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.

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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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."

The parties agree that during custodial interrogation, Mr. Smith told the detective, "I don't want to talk about this." (Respondent's Brief at 2). The parties only dispute whether "a reasonable police officer" would understand that statement to be a request to remain silent. ***United States v. Davis***, 512 U.S. 452, 459 (1994); ***Berghuis v. Thompkins***, 560 U.S. 370, 381-82 (2010). The Supreme Court requires a suspect to do nothing more than say "that he wanted to remain silent or that he did not want to talk with the police" to invoke the right to silence. ***Berghuis***, 560 U.S. at 382. Because Mr. Smith unambiguously invoked his right to silence, all of his subsequent statements should be suppressed.

The State argues that Mr. Smith's statements were ambiguous because the sentence preceding his invocation of the right to silence indicated that he did not know anything about the subjects being discussed. (Respondent's Brief at 3). Thus, the State argues that by saying, "I don't know nothing about this stuff," Mr. Smith cannot be believed to mean what he said when he subsequently said, "So, I don't want to talk about this." (Respondent's Brief at 3). Although context is relevant to assessing an invocation of the right to silence, "[t]he law does not require that a suspect unambiguously invoke the right to remain silent and also explain *why* they are doing so." ***Saeger v. Avlia***, 930 F.Supp.2d 1009, 1016 (E.D. Wis. 2013) (emphasis in original). Where a defendant's

words make clear that he no longer wants to speak, that is enough. ***Id.*** at 1015.

In ***Saeger***, which the State asserts was wrongly decided, the court acknowledged that context was relevant. ***Id.*** at 1018. However, the court faulted the Wisconsin Court of Appeals because it "purported to use context to transform Saeger's unambiguous words into an ambiguous invocation," which was "unreasonable in light of clearly established Supreme Court precedent." ***Id.*** The district court found that the court of appeals had gone too far when it attempted to ascribe meaning to the suspect's statements that did not exist in the record: "In concluding that Saeger did not invoke his right to terminate the interview, the state court looked not to the words Saeger used, or even the context in which he spoke them. Instead, the state court looked to what it found to be his motivation or intent, and concluded that he did not mean what he said." ***Id.*** at 1019.

This is precisely what the State attempts to do with Mr. Smith's statements in the present case. The State asks this Court to conclude that even though Mr. Smith said "I don't want to talk about this," he must not have meant it. (Respondent's Brief at 3).

Wisconsin courts have already held that statements substantively identical to Mr. Smith's qualify as an unambiguous invocation of the right to silence. ***State v. Goetsch***, 186 Wis. 2d 1, 8-9, 519 N.W.2d 634 (Ct. App. 1994). In ***Goetsch***, the defendant said "I don't want to talk about this anymore. I've told you, I've told you everything I can tell you." ***Id.*** The State argues that ***Goetsch*** is unlike the present case because Goetsch's statement that he told police everything he knew corroborated his desire to stop speaking. (Respondent's Brief at 6). However, this statement is

substantially similar to Mr. Smith's statement, "I don't know nothing about this stuff," which was immediately followed by his statement that he did not want to talk. Like ***Goetsch***, this statement indicated that not only did he want to stop talking, but he also had no additional information to provide.

The State also attempts to distinguish ***Goetsch*** by arguing that the statements in that case "unequivocally exhibit emotional exhaustion." (Respondent's Brief at 7). However, there is not, nor has there ever been, a requisite level of exhaustion that a defendant must demonstrate to invoke the right to silence. Rather, a defendant is only required to "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." ***State v. Ross***, 203 Wis. 2d 66, 78, 552 N.W.2d 429 (Ct. App. 1996) (internal quotations omitted). Here, the statement of Mr. Smith, an 18-year-old boy subjected to the pressures of custodial interrogation, made it sufficiently clear that he was invoking his right to silence.

The State attempts to distinguish ***State v. Wiegand***, where the court suppressed statements after the defendant said "I don't want to say anything more." No. 2011AP939, unpublished slip op. ¶ 8 (WI App Feb. 7, 2012). The State focuses on Wiegand's use of the phrase "anything more" to suggest that his request was somehow clearer than Mr. Smith's "I don't want to talk about this." (Respondent's Brief at 7-8). However, those two words did nothing to substantively distinguish Wiegand's statement from Mr. Smith's because both statements make it abundantly clear to a reasonable police officer that the suspect does not want to continue the interrogation.

