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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP001350-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ULANDA M. GREEN,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals Affirming a Denial of a Motion for Postconviction Relief and an Order Denying the Defendant's Motion to Suppress Evidence Entered in the Milwaukee County Circuit Court, the Honorable Thomas R. Wolfgram Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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ISSUES PRESENTED

1. Prior to informing Ms. Green of her *Miranda*[1] rights, police engaged her in a five-minute, largely one-sided, conversation about this case. Did this pre-*Miranda* interaction constitute "interrogation" or its functional equivalent?

The circuit court held: "Nothing in the detective's preliminary discussion with the defendant can reasonably be construed as an interrogation." (40:3); (App. 125).

The Court of Appeals affirmed, holding that Ms. Green's admission of receiving stolen property from one of her co-defendants was "volunteered" in response to police "summarizing" the evidence against her.[2] *State v. Green*, Appeal No. 2018AP1350-CR, ¶ 30, unpublished slip op. (Wis. Ct. App. May 29, 2019). (App. 116).

2. Ms. Green was eventually asked if she would like to make a statement. She replied, "No. I don't know nothing." Was this a sufficient invocation of her right to remain silent?

The circuit court denied Ms. Green's suppression motion, holding that this statement was

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

[2] The Court of Appeals focused on arguably the most incriminating statement by Ms. Green; however, Ms. Green's briefs also alleged that questions seeking to establish Ms. Green lived with, and was romantically linked to, the actual robber were also incriminating.

ambiguous. (52:7); (App. 132). The Court of Appeals agreed, holding that there was another competing inference—that she could "reasonably be understood to be asserting her innocence." *Green*, Appeal No. 2018AP1350-CR, ¶ 33. (App. 117).

POSITION ON ORAL ARGUMENT AND PUBLICATION

This Court's acceptance of this case for review signifies the importance of the issues presented, and therefore both oral argument and publication of its opinion are appropriate.

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)(a) 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); (App. 134). 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. 119-122).

Ms. Green 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, without a hearing. (28). Ms. Green filed a timely notice of appeal. (29). However, counsel ascertained the record may be deficient with respect to the preserved suppression issue. (34). The Court of Appeals 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 an improper pre-*Miranda* interrogation, which was raised 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 and denied relief. (40:3); (App. 125).

Ms. Green appealed and the Court of Appeals affirmed. *Green*, Appeal No. 2018AP1350-CR, ¶ 4. (App. 103). This Court then granted review.

STATEMENT OF FACTS

Background

This case arises from a robbery occurring in the Bluemound Heights neighborhood on Milwaukee's west side. (1:2). On that date, E.M.M. 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).

A short time later, two individuals were observed on surveillance footage trying to use E.M.M.'s stolen credit cards at a BP gas station. (1:2). In viewing the footage, police were able to identify a suspect, Kevin Cowser.[3] (53:16-17).

Mr. Cowser was then interviewed by law enforcement. (1:2). Mr. Cowser told police he was "staying with" Ms. Green and her boyfriend, Michael Winzer on Highland Boulevard, several neighborhoods over from where the robber occurred. (1:2). On the date of the robbery, he told police Mr. Winzer and Ms. Green left the home together. (1:2). Mr. Winzer was wearing clothing consistent with that of the robber. (1:2). When the pair returned home several hours later, Mr. Cowser told police they were acting "paranoid." (1:2). When asked, Ms. Green allegedly told Mr. Cowser she and Mr. Winzer had just done a "lick," which he understood to refer to a robbery. (1:3). Mr. Cowser told police he then went with Ms. Green to the gas station in order to try and use the stolen credit cards. (1:3). When the cards did not work, he told police Ms. Green threw them in a sewer grate. (1:3). Police searched the grate and recovered four of E.M.M.'s credit cards along with other personal documents. (1:3). Police then arrested both Mr. Winzer and Ms. Green. (1:3).

[3] The chain of events is not all that clear from the record but, based on defense counsel's explanation of the investigation at sentencing, it appears police "happened to see Mr. Cowser at a bus stop" which was apparently "nearby" the gas station. (53:17).

Interrogation of Ms. Green

In this case, the interrogation was recorded on video pursuant to Wis. Stat. § 968.073(2). The following description is derived from that video-recorded interview:

Pre-Miranda Questioning

After arresting Ms. Green, the police placed her in a small, windowless, concrete room for questioning. (Motion Hearing-12/9/16 – Exhibit 1 – CD) (hereinafter "Exhibit 1").[4] Although Ms. Green's handcuffs were removed at the beginning of the video, the door can be heard closing behind the two officers as they usher Ms. Green into the interrogation room. (Exhibit 1 at 6:50).[5] Ms. Green was then placed at the back of the relatively cramped interrogation room, with the seated bodies of both officers blocking the exit, which is apparently behind them. (Exhibit 1).

Detective Nicole Reaves—apparently the lead investigator in this case—initiated the conversation by introducing herself and asking Ms. Green to call her "Sugar." (Exhibit 1 at 7:29). Detective Reaves then began immediately discussing the underlying law enforcement investigation:

Det. Reaves: Ulanda, they did a search warrant

[4] The DVD containing the interview is not given its own record number although it is referenced on the clerk's certificate. (45:1).

[5] The DVD contains multiple timestamps; counsel will cite to the timestamp which is linked to the progress bar as displayed in the MediaSolv player.

on your house and stuff today, alright?

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, uh, 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, um 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, the cards and stuff into the grid. [Sic] 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, 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, 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 uhh down here also, uhh, so…uhh--

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, 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, alright? And, umm, we'll go from there.
>
> Ms. Green: I don't know nothing though.
>
> Det. Reaves: Okay. Alright.

(Exhibit 1 at 7:35-10:03).[6]

Invocation of the Right to Remain Silent

At that point, Detective Reaves produced a printed version of the *Miranda* warnings and began

[6] While counsel has done his best to accurately retype the conversation, he is not a certified court reporter and therefore urges this Court to utilize the video as the primary source of information for the words spoken during the interview.

reading them to Ms. Green. (Exhibit 1 at 10:06). From the video, Detective Reaves appears to have read the warnings, verbatim, from the written card. The reading of the rights takes approximately 30 seconds. Ms. Green was then asked if she understood her rights. (Exhibit 1 at 10:38). She answered "yes." (Exhibit 1 at 10:41). She was then asked if she was willing to make a statement. (Exhibit 1 at 10:45). She stated, "No. I don't know nothing." (Exhibit 1 at 10:45).

Detective Reaves began asking additional questions of Ms. Green:

> Det. Reaves: Okay. So you are telling me that you don't want to talk to me right now, you don't want to clear your name on this?
>
> Ms. Green: I ain't did nothing.
>
> Det. Reaves: Okay, 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.

(Exhibit 1 at 10:47-11:03).

Following this exchange, Detective Reaves asserted that Ms. Green had validly waived her rights and continued the interrogation. (Exhibit 1 at 11:09).

Motions to Suppress

In light of the foregoing, counsel for Ms. Green filed a motion to suppress Ms. Green's statements. (13). Counsel made three arguments, two of which are preserved for this appeal. First, counsel asserted Ms. Green was subjected to impermissible pre-*Miranda* interrogation. (13:1). Second, counsel argued Ms. Green validly invoked her *Miranda* when she stated, "No. I don't know nothing." (13:5).

