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DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. No. 2019AP151-CR

CHARDEZ HARRISON

Defendant-Appellant.

Appeal from the Circuit Court for Milwaukee County
Honorable David A. Hansher, Presiding
Circuit Court Case No. 2016-CF-735

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT CHARDEZ HARRISON

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STATEMENT OF THE ISSUES

1. Whether Appellant Chardez Harrison unambiguously invoked his constitutional right to remain silent under when he told an interrogating officer that he did not want to make a statement.

   The circuit court answered: No.

2. Whether officers "scrupulously honored" Harrison's right to remain silent under *Michigan v. Mosley*, 423 U.S. 96 (1975), and *State v. Hartwig*, 123 Wis. 2d 278, 366 N.W.2d 866 (1985), by conducting a second interrogation after he invoked his right to remain silent.

   The circuit court did not reach this issue.

STATEMENT REGARDING ORAL ARGUMENT

Appellant Chardez Harrison welcomes oral argument if the Court deems it helpful to adequately address the issues raised in the briefs.

STATEMENT REGARDING PUBLICATION

Publication of this case is requested. This case involves a suspect's response to a question printed on a state-issued *Miranda* card that is provided to all or nearly all officers in the state. This case will help to guide litigants in future cases with similar facts.

INTRODUCTION

Following a late-night arrest, Defendant-Appellant Chardez Harrison was interrogated at approximately 3:30 a.m. regarding a string of vehicle robberies and attempted robberies. Despite Harrison telling the detective that he wanted to take a nap, the detective continued the interrogation, recited Harrison's rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and ended the recitation by asking Harrison whether he would like to answer questions or make a statement. Harrison responded, "I don't want to make no statement right now," but he was thereafter questioned for over two hours in two separate interrogations.

Harrison's initial response that he did not want to make a statement was a clear invocation of his right to remain silent, and all questioning of Harrison should have ceased immediately. Yet the circuit court concluded that Harrison's invocation was not clear and unambiguous solely because the detective had asked a compound question. Rather than recognizing Harrison's single, clear invocation, the circuit court required Harrison to invoke his right to remain silent twice and answer each and every component of the detective's compound question.

The circuit court's decision unduly burdens a suspect's right to remain silent. The law is clear that if the detective had asked a non-compound question whether Harrison wanted to make a statement,

Harrison's response would have been sufficient to invoke his right to remain silent and end the questioning. Harrison should not be required to invoke his right to remain silent twice simply because the detective asked a compound question. The circuit court's holding encourages interrogating officers to ask compound, unclear, or ambiguous questions when seeking a *Miranda* waiver so they can have multiple opportunities to seek a waiver when the suspect does not respond precisely to the question asked. The circuit court's decision that Harrison did not invoke his right to remain silent should be reversed, and the case should be remanded for a full *Machner* hearing on Harrison's ineffective assistance of counsel claim.

STATEMENT OF THE CASE

A. The Alleged Crimes

In the late evening and early morning hours of February 11 and 12, 2016, a group of teenagers stole two vehicles from their owners at gunpoint and attempted to steal two others. (R.5.) Late in the evening on February 12, 2016, an officer with the Milwaukee Police Department ("MPD") observed several teenagers exit one of the stolen vehicles and enter the other, a Chevy Malibu. (*Id.* at 5.) MPD officers then attempted a traffic stop of the Malibu, which was being driven by Chardez Harrison ("Harrison"). (*Id.*) Harrison did not immediately stop the Malibu, and a brief chase ensued. (*Id.*) Harrison then abandoned the vehicle when one of

the tires was damaged. (*Id.*) A short time later, Harrison surrendered to MPD officers and was placed under arrest. (*Id.*)

B. The State's Interrogations of Harrison

Harrison was twice interrogated by police after his arrest. The first interrogation occurred on February 13, 2016 at approximately 3:30 a.m. and was conducted by MPD Detective Daniel Priewe. (R.54, A-App13.) From the beginning of the interview, it was readily apparent that Harrison, then just seventeen years old, was incredibly tired. Harrison did not know what time it was at the start of the interview, telling Detective Priewe that he was arrested "like an hour ago," even though it had been over three hours since his arrest. (R.54 at 1, A-App13; R.5 at 5.) When Detective Priewe asked Harrison, "How're you feeling right now?" Harrison answered that he was very tired. (R.54 at 1:12-15, A-App13.) Detective Priewe then asked whether Harrison would "just talk to me for a little bit or do you think you'll have to take a nap?" Harrison responded, "Take a nap. I'm tired." (*Id.* at 1:16-18.)

