STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

APPEAL NO. 2012AP863-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

OMAR J. SMITH,

Defendant-Appellant.

ON APPEAL TO REVIEW A JUDGMENT OF CONVICTION AND DENIAL OF A POSTCONVICTION MOTION IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, CASE NO. 2009CF2077, THE HONORABLE DENNIS R. CIMPL, PRESIDING

AMENDED BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

George M. Tauscheck
Attorney for Defendant-Appellant
State Bar No. 1015744
4230 N. Oakland Ave. #103
Milwaukee, WI 53211
(414) 704-9451

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ISSUES PRESENTED

1. Did Mr. Smith invoke his *Miranda* rights by unambiguously requesting counsel?

The trial court answered: No, because his request was ambiguous.

2. Was Mr. Smith denied his Confrontation Clause rights through the State's posing of questions to an unresponsive coactor who implicated Smith in the crime?

   The trial court answered: No, because the limiting instruction to the jury sufficed to cure any prejudice.

3. In the alternative, was trial counsel ineffective for failing to timely object to the confrontation violation?

   The trial court did not reach this issue.

4. Was the sentence imposed on Mr. Smith an abuse of discretion and unduly harsh and excessive?

   The trial court answered: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither is requested.

STATEMENT OF THE CASE AND FACTS

The Charges

Back on April 29, 2009, a five-count complaint was filed, alleging that Omar J. Smith committed the following crimes: one count of First Degree Reckless Homicide, Party to a Crime and Use of Dangerous Weapon, contrary to Wis. Stat. § 940.02(1) and 939.63(1)(b); two counts of Recklessly Endangering Safety, Party to a Crime and Use of a Dangerous

Weapon, contrary to Wis. Stat. § 941.30(1) and 939.63(1)(b); one count of Felon in Possession of a Firearm, contrary to Wis. Stat. § 941.29(2); and one count of Felony Bail Jumping, contrary to Wis. Stat. 94649(1)(b) (2:1-2; App. 101-102).

According to the probable cause section of the complaint (2:2-5; App. 102-104), Ashley Averiette stated that, on April 17, 2009, she was with Brittany and Jordan Alvarez at 2465 McKinley Street, a residential house in the City of Milwaukee. Several other people were outside on the front porch of the house, talking. She noticed three males who were walking westbound on the street and slowed down as they neared the house. Then she heard one loud gunshot, followed by eight to twelve more shots. Brittany Alvarez received a bullet wound in left knee.

Jennifer Langoehr, one of the women at the house, was admitted to hospital with single gunshot wound. Langoehr stated that she was on porch when three males, with black hoodies pulled up, appeared across street. She then heard more than three gunshots, but did not see who fired. She and Brittany and Jordan Alvarez were shot, and Jordan ended up dead as a result of her wounds.

Detective James Hutchinson of the Milwaukee Police Department examined the crime scene and observed seven bullet strikes to the exterior of the house with three strikes to west wall of porch, one strike to north wall, one strike to west corner, one strike to screen door and final strike to window of covered porch. He discovered two additional bullet strikes to a tree outside

The complaint also included Smith's statements to the police investigators. Smith was at his mother's house, as related by Detective Paul Lough, when it was shot up by unknown persons. Later, Smith learned that the "Deuce

Squad" had shot at his mother's house. The complaint has Smith saying that he and two others were given a ride to liquor store where they were going to scare the "Deuce Squad" guys. Smith said he didn't intend to shoot or kill anyone. Smith and his two partners saw group of about ten guys and few females in front of a residence. One of the Smith's partners said "I think that's them," referring to Deuce Squad.

Smith then started shooting toward the group of 10 people, and fired above their heads until clip was empty. He went to his mother's house and gave gun to someone to hide, and then went to girlfriend's house. Later, he heard the news about a girl who was killed and two others who had been shot. It was unintentional act, Smith explained, and he wasn't trying to hurt anyone. He didn't want to be "rat" and tell on the two other guys and would take responsibility himself.

At time of this incident, Smith was out on bail with one of the conditions being not to commit a new crime.

The Suppression Motion and Hearing

Smith filed a pretrial motion, on both state and federal constitutional grounds, to suppress the statements he made to Detectives Paul Lough and Keith Kopcha on April 25, 2009. This motion, filed on December 17, 2009, alleged that, although the detective ceased questioning Smith in response to his request for a lawyer, they reinitiated the interview and failed to stop the interview after Smith's second and very similar request for a lawyer (16:1-2; App. 105-106).

At the hearing on the motion, held on March 5 and 19, 2010, the Honorable Rebecca F. Dallet presiding, Detective Lough testified that he read Smith his Miranda rights and that Smith waived those rights (79:12). The detectives audio-

recorded the interview, but they stopped the recording, at 9:10 p.m., when Smith requested a lawyer (79:25). Smith requested a cigarette, but the Detectives did not have one. They picked up all of their things, including the portable tape recorder, and left the room (79:14-15).

Ten minutes later, however, one of the Detectives returned with the cigarette that Smith wanted (79:15). When the detective returned, Smith said that he wanted to tell them what happened, without a lawyer present, but he did not want to "rat on" anyone else involved (79:15, 29). This conversation occurred between 9:10 p.m. and 9:24 p.m., when the tape recorder was turned off. This 14-minute period was not recorded because, as Detective Lough testified, they only intended to give Smith a cigarette, not interview him anew (79:16).

As Detective Lough described this "second" interview, Smith started off by saying that he wanted to call his mother and his brother. The detective then broke down the interview by time of Smith's statements:

> At 2:24 minutes into the interview, Smith wanted to know if the police would put in a good word for him.
>
> At 3:03 minutes, Smith said, "I'll tell you all what I did but I don't want to tell on anybody else."
>
> At 3:24 minutes, Smith was given fresh Miranda warnings.
>
> At 4:28 minutes, Smith wondered if it would look bad for him if he says nothing about anybody else.
>
> At 5:45 minutes, Smith stated, "I want to, but I kinda want a lawyer here, but I don't want it to look like …" – and from there the tape was indiscernible to Detective Lough (79:20-23).

Detective Lough was the only witness at the suppression hearing; Smith did not testify.

The court summarized the issue as threefold. First, since the parties agreed that Smith initially requested a lawyer, did Smith reinitiate the interview? Second, after Smith reinitiated, did he request a lawyer again? Third, was there an issue of *Goodchild* involuntariness? (80:7)

After listening to the recording, the court denied the motion. In ruling against Smith, the court found that he reinitiated the interview and that his subsequent request for counsel was ambiguous (80:19-21, 24-25; App. 108-110, 113-114). Under the case law, as the court explained, the police questioners need not clarify an ambiguous request for counsel. There was no merit to any *Goodchild* claim (80:26; App. 115).