The circuit court, the Honorable Thomas R. Wolfgram presiding, held a hearing on the motion. (49:2). At that hearing, the parties stipulated to the admission of the videotaped interview, the only evidence presented by the State with respect to the suppression motion. (49:2).

After the court had an opportunity to review the video, the parties returned to court for an oral ruling. (52:2); (App. 127). During that hearing, the circuit court indicated this was a "difficult" motion. (52:5); (App. 130). The court made findings of fact 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 no weapons were drawn, etc.). (52:5-6); (App. 130-131). The court found the *Miranda* warnings to be "appropriate" and indicated the sufficiency of Ms. Green's "waiver" was the "[t]he only question." (52:6); (App. 131). The court then found Ms. Green's invocation of her right to remain silent ambiguous. (52:7); (App. 132).

Plea and Sentence

Shortly after the adverse ruling, Ms. Green agreed to plead 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 parties then proceeded directly to sentencing, at which time the State asked the court to 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 asked the court to impose six months of consecutive 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 concurrent prison sentence, as Ms. Green was currently serving a 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 initially filed a Rule 809.30 postconviction motion seeking plea withdrawal, resentencing, and sentence modification. (27). The motion was denied in a written order. (28). Ms. Green has not renewed those claims on appeal.

Counsel for Ms. Green then filed a supplemental postconviction motion in light of the circuit court's failure to adequately rule on all aspects

of trial counsel's suppression motion.[7] (36). Specifically, the record shows the court did not address the pre-*Miranda* interrogation issue in its oral ruling. (34:2). Accordingly, counsel for Ms. Green asked the court to rule on the merits of that issue or, in the alternative, to find trial counsel ineffective for not adequately preserving it. (36:2).

The circuit court, Judge Wolfgram presiding, addressed the issue on the merits, holding, "Nothing in the detective's preliminary discussion with the defendant can reasonably be construed as an interrogation." (40:3); (App. 125). Judge Wolfgram denied the supplemental motion. (40:3); (App. 125).

Appellate Litigation

Ms. Green appealed. (43). The Court of Appeals affirmed. *Green*, 2018AP1350-CR, ¶ 4. (App. 103). With respect to the first issue—whether Detective Reaves impermissibly interrogated Ms. Green before informing her of her *Miranda* rights—the Court of Appeals found this Court's decision in *State v. Hambly*, 2008 WI 10, 307 Wis. 2d 98, 745 N.W.2d 48, controlling. *Id*., ¶ 3. (App. 102). "As in the cases reviewed above, the detective in this case was '[c]onfronting a suspect with incriminating physical evidence, or verbally summarizing the State's case[.]'"

[7] The motion was necessary to preserve this issue for further review in light of *Sohns v. Jensen*, 11 Wis. 2d 449, 453, 105 N.W.2d 818 (1960). ("The court on appeal will also assume when a finding is not made on an issue which appears from the record to exist, that it was determined in favor of or in support of the judgment.")

Id., ¶ 30 (quoting *Hambly*, 2008 WI 10, ¶ 57) (brackets and formatting in original). (App. 116).

With respect to Ms. Green's invocation, the Court of Appeals held that Ms. Green's assertion "I don't know nothing" created ambiguity in light of this Court's prior jurisprudence establishing that a "proclamation of innocence is incompatible with a desire to cut off questioning." *Id.*, ¶ 33 (quoting *State v. Cummings*, 2014 WI 88, ¶ 64, 357 Wis. 2d 1, 850 N.W.2d 915). (App. 118).

SUMMARY OF ARGUMENT

In this case, the record clearly demonstrates Detective Reaves engaged in a deliberate attempt to elicit incriminating information from Ms. Green prior to informing her of her *Miranda* rights. She did so by utilizing both direct questioning and its functional equivalent. Because this is the very same conduct forbidden by the original *Miranda* decision, this Court must suppress Ms. Green's resulting admissions.

Detective Reaves eventually attempted to conform to constitutional norms by informing Ms. Green of her *Miranda* rights. In response, Ms. Green made a "clear statement" indicating that she wished to invoke her right to remain silent and terminate the encounter. However, Detective Reaves did not "scrupulously honor" that invocation. *Michigan v. Mosley*, 423 U.S. 96, 104 (1975) Accordingly, this Court must suppress her resulting statements.

STANDARD OF REVIEW

In applying constitutional principles to the facts of this case, this Court exercises de novo review "without deference to the courts initially considering the question, but benefitting from their analysis." *State v. Harris*, 2017 WI 31, ¶ 9, 374 Wis. 2d 271, 892 N.W.2d 663.

ARGUMENT

I. This Court should apply well-settled principles and find that the pre-*Miranda* conduct constituted an impermissible interrogation.

A. Legal principles.

"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.'" *Harris*, 2017 WI 31, ¶ 12, (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 whether interrogation occurred.

"Interrogation" in this context can refer to either "express questioning or its functional equivalent." *Id.* at 356. 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.

B. Because police utilized both express questioning and its functional equivalent before informing Ms. Green of her *Miranda* rights her resulting statements must be suppressed.

1. Express questioning.

As this Court recently set forth in *Harris*, whether "express questioning" occurred is evaluated in context of "the nature of the information" sought by a particular question or set of questions posed by law enforcement. *Harris*, 2017 WI 31, ¶ 17. That content must be "potentially incriminating." *Id.*, ¶ 18. In this context, the term "incriminatory" is broadly

defined: An incriminating response is "any response—whether inculpatory or exculpatory—that the prosecution may seek to introduce at trial." *Rhode Island v. Innis*, 446 U.S. 291, 301 n. 5 (1980).

Here, Detective Reaves' one-sided conversation with Ms. Green is peppered with numerous interrogative requests for incriminatory information.

First, Detective Reaves directly asked Ms. Green whether she was staying with her "boyfriend" Michael at the residence where a search warrant was previously executed. (Exhibit 1 at 7:45). This compound question seeks multiple pieces of incriminating information which the prosecution "may seek to introduce at trial." *Id*. By admitting she resided at a home where evidence may have been discovered, Ms. Green provided a circumstantial link the prosecution could have utilized at trial to connect her to the broader criminal scheme.[8] Moreover, the State's theory at this point—given the statement of Mr. Cowser—was that the robbery was committed by Mr. Winzer and Ms. Green working together. (1:2-3). Further, by admitting she was in a romantic relationship with Michael Winzer, the man who may have actually removed the wallet from E.M.M.'s pocket, Ms. Green provided yet another circumstantial piece of evidence the prosecution could have used at an ensuing trial.[9]

[8] In fact, the criminal complaint indicates that E.M.M.'s wallet was found down the street from this residence. (1:3).

[9] And these admissions also corroborate the details of the informant, Mr. Cowser, thereby adding yet more incremental force to the State's largely circumstantial case.

