating a series of armed robberies, Detective Travis Guy conducted a custodial interrogation of Adrean Smith. (32). At the outset of the interrogation, the detective advised Mr. Smith of his ***Miranda***[1] rights and Mr. Smith waived those rights. (32—WS115944 00:20).[2]

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[1] ***Miranda v. Arizona***, 384 U.S. 436, 467 (1966).

[2] On June 1, 2012, the court of appeals granted Mr. Smith's motion to supplement the record with recordings of the interrogations, which were admitted into the record in the circuit court. (31). The

During the interrogation, Mr. Smith made a number of statements about a stolen van. The detective then shifted the subject of the interrogation to the armed robberies. The relevant portion of the interrogation follows:

> Mr. Smith: See, I don't want to talk about, I don't want to talk about this. I don't know nothing about this.
>
> Detective: Okay.
>
> Mr. Smith: I don't know nothing. See, look, I'm talking about this van. I don't know nothing about no van. What's the other thing? What was the other thing that this is about?
>
> Detective: Okay.
>
> Mr. Smith: I don't even want to talk about—I don't know nothing about this, see. I'm talking about this van. This stolen van. I don't know nothing about this stuff. So, I don't want to talk about this.
>
> Detective: I got a right to ask you about it.

(32—04:24-04:55).

Mr. Smith subsequently made incriminating statements during seven interrogations that followed his statement "I

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interrogations relevant to this appeal are located on CD-21, which was admitted as Exhibit 5 in the circuit court at a suppression hearing. That disc contains three separate audio files. The file labeled WS115944 contains Mr. Smith's waiver of his ***Miranda*** rights. (32—00:20). Mr. Smith's statements that are the subject of this appeal are included in the audio file labeled WS115945. The record citations to the recording in this brief refer to the minutes and seconds of the recording labeled WS115945 unless otherwise indicated.

don't know nothing about this stuff. So, I don't want to talk about this." He admitted to his involvement in a series of robberies, burglaries, and shootings.

After the interrogation, the State charged Mr. Smith with seven counts of armed robbery, two counts of attempted armed robbery, three counts of delinquent in possession of a firearm, two counts of burglary while using a dangerous weapon, two counts of false imprisonment while using a dangerous weapon, one count of first degree reckless injury while using a dangerous weapon, and one count of operating a motor vehicle without owner's consent, contrary to Wis. Stat. §§ 939.32, 939.63(1)(b), 940.23(1)(a), 940.30, 941.29(2)(b), 943.10(2)(e), 943.23(3), 943.32(2). (2). The criminal complaint alleged that Mr. Smith and three other men stole a van and robbed a number of individuals, oftentimes while the victims were getting out of a car. They also broke into two occupied residences to steal property. (2).

Mr. Smith filed a motion to suppress the statements made during custodial interrogation. (6; 9). Because the contents of the recording were undisputed, the court ruled on the motion without any testimony. (27; App. 109-21).

Trial counsel argued that Mr. Smith unambiguously asserted his right to silence when he told the detective: "I don't want to talk about this." (9:2; 27:3; App. 111). Counsel argued that the detective illegally persisted, and even more alarmingly, told Mr. Smith that he had a right as an officer of the State to continue asking questions in the face of a request to remain silent. (27:3; App. 111).

The State argued that Mr. Smith's invocation of the right to remain silent was ineffective because he only declined to speak about the robberies, not about the stolen van. (10:1-2).

The circuit court ruled that Mr. Smith "did not clearly assert his right to remain silent." (27:11; App. 119). The court concluded that Mr. Smith said "I'll talk about this but I'll not talk about that," and generally engaged in a conversation with the detective without ever unambiguously asserting his right of silence. (27:11; App. 119). Therefore, the court denied the suppression motion. (27:12-13; App. 120-21).

Mr. Smith subsequently pled guilty to three counts of armed robbery and one count of first degree reckless injury while using a dangerous weapon. (28:18). Pursuant to a plea agreement, the remaining counts were dismissed and read in, and the parties were free to argue at sentencing. (28:3). The court sentenced Mr. Smith to a total sentence of twenty-five years in confinement, followed by ten years of extended supervision. (28:59-62).

