STATE OF WISCONSIN

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

DISTRICT I

Case No. 2018AP001350-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ULANDA M. GREEN,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and
an Order Denying Postconviction Relief Entered
in Milwaukee County Circuit Court,
the Honorable Tom R. Wolfgram, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Did police violate Ms. Green's right to be free from self-incrimination when they interrogated her before informing of her right to remain silent?

   The circuit court found that Ms. Green's custodial interaction with law enforcement could not "reasonably be construed as an interrogation." (40:3); (App. 120).

2. Did police violate Ms. Green's right to be free from self-incrimination when they continued interrogating her after she unambiguously invoked her right to remain silent?

   The circuit court found that Ms. Green's invocation was ambiguous and therefore no violation occurred.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication of this case is requested as it will help to guide litigants in future cases with similar facts.

While Ms. Green does not request oral argument, she welcomes the opportunity to discuss the case should the Court believe that oral argument would be of assistance to its resolution of the matter.

STATEMENT OF THE CASE

The information charged Ms. Green with being a party to the crime of robbery, contrary to Wis. Stats. § 943.32(1) and 939.05. (4:1).

Trial counsel filed a motion to suppress Ms. Green's custodial statements. (13:1). The circuit court held a hearing and denied the defense motion. (52:9). Ms. Green then pleaded guilty to the charges of harboring or aiding a felon contrary to Wis. Stat. § 946.47(1)(a) and receiving stolen property contrary to Wis. Stat. § 943.34(1)(a) and was sentenced to a term of imprisonment. (20; 22); (App. 101-104). She filed a timely notice of intent to pursue postconviction relief. (24).

Ms. Green then filed a Rule 809.30 postconviction motion asking for plea withdrawal, resentencing and sentence modification. (27:1). The motion was denied in a written order. (28). Ms. Green filed a timely notice of appeal. (29).

However, counsel ascertained that the record may be deficient with respect to the preserved suppression issue. (34). This Court therefore permitted Ms. Green to dismiss her pending appeal and file a supplemental Rule 809.30 postconviction motion in circuit court. (32). The supplemental postconviction motion asked the circuit court to make a definitive and clear ruling as to the issue of

improper pre-*Miranda*[1] questioning, which was rasied in in the motion to suppress. (36:2). In the alternative, Ms. Green alleged counsel was ineffective for not obtaining such a ruling at the motion hearing. (36:3). In a written order, the circuit court ruled on the remaining issue from the motion to suppress. (40:3); (App. 120).

This appeal followed. (43).[2]

STATEMENT OF RELEVANT FACTS

Underlying Offense

On July 25, 2016, E.M.M. was robbed while walking northbound on North 66th Street in Milwaukee, Wisconsin. (1:2). Specifically, he reported that a black male "approached him from behind and grabbed his wallet." (1:2). In the act of removing the wallet from E.M.M.'s back pocket, E.M.M.'s pants ripped. (1:2). The suspect fled on foot. (1:2).

Thirty minutes later, two individuals were captured on video attempting to use E.M.M.'s debit or credit cards at a gas station. (1:2). The cards did not work. (1:2). Based on their review of the surveillance video, law enforcement identified Kevin Cowser as a suspect in the robbery of E.M.M. (53:16-17). Police contacted Mr. Cowser, who was staying with Ulanda Green and Michael Winzer. (1:2). Mr. Cowser told

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).
[2] *See* Wis. Stat. § 971.30(10).

police that Ms. Green had arrived at the residence earlier that day in the company of Mr. Winzer, who was wearing clothing consistent with that of the robber. (1:2). Mr. Cowser admitted he went with Ms. Green to the gas station and tried to use the cards. (1:2), When the cards did not work, he told police that Ms. Green threw them in a sewer grate. (1:3).

Interrogation of Ms. Green

Police arrested Ms. Green based on Mr. Cowser's statement. (1:3). Police placed her in a small, windowless, concrete room for questioning. (Motion Hearing-12/9/16 – Exhibit 1 – CD) (hereinafter "Exhibit 1").[3] The lead interrogator was Detective Nicole Reaves. (13:1). Another officer was present in the room. (Exhibit 1). From the video, it appears that the second officer was armed. (Exhibit 1).