Smith reinitiated the interview, the court said, because the officers stopped questioning him after his first request for a lawyer, gathered their things, shut off the recorder, and left the room (80:20-21; App. 109-110). They returned only to give Smith a cigarette. But when they returned, Smith said that he wanted to tell them what happened and that he would tell them what happened without a lawyer. Only then did the Detective turn the recorder back on, saying on the recording that Smith reinitiated the interview. He was not being asked any questions when the detective gave him the cigarette, and only then did Smith bring up wanting to talk again.

Fresh Miranda warnings were given at 3:24 minute mark of the second interview, with Detective Kopcha being clear that Smith had a right to remain silent (80:21-23; App. 110-112). However, at the 5:50 minute mark, when Detective Kopcha asked Smith if he wanted to tell about his part in the crime, Smith responded, “I kind of want a lawyer present, but I don’t want it to look worse” (80:23; App. 112). This, the

court thought, was ambiguous and equivocal and did not require the detectives to stop their questioning of Smith.

Successor defense counsel filed a motion to reconsider Judge Dallet's decision to deny the suppression motion (31:1-3). The court, this time the Honorable Dennis R. Cimpl presiding, agreed with Judge Dallet's analysis of the issue and denied the motion (87:9).

The Jury Trial

Smith's statements played a major role in the prosecution. His statements, given to the police after his arrest as described above, were perhaps only direct evidence linking Smith to the crimes. A 47-page transcript of Smith's interview, prepared by the State and to which the accuracy was stipulated by defense counsel, was marked as Exhibit 127, received into evidence, and given to the jury as they listened to the recording of the interview (94:14-18).

Detective Keith Kopcha described the interview as the audiotape was played for the jury (94:18). As the detective related to the jury, he had map of the area of the crime, printed from Google maps, and had Smith place Xs at certain locations and draw the route that he took during the incident (94:19). Kopcha described the markings on the map, which he initialed, but Smith refused to initial (94:23). The jury continued listening to the tape of Smith's interview, interspersed with commentary from the detective about the interview and photographs of the crime scene and nearby areas to where Smith went immediately after the shootings (94:24-39).

Under cross-examination, Detective Kopcha explained that this interview was the one that Smith reinitiated and that

the police detectives started taping at 9:24 p.m. on April 25,2009 (94:44).

Detective Erik Gulbrandson testified about the recording of Smith's statement and presented a timeline of events prior to incident and leading to the arrest of Smith (96:14-20). According to Dective Gulbrandson's timeline, the house where Smith and his brother Xavier lived was "shot up" on April 14, 2009, at 11 p.m. The shooting that resulted in the death of Jordan Alvarez and the wounding of the other two women occurred on April 17, at 8:50 p.m. The autopsy of Jordan Alvarez and recovery of bullet and its identification of its caliber as 9mm occurred on April 18. Smith's brother, Xavier, was arrested on April 23, and Smith was interviewed about his involvement on April 25. Smith admitted to firing the 9mm, but refused to identify the other two subjects (96:21). On April 26, Harold Conner, known as "Juggy," arrested and admitted driving Smith, Alfonzo Treadwell, and an unidentified third person to 21st and Vliet (near where the shootings occurred) before he, Conner, continued on to a liquor store (96:21-22). Treadwell was arrested on April 27.

Upon cross-examination, Detective Gulbrandson, clarified that this timeline was prepared at the request of District Attorney's office and did not include the fact that Smith voluntarily turned himself in for questioning on April 19 and was released. Nor the fact that Xavier Smith arrested on April 23, which was dropped after arrest of Smith (96:26).

Other than the fact that these crimes had occurred, there was very little corroboration of Smith's confession. Aside from Smith's own statement, only the testimony of Harold Conner placed Smith anywhere near the scene of the crimes. Conner testified that he knew Smith and was a friend of the family (93:90-91).

On the day of the crimes, Conner described driving Smith and two others to a location that was a few blocks from McKinley Avenue, the street where the shootings occurred (93:98-100). Conner did not know why Smith and the others wanted to go that location; he assumed that they were going to visit a friend (93:101). Although Conner originally said he had dropped them off around 7 p.m., he ended up admitted it was probably around 8:30 p.m. or a little before the closing of the liquor store where he went after dropping them off (93:104-107). Conner also testified that he never waited around to pick up Smith or any of the others and never saw them with any guns (93:114).

The remainder of the State's witnesses merely offered evidence that a crime had, in fact, occurred. One group of witnesses included individuals who were present at the scene of the crime. These witnesses were Ashley Averiette, Brittany Alvarez, Jennifer Langoehr, and Jesse Walker. Nineteen-year-old Ashley Averiette described being at her birthday party with her friends Jordan and Brittany Alvarez, then going to 24th Street and McKinley, the location of Jennifer Langoehr's grandmother's house and the scene of the crime, just to "hang out" (90:46-47). They were in front of the house, talking, when someone noticed three young African American men, wearing dark clothing, across the street (90:52, 54). She glanced at them only briefly before she heard gunshots and Brittany Alvarez yelling, "I'm hit" (90:59). She saw Jordan Alvarez lying in the doorway (61). She was unable to identify the shooters (90:74).

Next, Brittany Alvarez testified that she went to 24th and McKinley with her sisters Jordan and Ashley (90:80). They were standing outside talking when her brother noticed some people walking down the street (90:83). A few second later, gunshots went off, and Brittany ran to the side of the

house where she was struck by a bullet (90:84, 86). She, too, was unable to identify the perpetrators (91:6).

Twenty-year-old Jennifer Langoehr was the next witness from the crime scene. She was inside her grandparent's house at 24th and McKinley when the shooting started around 9 p.m. (102:19). As she stood in the living room, a bullet hit her in the back (102:23). She saw three shooters, but could not even discern their race (102:34).

Finally, Jesse Walker testified that he was at the house that evening when his sister, Jordan Alvarez, was killed, and his sisters Brittany Alvarez and Jennifer Langoehr were wounded (102:76-77). Waller saw three "dudes" walking on the opposite side of the street, with their hoods pulled up (102:81-82). All three had guns and pointed them in the direction of the house (102:91). Walker heard more than 15 shots (102:92).

Besides the detectives who testified about Mr. Smith's testimony, three other police officers testified. Detective James Hutchinson described the crime scene, identified photographs of the Jordan Alvarez, and photographs of stickers reflecting bullet strikes on the house (90:22). Detective Christopher Blaszak described picking up shell casings for 45 mm, 9 mm, and 25 mm guns (91:74-86). No gun, DNA evidence, or fingerprints were recovered (91:95-97). Reginald Templin, from the Wisconsin Crime Lab, testified that a 9mm bullet was recovered from Jordan Alvarez's body, and confirmed that no gun or DNA evidence was recovered (93:47, 56).