Second, police asked three interrelated questions seeking information from Ms. Green about the robbery:

- "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, that robbed 'em, but we know you know who did, okay?"
- "It's not fair for us to do that [try to blame Ms. Green for the actual robbery] if you ain't the one that did it, right? [This question was essentially repeated multiple times to Ms. Green.]

(Exhibit 1 at 8:36-9:01).

These repeated queries posit that Ms. Green, while perhaps not participating in the actual robbery,[10] both (1) received stolen property and (2) knew who robbed E.M.M. When Ms. Green confessed to receiving stolen property from Mr. Cowser a short time later, her response was reasonably foreseeable from these questions, which clearly seek information about the robbery and her involvement in and knowledge of it.

Accordingly, this Court should find that Detective Reaves' direct questions seeking incriminatory information regarding Ms. Green's

[10] Although, as trial counsel pointed out at the sentencing hearing in this case, the State had apparently maintained at some point in their investigation that Ms. Green was actually present for the robbery. (53:18).

connection to the residence and to the suspected robber, Michael Winzer, as well as her knowledge about the robbery, constitute interrogation for purposes of *Miranda*.

2. Functional equivalence.

a. Functional equivalence defined.

Of course, "[t]here are more ways than one to obtain incriminating evidence from a suspect." *Harris*, 2017 WI 31, ¶ 19. Thus, police are also forbidden from using techniques of persuasion that, while stopping short of literally asking the person to admit guilt, are nonetheless functionally akin to express questioning.

In reviewing whether the police tactics are functionally equivalent to express questioning, this Court must consider the "entire context" of the police-citizen encounter. *Id.*, ¶ 23. This Court then assumes the posture of a "reasonable third-person observer" and asks how that hypothetical "person would expect the suspect to react to the officer's words and actions […]." *Id.,* ¶ 22. "A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation." *Innis*, 446 U.S. at 301-302.

In evaluating the police conduct, this Court must be scrupulously mindful of the "purpose" behind the *Miranda* rule: "preventing government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment." *Harris,* 2017 WI 31, ¶ 28

(quoting *Arizona v. Mauro*, 481 U.S. 520, 529-30 (1987)). *Miranda* therefore defines interrogation relatively broadly and is focused on the usage of "psychological ploys" which could be used, in a custodial setting, to overcome the suspect's will. *Innis*, 446 U.S. at 299.

Importantly, in assessing the "reasonably likely effect" of certain words and actions on a suspect, "each case stands on its own facts." *Harris*, 2017 WI 31, ¶ 29; *Hambly*, 2008 WI 10, ¶ 53. The case law therefore resists *per se* rules, *see State v. Cunningham*, 144 Wis. 2d 272, 282, 423 N.W.2d 862 (1988), although some general lessons can be drawn from prior authority.

For example, it is axiomatic that the "grammatical format" of the officer's words is irrelevant to the analysis: "Seemingly innocuous statements, when freighted with subtext or inquisitorial design, can become an interrogation. Thus, a dialogue with a suspect can constitute an interrogation even when law enforcement officers ask no questions." *Harris*, 2017 WI 31, ¶ 29.

To that end, even a single comment—if sufficiently suggestive—can constitute interrogation under the right circumstances. *State v. Bond*, 2000 WI App 118, 237 Wis. 2d 633, 614 N.W.2d 552; *see also Harris*, 2017 WI 31, ¶ 30 (citing *Bond* for the proposition that "an officer's cryptic comment about information only the perpetrator of the crime would recognize may be considered interrogation because of the effect the comment causes.") Likewise, "giving unresponsive answers to questions posed by a suspect

with the intent of provoking an incriminating response, and using interrogation techniques during the conversation, can serve as the functional equivalent of an interrogation." *Harris*, 2017 WI 31, ¶ 30.

It is also crucially important that this Court "pay attention to the atmosphere in which the suspect incriminates himself." *Id*., ¶ 32. Courts are more likely to find that interrogation has occurred, for example, when the setting and tone of the questioning is more consistent with a conventional "interrogation environment"—as, for example, when the defendant is handcuffed or held in a "stark interview room." *Id*.

b. Distinguishing functionally equivalent interrogation from more innocuous police-citizen interactions.

However, not all police-citizen encounters will rise to the level of a constitutionally cognizable interrogation. For example, this Court has found that "verbally summarizing the State's case against the suspect […] does not necessarily constitute the functional equivalent of express questioning," *Hambly*, 2008 WI 10, ¶ 57. Here, the Court of Appeals relied heavily on this statement from *Hambly* in rejecting Ms. Green's functional equivalence arguments. *Green*, Appeal No. 2018AP1350-CR, ¶ 3. ("We conclude that the detective was merely summarizing the investigation and the evidence.") (App. 102). Accordingly, further

explication of this perceived "exception" to the *Miranda* rule is warranted.

In *Hambly*, this Court confronted a complex fact pattern arising from an underlying drug investigation and ensuing prosecution. There, police arrested Hambly and placed him in a squad car. *Hambly*, 2008 WI 10, ¶ 9. Although he previously refused to give a statement (and had requested an attorney while walking to the squad car), Hambly told the arresting officer while in the squad car "that he did not understand why he was under arrest." *Id*., ¶ 10. In response, the officer told Hambly that police knew he sold cocaine to a confidential informant on three occasions. *Id*.

This Court concluded that the officer's "comment was reasonably responsive to the defendant's own statement that he did not understand why he was under arrest." *Id*., ¶ 57. The brief summary of the State's case, in response to that question, therefore did not rise to the level of a constitutional violation. *Id*. In so holding, this Court relied on both *Easley v. Frey*, 433 F.3d 969 (7th Cir. 2006) and its prior decision in *Cunningham*. *Id*., ¶ 55-56.

In *Easley*, the defendant fatally attacked the superintendent at the prison where he was then-housed. *Easley*, 433 F.3d at 970. After the attack, Easley was subdued, apparently placed back in a confined setting and then read his *Miranda* rights. *Id*. at 971. He invoked his right to remain silent. *Id*. One of the officers later testified that he made the following remarks to Easley after that invocation:

> 'I understand you have been given your rights and you don't wish to say anything, and I do not wish to ask you any questions at this time, but I want to advised [sic] you what lies ahead.' At that point in time, I advised him that we had inmate testimony that indicates that he and another individual were the hitters or perpetrators of the murder of Superintendent Taylor and that even though he was currently institutionalized on a serious matter this was more serious in the fact that it was a capital crime and if convicted, could be subject to the death penalty.

Id. (Quotations in original.) In response, Easley admitted he was the "killer." *Id*. After losing a series of state court appeals, Easley filed a petition for a writ of habeas corpus, alleging that the lower courts' conclusion this was not an interrogation was an unreasonable application of federal constitutional law. *Id*. at 972.

The Seventh Circuit Court of Appeals, utilizing the highly deferential standard of review required for such claims, denied relief. *Id*. at 974. The Seventh Circuit concluded that Easley was not persuasive in his argument this statement "was anything more than a matter-of-fact communication of the evidence against him and the potential punishment he faced." *Id*.