Pre-Miranda Interrogation

After greeting Ms. Green and telling her to refer to her as "Sugar," Detective Reaves immediately began discussing the underlying investigation:

[3] The index does not give a separate index number to the CD of the motion hearing, although the Clerk's Certificate dated August 15, 2018 indicates that it has been made a part of the record. Undersigned counsel has referred to it by the title which appears in the Clerk's Certification.

Det. Reaves: Ulanda, they did a search warrant on your house and stuff today, right?

Ms. Green: Mm-hmm.

Det. Reaves: Yes?

Ms. Green: Mm-hmm.

Det. Reaves: Okay and uh you staying there with your uh boyfriend, Michael?

Ms. Green: Umm staying with his momma and all them, yeah.

Det. Reaves: Yeah, his momma staying but Momma gonna be moving across the street in a minute right, his sister stays down the street, Pam?

Ms. Green: Mm-hmm.

Det. Reaves: Okay. Um. Well, when they did the search warrant, I know they took you and your boyfriend, uh Michael, into custody.

Ms. Green: Mm-hmm.

Det. Reaves: So, we have a, an incident that happened a couple days ago, that uh, uh Michael has been identified in and, um, it was a robbery and they were popping up with you as the property on video at the BP gas station out on Highland. Okay?

Ms. Green: Mm-hmm.

Det. Reaves: We also have you dumping the uh, cards and stuff into the grid. Okay. Now, this is the thing. Just having the property, that ain't no big deal, okay? But as far as doing the robbery, um, we know you not the one that robbed 'em, but we know you know who did, okay? And it's not fair for us to try and put that on you if you ain't the one that did it, you, you feel, --

Ms. Green: [unclear]

Det. Reaves: -- just, just just feel me, okay, you know what I'm saying –

Ms. Green: Yeah.

Det. Reaves: It's not fair for us to do that if you ain't the one that did it, right?

Ms. Green: I don't know nothing about that though.

Det. Reaves: Just, just hold on. That's just, just I'm just asking. It's not fair for us to just do that, right? [Nodding]

Ms. Green: Mm-hmm.

Det. Reaves: So. So basically that's why we got you down here and everything. Umm, we talked with um, with Kevin, uhh Kevin down here also, uhh, so…

Ms. Green: That's who I got the cards from.

Det. Reaves: Okay, well.

Ms. Green: I don't know nothing about it.

Det. Reaves: Hold on. Hold on.

Ms. Green: Nothing at all.

Det. Reaves: You got rights, I don't want you to, I don't want to violate any of your rights, you know? Sister to sister, because we going to be fair about this, okay?

Ms. Green: Mm-hmm.

Det. Reaves: This ain't about taking another black woman, black man to jail for some humbug stuff, or whatever, we gonna be fair about this across the board, okay?

Ms. Green: Mm-hmm.

Det. Reaves: Alright, So, what's right is what's right. Okay, so. We gonna talk about this. We gonna talk about, you know, the robbery and the cards and using the cards and all that kind of stuff, okay? Alright. So. Umm, before we do that though, because you have rights, I'm going to read you your rights, okay? And, umm, we'll go from there.

Ms. Green: I don't know nothing though.

Det. Reaves: Okay. Alright.

(Exhibit 1 from 18:35:57 to 18:39:02).

Invocation of Right to Remain Silent

At that point, Detective Reaves began reading the standardized *Miranda* warnings to Ms. Green. (Exhibit 1 at 18:39:02). The reading of the rights lasted approximately 30 seconds. Ms. Green was asked if she understood her rights. (Exhibit 1 at 18:39:02). She answered yes. (Exhibit 1 at 18:39:02). She was asked if she was willing to make a statement. (Exhibit 1 at 18:39:40). She answered: "No. I don't know nothing." (Exhibit 1 at 18:39:43).

Detective Reaves then stated, "So you're telling me you don't want to talk to me right now, you don't want to clear your name on this?" (Exhibit 1 at 18:39:46). Ms. Green became upset and stated she didn't "do nothing." (18:39:49). At that point, the following exchange occurred:

> Det. Reaves: Ok, well, that's what I'm saying. Just. Just, we have to clarify that. Do you want to talk to me and clear your name, or, or –
>
> Ms. Green: No. No, you all can talk but the only thing I can say is that I ain't did nothing.

Det. Reaves continued the interrogation. (18:39:59).

