APPENDIX

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APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 17-2192

ADREAN L. SMITH,

Petitioner-Appellant,

v.

GARY A. BOUGHTON, Warden,

Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 2:15-cv-01235 — **Lynn Adelman**, *Judge*.

ARGUED FEBRUARY 8, 2022 —
DECIDED AUGUST 4, 2022

Before SYKES, *Chief Judge*, and SCUDDER and JACKSON-AKIWUMI, *Circuit Judges*.

SCUDDER, *Circuit Judge*. Adrean Smith confessed to participating in an armed robbery, but believes police obtained his confession in violation of the Fifth Amendment. On direct appeal, the Wisconsin Supreme Court disagreed, concluding that Smith had not unequivocally invoked his right to cut off the interrogation that led to his confession. Our task is limited to deciding whether that conclusion reflected an unreasonable application of the Supreme Court's

Miranda line of cases. We conclude that it did not, so we affirm the denial of Smith's habeas petition.

I

A

Sometime in November 2010, Milwaukee police pulled over a stolen van. Adrean Smith, the driver, made a break for it, but the officers eventually caught and arrested him. Back at the precinct, Detective Travis Guy questioned Smith about the van, which officers believed was involved in a series of armed robberies. Smith's conversation with Detective Guy spans three audio recordings.

The first recording begins with Detective Guy providing Smith the *Miranda* warnings, adding to the familiar list of rights an express statement that "if you decide to answer questions now without a lawyer present, you have the right to stop the questioning or remain silent at any time you wish." Smith acknowledged that he understood all these rights, and agreed to speak with Detective Guy without a lawyer. All agree that Smith waived his *Miranda* rights knowingly and voluntarily.

The two then discussed the van for about ten minutes. Eventually, Detective Guy told Smith that the van was stolen. Smith admitted that he knew this, but claimed he did not steal the van himself—instead, he said, he got the van from someone named Joker.

After a short break, the second recording begins with more discussion of the van. Smith expressed remorse for having driven the stolen van, telling Detective Guy that he would pay the owners for any

damages or needed repairs. This part of the conversation came to a close as follows:

> SMITH: Okay, so what else do you want to know about the van?
>
> DET. GUY: [inaudible] I'm just letting you talk.
>
> SMITH: See, I don't know what to say. What I'm sayin' is I got caught in the van. That's pretty much all I can say.

The crucial exchange happened next. At this point, Detective Guy attempted to change the topic. He began describing a robbery:

> DET. GUY: ... Okay, alright, um, we're going to talk about this incident here, okay? This is Milwaukee Police Incident number 1032710—correction, 0130, which is an armed robbery, attempted home invasion. This happened on 7205 West Brentwood, okay? In this incident here, a woman was approached in her side drive, okay? On here it says that actors intentionally removed the victim's purse, okay? The victim pulled in a driveway, and one of the suspects was armed with a handgun, a silver and chrome handgun. And then the actors pointed the gun at the victim and took her purse. Now she was getting out of her vehicle—
>
> SMITH: See, I don't want to talk about, I don't want to talk about this. I don't know nothing about this.
>
> DET. GUY: Okay.
>
> SMITH: I don't know nothing. See, look, I'm talking about this van. I don't know nothing about no robbery. Or no—what's the other thing?

DET. GUY: Hm?

SMITH: What was the other thing that this is about?

DET. GUY: Okay.

SMITH: I don't want to talk—I don't know nothing about this, see. That's—I'm talking about this, uh, van. This stolen van. I don't know nothing about this stuff. So, I don't even want to talk about this.

Smith contends that his statements to this point constituted an unambiguous invocation of his right to remain silent, requiring Detective Guy to stop all questioning. But that is not what happened. Immediately after the exchange above, Detective Guy pressed on:

DET. GUY: Okay. I got a right to ask you about it.

SMITH: Yeah, you got a right but—

DET. GUY: You know what I mean?