Detective Priewe ignored Harrison's statement that he did not want to talk at that point and continued with the interrogation. He read Harrison a *Miranda* warning from a state-issued card, and the following exchange ensued:

DETECTIVE: Do you understand each of these rights? Chardez? Chardez?

MR. HARRISON: Huh?

DETECTIVE: Hey. Did you hear these?

MR. HARRISON: What? What?

DETECTIVE: I was reading you something. Should I read them again?

MR. HARRISON: Oh, my rights?

DETECTIVE: Yeah.

MR. HARRISON: No, you don't have to read them to me.

DETECTIVE: Okay. Did you hear them?

MR. HARRISON: Yeah.

DETECTIVE: Are you sure?

MR. HARRISON: Yeah.

DETECTIVE: Okay. Realizing that you have these rights, are you now willing to answer some questions or make a statement.

MR. HARRISON: Mhm.

DETECTIVE: Okay. That's a yes.

MR. HARRISON: **I don't want to make no statement right now.**

DETECTIVE: Oh, okay. Will you answer some questions that I have for you?

MR. HARRISON: (inaudible 0:03:29:7) what's the question?

(R.54 at 2:11-3:2, A-App14-15 (emphasis added).) Detective Priewe went on to question Harrison for an hour. (R.54, A-App13-59.) During the

questioning, Harrison admitted to driving a stolen car and fleeing the police. (*Id.*)

Later that day, at approximately 6:00 p.m., MPD Detective Michael Slomsczewski questioned Harrison regarding the robberies for approximately 90 minutes. (R.55.) During that interrogation, Harrison admitted to his involvement in two robberies and two attempted robberies. (*Id.*)

C. Harrison's Plea and Sentence

Harrison was charged with two counts of attempted armed robbery as party to a crime, two counts of armed robbery as party to a crime, and one count of possession of a firearm by an adjudicated delinquent. (R.5.) At the preliminary hearing held on February 29, 2016, the only evidence that the State offered against Harrison was his statements made to Detective Slomczewski during the second interrogation described above. (R.78.) The State did not offer any other evidence linking Harrison to the alleged crimes. (*See id*.)

On May 25, 2016, Harrison entered guilty pleas to Counts 2, 3, and 4 in the Amended Criminal Complaint – the two completed armed robberies and possession of a firearm by a delinquent. (R.10-11; R.80.) In exchange for his plea, Counts 1 and 5 – the two attempted armed robberies – were dismissed and read in and the State recommended a total sentence of 16

years of initial confinement, followed by 6 years of extended supervision. (R.80 at 2:24-4:1; R.83 at 2:20-25.)

The circuit court sentenced Harrison to a total of 14 years initial confinement and 6 years of extended supervision. (R.83 at 58:23-60:4.) The circuit court also ordered Harrison to pay a total of $10,389.60 in restitution. (R.83 at 57:23-58:1.)

D. Post-Conviction Proceedings

On February 12, 2019, Harrison filed a motion for post-conviction relief pursuant to Wis. Stat. § 809.30. (R.60.) Harrison sought a reduced sentence based on two factors – his pre-sentencing cooperation with law enforcement regarding the incredible abuse he suffered at Lincoln Hills School and the pre-sentencing evidence of Harrison's remorse. (*Id.* at 3-11.) Harrison asked that the Court reduce his sentence of initial confinement from 14 years to 7-10 years. (*Id.* at 11.) Harrison did not request a reduction in the six-year extended supervision sentence. (*See id.*)

Harrison also argued that he had received ineffective assistance of counsel for two reasons. First, his trial counsel had failed to raise Harrison's inability to pay the restitution imposed by the circuit court. (R.60 at 12-14.) Second, and relevant to this appeal, Harrison's trial counsel failed to seek suppression of statements that Harrison made to law enforcement during the interrogations described above. (*Id.* at 14-20.) In

particular, Harrison argued that suppression was warranted because the detectives violated Harrison's rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), *Michigan v. Mosley*, 423 U.S. 96 (1975), and *State v. Hartwig*, 123 Wis. 2d 278, 366 N.W.2d 866 (1985). Harrison requested a hearing on his ineffective assistance of counsel claims pursuant to *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Recognizing the practical effects of succeeding on his ineffective assistance of counsel claims, Harrison agreed to waive those claims if the circuit court reduced Harrison's sentence by the entire amount sought in his motion – that is, if the court granted Harrison a sentence modification that reduced his term of initial confinement by 4-7 years. (R.63 at 1-2.)