Motion to Suppress

Trial counsel filed a motion to suppress Ms. Green's statements to Detective Reaves, arguing that:

- Ms. Green was subjected to impermissible pre-*Miranda* questioning;
- Ms. Green was unlawfully interrogated after unambiguously invoking her right to silence;
- Ms. Green's statement was not otherwise voluntarily made.

(13).

The circuit court held a hearing on the motion. (52); (App. 105). By stipulation of the parties, the only evidence presented was the videotaped recording of the interview. (52:2); (App. 106). The circuit court, the Honorable Tom R. Wolfgram, Reserve Judge, indicated that this was a "difficult" motion. (52:5); (App. 109). The court made factual findings about the setting in which Ms. Green was interrogated (the size and appearance of the room, the clothing of the officers, the fact that one had a holster but that no weapons were drawn, etc.). (52:5-6); (App. 109-110). The court found that the *Miranda* warnings were "appropriate" and that, "The only question here is the waiver." (52:6); (App. 110). The court found that Ms. Green's invocation of her right to remain silent was ambiguous. (52:7); (App. 111). As to the voluntariness of her overall statement, the court found that "it was

freely, voluntarily, and intelligently entered or made." (52:8); (App. 112).

Plea and Sentence

Following the denial of the motion to suppress, Ms. Green pleaded guilty to a charge of harboring or aiding a felon, a Class I felony, and a charge of receiving stolen property, a Class A misdemeanor. (53:2-3). The State asked that the court impose the maximum prison sentence for harboring or aiding a felon, 1.5 years of initial confinement followed by 2 years of extended supervision. (53:12). With respect to the receiving stolen property, the State requested that the court impose a consecutive term of six months in jail. (53:12). The prosecutor asserted this sentence was justified based on Ms. Green's prior record. (53:12). Defense counsel asked the court to impose a sentence that would be concurrent with Mr. Green's revocation sentence. (53:23). The circuit court partially followed the State's recommendation and imposed the maximum sentence on the harboring or aiding a felon, consecutive to her revocation case, and a nine-month concurrent jail term on the receiving stolen property. (53:31).

Postconviction Proceedings

Ms. Green filed a postconviction motion asserting that she was entitled to plea withdrawal because the circuit court failed to adequately explain the nature of the offenses prior to accepting Ms.

Green's plea.[4] (27:5). Ms. Green also argued that she was entitled to either a resentencing or a sentence modification as a result of an unduly harsh sentence. (27:6; 27:9).[5] That motion was denied in a written order. (28).

With leave of this Court, Ms. Green ultimately filed a supplemental postconviction motion. (36). While trial counsel had asserted, in his motion, that Ms. Green was subject to impermissible pre-*Miranda* questioning, the circuit court did not adequately address that issue at the motion hearing. (36:2). Accordingly, Ms. Green asked the circuit court to address the issue on the merits or, in the alternative, to assess whether trial counsel was ineffective for failing to obtain a specific ruling at the motion hearing. (36:2).

The circuit court addressed the issue on the merits, holding that, "Nothing in the detective's preliminary discussion with the defendant can reasonably be construed as an investigation." (40:3); (App. 120). It denied the motion. (40:3); (App. 120).

SUMMARY OF ARGUMENT

Ms. Green's right to be free from self-incrimination was not respected in this case. Here, the State evaded the dictates of *Miranda* by interrogating her before actually reading her rights.

[4] That claim is not being renewed on appeal.

[5] That claim is not being renewed on appeal.

Because her eventual invocation was unambiguous, the interrogation should have ceased at that point.

ARGUMENT

I. Police violated Ms. Green's constitutional right to be free from self-incrimination by failing to advise her of right to remain silent before interrogating her.