In the court of appeals, Mr. Smith argued that he had unambiguously asserted his right to silence during custodial interrogation and that his statements should have been suppressed. The court of appeals affirmed and held that Mr. Smith did not unambiguously invoke his right to remain silent because he continued speaking with the officer after saying that he did not want to talk. ***State v. Smith***, No. 2012AP520, unpublished slip op. at ¶ 9 (WI App Jan. 23, 2013); (App. 104-05). The court of appeals also held that Mr. Smith only expressed unwillingness to discuss his involvement in the robberies, and held that he could not selectively invoke his right to silence. ***Id.***; (App. 105).

ARGUMENT

I. Mr. Smith Unambiguously Invoked His Right to Silence; Therefore, All Interrogation Should Have Ceased When He Said "I Don't Want to Talk About This."

Twice in the span of 30 seconds, Mr. Smith told the detective: "I don't want to talk about this." (32—04:24-04:55). This assertion of the right to remain silent advised any reasonable listener that Mr. Smith wanted to invoke his right to silence and cut off questioning. Although Mr. Smith had previously answered questions about a stolen van, he ultimately decided that he was done speaking with police entirely and invoked his right to silence. Police flagrantly ignored that request, told him that they had a right to continue questioning, then continued the interrogation in violation of his state and federal constitutional rights to silence. United States Constitution Fifth Amendment; Wisconsin Constitution Article 1, Section 8. This Court should reverse and order suppression of Mr. Smith's statements made after the detective insisted that he had a right to keep asking about the van and robberies, even after Mr. Smith said he did not want to talk anymore.

A. When a suspect invokes the right to remain silent, police must "scrupulously honor" that request before any further interrogation is permitted.

At the outset of custodial interrogation, police must "notify the [suspect] of his right of silence." ***Miranda v. Arizona***, 384 U.S. 436, 479 (1966). "The critical safeguard of the right to silence is the right to terminate questioning by invocation of the right to silence." ***State v. Hartwig***, 123 Wis. 2d 278, 284, 366 N.W.2d 866 (1985). "Through the exercise

of a suspect's option to terminate questioning he or she can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation." ***State v. Ross***, 203 Wis. 2d 66, 74, 552 N.W.2d 429 (Ct. App. 1996).

If a suspect invokes his right to remain silent, that right must be "scrupulously honored." ***Michigan v. Mosley***, 423 U.S. 96, 104 (1975). "Once the right to remain silent or right to counsel is invoked, all police questioning must cease . . . ." ***Ross***, 203 Wis. 2d at 74.

At issue in the present case is whether Mr. Smith's statements to police were sufficient to invoke his right to remain silent. To invoke the right to silence, a suspect must unambiguously request to remain silent. ***Berghuis v. Thompkins***, 560 U.S. 370, 381-82 (2010). "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." ***Ross***, 203 Wis. 2d at 78 (quoting ***Davis v. United States***, 512 U.S. 452, 459 (1994)) (internal quotations omitted).

B. This Court should review the circuit court's ruling de novo because the facts of this case are undisputed.

An appellate court applies a two-part standard when determining whether a defendant has sufficiently invoked his or her right to remain silent during custodial interrogation. ***Ross***, 203 Wis. 2d at 79. "First, this court upholds the circuit court's findings of facts unless clearly erroneous." ***State v. Edler***, 2013 WI 73, ¶ 20, 350 Wis. 2d 1, 833 N.W.2d 564. "Second, this court independently applies constitutional

principles to hose facts, benefiting from the circuit court's interpretation." ***Id.***

Here, the relevant facts (what Mr. Smith said during his custodial interrogation) are not disputed. Therefore, this Court "must answer the question of whether the statements should be suppressed under either the United States or Wisconsin constitutions." ***Id.***

C. Mr. Smith unambiguously invoked his right to silence; therefore, his statements should be suppressed.

1. Mr. Smith unambiguously invoked his right to silence when he said "I don't want to talk about this."

After Mr. Smith made a number of statements about a stolen van, the detective turned the interrogation to a series of robberies. When asked about the robberies, Mr. Smith indicated an unwillingness to discuss that topic, then made clear to the officer that he did not want to speak about anything:

> Mr. Smith: See, I don't want to talk about, I don't want to talk about this. I don't know nothing about this.
>
> Detective: Okay.
>
> Mr. Smith: I don't know nothing. See, look, I'm talking about this van. I don't know nothing about no van. What's the other thing? What was the other thing that this is about?
>
> Detective: Okay.