The State agreed that Harrison's sentence should be reduced, but not by as much as Harrison requested. (*See* R.62.) Instead, the State recommended a two-year reduction, from 14 years of initial confinement and 6 years of extended supervision to 12 years of initial confinement and 6 years of extended supervision. (*Id.*) The State did not address in its brief Harrison's request for a *Machner* hearing, believing that its recommendation of a small reduction in Harrison's sentence obviated the need for a hearing. (*Id.*)

At the hearing on Harrison's post-conviction motions, the circuit court modified Harrison's sentence as recommended by the State and

reduced the period of initial confinement by two years, rather than by the four to seven years that Harrison requested. (R.81 at 29:5-26:9.) Because the circuit court had not granted the full reduction he sought, Harrison proceeded with his ineffective assistance of counsel claims and asked for a *Machner* hearing those claims. (*Id.* at 30:18-20.) As to the *Miranda* issue, the parties and the circuit court agreed to forego a full *Machner* hearing and instead conduct the suppression hearing that would have been conducted if Harrison's counsel had moved to suppress the statements Harrison made during the two interrogations conducted by Detectives Priewe and Slomczewski. (R.81 at 38:18-39:9.)

The suppression hearing was conducted on September 13, 2019. (R.84.) When asked why he proceeded with the interview after Harrison said he wanted to take a nap, Detective Priewe replied that he "needed to get some information regarding the offense." (R.84 at 14:18-15:2.) Detective Priewe testified that after reading the *Miranda* warning from a state-issued card, he read a question from the same card and asked whether Harrison would like to answer questions or make a statement. (*Id.* at 15:16-25.) After Harrison responded that he did not want to make a statement, Detective Priewe exploited the compound question and asked Harrison to respond to the other part of the question and again asked Harrison whether he would be willing to answer questions. (*Id.* at 16:4-25.)

The State then argued that Detective Priewe's compound question and his conduct thereafter was constitutionally appropriate because the question appeared on "the State of Wisconsin Department of Justice-issued card" that Detective Priewe was reading from. (R.84 at 37.) The State further argued that Detective Priewe was entitled to seek a response to each part of the compound question even after Harrison clearly stated that he did not "want to make no statement." (*Id.*)

The circuit court held that Harrison had not unambiguously invoked his right to remain silent and that the evidence obtained during the interrogations would not have been suppressed had Harrison's trial counsel filed a motion to suppress. (R.85.) The circuit court drew a distinction between a suspect declining to make a statement and a suspect declining to answer questions: "Not once did Mr. Harrison say, you, I said I'm not going to answer any questions. I think there's a distinction." (R.85 at 6:3-6, A-App7.) According to the court, when Detective Priewe pressed Harrison for a response to the second part of his compound question, Harrison was required to invoke his right to remain silent a second time "by saying I told you, I'm not gonna make any -- answer any questions." (R.85 at 8:17-19, A-App9.)

Having concluded that the evidence obtained during the first and second interrogations was not subject to suppression, the circuit court

denied Harrison's post-conviction motion and did not hold a full *Machner* hearing. (R.74, A-App1.) Harrison filed a timely Notice of Appeal. (R.75.)

ARGUMENT

There are no "magic" words a suspect must use in order to invoke his right to remain silent. All that is required is a clear expression of his intent to invoke his right. Once a defendant clearly and unequivocally indicates that he does not wish to speak with interrogating officers, all questioning should cease. Officers do not get to continue asking questions under the guise of being "confused" by the suspect's response or seeking "clarification" of an otherwise clear statement.

Harrison said he did not want to make a statement to Detective Priewe. There was nothing ambiguous, unclear, or equivocal about his statement. The questioning should have ended there. Instead, Detective Priewe violated Harrison's constitutional rights by continuing to question him for more than an hour.