A. Legal principles and standard of review.

"The Wisconsin and United States Constitutions promise that no person will be compelled to incriminate himself or herself in a criminal case." *State v. Ezell*, 2014 WI App 101, ¶ 8, 357 Wis. 2d 675, 855 N.W.2d 453. "This freedom from compelled self-incrimination is one of the nation's 'most cherished principles.'" *State v. Harris*, 2017 WI 31, ¶ 12, 374 Wis. 2d 271, 892 N.W.2d 663 (quoting *Miranda*, 384 U.S. at 458)). Accordingly, this Court is tasked with "patrolling a generous buffer zone around the central prohibition." *Id.* "The most important aspect of that buffer is the right to remain silent while in police custody." *Id.*, ¶ 13. Thus, agents of the State are required "to formally instruct the suspect of his constitutional rights and then conduct themselves according to how he elects to preserve or waive them" before commencing an interrogation. *Id.*

Fifth Amendment warnings are required when: (a) the defendant is "in custody" for the purposes of *Miranda* and (b) the individual is subject to

constitutionally cognizable "interrogation." *State v. Armstrong*, 223 Wis. 2d 331, 352, 588 N.W.2d 606 (1999). In general, a person is 'in custody' for purposes of *Miranda* when he or she is 'deprived of his [or her] freedom of action in any significant way.'" *Id*. at 353 (quoting *Miranda*, 384 U.S. at 444 , 447) (brackets in original). Here, Ms. Green's custodial status has never been in dispute. The only issue is interrogation.

"Interrogation" in this context can refer to either "express questioning or its functional equivalent." *Id*., ¶ 15. If law enforcement fails to adequately warn the suspect before commencing an interrogation, "no evidence obtained as a result" can be used. *Miranda*, 384 U.S. at 479.

In determining whether there was a violation of these constitutional rules, this Court defers to the factual findings of the lower court but independently assesses whether those facts constitute a constitutional violation. *Harris*, 2017 WI 31, ¶ 9.

B. Ms. Green was subject to both express questioning and its functional equivalent before being read her *Miranda* rights. Her resulting statements are therefore inadmissible.

In this context, "express questioning is defined as "those questions 'designed to elicit incriminatory admissions.'" *Id*., ¶ 16 (quoting *Pennsylvania v. Muniz*, 496 U.S. 582, 602 n. 14 (1990)). The "functional equivalency" standard, in contrast,

requires this Court to consider whether there have been "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

This Court's analytical focus is "primarily upon the perceptions of the suspect." *Id*. Wisconsin courts are instructed to assume a "reasonable third-person observer and inquir[e] into how such a person would expect the suspect to react to the officer's words and actions." *Harris*, 2017 WI 31, ¶ 22. Further, in analyzing a claimed violation, this Court must consider the "entire context" of the police-suspect interaction. *Id*., ¶ 23. Moreover, this Court is not bound by the "grammatical format" of the officer's remarks—a suspect may be "interrogated" for the purposes of *Miranda* with no actual questions ever being asked. *Id*., ¶ 29.

Here, Detective Reaves' interrogation of Ms. Green contains both express questioning and the functional equivalent thereof. First, Detective Reaves began the interrogation by asking if Ms. Green was aware that a search warrant had been executed on her home. (Exhibit 1 at 18:36:30). When Ms. Green did not clearly answer, Detective Reaves followed up with a direct prompt for either a yes or no answer to her question. (Exhibit 1 at 18:36:36). Ms. Green responded to the prompt, and ratified Detective Reaves' assertion. (Exhibit 1 at 18:36:36). Once

Detective Reaves had established that she had Ms. Green's attention—and that Ms. Green knew she was expected to answer the questions put to her—Detective Reaves asked Ms. Green a direct question, seeking compound information about her "boyfriend Michael." (Exhibit 1 at 18:36:42). Specifically, Detective Reaves wished to establish—by her question—(1) that Ms. Green lived with Mr. Winzer, the robbery suspect and (2) she was romantically linked to him. Her affirmative answer, which corroborated the circumstantial details of Kevin Cowser's report, was therefore a "response […] that the prosecution may seek to introduce at trial" as it supports the State's theory that Ms. Green was an accomplice to her boyfriend's robbery. *See Innis*, 446 U.S. at 301, n. 5.

Detective Reaves then recapped the investigation thus far, telling Ms. Green she knew that both Mr. Winzer and Ms. Green had been taken into custody in connection with this offense. (Exhibit 1 at 18:36:59). On the video, this statement is emphasized via Detective Reaves' body language, when she makes a point of cocking her head and looking directly at Ms. Green. At that point, she confronted Ms. Green with: (1) the fact that Mr. Winzer was the robber and; (2) Ms. Green was on video attempting to use the stolen cards. (Exhibit 1 at 18:37:12-19). Again, Ms. Green was asked to signal her receipt of this information and she did so. (Exhibit 1 at 18:37:24).