Alfonzo Treadwell, who had already been sentenced after a guilty plea and was imprisoned for his role in this same crime, was called as a witness by the State (102:58-59). Treadwell admitted knowing Smith and identified him in court, but then he refused to answer about whether he and

Smith were involved in the shooting on (102:60). He said, "Get him on your own" (102:61). After denying that he and Smith were involved in the shooting, he refused to answer further questions from the State (102:63). The court removed the jury and then threatened Treadwell with contempt—to no avail (102:64-65).

Treadwell was passed until later, and the court suggested that the State use the lunch hour to see if he would cooperate upon being recalled to the witness stand (102:66). Defense counsel objected on the grounds that Smith had the right to face his accusers (102:66). The court did not rule on the objection, only noting that Treadwell could be declared unavailable (under the evidentiary rules) and that could be considered upon Treadwell's recall to the witness stand, assuming he continues his refusal to answer questions (102:67).

Treadwell was recalled for the afternoon session of that same day (93:59). The court told Treadwell to sit up and answer questions (93:61). But he did not. Instead, he sat unresponsive as the State proceeded to ask him a string of questions about Smith and his involvement in the crime. Among the more damaging statements that the prosecutor read, in the form of questions, to Treadwell were:

> Did you tell Detective Billy Ball on tape that a few days prior to this homicide of Jordan Alvarez that you were at Omar Smith's house, that he was your friend, and that the house that Omar Smith was at … was shot up? (93:63)
>
> (No response)
>
> Do you recall telling Detective Ball that a few days prior to this homicide that Omar Smith's house was shot up and that Omar had been very upset and his family was also upset over the shooting? (93:64)
>
> (No response)

> Do you recall telling Detective Ball that on the day of the homicide that you were at Omar Smith's house … and that at one point while you were over there, Omar Smith walked up to him and said, quote, come on with the heat, unquote? (93:64)
>
> (No response)
>
> Do you recall stating to Billy Ball that Juggy drove them to the area of 23rd and McKinley? When Juggy stopped the car he overheard Omar telling Juggy to wait for them? (93:66)
>
> (No response)
>
> You identified photographs shown to you of Omar Smith, who is the defendant in court here today, and you stated that Omar is the person who asked you to come with him to do the shooting? (93:70)
>
> (No response)
>
> Do you recall telling the detectives … that Omar wanted to go over to the area of 24th and McKinley to retaliate because Omar Smith believed that the, quote, Deuce squad, unquote, shot at his mother's house? (93:71-72)
>
> (No response)
>
> Do you recall telling the police that you were armed with a .45 caliber highpoint firearm and Omar was armed with a 9mm and that West was armed with a .22 caliber Ruger with a thin barrel? (93:73)
>
> (No response)
>
> And you stated … that Omar shot everything and then his gun locked back … after West's or Weasel's gun jammed that you and Omar kept shooting? (93:75)
>
> (No response)

There was no objection from the defense. The next day, however, defense counsel was questioning his decision to allow the questioning of Treadwell to occur without an objection (95:3; App. 116). Defense counsel explained that he had certain things he wanted to get out of Treadwell, especially if he was going to be declared (by the court) as an

unavailable witness anyway, but now had second thoughts about how things turned out (95:9-10; App. 122-123). But Treadwell just completely stopped talking, right in front of the jury. Defense counsel went on to say that, in retrospect, the questioning of Treadwell should not have been allowed, Smith was denied his right of confrontation, and the jury had been tainted as a result. Defense counsel thereupon requested a mistrial (95:4; App. 117).

In response, the State argued that there were no grounds for a mistrial and, in any event, no contemporaneous objection had been made by the defense (95:6; App. 119). The State proposed striking all of Treadwell's testimony (but because Treadwell was unresponsive, the State surely meant the questions posed to him).

The court decided not to grant a mistrial (95:12, 16; App. 125, 129). After discussing the five possible ways the problem could be handled, the court decided to strike the questions from the afternoon testimony and tell the jury to disregard them because Treadwell had refused to answer (95:14; App. 127). The court agreed with the defense about leaving in Treadwell's morning testimony (he answered a question to the effect that he and Smith were not involved in the crime). The court struck the questions/testimony and told the jury to disregard all questions and comments by the attorney and the court and any responses from Treadwell during the afternoon session (95:20-21; App. 133-134).

Despite the court's instruction, this confrontation issue was complicated with the next witness. A document analyst, named Cole Stephan from the Milwaukee police department, testified about a letter he had tested for fingerprints (95:27). He identified fingerprints from Smith, Alfonzo Treadwell, Michelle Thomas (Treadwell's girlfriend) on the letter (95:31, 34-35).

This letter was sent by Michelle Thomas to Treadwell's attorney who in turned mailed it to Detective Jeremiah Jacks (95:69-73). The letter was from Smith to Treadwell, and Treadwell's attorney obtained it from Thomas and forwarded to the District Attorney apparently as part of Treadwell's cooperation agreement with the prosecution. In the letter, read by Detective Jacks in court, Smith told Treadwell not to testify against him (95:75-78). The State referred to this letter during its closing argument: that Smith wrote, "you [Treadwell] better not testify against me" (96:113).

At the close of the State's case, defense counsel renewed the motion for mistrial, which the court again denied (96:30-31). Smith did not testify, no defense case was presented, and the case went to the jury. The jury returned guilty verdicts on all counts (97:5-6).

Sentencing

Sentencing occurred on January 14, 2011. The court sentenced Smith on both this case and an earlier case, 09CF0423, for which Smith pled guilty of Felon in Possession of a Firearm.

At sentencing, the State recommended a "maximum type" sentence of about 40 years for the death of Jordan Alvarez and consecutive sentences for the other shootings (98:7-9). When its turn came, the defense proposed a sentence in the range of 20 to 25 years of initial incarceration (98:25).

In explaining the sentencing rationale, the court stated that it would take into account the nature of the crime, the community's interest, and Smith's character (98:27; App. 136). First of all, the court said it needed to send a message

that gunplay in the community must be stopped (98:27; App. 136). Because Smith's mother's house had been shot at, the court continued, he went to the house on McKinley with his coactors and shot it up like in the "Old West," resulting in the death of Jordan Alvarez (98:29-30; App. 138-139). It was a bullet from Smith's gun—the 9mm—that killed Alvarez (98:30; App. 139).

