COURT OF APPEALS OF WISCONSIN
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

REPLY BRIEF OF DEFENDANT-APPELLANT CHARDEZ HARRISON

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INTRODUCTION

The law is clear that when an officer requests a *Miranda* waiver using a one-part, non-compound question asking whether the defendant would like to make a statement, the defendant unambiguously invokes his right to remain silent by responding that he does not want to make a statement. *State v. Hartwig*, 123 Wis. 2d 278, 286, 366 N.W.2d 866 (1985). In such a case, the officer is required to immediately cease all questioning. *Id.*

The outcome should be no different when the officer poses a two-part, compound question and the defendant responds that he does not want to make a statement. A defendant should not bear the burden of ensuring that he hears and responds to each part of an officer's multi-part question. As long as the defendant provides a response that clearly and unambiguously demonstrates an intent to invoke his right to remain silent, all questioning should cease, even follow-up questions designed to elicit an answer to the remaining parts of the compound question.

The State's near total reliance on Harrison's agreement to answer questions in response to Detective Priewe's follow-up question misses the point entirely. All questioning should have ceased when Harrison told Detective Priewe that he did not want to make a statement. Detective

Priewe should not have asked the follow-up question, or any other questions.

The State is also wrong that Harrison waived his ineffective assistance of counsel claim with his guilty plea. The effectiveness of Harrison's trial counsel plainly had an impact on his decision to plead guilty. Harrison's own statements were the primary evidence against him when he made the decision; had the evidence been suppressed, the State would have had little or no evidence for trial.

The Circuit Court's judgment should be reversed, and the case should be remanded for a full *Machner* hearing.

ARGUMENT

The issue presented in this case is a legal one: whether Harrison's statements would have been suppressed if his trial counsel had moved to suppress them. The issue is not, as the State suggests, whether the circuit court appropriately exercised its discretion in declining to hold a *Machner* hearing. (Resp. at 8-9.)

Though a circuit court has the discretion in certain circumstances to decline to hold a hearing on a post-conviction motion, *see State v. Bentley*, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996), the parties and the circuit court agreed that a full *Machner* hearing should be held if the circuit court concluded that the suppression motion would have been granted. (R. 84 at

41:10-22.) The reason the circuit court declined to hold a *Machner* hearing was because the court concluded, as a matter of law, that the suppression motion would not have been granted.

An underlying legal error always amounts to a misuse of discretion. *State v. Hutnik*, 39 Wis. 2d 754, 763, 159 N.W.2d 733 (1968) ("If a judge bases the exercise of his discretion upon an error of law, his conduct is beyond the limits of discretion."). Accordingly, the issue before this Court is a *de novo* review of the legal question whether the motion to suppress should have been granted. *State v. Hartwig*, 123 Wis. 2d 278, 284, 366 N.W.2d 866, 869 (1985) ("Determining whether the right to silence has been scrupulously honored requires the application of constitutional principles to the facts of the case and is subject to independent appellate review.").

I. THE CIRCUIT COURT ERRED IN HOLDING THAT HARRISON'S STATEMENTS SHOULD NOT BE SUPPRESSED.

A. Harrison Unambiguously Invoked His Right to Remain Silent.

The State agrees that Detective Priewe sought a *Miranda* waiver with a "two-part question." (Resp. at 15.) The State also agrees that Harrison clearly and unequivocally answered one part of the question, *i.e.,* whether Harrison wanted to make a statement. (*Id.*) The State's only argument is that Harrison's clear and unequivocal response was rendered

"facially ambiguous" solely because the question through which Detective Priewe sought the *Miranda* waiver had multiple parts. (Resp. at 17.)

Citing *State v. Cummings*, 2014 WI 88, 357 Wis.2d 1850 N.W.2d 915, the State argues that the Court ought to review the "full context of the interrogation" to determine whether Harrison's invocation of his right to remain silent was clear and unambiguous. (Resp. at 15-16.) The *Cummings* case is readily distinguishable. There, the officers were in the middle of the interrogating the defendant when he stated, "I don't want to talk about this" and "I don't know nothing about this." *Id.* at ¶ 63. The defendant had already agreed to answer questions, and his statements that indicated a desire to cut off questioning were interlaced with exculpatory statements proclaiming his innocence. *Id.* ¶ 64. The Supreme Court therefore held that the interrogating officers were permitted to ask follow-up questions, to which the defendant did not respond with an unequivocal invocation of his right to remain silent. *Id.* at ¶ 69.

Here, in contrast, Harrison invoked his right to remain silent at the very outset of the interrogation and his statement was not interlaced with exculpatory statements. Unlike the detectives in *Cummings*, Detective Priewe had no reason to believe Harrison was not invoking his right to remain silent and therefore was not permitted to ask follow-up questions for "clarification."