SMITH: —I don't know nothing about it. I don't know nothing about this. I'm here for the van.

DET. GUY: You're here for some other things that we're going to talk about, so let me finish. You don't know anything about this robbery that happened at 7205 West Brentwood Avenue?

SMITH: Nah.

DET. GUY: On the 23rd of November.

SMITH: Nah.

DET. GUY: Okay, where a woman was approached?

SMITH: Uh-uh. I don't know nothing about this.

DET. GUY: Okay—

SMITH: And then—nah.

DET. GUY: [inaudible] Okay. Go ahead.

SMITH: And then there's something else you're supposed to be talking to me about that—that was on my cell phone?

DET. GUY: Okay. We're going to get to that, there's a few things I got to go across with you, okay?

Detective Guy then transitioned back to questioning Smith about the van. That conversation lasted about three minutes, at which point Guy again asked Smith about a robbery on November 23. Smith maintained that he knew nothing about it. Over the next 20 minutes, Detective Guy attempted to convince Smith that police already had enough evidence to charge him with various robberies, and that it would be in his best interest to cooperate. At no point during this portion of the discussion did Smith indicate that he was uncomfortable or wished to terminate the interview.

Detective Guy then suggested that they take a break. About a half-hour later, the third recording begins with Smith confessing to a robbery.

State charges followed. Wisconsin authorities charged Smith with seven armed robberies and other offenses. Smith then moved to suppress his statements to Detective Guy. In Smith's view, his statement "I don't want to talk about this" expressed an unambiguous intention to cut off all further questioning, and Guy's failure to honor that request

violated *Miranda*. After the trial court denied the motion, Smith pled guilty to three counts of armed robbery and one count of first-degree reckless injury, preserving his right to appeal. The court sentenced him to 25 years' initial confinement and 10 years' extended supervision.

B

Smith's appeal eventually made its way up to the Wisconsin Supreme Court, which consolidated his case with that of his co-defendant, Carlos Cummings. See *State v. Cummings*, 850 N.W.2d 915 (Wis. 2014). Drawing upon the *Miranda* line of cases, the Wisconsin Supreme Court concluded that Smith's statements were admissible, though it saw the case as "a relatively close call." *Id.* at 927. The court observed that, "standing alone, Smith's statements might constitute the sort of unequivocal invocation required to cut off questioning." *Id.* But placing the statements "[i]n the full context of his interrogation," the court found ambiguity in Smith's words that precluded a finding that he had invoked his *Miranda* rights and wished to end all further questioning. *Id.*

Reviewing the transcript of the interrogation, the Wisconsin Supreme Court determined that it was "not clear" whether Smith's statements were "intended to cut off questioning about the robberies, cut off questioning about the minivan, or cut off questioning entirely." *Id.* The court also observed that Smith intermixed his possible invocations with exculpatory statements—like "I don't know nothing about this"—that it believed were "incompatible with a desire to cut off questioning." *Id.* at 928.

Also significant, in the court's view, were Smith's repeated references to the stolen van. By telling Detective Guy that he was "talking about this van," the court explained, Smith appeared to "indicate that [he] was willing to continue answering questions about the van," even if he was "unwilling, or perhaps unable, to answer questions about the robberies." *Id.* In this sense, the court reasoned, Smith's statements could be construed as "selective refusals to answer specific questions" rather than assertions of "an overall right to remain silent." *Id.* (quoting *State v. Wright*, 537 N.W.2d 134, 157 (Wis. Ct. App. 1995) (citing *Fare v. Michael C.*, 442 U.S. 707, 726–27 (1979))).