Smith went armed, the court pointed out, even though, as a convicted felon, he was not supposed to possess a gun (98:31; App. 140). Smith showed recklessness and "utter disregard of life," not aiming at anyone in particular but firing until his gun was empty (98:32; App. 141). The community expected strict punishment for this conduct (98:34; App. 143). Turning to Smith character, the court took into account that he was family-oriented, his juvenile record, his educational attainments, and his alcohol and drug use (98:35-36; App. 144-145).

The court imposed a sentence of 40 years of initial confinement (IC) and 20 years of extended supervision (ES) for the homicide of Jordan Alvarez (count 1), 7 years of IC and 5 years of ES for the shooting of Brittany Alvarez (count 2), 7 years of IC and 5 years of ES for the shooting of Jennifer Langoehr (count 3), 5 years of IC and 5 years of ES for being a felon in possession of a firearm (count 4), and 3 years of IC and 3 years of ES for bail jumping (count 5). All of these sentences were run consecutive, and, in total, they came to 62 years of IC and 38 years of ES (47:1-3; 98:40-41; App. 151-153).

The Postconviction Motion

Smith brought a postconviction motion (59:1-8; App. 154-161), raising the issues of whether trial counsel was

ineffective for failing to timely object to the confrontation clause violation (involving the questioning of Treadwell) and asking the trial court to reconsider its decision that a curative instruction would be sufficient to prevent prejudice to Smith from the confrontation clause violation. The postconviction motion also contended that the sentence imposed upon Smith was unduly harsh and an abuse of discretion. After the motion was filed, both parties submitted briefs to the court (65:1-9; 68:1-7).

In its written decision and order denying the postconviction motion (69:1-2; App. 162-163), the trial court said it would have denied the mistrial motion even if trial counsel had made the motion earlier in the proceeding. Treadwell would have been declared "unavailable" under the evidentiary rules, and the same information would have reached the jury anyway. The confrontation clause violation was, moreover, cured by the court's instruction, which the jury is presumed to have followed. The court also rejected Smith's sentencing claims.

ARGUMENT

I. SMITH'S STATEMENT TO THE POLICE INVESTIGATORS SHOULD HAVE BEEN SUPPRESSED BECAUSE HE UNAMBIGUOUSLY INVOKED HIS RIGHT TO COUNSEL.

The Fifth Amendment to the United States Constitution provides, "No person … shall be compelled in any criminal case to be a witness against himself." In *Miranda v. Arizona*, 384 U.S. 436 (1966), the U.S. Supreme Court required that law enforcement officers take affirmative

action to protect a suspect's Fifth Amendment rights. Law enforcement must read warnings, as a procedural safeguard, to suspects in custody and under interrogation. A suspect's right to counsel and right to remain silent are the rights protected by this warning. *State v. Ross*, 203 Wis. 2d 66, 73, 552 N.W.2d 428 (Ct. App. 1996). After the warnings are given, the suspect must knowingly waive the *Miranda* rights before any statement from the suspect can be used at trial. *North Carolina v. Butler*, 441 U.S. 369, 373 (1979). When a suspect in custody asks to speak to a lawyer, all interrogation must cease until a lawyer is present. *Miranda v. Arizona*, 384 U.S. at 474. This is intended as a "prophylactic rule designed to protect an accused in police custody from being badgered by the police." *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983).

In this case, the police detectives started an interview with Smith after reading the *Miranda* rights from a Department of Justice card (79:12). They stopped the interview and turned off the audio recorder when Smith requested a lawyer (79:13). During the next 14 or so minutes that were unrecorded, the police picked up their things, including the audio recorder, and left the room (79:15, 25, 27). When the police returned 10 minutes later to give Smith the cigarette he had requested, Smith said he wanted to tell them what happened but he did not want to tell on anyone else involved. Smith said he would talk without a lawyer, so the detectives turned on the audio recorder (79:26, 29).

The State has the burden of satisfying two criteria to show that a suspect validly waived the *Miranda* right to counsel in this case. First, after the police ceased the questioning of Smith the first time, the State must show that Smith reinitiated further communication with the police. *State v. Hambly*, 2008 WI 10, ¶67, 307 Wis. 2d 98, 745 N.W.2d 48. Small talk and generalities do not meet the

standard for reinitiation: the suspect's questions or statements must have, under the totality of circumstances, "evinced a willingness and desire for a generalized discussion about the investigation."[1] *Oregon v. Bradshaw*, 462 U.S. at 1045-46. Second, the State has the burden to show that Smith "knowingly, voluntarily, and intelligently" waived his Fifth Amendment *Miranda* right. *Miranda*, 384 U.S. at 444. Any showing under this second criterion must take into account the totality of circumstances. *Edwards v. Arizona*, 451 U.S. 477, 482 (1981).

The suspect also must affirmatively and unambiguously invoke the Fifth Amendment right to counsel. *State v. Jennings*, 2002 WI 44, ¶36, 252 Wis. 2d 228, 647 N.W.2d 142; *Davis v. United States*, 512 U.S. 452, 459 1994). Both *Jennings* and *Davis* stand for the principle that police do not have to seek clarification of a suspect's ambiguous request for counsel. While being interrogated by the police on suspicion of homicide, Jennings said, "I think maybe I need to talk to a lawyer," a statement that was deemed ambiguous. Our state supreme court held that the police need not seek clarification of an ambiguous request and, in keeping with *Davis*, the suspect must "articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." Jennings, 252 Wis. 2d 228, ¶30, *quoting Davis v. United States*, 512 U.S. at 460. *See also State v. Linton*, 2010 WI App 129, ¶ 8, 329 Wis. 2d 687, 791 N.W.2d 222.

Under the standard of review applicable to cases such as this one, this court will uphold the trial court's findings of facts unless they are clearly erroneous. But this court also

[1] This test came from the four-justice *Bradshaw* plurality. The four-justice dissent in *Bradshaw* proposed a rival test: the suspect's initiation of dialogue with the police about the subject matter of the particular criminal investigation. *Id*. at 1053.

conducts an independent review, without deference to the trial court, in applying constitutional principles to those facts. *State v. Linton*, 329 Wis. 2d 687, ¶9. Here, Smith does not challenge the trial court's findings of historical fact or the finding that he reinitiated the second interview. He only challenges the trial court's ruling that his second request for counsel was too ambiguous to require the detectives to halt their questioning. The issue here is not what Smith said but the constitutional import, under the Fifth Amendment and its Wisconsin corollary, of what he said.

This reinitiated interview started with Smith saying that he wanted to call his mother (79:20). Then he wanted to know if the police would put in a good word for him (79:21). The detectives gave Smith the *Miranda* warnings for a second time, which he said he understood (79:22). Smith wondered if it would look bad for him if he told the police about his role but not what anybody else may have done. Finally, Smith said, "I want to, but I kind of want a lawyer present, but I don't want it to look worse" (79:22-23; 80:23; App. 112).