> Mr. Smith: I don't even want to talk about—I don't know nothing about this, see. I'm talking about this van. This stolen van. I don't know nothing about this stuff. So, I don't want to talk about this.
>
> Detective: I got a right to ask you about it.

(32—04:24-04:55). Mr. Smith's statement that he did not want to talk about this anymore made it "sufficiently clear" to any reasonable listener that he wanted to remain silent and the interrogation was required to cease. ***Ross***, 203 Wis. 2d at 78. After he said he did not want to talk, he stopped talking completely. He did not utter a single word after "I don't want to talk about this." Mr. Smith only started talking again after the detective stated that he had a right to continue, and then continued questioning.

In ***Berghuis***, the Supreme Court held that a suspect unambiguously invokes his right to remain silent by saying that he "[does] not want to talk with the police" or that he "[wants] to remain silent." 560 U.S. at 382. Nothing more is necessary.

Mr. Smith did exactly what ***Berghuis*** instructs. He told police "I don't want to talk about this." (32—04:50). Even if he had been willing to answer questions previously, he clearly asserted his "right to cut off questioning" by saying that he did not want to continue talking. ***Id.***

This case is directly controlled by the court of appeals' decision in ***State v. Goetsch*** where the court held that a suspect unambiguously invoked his right to silence when he made statements nearly identical to those made by Mr. Smith. 186 Wis. 2d 1, 8-9, 519 N.W.2d 634 (Ct. App. 1994). Goetsch told police: "I don't know, I don't know, *I don't want to talk about this anymore. I've told you, I've told you*

everything I can tell you. You just ask me any questions and I just want to get out of here. Throw me in jail, I don't want to think about this." ***Id.*** at 7 (emphasis in original). The court of appeals held that Goetsch unambiguously invoked his right to silence because his statement made it clear that he "did not consent to continued questioning." ***Id.*** at 8.

Mr. Smith's statement, "I don't want to talk about this," was substantively identical to Goetsch's statement, "I don't want to talk about this anymore." The only distinction is Goestch's use of the word "anymore." However, there is no basis to find that "anymore" is a magic word that when uttered transforms an ambiguous request to remain silent into an unambiguous one. Even without that word, Mr. Smith's invocation made it sufficiently clear that he wished to stop talking to police and had nothing further to say.

The court of appeals has also held, in an unpublished case, that a suspect effectively invoked his right to silence when he told officers, "I don't want to say anything more." ***State v. Wiegand***, 2011AP939, unpublished slip op. at ¶ 8 (WI App Feb. 7, 2012); (App. 151). The court held: "This is a straightforward case. . . . We discern no ambiguity in the meaning of [the suspect's] statement." ***Id.*** Therefore, the court held that the defendant's statements must be suppressed because "the State failed to immediately cut off its interrogation upon Wiegand's unambiguous invocation of his right to remain silent." ***Id.*** at ¶ 12.

Most recently, in ***Saeger v. Avila***, the United States District Court for the Eastern District of Wisconsin granted a defendant's petition for a writ of habeas corpus and suppressed statements he made after he told his interrogator: "You . . . ain't listening to what I'm telling you. You don't want to hear what I'm saying. You want me to admit to

something I didn't . . . do . . . and I got nothing more to say to you. I'm done. This is over." 920 F. Supp. 2d 1009, 1011 (E.D. Wis. 2013). The District Court ruled that Wisconsin courts unreasonably applied clearly established law by concluding that the defendant's statement "was simply 'fencing' or a negotiating ploy to get a better deal, and that he did not really mean to end the interrogation." ***Id.*** at 1017, 18.

The District Court ruled that there was no basis to interpret the context of the defendant's words "where the defendant's words, understood as ordinary people would understand them, are obvious." ***Id.*** at 1015. The court noted that the suspect's words made it perfectly clear that he wanted to end the interrogation; the Wisconsin courts arrived at an alternate conclusion only by developing its own reason as to why he was using those words. ***Id.*** at 1015-16. However, the court ruled that "[t]he law does not require that a suspect unambiguously invoke the right to remain silent and explain *why* they are doing so." ***Id.*** at 1016 (emphasis in original). "Such a foray into the mental state of the accused has never been advanced by the Supreme Court. Rather, it is exactly the kind of 'difficult decision about an accused's unclear intent' sought to be avoided by the bright-line rule stated in ***Miranda*** and the requirement that a suspect unambiguously invoke the right to remain silent." ***Id.*** at 1017.