Detective Reaves then directly addressed Ms. Green's disposal of the stolen property, telling her that she was on video throwing out the cards. (Exhibit 1 at 18:37:28). She then falsely told Ms. Green that she could not get in trouble for merely possessing the stolen property. (Exhibit 1 at 18:37:33). She began hinting that Ms. Green knew who did the robbery, suggesting that this information would prevent Ms. Green from being falsely accused of participating in the actual robbery. (Exhibit 1 at 18:37:42). Ms. Green was repeatedly asked if she believed it was fair to be held responsible for the robbery if she in fact had nothing to do with it. (Exhibit 1 at 18:37:48-18:38:02).

Detective Reaves then told Ms. Green that, "this is why we have got you down here and everything." (18:38:05). It was at this point that Detective Reaves brought up Kevin Cowser—the man police believed Ms. Green was with when she tried to use the stolen cards. (Exhibit 1 at 18:38:07). Detective Reaves lingered on this piece of information, telling Ms. Green, "We talked with um, with Kevin, uhh Kevin down here also, uhh, so…" (Exhibit 1 at 18:38:14). It was in response to this conversational shift that Ms. Green stated "That's who I got the cards from." (18:38:15).

This is an incriminating statement. The State could use this admission to support a charge of receiving stolen property—the charge to which Ms. Green ultimately pleaded. It also places stolen property in Ms. Green's hands, thereby contributing

circumstantial evidence for the original charge of being a party to the crime of robbery. Finally, it is an indirect acknowledgement that Ms. Green possessed the cards and, thus, that it is her on the video disposing of them—the basis for the eventual charge of aiding a felon.

In observing this roughly four-minute interaction, it is therefore clear that Detective Reaves "interrogated" Ms. Green for the purposes of *Miranda*. Here, the conversation went beyond mere "small talk." *C.f. State v. Kramar*, 149 Wis. 2d 767, 789, 440 N.W.2d (1989). ("We find that Officer Edge's "small talk" with the defendant about school and his family was not interrogation within the meaning of Miranda because Officer Edge's conversation with the defendant was not reasonably likely to elicit an incriminating response from the suspect and, in fact, did not.") Importantly, it also went beyond a "matter-of-fact communication of the evidence the police possessed." See *State v. Hambly*, 2008 WI 10 ¶ 57, 307 Wis. 2d 98, 745 N.W.2d 48. (Simple statement of basis for arrest was not functional equivalent of express questioning.)

Here, police had information from a co-actor that suggested Ms. Green may have been involved in the robbery, assisted after the fact, or at the very least, received proceeds from it. The police questioning was meant to probe at Ms. Green's level of involvement in the crime. To that end, Detective Reaves engaged Ms. Green in a conversation about the evidence arrayed against her, telling her that the

State's case included video footage and alluding to her codefendant, Kevin Cowser, also being in custody.

Detective Reaves framed her statements as questions and, at several points, waited for an "okay" from Ms. Green before continuing the dialogue. She also asked at least one direct question about Ms. Green's relationship with Mr. Winzer—information which would corroborate Mr. Cowser's account as well as tie Ms. Green more conclusively to the robbery. Ms. Green's resulting statement, because it was not preceded by a proper Fifth Amendment warning, should have been inadmissible.

Most significantly, Detective Reaves coupled her suggestive statements about the evidence arrayed against Ms. Green with other statements designed to lull Ms. Green into a false sense of security. For example, she intentionally misled Ms. Green by telling her that would not get in trouble for merely possessing the stolen property and suggesting that Ms. Green could help herself by giving up information about either the robbery itself or how she had come into possession of those items. Police also led Ms. Green to incriminate herself by using "'a particular form' of speech that elicited" Ms. Green's response as to how she came to possess the stolen property. *State v. Bond*, 2000 WI App 118, ¶ 17, 237 Wis. 2d 633, 614 N.W.2d 552. Here, the police intentionally lingered on the revelation that Ms. Green's codefendant—Kevin Cowser—was in custody. This had its intended effect when Ms. Green told police that she got the cards from Mr. Cowser,

thereby admitting to the offense of receiving stolen property and creating further circumstantial proof of her involvement in the underlying crime. That admission was not preceded by Fifth Amendment warnings and was therefore inadmissible.