The issue here, therefore, is whether Smith's second request was unambiguous and required the police to cease their questioning. Or was it ambiguous in the sense of *Jennings* and *Davis*, meaning that he police could continue. The trial court rule that Smith's request was ambiguous (80:24; App. 113).

The word-by-word exchange, as depicted in a transcript of Smith's audio-recorded statement to the police, prepared by the Milwaukee District Attorney and received into evidence without objection during the jury trial (94:16-17), goes:

> Detective: You can, listen, you can – you can tell us what you wanna tell us and what you don't wanna tell us, you don't have to right now. You know what I mean? And if you don't

> want to, that's up to you. If you don't wanna tell us who else, you know, what other people's parts were, that's your decision. You know what I mean? Do you wanna tell us what your part in this was, Omar?
>
> Smith: I want to, but I kinda wanna lawyer present, but I don't want it to look like if I wait for my lawyer.
>
> Detective: It's your decision.
>
> Smith: I don't want it to look worse for me if I wait for my lawyer.
>
> Detective: Omar, Omar. This is your decision. We can't help you with that …(103:3).

Smith maintains that he unambiguously invoked his *Miranda* right to counsel, precluding the police detectives from continuing the interrogation, and, as a matter of constitutional law, requiring them to halt any further questioning. Smith's language in second request, paraphrased by the trial court, was "I kind of want a lawyer but I don't want it to look worse" (80:23; App. 112). This language was not as ambiguous as it appeared to the circuit court and as it may appear here upon first glance. First of all, it is commonplace in everyday speech, among younger people and many others, to couch one's language with the term "kinda" or "kind of." Especially as a young person speaking to someone in a position of authority (Smith, born on November 5, 1988, was 20 years old when this crime was committed on April 17, 2009).

Smith's use of the conjunctive "but" should not be viewed as a limitation on or qualification of his request for counsel. He is asking for counsel, which also means he no longer wants to answer questions, while he hopes this does not make him look bad. This is the most obvious way of interpreting Smith's request. It would be a mistake to struggle hard to find ambiguity in the request of an untutored

suspect. As our supreme court pointed out, "a suspect need not speak with the discrimination of an Oxford don." *State v. Jennings*, 252 Wis. 2d 228, ¶30, *quoting Davis*, 512 U.S. at 476.

And the police detectives knew it would not look bad for Smith. When Smith said he does not want it to look "worse," he means, "I want a lawyer but I don't want it to be used or held against me." The detectives knew that Smith's request would not be used against him. Smith's request here contains a special element that does not line up with the cases where the suspect's request was determined to be ambiguous (*Jennings*: "I think maybe I need to talk to a lawyer"; *Davis*: "I think I want a lawyer before I say anything else"). The only way Smith goes forward without a lawyer is if he is misled about his rights. By not stopping their questioning at this point, the detectives undermined *Miranda*, since Smith was still laboring under the belief that his silence or refusal to talk without a lawyer could be used against him. Because of this distinction, Smith's request is dissimilar to the requests that the reviewing courts found ambiguous in *Jennings* and *Davis*.

Under the totality of circumstances it is significant that Smith had, only a little earlier, asserted his right to counsel forcibly enough for the police to cease their questioning, even to the point of removing their tape recorder and leaving the interrogation room (79:14-15, 25). Smith's first request, made only shortly before, added weight to his second, post-reinitiation request; and made his second request clear enough so that a reasonable police officer would have understood his statement to be another request for an attorney.

The trial court should have suppressed Smith statements and kept them from being introduced at trial.

II. SMITH SUFFERED PREJUDICE FROM THE VIOLATON OF HIS CONFRONTATION RIGHTS, RESULTING FROM THE STATE'S QUESTIONING OF TREADWELL, WHICH WAS NOT CURED BY THE COURT'S INSTRUCTION.

A. Smith was prejudiced by the violation of his confrontation rights.

The Confrontation Clause of the United States and Wisconsin Constitutions guarantees criminal defendants the right to confront witnesses against them. *State v. Jorgensen*, 2008 WI 60, ¶34, 310 Wis. 2d 138, 754 N.W.2d 77; U.S. Const. amend VI; Wis. Const. art. I, sec. 7. In this case, the prosecution called Alfonzo Treadwell as a witness against Smith. Treadwell was first called in the morning of November 3, 2010 (102:58). He refused to answer questions about whether he and Smith were involved in the shooting, saying "get him on your own," but then denied that he and Smith were involved (102:61-62). After being threatened with contempt for his refusal to answer questions, Treadwell was removed from the witness stand, only to be recalled in the afternoon session.

In the afternoon session, the prosecutor again asked Treadwell about the shooting. The prosecutor asked Treadwell if he recalled speaking with Detective Billy Ball about the incident, but Treadwell remained unresponsive. The court invited the prosecution to continue putting the statements that Treadwell made to the detective into the record as long as Treadwell refused to answer (93:62). Among the more damaging statements that the prosecutor read, in the form of questions, to Treadwell were:

> Did you tell Detective Billy Ball on tape that a few days prior to this homicide of Jordan Alvarez that you were at Omar Smith's house, that he was your friend, and that the house that Omar Smith was at … was shot up? (93:63)
>
> Do you recall telling Detective Ball that a few days prior to this homicide that Omar Smith's house was shot up and that Omar had been very upset and his family was also upset over the shooting? (93:64)
>
> Do you recall telling Detective Ball that on the day of the homicide that you were at Omar Smith's house … and that at one point while you were over there, Omar Smith walked up to him and said, quote, come on with the heat, unquote? (93:64)
>
> Do you recall stating to Billy Ball that Juggy drove them to the area of 23rd and McKinley? When Juggy stopped the car he overheard Omar telling Juggy to wait for them? (93:66)
>
> You identified photographs shown to you of Omar Smith, who is the defendant in court here today, and you stated that Omar is the person who asked you to come with him to do the shooting? (93:70)
>
> Do you recall telling the detectives … that Omar wanted to go over to the area of 24th and McKinley to retaliate because Omar Smith believed that the, quote, Deuce squad, unquote, shot at his mother's house? (93:71-72)
>
> Do you recall telling the police that you were armed with a .45 caliber highpoint firearm and Omar was armed with a 9mm and that West was armed with a .22 caliber Ruger with a thin barrel? (93:73)
>
> And you stated … that Omar shot everything and then his gun locked back … after West's or Weasel's gun jammed that you and Omar kept shooting? (93:75)