While the persuasive force of *Easley* is lessened somewhat by its procedural posture,[11] *Hambly* also finds support in *Cunningham*, another fact-intensive decision. In that case, police executed a search warrant at the defendant's apartment. *Cunningham*, 144 Wis. 2d at 275. The defendant ran into a bedroom and was then subdued. *Id*. Upon searching the bedroom into which Cunningham had attempted to flee, police discovered a loaded gun. *Id*. They showed the gun to Cunningham and told him where they had found it. *Id*. Cunningham, who had not yet been informed of his *Miranda* rights, admitted it was his gun. *Id*. This Court concluded no interrogation had occurred under these circumstances. *Id*. at 282.

While this Court based its holding in *Hambly* in part on these decisions, it was also careful to acknowledge and distinguish *Hill v. United States*, 858 A.2d 435 (D.C. Cir. 2004). *Hambly*, 2008 WI 10, ¶ 63. In this Court's view, *Hill* demonstrates when a "planned interrogation strategy" underlies the police-citizen encounter, constitutionally cognizable interrogation has occurred. *Id*., ¶ 65.

In *Hill*, the defendant was arrested on suspicion of murder and placed in an interview room for several hours. *Hill*, 858 A.2d at 439. The D.C. Circuit Court of Appeals concluded that the detective

[11] Under the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d), the Seventh Circuit was precluded from granting relief even if it agreed the lower court had erroneously applied the law. *Easley*, 433 F.3d at 972. Instead, the Court could only grant relief if Easley proved that the lower court ruling was "unreasonable"—a much more imposing standard of review. *Id*.

engaged in impermissible pre-*Miranda* interrogation when he confronted the defendant with the fact that his accomplice was in custody and cooperating with police. *Id*. at 443. The Court also relied on evidence tending to suggest there was "deliberation" in making this remark to the suspect, thereby signaling "persuasive evidence of a designed practice, unlikely to be one that the detective could not have known would reasonably prompt an incriminating response from appellant." *Id*. Finally, the Court also focused on the "context surrounding the remark" in which the detective used "classic interrogation techniques" (including the strategic use of a "verbal vacuum") to elicit an incriminating admission. *Id*.

In acknowledging *Hill*, this Court therefore reasserted a foundational *Miranda* principle—whenever police engage in deliberate action which appears reasonably likely to elicit incriminating information, no matter how subtle their attempts may be, interrogation will have occurred. *Innis*, 446 U.S. at 299. Thus, while police are not forbidden from "provid[ing] information responsive to questions posed by defendants," *Harris*, 2017 WI 31, ¶ 31, deliberately giving unresponsive answers to those very same questions can violate constitutional norms. *Id*.,¶ 30. And, while police may use "non-editorialized statements of fact" to inform the defendant of the basis for his custody, they may run afoul of *Miranda* and *Innis* when making "cryptic" comments about that very same evidence which only the perpetrator would understand. *Id*., ¶ 30-31; *Bond*, 2000 WI App 118.

Whether those practices have been deployed in a given case is an intensely fact-dependent inquiry. For example, merely displaying a firearm recovered shortly after a foot chase may not constitute the functional equivalence of interrogation. *Cunningham*, 144 Wis. 2d at 283. Yet, if Cunningham had been arrested, placed in a jail cell, and the firearm suggestively placed in front of his person, the line has likely been crossed. *See People v. Ferro*, 472 N.E.2d 13, 17 (N.Y. 1984) (Placing murder victim's property, stolen during the course of the crime and obtained from a codefendant, in front of suspect without further commentary was interrogation). That inference would be strengthened even further if this action was accompanied by suggestive comments, as for example, telling the defendant the evidence was going to be tested for the defendant's fingerprints. *Drury v. State*, 793 A.2d 567, 572 (Md. 2002).

Thus, rather than establishing an "exception" to the usual interrogation rule, *Hambly*, when properly understood, merely reasserts the core principle: the functional equivalent of an interrogation occurs when law enforcement undertakes specific action that has the effect of eliciting incriminating information from the suspect. While this test does not preclude "offhand remarks," and "matter-of-fact communication[s]," *Hambly*, 2008 WI 10, ¶¶ 54-55, it is nonetheless intended to curb even the most subtle of psychological interrogation practices when those practices precede formal *Miranda* warnings. *Miranda*, 384 U.S. at 457-458.

C. Detective Reaves' conduct went beyond merely summarizing the State's evidence, evincing a deliberate strategy to elicit incriminating information from Ms. Green and constituting impermissible pre-*Miranda* interrogation.

Here, police went beyond mere declaratory statements or simple prefatory comments about why Ms. Green was in custody. Nor were Detective Reaves' words "matter-of-fact communication[s]" regarding the evidence against Ms. Green, *Hambly*, 2008 WI 10, ¶ 55; or reasonably construed as "non-editorialized statements of fact," *Harris*, 2017 WI 31, ¶ 31.

Instead, a careful review of Detective Reaves' interaction with Ms. Green reflects that the officer deliberately engaged in "classic interrogation techniques," *see Hill*, 858 A.2d at 444, in order to elicit Ms. Green's inculpatory admission of receiving stolen property. While this Court must consider the entire interview holistically, several individual features supporting that conclusion merit special attention.

First, this Court should pay special attention—as it must—to the "atmosphere" in which this police-citizen interaction occurred. *Harris,* 2017 WI 31, ¶ 32. Here, Ms. Green was already under arrest and was led into the cramped interview room in handcuffs. While the handcuffs were removed during the actual questioning, the coercive atmosphere did not dissipate. Instead, the officers deliberately placed Ms. Green at the rear of the small, windowless room,

blocking the only exit with their bodies. It was at this point that Detective Reaves almost immediately began discussing the details of the investigation. Thus, while certainly not dispositive in the analysis, it does appear that Ms. Green was placed in what any objective third-party observer would view as the classic setting for a conventional police interrogation.

Second, this Court should also consider the tone and tenor of the conversation, as Detective Reaves gradually revealed the fruits of the law enforcement investigation to Ms. Green. While this Court has found that "verbally summarizing the State's case against the suspect […] does not necessarily constitute the functional equivalent of express questioning," *Hambly*, 2008 WI 10, ¶ 57, the egregious facts of this case are easily distinguishable.

Here, Detective Reaves slowly doled out the evidentiary picture in a piecemeal fashion, seeking to incrementally persuade Ms. Green that strong evidence of her guilt existed. In order to make sure Ms. Green comprehended each new piece of incriminating information, Detective Reaves punctuated each evidentiary revelation with an explicit request that Ms. Green ratify her receipt thereof. This call-and-response pattern was set up very early on in the conversation:

> 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.

(Exhibit 1 at 7:35-7:42).

Once Detective Reaves established her position of authority over Ms. Green, she gradually unspooled the case against Ms. Green with deliberate pacing, telling her that police had her boyfriend and alleged accomplice, Michael Winzer, in custody and that he had been "identified" as the actual robber. (Exhibit 1 at 8:04-8:18). Detective Reaves then told Ms. Green she was "on video" at the BP gas station where the stolen credit cards were used. (Exhibit 1 at 8:26). Once again, Ms. Green was asked to ratify her receipt of this information via Detective Reaves' use of a strategically placed, "Ok?" (Exhibit 1 at 8:30).