All told, the Wisconsin Supreme Court concluded that Smith's statements were "subject to reasonable competing inferences," as they could be "interpreted as proclamations of innocence or selective refusals to answer questions." *Id.* (cleaned up). And this ambiguity led the court to conclude that Smith had not unequivocally invoked his right to remain silent. See *id.*

Three Justices dissented. Justice Prosser, joined by Justice Bradley, concluded that Detective Guy's inappropriate assertion that he had "a right" to ask about the robberies "undercut [Smith's] constitutional right to remain silent." *Id.* at 930 (Prosser, J., concurring in part and dissenting in part). In his view, "[w]hen Smith said, 'I don't want to talk about this,' he unambiguously indicated that he did indeed not want to talk anymore." *Id.* at 931. Chief Justice Abrahamson, meanwhile, expressed concern that the majority "seem[ed] to assert that [Smith] did not mean what [he] said" and "f[ound] equivocation

where ... none exists." *Id.* at 932–33 (Abrahamson, C.J., dissenting). She concluded that "a reasonable person would understand that 'I don't want to talk about this' ... mean[t] the conversation [wa]s at an end." *Id.* at 933.

The Wisconsin Supreme Court thus affirmed Smith's conviction and sentence.

C

With his avenues for state-court review exhausted, see 28 U.S.C. § 2254(b)(1)(A), Smith pursued habeas corpus relief in federal court. Invoking 28 U.S.C. § 2254(d)(1), Smith argued that the Wisconsin Supreme Court's decision reflected an unreasonable application of clearly established federal law—specifically, the Supreme Court's *Miranda* cases. See *id.* § 2254(d)(1); see also *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018) (explaining that, under § 2254, federal courts review the decision of "the last state court to decide a prisoner's federal claim ... on the merits in a reasoned opinion").

The district court took care to explain that, in both the Wisconsin courts and in his federal habeas petition, Smith advanced one and only one argument—that his statement "I don't want to talk about this" was an unambiguous invocation of his right to cut off all questioning about all topics. The district court likewise emphasized two arguments Smith had *not* made. For one, Smith never contended that he had selectively invoked his right to remain silent as to the topic of the robbery alone, such that Detective Guy's continued questions about that particular topic were improper. Nor had Smith ever argued—along the lines of Justice Prosser's dissent—

that Detective Guy's statement that he had "a right" to ask about the robbery itself violated *Miranda* by undermining Smith's desire or ability to exercise his right to remain silent.

On the sole question put to it—whether Smith had unambiguously invoked his right to end all questioning—the Wisconsin Supreme Court answered no. And the district court, looking to the governing Supreme Court precedent and applying the deferential standard of review set out in § 2254(d)(1), concluded that this decision did not result from "an unreasonable application of[ ] clearly established Federal law." 28 U.S.C. § 2254(d)(1).

In the district court's view, Smith's use of the phrase "about this" (in his statement "I don't want to talk about this") indicated a desire not to talk only about "a particular topic"—specifically, "the topic most recently mentioned." And so the district court found that "the most natural interpretation of [Smith's] interjection" was that "he did not want to talk about the robbery, as opposed to the other matters that had been under discussion" to that point—foremost, the van. This fact, taken alongside Smith's assertions of innocence and his affirmative statements indicating a willingness to continue discussing the van, led the district court to conclude that the Wisconsin Supreme Court's holding that Smith had "not express[ed] a desire to cut off questioning on all topics" was not unreasonable.

The district court did not issue a certificate of appealability, but in May 2021 we did, determining that "[r]easonable jurists could debate whether

Smith's confession was obtained in violation of his right to end a custodial interview."

II

A

Section 2254 sets a high bar for federal habeas petitioners. Congress has instructed that federal courts "shall not" grant relief unless the relevant state-court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). This deferential standard ensures that § 2254 serves only as "a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 562 U.S. 86, 102–03 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in the judgment)). To this end, the Supreme Court has underscored that success under § 2254 requires a petitioner to "show far more than that the state court's decision was 'merely wrong' or 'even clear error.'" *Shinn v. Kayer*, 141 S. Ct. 517, 523 (2020) (per curiam) (quoting *Virginia v. LeBlanc*, 137 S. Ct. 1726, 1728 (2017) (per curiam)).