The second interrogation conducted by Detective Slomczewski fares no better. A suspect may not be interrogated a second time on the same subject if his right to remain silent was not "scrupulously honored" during the first interrogation. Because Harrison's rights were violated during the

first interrogation, the evidence obtained during the second interrogation was also subject to suppression.

The circuit court's decision that a motion to suppress the evidence obtained during the interrogations would not have been successful should be reversed, and the case should be remanded for a full *Machner* hearing on Harrison's post-conviction motion.

I. STANDARD OF REVIEW

Determining whether the right to silence was unambiguously invoked and whether it was scrupulously honored requires the application of constitutional principles and is subject to independent appellate review, though this Court will defer to the circuit court's factual determinations unless clearly erroneous. *State v. Ross*, 203 Wis. 2d 66, 79, 552 N.W.2d 428. In reviewing the circuit court's factual findings, this Court will defer to the circuit court's findings regarding *what* the defendant said, but whether that statement was an unequivocal indication of the right to remain silent is a question subject to independent appellate review. *State v. Wiegand*, 2012 WI App 40, ¶ 10, 340 Wis. 2d 498, 812 N.W.2d 540 (unpublished).

II. HARRISON'S STATEMENTS DURING THE FIRST INTERROGATION SHOULD HAVE BEEN SUPPRESSED BECAUSE HE UNAMBIGOUSLY INVOKED HIS RIGHT TO REMAIN SILENT.

"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.

"Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of free choice." *Miranda*, 384 U.S. at 458. "The intention of the Court in *Miranda* was to adopt a fully effective means to notify the accused of his right to silence and to assure him that the exercise of that right will be 'scrupulously honored.'" *Hartwig*, 123 Wis. 2d at 284 (quoting *Michigan v. Mosley*, 423 U.S. 96, 103 (1975). "The critical safeguard of the right to silence is the right to terminate questioning by invocation of the right to silence." *Id.* "Once the right to remain silent . . . is invoked, all police questioning must cease[.]" *Ross*, 203 Wis.2d at 74.

Harrison clearly invoked his right to remain silent when he told Detective Priewe "I don't want to make no statement right now." (R.54 at

2, A-App14.) All questioning should have ceased at that point. The State cannot manufacture an ambiguity in his response by relying on a compound question asked by Detective Priewe, nor should an interrogating officer be permitted to continue questioning in order to obtain an answer to every part of his compound question.

A. Harrison Invoked His Right to Remain Silent When He Said, "I Don't Want to Make No Statement."

To invoke his right to remain silent, a suspect need only "say that he wanted to remain silent or that he did not want to talk with the police." *Berghuis v. Thompkins*, 560 U.S. 370, 382 (2010). "A suspect need not speak with the discrimination of an Oxford don." *Ross*, 203 Wis. 2d at 78 (quoting *Davis v. United States*, 512 U.S. 452, 459 (1994)). He need only say enough that a reasonable police officer would understand that the suspect is invoking his right to remain silent. *Id.* Once a suspect has invoked his right to remain silent, all questioning of the suspect must cease. *Berghuis v. Thompkins*, 560 U.S. at 382. Officers cannot continue questioning the suspect about his invocation. *See id.*

A suspect invokes his right to remain silent when he says, "I don't to talk about this anymore," *State v. Goetsch*, 186 Wis. 2d 1, 7-8, 519 N.W.2d 634 (Ct. App. 1994); "I got nothin[g] more to say to you. I'm done. This is over." *Saeger v. Avila*, 930 F. Supp. 2d 1009, 1015 (E.D. Wis. 2013); or "I don't want to say anything more." *State v. Wiegand*, 2012 WI App 40, 340

Wis. 2d 498, 812 N.W.2d 540 (unpublished). With respect to the particular compound question asked in this case, a suspect can unambiguously invoke his right to remain silent by responding "no" when asked whether he would like to make a statement or answer questions, even where he does not specify which portion of the question his negative response applies to. *Hartwig*, 123 Wis. at 281.