The results in ***Goetsch***, ***Wiegand***, and ***Saeger*** are further supported by a litany of decisions in other jurisdictions where courts have found similar statements to qualify as unambiguous invocations of the right to silence. *See, e.g.,* ***Tice v. Johnson***, 647 F.3d 87, 107 (4th Cir. 2011) (defendant made a statement that "he decided not to say any more"); ***Miles v. State***, 60 So.3d 447, 451-52 (Fla. Dist. Ct. App. 2011) (defendant said "actually I don't know nothing about this, so I'm not fixing to say nothing about this");

Buster v. Commonwealth, 364 S.W.3d 157, 163 (Ky. 2012) (as to the defendant, the interrogator testified "she said she did not have nothing to say to me"); ***State v. Morrisey***, 214 P.3d 708, 722 (Mont. 2009) (defendant, after being advised of right to silence, said "Yeah, I will," and "I ain't saying nothing"); ***State v. Crump***, 834 S.W.2d 265, 266 (Tenn. 1992) (defendant stated "I don't have anything to say"); ***Ramos v. State***, 245 S.W.3d 410, 418-19 (Tex. 2008) (defendant stated he did not want to talk to the officer and "didn't want to talk about it anymore").

When Mr. Smith told his "interrogator," I don't want to talk about this," and then ceased talking, he clearly invoked his right to silence and all questioning should have ended. Therefore, this Court should reverse the decisions of the circuit court and court of appeals because police failed to cut off questioning after Mr. Smith invoked his constitutional right to remain silent. ***Berghuis***, 560 U.S. 404-05.

2. Mr. Smith did not selectively invoke his right to silence as to certain questions or subjects; rather, he asserted a desire to cut of all questioning on all subjects.

In the present case, the court of appeals held that Mr. Smith did not effectively invoke his right to remain silent because when he said "I don't want to talk about this," he was only stating he did not want to talk about certain topics. ***Smith***, No. 2012AP520, unpublished slip op. at ¶ 9. To support its holding, the court cited ***State v. Wright***, 196 Wis. 2d 149, 537 N.W.2d 134 (Ct. App. 1995).

In ***Wright***, the defendant responded to a question about a homicide by saying, "I'm going to do what that guy told me and plead the Fifth *on that one*." ***Id.*** at 156 (emphasis added). The court of appeals held that "refusals to answer specific

questions do not assert an overall right to remain silent." ***Id.*** at 157. The defendant in ***Wright*** had expressly only refused to answer one specific question because he only pled the Fifth "on that one." ***Id.*** at 157-58. Therefore, the court held that the defendant had not invoked the right to silence and police were not required to stop questioning. ***Id.***

In contrast, Mr. Smith did not make a question-specific invocation of the right to silence. He asserted a broader desire to stop talking with police. (32—04:50). Mr. Smith had already made a number of statements about the stolen van, and then the detective began asking questions about the robberies. Mr. Smith told police he was only there to talk about the van ("I'm talking about this van"), then decided that he was done answering questions about all subjects and said "I don't want to talk about this." (32—04:50). Mr. Smith had already suggested that he was done talking about the van when he said "I don't know nothing about no van." (32—04:31). He then attempted to cut off all questioning by saying "I don't want to talk about this." (32—04:50). Consequently, ***Wright*** does not govern this case and this Court should reverse the decision of the circuit court because police failed to cut off all questioning after Mr. Smith asserted his state and federal constitutional right to remain silent. ***Berghuis***, 560 U.S. at 404-05.

CONCLUSION

For the reasons discussed above, Mr. Smith requests that this Court reverse the decisions of the circuit court and court of appeals and suppress all statements, and fruits of those statements, made subsequent to the invocation of his right to silence.

Dated January 15, 2014.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3,167 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 January 15, 2014.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) 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.

Dated January 15, 2014.

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