The foregoing statements represent confrontation clause violations. For statements to violate the confrontation clause, they must be testimonial in nature. Since it could have objectively foreseen that Treadwell's statements might be used in a criminal investigation or in the prosecution of a crime, his statements were testimonial. *State v. Jensen*, 2011 WI App 3, ¶27, 331 Wis. 2d 440, 794 N.W.2d 482. In

addition, there was no finding of witness unavailability or any prior opportunity for cross-examination that would have satisfied the confrontation clause. *Id.* at ¶2

The postconviction motion raised the issue that trial counsel was ineffective for failing to promptly object to the confrontation violation and promptly request a mistrial (59:2, 4-5). Trial counsel objected on confrontation grounds at the end of Treadwell's morning testimony (102:66), but did not lodge a standing or continuing objection and did not freshly object when Treadwell was brought back for the afternoon session. The afternoon questioning of Treadwell proceeded without objection. During the afternoon session of the next day, on November 4, trial counsel voiced second thoughts about his handling of Treadwell's testimony (95:3; App. 116). Trial counsel laid out a strategic reason for not objecting—Treadwell's testimony would probably be admitted anyway and he wanted to elicit favorable evidence from Treadwell—but now felt that Mr. Smith's right of confrontation had been violated (95: 4, 9-10; App. 117, 122-123). Defense counsel thereupon requested a mistrial (95:5; App. 118), which the state noted was untimely (95:6; App. 119).

The trial court denied the mistrial motion on the grounds that neither side was unduly prejudiced (95:12, 13-14; App. 125, 126-127). The court struck the questions asked of Treadwell during the previous day's afternoon session and gave the jury an instruction to ignore them as well as all comments by the court and counsel (95:16, 21-22; App. 129, 134-135). In denying the postconviction motion, the trial court stated that, because of the overwhelming nature of the evidence against Smith and the presumption that jurors follow instructions, it would not have granted a mistrial had defense

counsel sought one earlier or lodged an earlier objection on confrontation grounds (59:2).[2]

But neither the limiting instruction nor the evidence properly before the jury was sufficient to overcome the prejudice caused by the State's reading of Treadwell's statements to the jury. Limiting instructions are sometimes inadequate to cure the prejudice suffered by a defendant. A jury is unlikely to follow an instruction given in instances when the inadmissible evidence is highly incriminating. *See U.S. v. Lovelace*, 123 F.3d 650, 654 (7th Cir. 1997). One such instance involves the admission of a codefendant's confession, without the codefendant's testimony, in violation of the defendant's constitutional right of confrontation. The Confrontation Clause prevents, even in a joint trial, the introduction of a confession by a codefendant that implicates the accused, even if the trial judge gives a limiting instruction. *See Bruton v. United States*, 391 U.S. 123, 127-28 (1968). The risk is too great that the jury will not heed the instruction.[3]

The holding of *Bruton* was taken a step further in *Cruz v. New York*, 481 U.S. 186, 193 (1987), where the U.S. Supreme Court held that when a nontestifying codefendant's confession incriminates the defendant and is not directly

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[2] The trial court's decision and order denying the postconviction motion also indicates that it would have found Treadwell "unavailable" and his statements would have been heard anyway as an exception to the hearsay rule. But it is not so certain that Treadwell would have been unavailable for the purpose of avoiding confrontation. According to the U.S. Supreme Court, in *Lilly v. Virginia*, 527 U.S. 116 (1999), the penal and social interest exceptions to the hearsay rule are not firmly rooted. As such, statements under these exceptions are only admissible if they come with "particularized guarantees of trustworthiness." *Id.* at 134. It is unclear what those guarantees may have been with respect to the statements attributed to Treadwell.

[3] While *Bruton* involved a joint trial, this distinction does not undermine *Bruton's* application to the case here. The prosecutor read Treadwell's confession implicating Smith to the jury. The prosecutor's reading of the confession, in the form of posing questions to the recalcitrant codefendant, denied Smith the essential right guaranteed by the Confrontation Clause. *See Douglas v. Alabama*, 380 U.S. 415, 419-20 (1965).

admissible against the defendant, the Confrontation Clause bars its use even with a limiting instruction and even if the defendant's own confession is properly before the jury. *Bruton* and *Cruz* demonstrate that limiting instructions are inadequate to prevent prejudice against the defendant when the codefendant's incriminating statements are improperly admitted.

This error was not harmless given the underwhelming nature of the properly admitted evidence. This evidence consists, in the main, of Smith's confession (which is at issue in this appeal) and the testimony of Harold Connor (Juggy), who testified that he gave Smith, Treadwell, and an unidentified third person a ride to the area where the shootings occurred. In determining harmless error, the following factors are relevant: the frequency of the error, the importance of the erroneously admitted evidence, the presence or absence of corroborating evidence, whether untainted evidence duplicates the erroneously admitted evidence, the nature of the defense, and the nature and overall strength of the State's case. *State v. Jorgensen*, 2008 WI 60, ¶23, 310 Wis. 2d 138, 754 N.W.2d 77.

Here, the error was profound and cannot be called harmless. For example, in *Ray v. Boatwright*, 592 F.3d 793, 798 (7th Cir. 2010), the reviewing court found it prejudicial, in conducting the harmless error analysis, that the defendant was unable to cross-examine the only witness who directly placed him at the scene of the shooting with a gun in hand. For this reason, the *Boatwright* court found that the Confrontation Clause violation profoundly affected the fairness of the trial and required a reversal. The prosecutor in this case presented Treadwell's confession, in the form of questions posed to the unresponsive Treadwell, that Smith was armed with a gun and was the shooter (93:73-75). As in *Boatwright*, the jury in

this case heard highly prejudicial information that went to the heart of the case against Smith.

The error was also prolonged and extended. It was not just a passing comment, corrected and dispelled. The prosecutor's questioning of Treadwell covered pages 61 to 77 of the November 3, afternoon session, of the jury trial (93:61-77).

In addition, Smith's confession was front and center for both the prosecution and the defense. The prosecution of course wanted to magnify Smith's confession; the defense sought to minimize it. In the defense's closing argument, defense counsel emphasized that only after the police had apparently detained Smith's brother did Smith start supplying them with information about the shootings. The defense theory seemed to be that Smith was talking with the police only in an effort to protect his brother (96:123-24). But in the questions posed to Treadwell, the jury heard significant corroboration of the details of Smith's confession. What the jury heard as questions posed to Treadwell significantly undermined Smith's efforts to distance himself from the confession.

Codefendant confessions that "interlock" with the defendant's own confession produce a particularly devastating effect that cannot be undone. *Cruz v. New York*, 481 U.S. 190, at 192. The questions posed to Treadwell made Smith's own purported confession seem more reliable and cast the defense's efforts to minimize the impact of his confession.