This Court's decision in *Wiegand* is instructive. In that case, the defendant was arrested as a suspect in a robbery. *Id.* at ¶¶ 2-3. He was questioned by one detective for over an hour regarding possible welfare fraud. *Id.* ¶ 3. A second detective then took over and started asking questions regarding the robbery. *Id.* ¶¶ 3-4. During the questioning related to the robbery, the defendant told the detective, "I don't want to say anything more," but the detective continued to question him and the defendant later confessed. *Id.* ¶ 4. Deeming it to be a "straightforward case," the court held that the defendant had unambiguously invoked his right to remain silent. *Id.* ¶ 8 ("We discern no ambiguity in the meaning of that statement."). The State was thereafter required "to immediately cut off its interrogation," and this Court directed the circuit court to suppress all statements and derivative evidence obtained following the defendant's invocation of his right. *Id.* ¶ 12.

Here, Harrison similarly unambiguously invoked his right to remain silent by telling Detective Priewe, "I don't want to make no statement right now." There was nothing unclear or ambiguous about Harrison's words. "He did not vacillate or say 'maybe' or 'I think' or 'if.'" *Saeger*, 930 F.Supp.2d at 1015. A reasonable officer in these circumstances would not have been required to resolve any "difficult decisions about an accused's unclear intent." *Berghuis*, 560 U.S. at 382. He clearly and unequivocally told Detective Priewe that he did not want to make a statement.

That should have been the end of the interrogation. Detective Priewe should have honored Harrison's invocation of his right to remain silent and immediately ceased his questioning. Because the questioning continued, the circuit court's conclusion that the evidence gathered in the first interrogation was not subject to suppression was erroneous and should be reversed.

B. Harrison's Clear Response to a Compound Question Did Not Render His Invocation Ambiguous.

The State and the circuit court improperly injected ambiguity in Harrison's response by reasoning that Detective Priewe was entitled to seek an answer to both parts of his ambiguous, compound question that asked Harrison both whether he wanted to answer questions and whether he wanted to make a statement. Once a suspect invokes his right to remain silent, the officer may not further attempt to seek a *Miranda* waiver by

asking that the suspect answer every part of his initial waiver-seeking question.

Officers must respect a suspect's invocation of his right to remain silent unless the invocation is ambiguous. *State v. Markwardt*, 2007 WI App 242, ¶ 28, 306 Wis. 2d 420, 436, 742 N.W.2d 546, 554. An invocation is ambiguous only if it is subject to "reasonable competing inferences." *Id.* at ¶ 36. To determine whether a suspect's statement is subject to reasonable competing inferences, a court should consider the context of the statement only "where the defendant's words, understood as ordinary people would understand them, are ambiguous." *Saeger*, 930 F. Supp. 2d at 1015 (quoting *Connecticut v. Barrett*, 479 U.S. 523, 529 (1987)). When a suspect's statement on its own is clear and unambiguous, the "context" of the statement cannot be used to manufacture an ambiguity that would not otherwise exist. *See id.*

In *Saeger*, the Wisconsin Court of Appeals held that a suspect had not unambiguously invoked his right to remain silent when he told officers, well into an interrogation, "I got nothin[g] more to say to you. I'm done. This is over." 930 F. Supp. 2d at 1011. The court reviewed the entire context of the interrogation and concluded that "it was reasonable for the detectives to conclude that his statement was merely a fencing mechanism to get a better deal." *Id.* at 1012-13. That is, the court held that it was

reasonable to infer that the suspect did not mean what he had said based on his conduct throughout the interrogation. *Id.* The Eastern District of Wisconsin granted Saeger's petition for a writ of habeas corpus, holding that the court had unreasonably applied clearly established federal law. *Id.* at 1015. In the federal court's view, if detectives are permitted to continue questioning any time there is a *possible* construction of the suspect's statement that would render it ambiguous, "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." *Saeger*, 930 F. Supp. 2d at 1016.

Saeger teaches that the "context" of a suspect's invocation of his right to remain silent should not be used to create ambiguity where none exists from the plain language used by the suspect. Where the suspect's language on its own is sufficient to invoke his right to remain silent, an officer is not entitled to continue to interrogation or make further efforts to seek a *Miranda* waiver.