Detective Reaves then told Ms. Green, "We also have you dumping the uh, the cards and stuff into the grid." (Exhibit 1 at 8:30). There are at least two ways of reading that utterance. In context of the previous statement about Ms. Green being "on video," a reasonable observer could understand this to mean police had actually captured Ms. Green on video throwing out the cards, which would be strong evidence of her guilt. The record, however, does not establish that act was actually captured on video. Thus, to the extent Detective Reaves was exaggerating the State's case by suggesting that evidence implicating Ms. Green's involvement existed, she was therefore engaged in a "classic interrogation technique" clearly meant to elicit an incriminatory admission. *See State v. Finley*, Appeal No. 2018AP258-CR, ¶ 21-22, unpublished slip op. (Wis. Ct. App. June 12, 2019) (Lying about or otherwise exaggerating evidence possessed by the

police is a "common" interrogation technique). (App. 149-151).

At the same time, another logical reading of this utterance is that Detective Reaves was referring to Mr. Cowser's statement, in which he described Ms. Green throwing out the cards. (1:3). By implying the State had "inside knowledge" of the crime—information that must have come from Ms. Green's co-conspirator—Detective Reaves was therefore engaging in yet another "classic interrogation technique" meant to elicit an incriminatory admission.

Thus, Detective Reaves was clearly going beyond a "mere summary" of the State's case. Instead, her actions evince a deliberate attempt to place pressure on Ms. Green, thereby compelling her to incriminate herself. *See Ferro*, 472 N.E.2d at 17. ("Where, as here […] the only possible object of the police action in revealing evidence to a defendant is to elicit a statement from him, it does no violence to logic to conclude that the police should have known that it would do so.") This reading is only strengthened by the other highly suggestive comments made by Detective Reaves, including her assertions that it would "not be fair" to hold Ms. Green responsible for a crime she did not commit. (Exhibit 1 at 8:48-9:06). These comments, in context of Detective Reaves' assertions regarding the strength of the State's case, were clearly intended to pressure Ms. Green into cooperating with the police.

Third, this Court should pay careful attention to how Detective Reaves revealed the cooperation of

Ms. Green's accomplice, Mr. Cowser, when she told Ms. Green they had "talked" with him. (Exhibit 1 at 9:15). Detective Reaves deliberately lingered on that information, drawing out her "uh, so…" utterance in order to create a "verbal vacuum" which Ms. Green filled with her statement, "That's who I got the cards from." (Exhibit 1 at 9:15-9:21). This tactic is nearly identical to the conduct discussed, and condemned, in *Hill*. *Hill*, 858 A.2d at 444. By telling Ms. Green her accomplice had "talked" to police—and then leaving an opening for Ms. Green to respond—it was reasonably foreseeable this tactic would produce the intended effect of eliciting an incriminating admission from Ms. Green. *See Innis*, 446 U.S. at 302 n. 7. ("In particular, where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect.")

Fourth, Detective Reaves clearly utilized the kind of psychological ploys discussed in *Miranda* including "posit[ing] the guilt" of the suspect and "minimiz[ing] the moral seriousness of the offense." *Miranda*, 384 U.S. at 450. As to the former, Detective Reaves explicitly told Ms. Green she "knew" Ms. Green had information about the robbery—thereby directly insinuating Ms. Green could avoid being blamed for the robbery if she told the police what they "knew" *she knew* about that crime. (Exhibit 1 at 8:45). Detective Reaves paired these assertions with probably the most egregiously problematic utterance—that possessing stolen property "ain't no big deal." (Exhibit 1 at 8:38). That, of course, was a flat-out lie—Ms. Green was ultimately convicted of

that offense in part because of her admission that she received the stolen credit cards from her co-conspirator, Mr. Cowser.

These comments go well beyond the otherwise straightforward assertions discussed in *Hambly*, as they are suggestive assertions deliberately seeking incriminating information about an open police investigation in which Ms. Green was a suspect. Accordingly, this Court should find that Detective Reaves' questioning and statements constituted an interrogation for purposes of *Miranda*, and suppress any resulting statements.

II. This Court should find that, under the facts of this case, Ms. Green sufficiently invoked her right to remain silent.

A. Legal standard.

1. A defendant unambiguously invokes their right to remain silent when a reasonable officer would understand their invocation as such.

"Both the United States and Wisconsin Constitutions protect persons from state compelled self-incrimination." *State v. Hall*, 207 Wis. 2d 54, 67, 557 N.W.2d 778 (1997). This "precious" constitutional right is especially at risk in the custodial interrogation context, which is "created for no purpose other than to subjugate the individual to the will of his examiner." *Miranda*, 384 U.S. at 457. Thus, in order to preserve not only this "cherished" protection against self-incrimination guaranteed by

the Fifth Amendment but also fundamental "human dignity," *Miranda* seeks to equalize police-citizen encounters by giving the citizen a right to terminate interrogation by State actors at any time. *Id.* at 474.[12]

The nature of that right was further addressed in *Davis v. United States*, 512 U.S. 452 (1994) and *Berghuis v. Thompkins*, 560 U.S. 370 (2010). In *Davis,* the United States Supreme Court adopted a rule that police are not forbidden from continuing to interrogate a suspect "upon the making of an ambiguous or equivocal reference to an attorney." *Davis*, 512 U.S at 459. The Court extended that holding to invocations of the right to silence in *Berghuis,* further holding that a suspect wishing to invoke their right to remain silent must do so "unambiguously." *Berghuis*, 560 U.S. at 381.

Berghuis substantively modifies several decades of *Miranda* jurisprudence and effectively abrogates *Miranda's* holding that a suspect may invoke their rights "in any manner." *Miranda*, 384 U.S. at 446. *Berghuis* therefore marks a sea change

[12] Importantly, while the concepts of "waiver" and "invocation" are similar, they are nonetheless conceptually distinct inquiries. *See Berghuis*, 560 U.S. at 382. Although the two concepts have been frequently conflated in the lower court, the question for this Court is relatively straightforward—whether Ms. Green's words should have been understood as an invocation of her right to remain silent. If this Court agrees that the invocation was sufficient, any actual or constructive waiver that may have occurred after further questioning would be "invalid." *Montejo v. Louisiana,* 556 U.S. 778, 797 (2009). If Ms. Green's invocation was sufficient, the interrogation should have totally ceased at that point. *Miranda*, 384 U.S. at 474.

in how courts are now required to analyze and interpret a suspect's invocation.[13]

The *Berghuis* Court was confident this new standard would "avoid difficulties of proof" and provide greater clarity to law enforcement officers conducting interrogations. *Berghuis*, 560 U.S. at 381. Yet, beyond asserting that the test is "objective," *id.*, the opinion actually offers scant guidance to lower courts seeking to apply this new constitutional