The trial court's curative instruction was undermined soon after it was given. The State called a police technician who testified that he had identified the fingerprints of Smith and Treadwell on a letter sent to the District Attorney by Treadwell's attorney, who obtained it from Treadwell's

girlfriend (95:31, 34-35, 69-73). In the letter, read by a police detective to the jury, Smith told Treadwell not to testify against him (95:75-78). With this, the jury had an explanation for Treadwell's refusal to answer and a reason to credit the loaded questions posed to him by the State, despite the trial court's instruction to ignore these questions. The State also called attention to this letter in its closing argument (96:113).

For these reasons, the confrontation violation involving Treadwell was of sufficient magnitude to have prejudiced the trial's outcome and the trial court should have granted Smith's motion for a mistrial.

B. Alternatively, Smith's trial counsel was ineffective for failing to timely object to the confrontation violation.

As a general rule, parties waive objections to the admissibility of evidence if they fail to object before the trial court. *State v. Edwards*, 2002 WI App 66, ¶9, 251 Wis. 2d 651, 642 N.W.2d 537. Whether an objection was adequately preserved is a question that this court reviews *de novo*. *State v. Agnello*, 226 Wis. 2d 164, 172, 593 N.W.2d 427 (1979).

Smith asked the trial court, among other things in his postconviction motion, to clarify whether trial counsel's objection was timely (59:5; App. 158). In denying the postconviction motion, the trial court said, "The court already ruled on the confrontation issue and mistrial request pertaining to Alfonso Treadwell's testimony or lack of testimony. The defendant, however, wishes the court to determine whether it would have ruled differently had counsel voiced an objection earlier in the proceeding [footnote omitted]. After Treadwell's initial testimony on the morning of November 3, 2010, *trial counsel did voice a confrontation objection*" (69:1; App. 102) (emphasis added).

The trial court clarified that defense counsel lodged a timely objection and saw no reason to grant a *Machner* hearing on whether counsel was ineffective. Although trial counsel objected later and asked for a mistrial (95:4), which the court denied, the court seemingly considered the original objection as covering Treadwell's return to the witness stand that afternoon.

In the event that the foregoing characterization of the trial court's ruling is debatable or ambiguous, Smith alternatively contends that defense counsel was ineffective for failing to promptly object to the confrontation violation and continue this objection when Treadwell was returned to the stand that afternoon. To establish ineffective assistance of counsel, a defendant must show that (1) counsel provided deficient performance, and (2) this deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 685-686 (1984). Here, the prosecutor posed as questions certain statements attributed to Treadwell, Smith's alleged coactor, implicating Smith in violation of his confrontation rights. Defense counsel's failure to make a fresh objection or continue objecting in the afternoon session represents a clear example of deficient performance. These statements were also prejudicial because they directly implicated Smith as being at the scene of the shooting with a gun in hand. *See Ray v. Boatwright*, 592 F.3d at 798.

During the afternoon session of the next day, defense counsel voiced second thoughts about his handling of Treadwell's testimony (95:3-5; App. 116-118). Defense counsel laid out a strategic reason for not objecting – he felt that Treadwell's testimony would be admitted anyway and he wanted to elicit favorable evidence from Treadwell – but now felt that Smith's right of confrontation had been violated (95:4, 9-10; App. 117, 122-123).

Defense counsel posed questions to Treadwell about, among other things, that he was angry about Smith's house being shot up, that he went to the scene of the shooting with a gun and aimed at a specific person, that he pled guilty in exchange for the dismissal of some charges and a 25-year prison recommendation from the State, that he hoped to get back to court for a sentence modification, and that he had given many conflicting statements about the case (93:81-87).

None of the questions that defense counsel posed to Treadwell compensated for the direct prejudice from the prosecutor's questions: that Smith asked him to come with on the mission to shoot up the house and Smith was armed with and used a 9mm gun (93:71-75).

For these reasons, if this court determines that this issue should be viewed through the lens of ineffective assistance of counsel, Smith asks that this court find defense counsel's performance deficient and prejudicial and remand the case with an order vacating the judgment of conviction. In the alternative, a remand for a hearing, under *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979), to determine whether trial counsel can flesh out his strategic reason for his deficient performance may be in order.

III. THE SENTENCE IMPOSED UPON SMITH WAS UNDULY HARSH AND AN ABUSE OF DISCRETION.

Smith received the following sentences: 40 years of initial confinement, 20 years of extended supervision for the reckless homicide; seven years of initial confinement, five years of extended supervision for the first count of recklessly endangering safety; seven years of initial confinement, five years of extended supervision for the second count of

recklessly endangering safety; five years of initial confinement, five years of extended supervision for felon in possession of a firearm; and three years of initial confinement, three years of extended supervision for bail jumping. All of the sentences were ordered to run consecutive. Overall, Smith received an aggregate sentence of 62 years of initial confinement and 38 years of extended supervision in this case (98:40-41; App. 151-153). Smith contends that this total sentence is unduly harsh and reflects an abuse of discretion.

Because Smith received a *de facto* life sentence for crimes of recklessness, his cumulative sentence structure represents cruel and unusual punishment within the meaning of the Eighth Amendment to the United States Constitution. The Eighth Amendment's prohibition of cruel and unusual punishment is binding on the states. *Robinson v. California*, 370 U.S. 660 (1962). Recently, the U.S. Supreme Court noted that the meaning of cruel and unusual punishment changes with the times and that "standards of decency … will never stop evolving." *Graham v. Florida*, 560 U.S. ___ (2010), 130 S.Ct. 2011, 176 L.Ed.2d 825.

Graham held that the Constitution prohibits the sentencing of a juvenile to life without parole or probation for a non-capital crime. Although Smith is an adult, he was only 20 years old when these crimes were committed. The sentences he received, as described above, represent a life sentence for non-capital crimes with no realistic opportunity for release or parole, and no real opportunity, from the age of 20 onward, to demonstrate improvement, reform, or rehabilitation. Smith submits that, under these circumstances, his sentence structure is unduly harsh and excessive.

This aggregate sentence effectively amounts to a life term for Smith, without a meaningful chance for release. Smith was 20 years old when this crime was

committed and 22 years old when he was sentenced. Under the sentence imposed, he will not be released until he reaches 82 years of age. The defendant's age is among the factors that must be considered by the court at sentencing. *State v. Tew*, 54 Wis. 2d 361, 367, 195 N.W.2d 615 (1972). This aggregate sentence is a *de facto* life sentence, the second most severe sentence allowed by law and the most severe sentence permitted in Wisconsin.