The circuit court here impermissibly used the compound nature of Detective Priewe's question to excuse the detective's continued questioning of Harrison. The Constitution does not bifurcate the right to remain silent into the right not to make a statement and the right not to answer questions. Nevertheless, the circuit court required Harrison to invoke his right to remain silent twice: After unequivocally responding that he did not want to

make a statement, Harrison had to *also* say that he did not want to answer questions. (R.85 at 8:22-9:2, A-App9-10.)

The circuit court improperly put the burden on Harrison to repeatedly invoke his rights. Harrison should not have had to tell Detective Priewe a second time that he would not waive his right to remain silent. Indeed, the court's example of what Harrison purportedly *should have* said to invoke his rights reveals that a second invocation would have been repetitive – the court indicated that Harrison should have said "***I told you***, I'm not gonna make any -- answer any questions." (R.85 at 8:18-19, A-App9 (emphasis added).)

The circuit court's holding is directly contrary to both federal and state law that a single invocation is all that is necessary to require officers to cease questioning. *See Miranda*, 384 U.S. at 473 ("If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."). Had Harrison made his statement extemporaneously and not in response to a question, there would be no ambiguity. The result would be the same if Detective Priewe's question had not been compound, instead asking only whether Harrison wanted to make a statement. Harrison's response of "I don't want to make no statement right now" would been sufficient to invoke the procedural safeguards of *Miranda*. *See Hartwig*, 123 Wis. 2d at 286

(suspect invoked his right to remain silent by answering "no" and "I don't know what good that will do" in response to officer question whether he would like to make a statement); *see also Toliver v. Gathright*, 501 F. Supp. 148, 151 (E.D. Va. 1980) (suspect invoked "procedural safeguards" of *Miranda* by responding "No," when asked whether he would like to make a statement). The State cannot avoid those safeguards and require suspects to repeatedly invoke their rights because an officer chose to seek a *Miranda* waiver by posing a compound question.[1]

Detective Priewe's compound question is not saved simply because it was written on a State-issued card. An official endorsement of a question does not render constitutional an officer's insistence on receiving an answer to both parts of his question before honoring the suspect's right to remain silent. If a questioning officer receives a negative response to either portion of the state-mandated compound question, the questioning should cease. *See Hartwig*, 123 Wis.2d at 286. Any other rule encourages interrogating officers to purposefully use compound questions when seeking *Miranda*

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[1] The circuit court never even considered that Harrison did not hear the first part of Detective Priewe's question and heard only the latter part in which he was asked whether he would like to make a statement, a very real possibility in light of the early hour and Harrison's evident fatigue. This is yet another reason why the burden should not be on a suspect like 17-year old Harrison to hear and respond to each part of an officer's question. Once the suspect indicates he does not wish to speak with the officer in any manner, the interrogation should end, regardless of whether the expression related to giving a statement or answering questions.

waiver so they may have more than one opportunity to seek the waiver when the suspect does not respond fully to the precise question asked. Indeed, there would be nothing to prevent officers from posing compound questions with far more than two parts and attempting multiple times to seek a *Miranda* waiver until each part of the question is answered.

The Supreme Court is clear that the Constitution requires only a single, clear invocation of a suspect's right to remain silent. Harrison's response to Detective Priewe's question was just such an invocation. As a result, all evidence gathered during the first interrogation by Detective Priewe was rendered inadmissible and should have been suppressed upon request by Harrison's trial counsel. The circuit court's contrary ruling should be reversed.

III. HARRISON'S STATEMENTS DURING THE SECOND INTERROGATION SHOULD HAVE BEEN SUPPRESSED BECAUSE HIS RIGHT TO REMAIN SILENT WAS NOT "SCRUPULOUSLY HONORED."

After an individual invokes his right to remain silent, the State can interrogate him again only if his rights are "scrupulously honored." *State v. Hartwig*, 123 Wis. 2d 278, 284 (1985). In *Michigan v. Mosley*, 423 U.S. 96, 103 (1975), the U.S. Supreme Court identified several factors for determining whether an individual's rights were "scrupulously honored":

> (1) The original interrogation was promptly terminated. (2) The interrogation was resumed only after the passage of a significant period of time. (In

> *Mosley* it was two hours). (3) The suspect was given complete Miranda warnings at the outset of the second interrogation. (4) A different officer resumed the questioning. (5) The second interrogation was limited to a crime that was not the subject of the earlier interrogation.