Instead, § 2254 affords relief only where the state court's holding is "objectively unreasonable." *White v. Woodall*, 572 U.S. 415, 419 (2014) (cleaned up). A state court falls short only "where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [Supreme Court] precedents." *Richter*, 562 U.S. at 102. Put another way, for a federal court to issue the writ, the state-court decision must be "so lacking in justification that

there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103. And if a state decision rests on multiple grounds, it may not be disturbed unless "*each* ground supporting [it] is examined and found to be unreasonable." *Kayer*, 141 S. Ct. at 524.

A reader confronting these standards for the first time might be left wondering whether relief under § 2254 is available only in theory. It exists in practice, too, but examples are few and far between. See, *e.g.*, *Sims v. Hyatte*, 914 F.3d 1078, 1088–92 (7th Cir. 2019). And that is by congressional design: "Federal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Calderon v. Thompson*, 523 U.S. 538, 555–56 (1998) (cleaned up). So if the standard for relief under § 2254 appears "difficult to meet, that is because it was meant to be." *Richter*, 562 U.S. at 102.

B

In affirming the denial of Smith's motion to suppress, the Wisconsin Supreme Court discussed and applied all the right governing law.

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Supreme Court's decision in *Miranda* announced a set of "concrete constitutional guidelines" to effectuate that protection in the context of custodial interrogations. *Miranda v. Arizona*, 384 U.S. 436, 442 (1966); see *Dickerson v. United States*, 530 U.S. 428, 444 (2000) (holding that "*Miranda* announced a

constitutional rule"). In particular, because of the "inherent compulsions of the interrogation process," *Miranda* requires that, "if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms" of his constitutional rights. 384 U.S. at 467–68.

First among the rights set out in *Miranda* is the one at issue here: the right to remain silent. See *id.* at 468. This right includes not only a right not to respond to official questions, but also an affirmative "right to cut off questioning" at any time during a custodial interrogation—even if the suspect has earlier waived his rights and agreed to speak with police. *Michigan v. Mosley*, 423 U.S. 96, 103 (1975) (quoting *Miranda*, 384 U.S. at 474); see *Cummings*, 850 N.W.2d at 925. The Supreme Court has characterized a suspect's power to terminate questioning as "[t]he critical safeguard" of the *Miranda* right to silence, permitting him to "control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation." *Mosley*, 423 U.S. at 103–04.

In *Berghuis v. Thompkins*, the Supreme Court underscored that a suspect seeking to invoke the right to remain silent must do so "unambiguously." 560 U.S. 370, 381 (2010); see *Cummings*, 850 N.W.2d at 925–26 (discussing *Thompkins*'s "unequivocal invocation standard"). Van Chester Thompkins remained largely silent during a three-hour interrogation before ultimately confessing to a murder. See *Thompkins*, 560 U.S. at 375–76. The Court held that this silence alone did not require police to terminate the interrogation. See *id.* at 382. Instead, the Court explained, a defendant may invoke his *Miranda* right

to silence only by making an "unambiguous" statement to that effect, such as by telling police "that he want[s] to remain silent or that he [does] not want to talk with [them]." *Id.*

Courts applying the *Thompkins* standard have thus looked for simple statements clearly indicating that the suspect wished to bring police questioning to a close. See, *e.g.*, *United States v. Abdallah*, 911 F.3d 201, 211–12 (4th Cir. 2018) (finding the defendant's statement that he "wasn't going to say anything at all" to be an unambiguous invocation); *Jones v. Harrington*, 829 F.3d 1128, 1140 (9th Cir. 2016) (reaching the same conclusion when the defendant told police "I don't want to talk no more"); *Tice v. Johnson*, 647 F.3d 87, 107 (4th Cir. 2011) (holding likewise for "I have decided not to say any more").