[13] This case unleashed a torrent of scholarship, most of it critical in tone, noting the Court's new direction with respect to *Miranda* rights. *See for example* George M. Dery III, *Do You Believe in Miranda? The Supreme Court Reveals Its Doubts in Berghuis v. Thompkins by Paradoxically Ruling That Suspects Can Invoke Their Right to Remain Silent by Speaking*, 21 GEO. MASON U. CIV. RTS. L.J. 407 (2011); Alfredo Garcia, *Regression to the Mean: How Miranda Has Become a Tragicomical Farce*, 25 ST. THOMAS L. REV. 293 (2013); Harvey Gee, *In Order to Be Silent, You Must First Speak: The Supreme Court Extends Davis' Clarity Requirement to the Right to Remain Silent in Berghuis v. Thompkins*, 44 J. MARSHALL L. REV. 423 (2011); Yale Kamisar, *The Rise, Decline, and Fall (?) of Miranda*, 87 WASH L. REV. 965 (2012); Kit Kinports, *The Supreme Court's Love-Hate Relationship with Miranda*, 101 J. CRIM. L. & CRIMINOLOGY 375 (2011); Laurent Sacharoff, *Miranda, Berghuis, and the Ambiguous Right to Cut Off Police Questioning*, 43 N. KY. L. REV. 389 (2016); *see also* Richard L. Budden, Comment, *All in All, Miranda Loses Another Brick From Its Wall: The U.S. Supreme Court Swings Its Hammer in Berghuis v. Thompkins, Dealing a Crushing Blow to the Right to Remain Silent*, 50 WASHBURN L.J. 483 (2011); Brigitte Mills, Comment, *Is Silence Still Golden? The Implications of Berghuis v. Thompkins on the Right to Remain Silent*, 44 LOY. L.A. L. REV. 1179 (2011); Michael L. Vander Giessen, Comment, *Berghuis v. Thompkins: The Continued Erosion of Miranda's Protections*, 46 GONZ. L. REV. 189 (2011).

standard to an asserted invocation of the suspect's right to remain silent.

The Court's prior decision in *Davis* is therefore essential in helping to fill this gap. In *Davis*, speaking of an invocation of the right to counsel, the Court concluded that a sufficient invocation must satisfy the following test:

> Although a suspect need not "speak with the discrimination of an Oxford don," *post*, at 2364 (SOUTER, J., concurring in judgment), he 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. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect.

Davis, 512 U.S. at 459 (citing *Edwards v. Arizona*, 451 U.S. 477 (1981)).

Some other lessons can also be derived from earlier, pre-*Berghuis* decisions. For example, the Court has been clear that post-invocation responses cannot be used to "cast doubt" on an earlier request for counsel. *Smith v. Illinois*, 469 U.S. 91, 98-99 (1984). Because *Berghuis* merely extends the *Davis* framework to invocations of the right to silence, that holding is logically applicable to the assessment of whether a defendant has asserted his right to silence. Moreover, while context is always key in assessing the meaning of a given utterance, the Court has also made clear that context may not be distorted in order to call an otherwise unambiguous invocation into doubt. *See Connecticut v. Barrett*, 479 U.S. 523, 529 (1987) (focusing on whether "defendant's words,

understood as ordinary people would understand them, are ambiguous"); *see also Anderson v. Terhune*, 516 F.3d 781, 787 (9th Cir. 2008) (en banc). ("It is not that context is unimportant, but it simply cannot be manufactured by straining to raise a question regarding the intended scope of an otherwise facially unambiguous invocation of the right to silence.")

2. The Wisconsin standard.

In *State v. Cummings*, 2014 WI 88, ¶¶ 49-50, 357 Wis. 2d 1, 850 N.W.2d 915, this Court stated it was adopting the United States Supreme Court's "clear articulation rule." It then heavily incorporated the reasoning of the Court of Appeals in *State v. Markwardt*, 2007 WI App 242, 306 Wis. 2d 420, 742 N.W.2d 546 in order to further explain how this "clear articulation rule" is to be applied in Wisconsin. *Cummings*, 2014 WI 88, ¶ 51.

While *Markwardt*—which predates *Berghuis*—faithfully recites the *Davis* standard, it also adds a new twist. Under Wisconsin law, the rule "allows no room for an assertion that permits even the possibility of competing inferences; there is no invocation of the right to remain silent if *any* reasonable competing inference can be drawn." *Markwardt*, 2007 WI App 242, ¶ 36 (emphasis in original). Thus, so long as a reasonable competing inference can be hypothesized in light of the suspect's assertion, that individual has failed to invoke as a matter of law. *See Saeger v. Avila*, 930 F.Supp.2d 1009, 1015 (E.D. Wis. 2013) (discussing Wisconsin standard).

In addressing the two consolidated appeals at issue in *Cummings,* this Court then applied this new rule to find that neither defendant had sufficiently invoked their right to remain silent:

In *Cummings*, the defendant was questioned by police about his involvement in a murder. *Cummings,* 2014 WI 88, ¶¶ 6-10. He was properly *Mirandized* and agreed to make a statement. *Id*., ¶ 10. Midway through the conversation, however, Cummings asserted, "Well, then, take me to my cell. Why waste your time? Ya know?" *Id*., ¶ 53. This Court disagreed that this was an invocation, finding that it was susceptible to two reasonable competing inferences "[i]n the context of the ongoing back and forth" between Cummings and the police. *Id*. Although this Court agreed that one reasonable interpretation was that Cummings was attempting to terminate the interrogation, it also concluded that his statement may have been a "rhetorical device intended to elicit additional information from the officers about the statements of his co-conspirators." *Id*.

The companion case, *Smith*, presents similar facts. In that case, the defendant also "agreed to waive his rights and speak to police." *Id.,* ¶ 30. While Smith was more than willing to admit his participation in a vehicle theft, his attitude changed once police started asking him about a series of armed robberies. *Id*., ¶ 30-31. He told police he did not want to "talk about" those allegations and he didn't "know nothing" about the robberies. *Id*.

This Court concluded that, in context, it was unclear whether Smith intended to terminate the

interrogation or whether he was only "selectively" refusing to answer those questions about the armed robberies. *Id*., ¶¶ 67-68. Thus, this Court held that "[t]he mere fact that Smith's statements *could* be interpreted as proclamations of innocence or selective refusals to answer questions is sufficient to conclude that they are subject to 'reasonable competing inferences' as to their meaning." *Id*., ¶ 68 (quoting *Markwardt*, 2007 WI 242, ¶ 36) (emphasis in original).

This Court's adoption of the "reasonable inferences" test in *Cummings* was the product of a divided Court. Most pertinent to this appeal, then-Chief Justice Abrahamson explicitly asserted that the majority approach was "contrary to the holdings of the United States Supreme Court in *Davis* and *Berghuis*." *Id*., ¶ 97 (Abrahamson, C.J., *dissenting*). As persuasive authority, Chief Justice Abrahamson cited to the decision of the United States District Court for the Eastern District of Wisconsin in *Saeger*. *Id*.