Was it the court's intention to impose what effectively amounts to a life term in this case? Actuarial data from the Social Security Administration show that someone 20 years of age can expect to live an additional 61 years (http://www.ssa.gov/OACT/STATS/table4c6.html). What also makes this sentence excessive and an abuse of discretion is that it will incarcerate Smith for life *from the age of 20*. And this aggregate sentence is for crimes, while serious, involved reckless conduct, not the more aggravating element of intent.

By imposing such a harsh sentence, the trial court also improperly exercised discretion. Discretion is "a process of reasoning based on facts of record and reasonable inferences from those facts, and a conclusion supported by a logical rationale founded upon proper legal standards," and is "not synonymous with decision-making." *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). Moreover, in sentencing a defendant, the court should exercise discretion based on the whole record. *State v. Burgher*, 53 Wis. 2d 452, 457, 192 N.W.2d 869 (1972). Wisconsin statutes require the sentencing court to consider any applicable mitigating factors. Wis. Stats, § 973.017(2)(b). In light of *McCleary*, these mitigating factors should be reflected on the record. *McCleary v. State*, 49 Wis. 2d at 276-78.

A defendant and the public have the right to a thorough explanation of a sentencing decision on the record.

See generally State v. Gallion, 2004 WI 42, Wis. 2d 535, 678 N.W.2d 197. *Gallion* rejected a "mechanical form" of sentencing, in which the court refers to facts and recites "magic words," hoping that its reasoning will be "implied." *Id*. at ¶¶26, 37, 38, 50. Instead, the sentencing court must provide "linkage" by explaining the objectives of sentencing (such as deterrence, retribution, rehabilitation) and how the available facts are relevant to the objectives identified as important by the court. *Id*. at ¶¶40-42. The sentencing court should explain why the sentence given was the minimum custody sentence that would meet the objectives identified by the court. *Id*. at ¶44.

How did the trial court justify the sentence imposed upon Smith? The trial court started off by reciting the objectives of sentencing—punishment, general deterrence, and rehabilitation—and then the court referred to the nature of the crime, the community's interest, and Smith's character as considerations (98:27; App. 136). The trial court reviewed Smith's single past adult conviction, then discussed the instant crime: Smith and two others shot at a house in apparent retaliation for Smith's own home being targeted a few days earlier (98:29-31; App. 138-140), and Smith admitted to using the 9mm gun and fired until the clip was empty (98:30; App. 139). Although Smith was not shooting at anybody in particular and may not have even been trying to hit anyone, his conduct was reckless in the extreme (98:32; App. 141). Smith was not sufficiently apologetic, the court noted, apparently because he would not "rat" on the others involved in the crime (98:33; App. 142).

About the most the trial court said in linking specific facts to the sentence imposed was "…it appears that despite the severe sentences we're giving out on homicides involving guns, it appears to do nothing. It's frustrating, but yet I'm not gonna give up. I am gonna continue by my sentences to say

you use a gun – you use a gun to kill somebody, you get it from me" (98:34; App. 143). The trial court also examined Smith's background and concluded that he had a substance abuse problem that required treatment (98:37; App. 146). This treatment would occur in prison, however, since probation would unduly depreciate the seriousness of the offenses (98:38; App. 147).

This sentencing rationale was deficient under *Gallion*. Other than listing possible objectives in a burst of magic words—punishment, deterrence, gun crime—the trial court did not explicitly identify the objectives of the sentence or, in particular, why it was necessary to impose the functional equivalent of a life sentence to meet whatever objective the court may have had. It can be guessed that the trial court found the offenses serious and did not want to depreciate their seriousness, but the court never made clear whether and how the crimes arising from this particular incident were more serious than other crimes of the same type. No explanation was forthcoming about how the relative seriousness of the crimes and circumstances at issue here, *vis-à-vis* the same crimes in similar cases, made Smith deserving of an aggregate sentence of 62 years of initial incarceration.

In fact, the trial court did not seem to realize that it was imposing the equivalent of a life sentence. Before actually imposing sentence, the trial court held out hope that Smith would not have to spend the rest of his life in prison: "So you are going to prison. And when you get out of prison, you'll be subject to the rules, you go back to prison for up to the time that I'm gonna give you on extended supervision" (App. 98:38; App. 147). Yet, when the trial court imposed the aggregate sentence, it gave Smith initial incarceration for a term of 62 years, taking him up to about 80 years of age before he could be released on extended supervision.

The sentencing court also erroneously exercised discretion by running all of the sentences consecutive without offering any justification or displaying a process of reasoning. In sentencing a defendant to consecutive terms, the trial court must provide justification for each sentence and "apply the same factors concerning the length of sentence to its determination of whether sentences should be served concurrently or consecutively." *State v. Hall*, 2002 WI App 108, ¶8, 255 Wis. 2d 662, 648 N.W.2d 41. *Hall* referred to the ABA Standards directing that, "where the separate offenses are not merged for sentencing, a sentencing court … in imposing sanctions of total confinement, ordinarily should designate them to be served concurrently," and that "the imposition of consecutive sentences of total confinement … should be accompanied by a statement of reasons for the selection of consecutive terms. *Id*. at ¶14.

Like all other aspects of sentencing, the decision to order consecutive terms entails the proper exercise of discretion and must be a product of rational consideration of facts in the record, reasonable inferences, and proper legal standards. *State v. McCleary*, 49 Wis. 2d at 277. In the instant case, all of Smith's convictions stem from the same incident. Even so, the sentencing court merely announced, without offering more, that the sentences would be consecutive (98:40-41; App. 149-150). For these reasons, the sentencing court erroneously exercised discretion in ordering consecutive sentences.

CONCLUSION

For the foregoing reasons, Omar J. Smith respectfully asks this court to vacate the judgment of conviction. Alternatively, he asks for resentencing and/or a *Machner* hearing.

Dated: May 13, 2013

Respectfully submitted,

_____

George M. Tauscheck
Attorney for Omar J. Smith
State Bar No. 1015744
4230 N. Oakland Ave. #103
Milwaukee, WI 53211
(414) 704-9451

CERTIFICATION OF LENGTH AND FORM

I certify that this brief conforms to the rules for a brief produced using a proportional serif font. The length of this brief is **9,659** words.

Dated: May 13, 2013

_____

George M. Tauscheck
State Bar No. 0101574

CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as 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 trial court; and
(3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial 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 findings of fact and conclusions of law, if any, and the 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 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: May 13, 2013

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George M. Tauscheck
State Bar No. 1015744

CERTICATE OF ELECTRONIC FILING

I hereby certify that pursuant to Wisconsin Statutes (Rule) 809.19(12), I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and form 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: May 14, 2013

_____

George M. Tauscheck
State Bar No. 1015744

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