Accordingly, this Court should find that Ms. Green was subjected to an unlawful interrogation. Her incriminating responses during the pre-*Miranda* interrogation were therefore inadmissible. This Court should reverse the circuit court's order denying the defense motion.

II. The State violated Ms. Green's right to be free from self-incrimination by continuing to question her after an unambiguous invocation of her right to silence.

A. Legal standard and standard of review.

As outlined in section I.A., supra, Ms. Green had a right against "state compelled self-incrimination." *State v. Cummings*, 2014 WI 88, ¶ 46, 357 Wis. 2d 1, 850 N.W.2d 915. In order to protect these constitutional rights, law enforcement is forbidden from continuing to question a suspect after they have "unequivocally" invoked their right to remain silent. *Id.*, ¶ 48; *see also Berhuis v. Thompkins*, 560 U.S. 370, 386 (2010).

This Court independently assesses whether Ms. Green's invocation satisfies that objective test. *Cummings*, 2014 WI 88, ¶ 44, 50. Whether a suspect has unequivocally invoked the right to remain silent

turns on the person's statements "[i]n the full context of [the] interrogation." *See Cummings*, 357 Wis. 2d 1, ¶ 61. If a suspect's statement is susceptible to "reasonable competing inferences" as to its meaning, then the suspect did not sufficiently invoke the right to remain silent. *State v. Markwardt*, 2007 WI App 242, ¶ 36, 306 Wis. 2d 420, 742 N.W.2d 546.

B. Ms. Green's statement was unambiguous and not subject to reasonable competing inferences.

In this case, Ms. Green was asked if she understood her rights. (Exhibit 1 at 18:39:35). She indicated, unambiguously, that she did. (Exhibit 1 at 18:39:35). She was then asked if she would like to make a statement. (Exhibit 1 at 18:39:40). Her answer is clear: "No. I don't know nothing." (Exhibit 1 at 18:39:43). That was a sufficient invocation as it is a direct, negative, answer to the question being asked. And, while Ms. Green did buttress her "no," with an additional statement, that additional statement needs to be taken in context of the surrounding conversation. Here, Detective Reaves had already begun to interrogate Ms. Green before reading her *Miranda* rights to her. The tone and tenor of the conversation involved Detective Reaves suggesting that Ms. Green had knowledge of who the robber was and implying that she could help herself by revealing that information. In that context, the explanatory addendum is not a superfluous invocation of innocence giving rise to ambiguity but,

rather, a sensible (and polite) response to the ongoing interrogation.[6]

Ms. Green's invocation can also be readily distinguished from other cases in which the Wisconsin Supreme Court concluded that a waiver was ambiguous.

For example, in *Cummings*, the defendant made an unambiguous waiver of his *Miranda* rights "orally and in writing." *Cummings*, 2014 WI 88, ¶ 53. The defendant then engaged in an "ongoing back and forth" with officers. *Id.*, ¶ 54. In the midst of that conversation, the defendant stated, "Well, then, take me to my cell. Why waste your time? Ya know?" *Id.*, ¶ 53. The Wisconsin Supreme Court found that, given the context, this comment was subject to reasonable competing inferences. *Id.*, ¶ 54. While it could be a request to terminate the interview, it could also have been "a rhetorical device intended to elicit additional information from the officers about the statements of his co-conspirators." *Id.* Importantly, this statement followed on the heels of questions from the defendant as to what his codefendants "had been telling" the police. *Id.*, ¶ 10.

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[6] It is also consistent with how people talk in the real world. Imagine asking a coworker to lunch: "Would you like to eat lunch with me?" The coworker says, "No. I am not hungry." No reasonable human being could, with a straight face, claim to detect any ambiguity as to whether or not the person desired to dine with them.

In contrast, Ms. Green was not engaged in any such "back and forth" with Detective Reaves. Her invocation of her desire to remain silent was also not an impromptu remark amidst other chatter; rather, it was in direct response to law enforcement's straightforward, preliminary question as to whether she wished to make a statement. The context of her question makes clear that she was merely answering that question—and nothing more.