In *Saeger*, another federal habeas case, the district court concluded that the Wisconsin Court of Appeals unreasonably applied federal law when it utilized *Markwardt's* competing inferences test to find the habeas petitioner's invocation equivocal as a matter of law. *Saeger*, 930 F.Supp.2d at 1015. Relevant to this appeal, the district court cautioned that the Court of Appeals standard—essentially the same standard applied in this case—threatened to virtually erase a criminal defendant's meaningful ability to invoke their right to remain silent. *Id*. at 1015-1016. (Holding that if the Court of Appeals

"reasoning were accepted, then it is difficult to imagine a situation where a suspect could meaningfully invoke the right to remain silent no matter what words he used.")[14]

Of course, *Saeger* is not binding on this Court. Yet, there are unavoidable incongruities between the invocation test utilized by this Court in *Cummings* and the binding language set forth in *Davis*. This problematic inconsistency is further highlighted by *Saeger*, which goes so far as to label the approach of the Court of Appeals "unreasonable." *Saeger*, 930 F.Supp.2d at 1015.

While it appears that there may be some conflict between the "ambiguity" standard announced by a majority of this Court in *Cummings* and the United States Supreme Court's rule as set forth in *Davis* and

[14] It is also worth bringing to this Court's attention that *Saeger* was cited in an unpublished Tennessee Court of Appeals decision for the proposition "the fact that a particular statement may have 'reasonable competing inferences that could be drawn from context' does not mean that the statement is ambiguous." *State v. Lalone*, 2017 WL 2297653 (Tenn. Crim. App. 2017). Likewise, counsel's review of secondary sources shows that several different commentators have cited the underlying Wisconsin Court of Appeals decision as an example of a problematic application of the ambiguous invocation rule. *See Vander Giessen supra* n. 13 at 206-207; Michael D. Cicchini, *The New Miranda Warning*, 65 SMU L. REV. 911, 923 (2012); *see also* Isa Chakarian, Note, *Earning the Right to Remain Silent After Berghuis v. Thompkins*, 15 CUNY L. REV. 81, 106-107 (2011); Joshua Hammack, Note, *Turning Miranda Right Side Up: Post-Waiver Invocations and the Need to Update The Miranda Warnings*, 87 NOTRE DAME L. REV. 421, 433 (2011).

Berghuis, Ms. Green's invocation in this case was straightforward and unambiguous. Accordingly, under either formulation of the ambiguity "test," Ms. Green invoked her right to remain silent.

B. Ms. Green's invocation of her constitutional right to remain silent was sufficient under either the U.S. Supreme Court's or this Court's iteration of the "ambiguity" test.

1. Under *Davis,* a reasonable officer would have understood Ms. Green was invoking her right to remain silent.

Pursuant to controlling United States Supreme Court precedent, Ms. Green's invocation should be assessed in light of the *Davis* test: Whether a reasonable officer, in light of the circumstances then-existing, would have construed her statement as an invocation of her right to remain silent. *Davis*, 512 U.S. at 459.

Here, the meaning of Ms. Green's statement is clear and unambiguous. She was first told, by Detective Reaves, "We gonna talk about this." (Exhibit 1 at 9:45). However, before they could "talk about this"—meaning the underlying crime—police needed to read her the *Miranda* warnings. (Exhibit 1 at 9:55). She was then asked if she would like to make a statement. She told the police, "No. I don't know nothing." (Exhibit 1 at 10:45).

That statement is facially unambiguous and was therefore sufficient to cut off further

interrogation. *Smith*, 469 U.S. 91 at 98-99; *see also Garcia v. Long*, 808 F.3d 771, 773-774 (9th Cir. 2015) (Responding "no" to "Do you wish to talk to me?" was an unambiguous invocation); *Jones v. Harrington*, 829 F.3d 1128, 1140 (9th Cir. 2016). ("No fairminded jurist could determine that" the defendant's utterance "I don't want to talk no more" was ambiguous.)

The record is also clear Ms. Green did not equivocate by using words like "maybe," "might," or "I think." *Id*.; *see also* Marcy Strauss, *The Sounds of Silence: Reconsidering the Invocation of the Right to Remain Silent Under Miranda*, 17 WM. & MARY BILL RTS. J. 773, 789 (2009) (discussing how courts often focus on the use of such "modal verbs" in order to find an invocation ambiguous). Nor did she "hedge" by using "lexical expressions that function to attenuate the emphasis of a statement, or to make it less precise." *Strauss supra* at 790. An example of a "hedge," in this context, would be if Ms. Green responded, "Naw, I don't think so," in response to Detective Reaves' question. *Id.* at 791. Nor was her invocation "temporally vague," thereby signaling a conditional desire to speak, but just not at that moment. *Id*. at 794.

A reasonable officer in these circumstances would not therefore have been required to resolve any "difficult decisions about an accused's unclear intent […]." *Berghuis*, 560 U.S. at 382. In fact, Detective Reaves appeared to acknowledge the commonsense reading of this utterance in her response: "So you are telling me that you don't want to talk to me right

now, you don't want to clear your name on this?" (Exhibit 1 at 10:52).

The record is therefore clear 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 her "no" with a statement that she "don't know nothing," this does not lessen the unambiguous nature of her "no." In context, Ms. Green's statement, "I don't know nothing," is an understandable addendum to her otherwise blunt "no" answer. It was also reasonably responsive to Detective Reaves's assertion "we gonna talk about" the underlying crime. 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 Ms. Green had knowledge about the crime and that she would or should share it with the officers.

This case is therefore analogous to *Commonwealth v. Lukach*, 195 A.3d 176 (Pa. 2018), a recent decision from the Pennsylvania Supreme Court. In *Lukach*, the defendant was arrested and placed in an interrogation room, where he was read his *Miranda* rights. *Id.* at 179. He spoke to police for roughly twenty minutes, continuously asserting his innocence with respect to the crime for which he had been arrested. *Id.* Eventually, he told police, "Yeah. I don't know just, I'm done talking. I don't have nothing to talk about." *Id.*

The Pennsylvania Supreme Court held that the defendant's assertion he was "done talking" was unambiguous as a matter of law pursuant to *Berghuis*. *Id*. at 285. Moreover, it also held that the defendant's subsequent assertion—"I don't have nothing to talk about" did not render this invocation equivocal. *Id*. at 189-190. Taking the defendant's statement as a whole, telling the officer he had "nothing to talk about" was logically linked to the prior utterance that he was "done talking." *Id*. In so holding, the Pennsylvania Supreme Court explicitly distinguished *Cummings*, noting that Lukach's situation was factually distinct. *Id*. at 188.

Other courts have similarly refrained from finding an invocation ambiguous merely because the defendant's assertion evinces a lack of knowledge as to the interrogation's subject matter. For example, in *State v. Crump*, 834 S.W.2d 265, 269 (Tenn. 1992), the parties did not dispute that the defendant had invoked his rights by telling police he did not "have anything to say," challenging instead whether police had "scrupulously honored" that invocation when they took the defendant on a lengthy drive retracing the route of the defendant's alleged escape. Similarly, the Florida District Court of Appeal concluded that a defendant had invoked his right to remain silent when, in response to a request to make a statement about an open investigation, he told police, "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, 452 (Fla. Dist. Ct. App. 2011).

As Ms. Green argued in both her briefs below and in her petition for review in this Court, it strains

credulity to conclude that Ms. Green's assertion was anything other than a plainspoken attempt to invoke her right to remain silent. That is supported by a common sense and conventional understanding of how people talk "in the real world." Consider, for example, the following hypothetical:

> Joe works in a conventional "9-5" office environment. On the day in question, he notices that it is the socially-agreed upon time that most people eat lunch—the noon hour. Joe is hungry, so he announces that he would like to go get lunch. Joe then asks his coworker, Ann, if she would like to "get lunch" with him. Ann responds: "No. I am not hungry."