The State focuses entirely on Harrison's willingness to answer Detective Priewe's follow-up question. Whether Harrison's response to that was "incompatible with a desire to cut off questioning" is irrelevant. (*See* Resp. at 16.) Harrison did not invoke his right to remain silent with his second response. What matters in evaluating Harrison's invocation is his first response.

"Once the right to remain silent . . . is invoked, all police questioning must cease[.]" *State v. Ross*, 203 Wis. 2d 66, 74, 552 N.W.2d 428 (Ct. App. 1996); *see also Saeger v. Avila*, 930 F. Supp. 2d 1009, 1016 (E.D. Wis. 2013) ("[O]nce the defendant unambiguously and unequivocally invoked his right to remain silent, the interrogation should have immediately ended."). Continued questioning after invocation has a "coercive effect," rendering statements made in response to the additional questioning involuntary. *Hartwig*, 123 Wis. 2d at 287.

When viewed in isolation, Harrison's first response indicates a clear desire to cut off questioning:

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.

(R.54 at 2:26-30 A-App 14.) The interrogation should have ended at that point, and any responses Harrison gave after that were coerced and involuntary.

The State never even addresses whether Harrison invoked his right to remain silent by saying, "I don't want to make no statement," and instead jumps right to Harrison's next response to argue that his invocation was ineffective. But Detective Priewe's failure to honor Harrison's initial invocation was not cured by Harrison's responses to Detective Priewe's follow-up questions. Harrison's words were clear, unambiguous, and entirely sufficient to invoke his right to remain silent.[1]

The Court should not even consider the "context" of Detective Priewe's next question and Harrison's next answer to determine whether Harrison invoked his right to remain silent. "Interpretation of the context in which the invocation is made 'is only required where the defendant's words, understood as ordinary people would understand them, are ambiguous.'" *Saeger v. Avila*, 930 F. Supp. 2d 1009, 1015 (E.D. Wis. 2013) (quoting *Connecticut v. Barrett*, 479 U.S. 523, 529 (1987)). The

[1] In telling Detective Priewe that he did not want to make a statement, Harrison likely assumed that the process of making a statement would involve answering some questions. Harrison was a 17-year-old teenager at the time, and Detective Priewe almost certainly would have needed to ask him questions to assist him with making a statement, should he have desired to make one.

State cannot resort to later "context" to claim that Harrison's clear statement was ambiguous.

The State raises but skirts entirely the issue whether officers are permitted to "purposefully use compound questions" to attempt to elicit "ambiguous" responses that will offer additional opportunities to seek a *Miranda* waiver. (Resp. at 18.) There may be no limit if officers are allowed to ask endless follow-up questions to multi-part questions. Officers could ask questions with three, four, or more parts just to ensure that they will have more opportunities to follow up on the defendant's "ambiguous" response, and a defendant would be required to repeatedly answer questions after invoking his right to remain silent if the officer can claim that his question created some sort of ambiguity.

"A suspect need not speak with the discrimination of an Oxford don." *Ross*, 203 Wis. 2d at 78. A single, clear invocation of a defendant's right to remain silent is all that is required. Questions asked after a defendant unambiguously invokes his right to remain silent are coercive, regardless of whether the questions are posed under the guise of seeking a response to every part of a prior, multi-part question. The circuit court's ruling that Harrison did not invoke his right to remain silent should be reversed.

B. Harrison's Statements Made During Both Rounds of Questioning Should Have Been Suppressed.

The State makes a half-hearted attempt to argue that the statements Harrison made during the second interrogation by Detective Slomczewski would not be suppressed under *Michigan v. Mosley*, 423 U.S. 96, 103 (1975). (Resp. at 21.) The State's only argument on this score is that the first interrogation by Detective Priewe involved exclusively "pedigree questions" and that Detective Priewe did not ask questions related to the crimes with which Harrison was ultimately charged. (*Id.*) As detailed in Harrison's opening brief, after failing to honor Harrison's invocation of his right to remain silent, Detective Priewe asked a number of questions regarding the robberies and the cars involved. (*See* Open. Br. at 21-22.) A defendant need not actually confess during the first interrogation for the second interrogation to be on the same subject as the earlier interrogation. *See Hartwig*, 123 Wis. 2d at 285.