Thompkins also emphasized an important corollary to its clear-invocation rule: if a suspect's attempt to invoke his right to remain silent is "ambiguous or equivocal," the police "are not required to end the interrogation ... or ask questions to clarify" the suspect's intent. *Thompkins*, 560 U.S. at 381 (quoting *Davis v. United States*, 512 U.S. 452, 459, 461–62 (1994)). The key inquiry, then, is whether a reasonable officer under the circumstances would understand the defendant's statements as an unequivocal invocation of the right to remain silent. See *Davis*, 512 U.S. at 458–59. If so, as the Wisconsin Supreme Court recognized, "all police questioning must cease" immediately. *Cummings*, 850 N.W.2d at 926 (citations omitted). If not, the interrogation may proceed.

C

Because the Wisconsin Supreme Court rooted its decision in "the correct governing legal rule[s]," our task under § 2254(d)(1) is to determine whether its application of those rules to the facts of Smith's interrogation was "objectively unreasonable." *Woodall*, 572 U.S. at 419, 425 (cleaned up). It was not.

1

When Detective Guy switched topics from the van to the robberies, Smith responded by saying "I don't want to talk about this." Smith insists that this statement clearly expressed a desire to cut off questioning about *all topics*. But another reasonable interpretation of Smith's statement that he did not want to talk "about this" is that *this* referred only to the robbery—the topic Detective Guy had just introduced—and that Smith was willing to continue talking about the van. That possibility alone means it was not unreasonable for the Wisconsin Supreme Court to conclude that Smith's statement fell short of satisfying *Thompkins*'s unambiguous-invocation test. See 560 U.S. at 381.

A look back at the transcript reveals that this interpretation of Smith's statement is bolstered by his statements a moment later that he was "here for the van" and "talking about this van." Smith contends that we cannot consider these statements, as the Supreme Court has held that courts may not use a suspect's "subsequent responses to continued police questioning" to render earlier clear statements ambiguous. *Smith v. Illinois*, 469 U.S. 91, 97 (1984) (emphasis omitted). But we have rejected the premise: it was reasonable for the Wisconsin Supreme

Court to think that Smith's initial statement—"I don't want to talk about this"—was *not* unambiguous but instead left unclear what he meant by "this." And so the court's consideration of Smith's subsequent references to the van was not "contrary to" or "an unreasonable application of" *Smith* or any other Supreme Court case. See 28 U.S.C. § 2254(d)(1).

Looking at the full context of the back and forth in the interrogation, the Wisconsin Supreme Court determined that Smith appeared "willing to continue answering questions about the van, but was unwilling, or perhaps unable, to answer questions about the robberies." *Cummings*, 850 N.W.2d at 928. That analysis aligns with the Supreme Court's observation in *Fare v. Michael C.* that a suspect's statements that "he could not, or would not, answer [specific] question[s] ... were not assertions of his [overall] right to remain silent." 442 U.S. at 727.

We are not the only ones to see alignment with *Michael C.* The Wisconsin Supreme Court did too, affirmatively relying on *Michael C.* to conclude that a reasonable officer could have believed Smith's statements were "selective refusals to answer specific questions" about the robbery rather than assertions of "an overall right to remain silent." *Cummings*, 850 N.W.2d at 928 (citations omitted). The court went on to explain that "[t]he mere fact that Smith's statements *could* be interpreted as … selective refusals to answer questions is sufficient to conclude" that they were not unambiguous invocations within the meaning of *Thompkins*. *Id.* Far from being "an error well understood and comprehended in existing law," *Richter*, 562 U.S. at 103, this is an accurate statement of the Supreme Court's *Miranda* case law.

For his part, Smith takes issue with the conclusion that "I don't want to talk about this" could reasonably be interpreted as ambiguous. It is, after all, quite similar to *Thompkins*'s prototypical example of a clear invocation: a statement that the suspect "did not want to talk with police." 560 U.S. at 382. In *Connecticut v. Barrett*, the Supreme Court made clear that "[i]nterpretation" of a claimed invocation "is only required where the defendant's words, understood as ordinary people would understand them, are ambiguous." 479 U.S. 523, 529 (1987). Smith says his invocation was unambiguous—full stop—and that the state court ran afoul of *Barrett* by looking to context to "interpret" the statement as ambiguous.