Assuming Joe is a "reasonable" person, it seems far-fetched to assume he would fail to understand that Ann did not want to "get lunch" with him. If that logic prevails in the real world, then it should prevail here too.

In order to avoid this commonsense conclusion, the Court of Appeals relied on *Cummings* for the proposition that Ms. Green's statement she did not "know nothing" was an assertion of innocence and therefore categorically incompatible with a claim that she had unambiguously invoked her right to remain silent. *Green*, Appeal No. 2018AP1350-CR, ¶ 33. (App. 117). In so doing, the Court of Appeals appeared to derive a *per se* rule from this Court's prior jurisprudence—that an assertion of innocence will always negate a suspect's attempt to invoke their constitutional rights. However, this formulation ignores the bedrock principle that the invocation analysis is a necessarily fact-dependent inquiry. It would therefore be a mistake to read this Court's

prior jurisprudence as establishing a *per se* rule that certain utterances categorically exempt a reviewing court from otherwise applying the circumstance-dependent, reasonable officer test articulated by the United States Supreme Court.[15]

Instead, this Court's conclusion in *Cummings* must be qualified in light of the specific facts therein—which include the defendant vacillating between "I don't want to talk about this" and "I don't know nothing about this." *Cummings*, 2014 WI 88, ¶ 64. In that context, a reasonable officer would have a basis for confusion—is the suspect invoking, or does he want to protest that he has been wrongly accused? Here, no such vacillation or inconsistency is present. Instead, Ms. Green gave a perfectly rational response to the officer's words which any reasonable officer would construe as an invocation of their right to remain silent.

Because Detective Reaves did not yield to that invocation, this Court should hold that further interrogation violated Ms. Green's constitutional right against self-incrimination.

[15] Consider the following: What if the suspect unambiguously tells the officer, "As an innocent man, I hereby invoke my Fifth Amendment right to remain silent and ask to terminate this interrogation." Applying the *Cummings* "rule" as stated by the Court of Appeals would appear to render this clear invocation ambiguous, simply because the suspect asserted his innocence in conjunction with invoking his right to remain silent.

2. The overall context of this interrogation shows there was only one reasonable inference: Ms. Green invoked her right to remain silent.

This Court has framed the analysis used to assess the sufficiency of an invocation somewhat differently than set forth in *Davis*. As set forth in *Cummings,* resolution of Ms. Green's claim under state law turns on whether there were "reasonable competing inferences" which could be drawn from her response to Detective Reaves' question. Focusing on the essential criterion—reasonableness—the record discloses only one defensible reading: Ms. Green wished to terminate the encounter and exercise her right to silence.

That conclusion follows from a good-faith reading of the interplay between Detective Reaves and Ms. Green. Here, Detective Reaves: (1) directly asserted Ms. Green had knowledge of the crime; (2) told Ms. Green they would talk about that information; and (3) asked if her she would like to waive her *Miranda* rights in order to discuss the information which Detective Reaves had already alluded to. Ms. Green responded, "No. I don't know nothing." (Exhibit 1 at 10:45). Her case is therefore readily distinguishable from both *Cummings* and *Smith*.

For example, in *Cummings*, the defendant made an unambiguous waiver of his *Miranda* rights "orally and in writing." *Cummings*, 2014 WI 88, ¶ 53. Here, there was no waiver—Ms. Green invoked her

right to remain silent in direct response to the detective's attempt to elicit just such a waiver.

Another principal difference involves the existence of an "ongoing back and forth" with officers. *Id.*, ¶ 54. It was in the midst of an ongoing conversation that Cummings stated, "Well, then, take me to my cell. Why waste your time? Ya know?" *Id.*, ¶ 53. Importantly, this statement followed on the heels of questions from the defendant as to what his co-defendants "had been telling" the police. *Id.*, ¶ 10. 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 response makes clear she was merely answering the question—and nothing more.

Likewise, in *Smith*, the defendant waived his *Miranda* rights and "readily answered" law enforcement's questions about the theft of a van. *Id.*, ¶ 30. However, when the topic shifted to additional offenses, the defendant stated he did not wish to talk about those offenses and indicated he had no knowledge of those offenses. *Id.* Placed in context, the remark did not unambiguously convey a desire to cut off *all* questioning; rather, it suggested only a desire to selectively converse with law enforcement. *Id.*, ¶ 61. In contrast, here Ms. Green did not initially waive her right to remain silent, she did not engage in a prior conversation with officers, and her statement

does not evince a desire to selectively waive her rights.

Read in context, the only reasonable inference to draw from Ms. Green's statement is that she wished to invoke her right to remain silent. To hold otherwise does violence to the plain English reading of her words, contrary to *Smith v. Illinois*, 469 U.S. at 98-99. Moreover, in assessing Ms. Green's words, this Court ought not to contrive ambiguity in the face of apparent clarity. *See Anderson*, 516 F.3d at 787. Instead, this Court must scrupulously exercise its role as the "unstinting" protector of Ms. Green's constitutional rights and hold that this invocation, under these circumstances, was constitutionally sufficient. *Harris*, 2017 WI 31, ¶ 10. To do otherwise risks signaling this "soaring rhetoric" is nothing more than an empty promise for those aggrieved by State-sponsored violation of their "cherished" rights. *Id*., ¶ 56 (Abrahmson, J., *dissenting*).

Accordingly, this Court should reverse the Court of Appeals and suppress Ms. Green's statements.

III. If this Court grants relief, the parties are in agreement this Court should suppress the evidence and remand for further proceedings.

In the Court of Appeals' brief-in-chief, Ms. Green asked the Court of Appeals to suppress any statements obtained from Ms. Green and then remand so she may "withdraw her guilty plea." (Ct. App. Br. at 26). The State argued in its response brief, however, that Ms. Green is not automatically

entitled to plea withdrawal. (State's Ct. App. Br. at 28). Instead, if the statements are suppressed, the State has asked that this matter be remanded so Ms. Green can file a motion for plea withdrawal. (State's Ct. App. Br. at 28). At that time, the State asserted it should then be permitted to make a harmless error argument. (State's Ct. App. Br. at 28).

The State has not developed any harmless error argument on appeal. In turn, Ms. Green did not reply to this proposed clarification from the State, primarily because she believes it has correctly set forth the procedural steps that should occur if she prevails. Accordingly, if this Court grants relief, Ms. Green would respectfully ask this Court to remand the matter for further proceedings as outlined herein.

CONCLUSION

Applying well-settled principles of constitutional law, the police actions in this case violated Ms. Green's right to be free from compelled self-incrimination. Accordingly, this Court should reverse the Court of Appeals and suppress all statements made by Ms. Green during this interrogation. It should then remand for further proceedings.

Dated this 3rd day of October, 2019.

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 10,907 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 3rd day of October, 2019.

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.

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Dated this 3rd day of October, 2019.

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APPENDIX

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