Similarly, in *State v. Smith*—one of the consolidated cases at issue in *Cummings*—the defendant waived his *Miranda* rights and "readily answered" law enforcement's questions about the theft of a van. *Id.*, ¶ 30. However, when the subject changed to other offenses, the defendant stated that he did not wish to talk about those offenses and claimed to have no knowledge on the subject at hand. *Id.* Placed in context, the remark did not unambiguously convey a desire to cut off all questioning; rather, it suggested a desire to selectively converse with law enforcement. *Id.*, ¶ 61.

Here again, Ms. Green's situation can be distinguished. Ms. Green invoked her right to remain silent in direct response to Detective Reaves' initial reading of her *Miranda* rights, unambiguously answering the question of whether she wanted to talk with a negative answer. And, while Ms. Green followed that "no" with a statement that she "don't know nothing," this does not lessen the unambiguous nature of her "no." In other words, Ms. Green's "proclamation of innocence" is distinguishable from

the statement at issue in *Smith*, as it was not coupled with a demonstrated desire to converse about other topics. Instead, it is merely a short explanatory gloss on an otherwise straightforward statement.

That is, Ms. Green's statement that, "I don't know nothing" is an understandable addendum to the otherwise blunt "no" answer to the question of whether she wished to talk to police. "I don't know nothing" fails to create any interpretive ambiguity for a reasonable listener—especially when placed in proper context. Here, Detective Reaves had already told Ms. Green that there was evidence to convict her of wrongdoing, that she was on the line for a criminal charge, and that she could help herself by giving information. She also told Ms. Green that "we gonna talk about" the underlying crime *before* asking her if Ms. Green wished to make a statement. In essence, Ms. Green's statement of why she did not wish to talk was a mere callback to Detective Reaves' pre-*Miranda* comments implying that Ms. Green had knowledge and that she *would* or *should* share it with the officers.

Ms. Green's statement made it "sufficiently clear" to any reasonable listener that she wished to remain silent and the interrogation was required to cease. *See State v. Ross*, 203 Wis. 2d 66, 78, 552 N.W.2d 428 (1996). (A defendant "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.") It

is substantially similar to the invocation contemplated in *Berghuis*, 560 U.S. 370, 382, and functionally identical to invocations found to be sufficient in other cases:

- "I don't have anything to say." *State v. Crump*, 834 S.W.2d 265, 266 (Tenn. 1992).
- "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." *State v. Goetsch*, 186 Wis. 2d 1, 7, 519 N.W.2d 634 (Ct. App. 1994).
- Defendant stated he "didn't want to talk about it anymore." *Ramos v. State*, 245 S.W.3d 410, 418-19 (Tex. Crim. App. 2008).
- "I ain't saying nothing." *State v. Morrisey*, 214 P.3d 708, 722 (Mont. 2009).
- Defendant stated he "decided not to say any more." *Tice v. Johnson*, 647 F.3d 87, 107 (4th Cir. 2011).
- Defendant stated "actually I don't know nothing about this, so I'm not fixing to say nothing about this." *Miles v. State*, 60 So.3d 447, 451-52 (Fla. Dist. Ct. App. 2011).

- Interrogator stated that defendant asserted that "she did not have nothing to say to me." *Buster v. Commonwealth*, 364 S.W.3d 157, 163 (Ky. 2012).

- "I don't want to say anything more." *State v. Wiegand*, Appeal No. 2011AP939-CR, ¶ 8, unpublished slip op. (Wis. Ct. App. February 7, 2012). (App. 121).

- "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 nothin[g] more to say to you. I'm done. This is over." *Saeger v. Avila*, 930 F.Supp.2d 1009 (E.D. Wis. 2013).

- "I don't know, just, I'm done talking. I don't have nothing to talk about." *Com v. Lukach*, 163 A.3d 1003, 1009 (Pa. Super. Ct. 2017).

This Court should therefore find the statement to be an unambiguous invocation of her rights. Her ensuing statements were inadmissible. Accordingly, this Court should reverse the circuit court's ruling.

CONCLUSION

Ms. Green therefore respectfully requests that this Court reverse the ruling of the circuit court, suppress all statements obtained as a result of unlawful interrogation procedures and permit her to withdraw her guilty plea.

Dated this 25th day of September, 2018.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,825 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 25th day of September, 2018.

Signed:

_____

Christopher P. August
Assistant State Public Defender

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 one or more initials or other appropriate pseudonym or designation 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 this 25th day of September, 2018.

Signed:

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APPENDIX

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