The State also notes that ***Wiegand*** is unlike this case because that defendant used "the magic word 'lawyer'" when invoking his right to silence. (Respondent's Brief at 8). However, Wiegand's use of the word "lawyer" does nothing to make his invocation of the right to silence any clearer. The court of appeals expressly declined to consider whether Wiegand invoked his right to counsel because it concluded he had unambiguously invoked his right to silence. ***Id.*** Thus, the fact that Mr. Smith did not haphazardly insert the word "lawyer" in his statement is irrelevant to determining whether he unequivocally invoked his right to *silence*.

The State cites to several cases from different jurisdictions; none undermine Mr. Smith's argument that by saying "I don't want to talk about this," he invoked his right to silence.

In ***People v. Williams***, the court held that the defendant was merely frustrated, rather than actually invoking his right to silence when he said "I don't want to talk about it." 233 P.3d 1000, 2013 (Cal. 2010). The court concluded that, in context, the defendant's statement was not an invocation of the right to silence. ***Id.*** Specifically, the court pointed to the preceding four questions and answers, which consisted of the officer asking about the victim, and the defendant giving variations on the answer, "I don't know." ***Id.*** The court held that in context, the defendant's statement was a denial, rather than a request to remain silent. ***Id. Williams*** is wrongly decided for the same reasons the Wisconsin Court of Appeals erred in ***Saeger***: the appellate court relied on context to cast doubt on an unambiguous invocation of the right to silence. Further, even if the court was right to look at context, ***Williams*** is still distinguishable from the present case. Mr. Smith's statements leading up to his invocation, demonstrate that he was progressively contemplating silence. He had

already said, "I don't want to talk about this" once. (32—04:24-04-30). He then asked about the robberies, but before the detective could even answer, he decided that he did not want to continue the interrogation, and said "I don't want to talk about this" for the second time in 30 seconds. (32—04:24-04:55).

The State's reliance on ***Joe v. State*** is similarly misplaced because in that case the defendant effectively reinitiated the interrogation. 66 So.3d 423, 426 (Fla. Dist. Ct. App. 2011). There, the defendant said: "Yeah. I ain't got nothing to say. I didn't, I don't even know what happened. I got shot I mean, you know what I'm saying." 66 So.3d at 426. The court held that the last sentence confirmed that he was not invoking his right to silence, but rather, was saying that "because he was shot, he did not know what happened and, thus, had nothing to say." ***Id.*** The court confirmed this by listening to the recording and noted the "casual and engaging" tone of the defendant. ***Id.*** In contrast with Joe's decision to keep talking after he said he had nothing to say, Mr. Smith said nothing. After he said he did not want to talk anymore, he simply remained silent. It was only after the detective illegally continued questioning that he spoke.

In ***West v. Johnson***, a case denying a petition for a writ of habeas corpus, the police testified that the defendant said "he didn't want to tell us anything about it" during custodial interrogation. 92 F.3d 1385, 1403 (5th Cir. 1996). That case was decided without the benefit of a recorded interrogation; instead, the decision was based on the testimony of the interrogating officers, who claimed that the defendant was "arrogant" and making repeated denials. ***Id.*** The habeas court held that the record "fairly support[ed]" the factual determination that the defendant did not invoke his right to silence, but was merely denying involvement in the

crime. Again, Mr. Smith's statements are distinguishable. Unlike ***Johnson***, the recorded interrogation is in the record, and in it, Mr. Smith's words are clear: "I don't want to talk about this." These words are susceptible to only one reasonable interpretation: he did not want to continue talking with police.

The last case on which the State relies, ***Alvarez v. State***, is similarly unhelpful because the defendant's statement, "I really don't have nothing to say," is decidedly more ambiguous than Mr. Smith's, "I don't want to talk about this." 15 So. 3d 738, 742 (Fla. Dist. Ct. App. 2009). Alvarez's words could easily be interpreted as a statement that he did not think that he could be of any assistance to the police investigation. *See* ***id.*** at 745. This is most similar to Mr. Smith's statement: "I don't know nothing about this stuff." Police were not required to stop questioning Mr. Smith after that statement, just as they were not required to stop questioning Alvarez. However, once Mr. Smith said he did not want to talk, his case became unlike ***Alvarez***, because he clearly indicated that he did not want the interrogation to continue. He only continued answering questions once the detective asserted a right to keep asking. Therefore, this Court should reverse and order the suppression of Mr. Smith's statements after he said he did not want to talk.

CONCLUSION

For the reasons discussed above, and those reasons discussed in his initial brief, 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 February 5, 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 1,781 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 February 5, 2014.

Signed:

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