That Detective Slomczewski re-read the *Miranda* warnings and Harrison thereafter answered his questions does not immunize the second interrogation. (*See* Resp. at 22.) "Repetition of the *Miranda* warnings did not dispel the coercive effect of the state's method of interrogating the defendant." *Hartwig*, 123 Wis. 2d at 287. Because Detective Priewe failed to "scrupulously honor" Harrison's rights, and the second interrogation

involved the same subject matter as the first, all statements made during both interrogations would have been suppressed.

II. HARRISON DID NOT WAIVE HIS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

The State's suggestion that the Court apply the "guilty-plea" waiver rule to dispose of this case can be roundly rejected. A defendant may withdraw a guilty plea after sentencing upon a showing of "manifest injustice." *State v. Rock*, 92 Wis.2d 554, 558-59, 285 N.W.2d 739 (1979). The "manifest injustice" test is met if the defendant was denied the effective assistance of counsel. *Id.* at 558-59. Thus, if Harrison was denied effective assistance of counsel because his counsel should have filed a motion to suppress the statements Harrison made to Detectives Priewe and Slomsczewski, then he has not waived his ability to withdraw his guilty plea.

The State's citation to *State v. Villegas*, 2018 WI App 9, 380 Wis.2d 246, 908 N.W.2d 198, is inapposite. (Resp. at 23-24.) The court in *Villegas* held that the defendant had waived the argument that he had received ineffective assistance of counsel during a juvenile waiver hearing by later pleading guilty. 2018 WI App 9 at ¶ 48. The waiver was not the result of the guilty plea itself, as the State suggests, but because the defendant "d[id] not assert that [counsel]'s alleged ineffectiveness during

the waiver proceedings had anything to do with his later decision to plead guilty." *Id.*

Here, in contrast, counsel's ineffectiveness in failing to pursue suppression of Harrison's statements is directly tied to Harrison's decision to plead guilty. If granted a *Machner* hearing on his ineffective assistance of counsel claim, Harrison will testify that "had trial counsel successfully suppressed this evidence, Mr. Harrison would not have pled guilty but would have gone to trial." (R. 46 at 20.) Harrison's guilty plea was based on his understanding of the evidence against him, and the primary evidence included the statements that his trial counsel should have moved to suppress. The State does not argue otherwise or that there is any uncertainty as to the effect of the admissibility of that evidence. The clear connection between Harrison's guilty plea and the ineffectiveness of his counsel means that the waiver rule applied in cases like *Villegas* cannot be applied here.

For the same reason, the State's new argument that Harrison is not entitled to a *Machner* hearing even if this Court holds that his statements would have been suppressed has no merit. (*See* Resp. at 12-13.) The State already agreed that the circuit court should hold a full *Machner* hearing if the court would have granted the motion: "I believe if you grant the motion, I think then we go to a *Machner* hearing as to whether or not it was

ineffective, if there was a strategy, et cetera." (R. 84 at 41:13-16.) Having already conceded that the circuit court should hold a *Machner* hearing, the State cannot now argue that Harrison's underlying post-conviction motion was insufficient for the circuit court to grant a hearing. *See State v. Nichelson*, 220 Wis. 2d 214, 229, 582 N.W.2d 460 (Ct. App. 1998) (applying waiver rule to the State's failure to object).

Indeed, there would have been no reason to hold a suppression hearing if the State had argued in the circuit court that Harrison's post-conviction motion was insufficient to hold a *Machner* hearing regardless of the outcome of the suppression hearing. But the State specifically requested that the Court hold a suppression hearing as a prerequisite to the *Machner* hearing:

> As far as the suppression issue or the suppression motion that should have been filed, it was, I guess, my position that we should just have a Miranda hearing. Because if the court denies the Miranda hearing, then there can be no prejudice as it would not have been granted to begin with.

(R. 81 at 5:22-6:3.) In requesting that procedure, the State effectively agreed that Harrison would be able to demonstrate the prejudice required under *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), if the circuit court concluded that the suppression motion should have been granted.

The *Bentley* requirements are not at issue here. (*See* Resp. at 26.) This appeal centers on whether the circuit court correctly concluded that a suppression motion would have been successful. If the Court concludes that it would have been successful, then the circuit court should hold a *Machner* hearing to determine whether Harrison's trial counsel was ineffective for not filing a suppression motion.

CONCLUSION

For the foregoing reasons and the reasons stated in his opening brief, Harrison respectfully requests that the Court reverse the circuit court's order holding that Harrison's statements would not have been suppressed and remand the case for a *Machner* hearing on Harrison's ineffective assistance of counsel claim.

Dated: September 14, 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 2,455 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 September 14, 2020, I caused ten copies of the Reply Brief 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 September 14, 2020, I caused three copies of the Reply Brief of Defendant-Appellant Chardez Harrison to be served via U.S. Mail, postage prepaid, on:

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