STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP0342-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHNNY JEROME JONES,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
Entered in the Milwaukee County Circuit
the Honorable David L. Borowski, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. Mr. Jones Unequivocally Invoked His Right to Counsel, and the Court Should Have Granted the Motion to Suppress His Statements.

As the State agrees, Mr. Jones stated "So y'all *can* get a public pretender right now," with a question mark. (State's Br. at 7) (emphasis added). Contrary to the circuit court's finding, Mr. Jones did not state "so y'all *going to get* a public pretender right now". (76:8) (emphasis added).

Significantly, other courts, including the Wisconsin Supreme Court, have found that a request using "can" is an unequivocal request for counsel. *See*, *e.g.*, ***State v. Edler***, 2013 WI 73, ¶¶ 35-37, 350 Wis. 2d 1, 833 N.W.2d 564 (holding that "can my attorney be present for this," constituted an unambiguous, unequivocal invocation of the right to counsel); ***State v. Lee***, 413 F.3d 622, 626 (7th Cir. 2005) (finding that "Can I have lawyer?" was a valid invocation of the right to counsel); ***State v. Dumas***, 750 A.2d 420, 425 (R.I. 2000) (stating that the phrase "Can I get a lawyer?" is a reasonable and acceptable way to frame a request for counsel); *contra, e.g.,* ***State v. Jennings***, 2002 WI 44, ¶ 36, 252 Wis. 2d 228, 647 N.W.2d 142 (finding "I think maybe I need to talk to a lawyer" ambiguous). Thus, when Mr. Jones stated "So y'all *can* get a public pretender right now," a reasonable officer would have understood the statement to be a request for counsel. ***Davis v. United States***, 512 U.S. 452, 459 (1994). Mr. Jones did not need to "'speak with the discrimination of an Oxford don.'" ***Id.*** 459 (citation omitted).

The State argues that Mr. Jones's use of "now" shows "the contingent (hence equivocal) character of the question." (State's Br. at 17). However, the State cites no case law in which a court found that the word now creates ambiguity. In

fact, one of the Seventh Circuit cases cited by the State held that a defendant's statement, which included the word now, was an unequivocal request for an attorney. *See* ***U.S. v. Wysinger***, 683 F.3d 784, 795-96 (7th Cir. 2012) (holding that defendant's statement "I mean, but can I call one now?" was an unequivocal request for an attorney and interrogation should have ceased).

Contrary to the State's argument, Mr. Jones's use of the phrase "right now" strengthens the unequivocal nature of the statement. Mr. Jones's statement, "So y'all can get a public pretender right now," communicates that he wants an attorney immediately or presently. *See, e.g.,* ***Edler***, 350 Wis. 2d 1 at ¶¶ 35-37 (holding that "can my attorney be present for this," constituted an unambiguous, unequivocal invocation of the right to counsel); ***Alvarez v. Gomez***, 185 F.3d 995, 996-98 (9th Cir. 1999) (finding that defendant's statements "Can I get an attorney right now, man?", "You can have attorney right now?", and "Well, like right now you got one?" invoked his right to counsel); *contrast with* ***State v. Fischer***, 2003 WI App 5, ¶ 19, 259 Wis. 2d 799, 656 N.W.2d 503 (concluding that the defendant's statement "*if* the officers read him his rights he would not answer any questions and would request an attorney" is sufficiently ambiguous because it depended upon something that had not yet happened but might happen in the future). Thus, contrary to the State's argument, Mr. Jones's use of the word "now" supports that the statement was unequivocal because it communicates an immediate or present desire to consult with an attorney.

The State notes the circuit court's findings that Mr. Jones was using "public pretender" to be "insulting," and "derogatory." (State's Br. at 9-10). However, "public pretender" is a common term for a public defender. Detective Hensley testified that he understood "public pretender" to mean an appointed attorney, and significantly, the circuit court found that "the detective knew that public pretender meant public defender." (74:15-16, 76:9); s*ee also*, Lida

Rodriguez-Taseff & Rodney Thaxton, *Professionalism and Life in the Trenches: The Case of the Public Defender*, 8 ST. THOMAS L. REV. 185, 186 n. 2 (1995) (noting that "Criminal defendants often refer to public defenders as "public pretenders"…); *Public Pretender Definition*, URBANDICTIONARY.COM, http://www.urbandictionary.com/define.php?term=public+pretender (last visited Dec. 4, 2014) (stating that a public pretender is a "[c]ourt appointed attorney"). If any ambiguity existed surrounding the meaning of "public pretender," such ambiguity was eliminated when Detective Hensley responded "they're called public defenders" and Mr. Jones agreed, stating "Oh yeah." (111:Exh. 1; 28:50-29:56).

And, even if the use of "public pretender" was meant to be "insulting" or "derogatory," it does not matter. Mr. Jones was clearly requesting an attorney, and given the popularity of the term, a reasonable officer would have understood the request to be for an attorney, as did the officer in this case. Neither the circuit court nor the State cite to any case law that indicates that because the defendant used a derogatory or insulting term for an attorney that it somehow makes the result ambiguous.

In addition, as discussed in Mr. Jones's initial brief (at 9-11), contrary to the circuit court's findings, Mr. Jones's statement was not made in a "joking manner". Mr. Jones's tone is non-descriptive, and it is not possible to tell who laughed—Mr. Jones or the officers. In addition, there was no testimony elicited at the suppression hearing describing Mr. Jones's tone. There was also no testimony elicited definitively establishing who was laughing—Mr. Jones, the officers, or

both.[1] Mr. Jones testified that he asked for a public pretender "[b]ecause I thought that you could get one during the course of the interview." (74:61-62).

Therefore, when Mr. Jones requested "a public pretender," questioning should have ceased, and all of Mr. Jones's subsequent statements should have been suppressed.

CONCLUSION

For the reasons stated, Mr. Jones respectfully requests that this court vacate the judgment of conviction, reverse the circuit court's denial of the suppression motion based on Mr. Jones's unequivocal assertion of the right to counsel, and order his statements to be suppressed.

Dated this 4th day of December, 2014.

Respectfully submitted,

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[1] As noted in Mr. Jones's initial brief (at 11), when asked if he recalled "telling the detectives that ya'll can get me a public pretender now," Mr. Jones responded "Yes. Because we made a joke. They made a joke right after that about it." (74:37). The meaning of Mr. Jones's statement "[b]ecause we made a joke" is unclear, as it is followed by "*[t]hey* made a joke after that about it."(emphasis added).

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 1,062 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 this 4th day of December, 2014.

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