Hartwig, 123 Wis. 2d at 284. There is no dispute that almost 14 hours passed between the first and second interrogations, that Harrison was given complete *Miranda* warnings at the outset of the second interrogation, and that a different officer conducted the questioning. However, neither the first nor the fifth factor was present here, which compels suppression of Harrison's statements made during the second interrogation.

The first interrogation with Detective Priewe was not promptly terminated as it should have been when Harrison stated, "I don't want to make no statement right now." (R.54 at 1-2.) As set forth above, when Harrison unequivocally invoked his right to remain silent, the interrogation should have immediately ended. Rather than honor Harrison's rights, however, Detective Priewe continued questioning him in violation of his constitutionally-protected right to remain silent.

In addition, the first and second interrogations involved the same subject. During the first interrogation, Detective Priewe repeatedly asked Harrison where he obtained the stolen Chevy Malibu, which clearly related to one of the crimes that Harrison later confessed to and with which he was charged. (R.54 at 14, 19, 26, 35, 44-45, A-App26, 31, 38, 47, 56-57; *see*

also R.5 at 4.) Detective Priewe also asked questions about the other robberies and attempted robberies. He asked whether Harrison had been driving in any other cars (R.54 at 27, A-App39), whether Harrison knew anything about the teenagers he was with "robbing ladies and . . . taking cars from people" or "driving cars that probably ain't theirs" (R.54 at 28, 33, A-App40, 45), and whether Harrison would "ever do any robberies" (R.54 at 32, A-App44). The second interrogation by Detective Slomczewski covered each of the crimes that Harrison was ultimately charged with in more detail, but the subject was the same – *i.e.*, the string of robberies allegedly committed by Harrison and the teenagers he was arrested with.

While the presence or absence of the *Mosley* factors is does not establish a test that can be "woodenly applied," the essential inquiry is whether, under the circumstances, a defendant's right to remain silent was "scrupulously honored." *Hartwig*, 123 Wis. 2d at 285. The Wisconsin Supreme Court has indicated that the final *Mosley* factor – whether the questioning was on the same incident – should be assigned "considerable weight," and that overlap in subject matter is a "critical" factor. *Id.* at 287.

The State did not scrupulously honor Harrison's right to remain silent after Harrison clearly indicated that he did not want to speak to Detective Priewe, yet Detective Slomczewski later continued the same line

of questioning. Detective Slomczewski's repetition of the *Miranda* warning at the outset of the second interrogation "did not dispel the coercive effect of the state's method of interrogating the defendant." *Hartwig*, 123 Wis. 2d at 287.

Because Harrison invoked his right to remain silent during the first interrogation, the second interrogation on the same subject was improper under *Mosley* and *Hartwig*. The circuit court's holding that the evidence obtained during that interrogation was not subject to suppression should be reversed.

CONCLUSION

For the foregoing reasons, Harrison respectfully requests that the Court reverse the circuit court's order holding that the evidence obtained during the first interrogation by Detective Priewe and the second interrogation by Detective Slomczewski would not have been suppressed. The Court should remand the case for a full *Machner* hearing on Harrison's ineffective assistance of counsel claim.

Dated: June 8, 2020.

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FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced using proportional serif font. The length of this brief is 5,219 words.

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E-FILING CERTIFICATION

Pursuant to Wis. Stat. § 809.19(12)(f), I hereby certify that the text and content of the electronic copies of this brief and appendix are identical to the text of the paper copies.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on June 8, 2020, I caused ten copies of the Brief and Appendix of Defendant-Appellant Chardez Harrison to be delivered to a third-party commercial carrier for delivery to the clerk within three days.

I also hereby certify that on June 8, 2020, I caused three copies of the Brief and Appendix of Defendant-Appellant Chardez Harrison to be served via U.S. Mail, postage prepaid, on:

Wisconsin Department of Justice
Criminal Appeal Unit
P.O. Box 7857
Madison, WI 53707-7857

Dated: June 8, 2020.

Electronically filed by Atty. Rachel M. Blise
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APPENDIX CERTIFICATION

I hereby certify that the appendix complies with Wis. Stat. § 809.19(2)(a) and 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 Wis. Stat. § 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 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 including 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: June 8, 2020.

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APPENDIX