But the Supreme Court has likewise underscored that context is an important factor in the plain-meaning analysis. See, *e.g.*, *Yates v. United States*, 574 U.S. 528, 537 (2015) (Ginsburg, J., plurality opinion) ("In law as in life ... the same words, placed in different contexts, sometimes mean different things."). And ordinary listeners would know that the meaning of "I don't want to talk about this" depends on the answer to the question *talk about what*? Since Smith's statement left that crucial question unanswered, *Barrett* recognizes that an ordinary listener must look to the broader context of the interrogation for the answer. At the very least, then, the Wisconsin Supreme Court's consideration of that added context was not "objectively unreasonable." *Woodall*, 572 U.S. at 419.

Smith begs to differ, relying on the Sixth Circuit's opinion in *McGraw v. Holland*, 257 F.3d 513 (6th Cir. 2001), a case he says "cannot be distinguished" from his own. We think otherwise. In *McGraw*, police

interviewed a suspect about one and only one thing—an alleged sexual assault. See *id.* at 515. In response the suspect repeatedly told police "I don't want to talk about it," *id.*, a statement which, like the one here, raises the question *talk about what*? The Sixth Circuit, considering the context of the interrogation, found it clear that "it" meant the sexual assault—the only topic being discussed. See *id.* at 518. And so the court determined that the statement was a clear invocation of the right to remain silent. See *id.*

Here, by contrast, the interrogation covered *two* topics. After discussing the van for 15 minutes, Detective Guy asked about a robbery. Only then did Smith indicate that he didn't "want to talk about this." In this context, it was not unreasonable for the state court to conclude that "about this" referred only (or, at least, ambiguously) to the robbery. Construed in this way, the statement was not a clear and unequivocal invocation of the right to remain silent about any and all topics. On this record, then, we cannot say the Wisconsin Supreme Court's decision amounted to an unreasonable application of the clear-invocation rule announced in *Thompkins*.

2

The comparison to *McGraw* leads us to a final observation. In *McGraw*, when the suspect said she did not want to talk about the sexual assault, the officer told her that she "ha[d] to." 257 F.3d at 515. The Sixth Circuit held that a reasonable officer "would have understood that when [the suspect] repeatedly said she did not want to talk about the rape, she should not have been told that she *had* to talk about it." *Id.* at 518. A similar concern is present here. If,

as the Wisconsin Supreme Court suggested, Smith remained willing to speak about the van but was "unwilling, or perhaps unable, to answer questions about the robberies," *Cummings*, 850 N.W.2d at 928, Detective Guy should not have told him he had "a right to ask" about the robberies and then proceeded to do so.

No doubt Detective Guy's statement went too far—and, if this case were coming to us on direct review, we may have more leeway to address this point further. But remember that Smith made only one argument before the Wisconsin Supreme Court: that he unambiguously invoked as to *all topics*, not just the robbery, and that Detective Guy's statement was not itself the cause of any *Miranda* violation. For whatever reason, this is the way Smith's state-court counsel chose to tee up his case on direct appeal. And Smith is bound by that decision on collateral review in federal court. See *White v. United States*, 8 F.4th 547, 554 (7th Cir. 2021) ("A claim not raised on direct appeal generally may not be raised for the first time on collateral review and amounts to procedural default."); *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991) (explaining that a petitioner's "fail[ure] to exhaust state remedies" with respect to a particular claim amounts to "a procedural default for purposes of federal habeas" when the state court "to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred"). In the deferential § 2254(d)(1) context it is especially important that we adhere to the general rule that parties, and not courts, "are responsible for advancing the facts and argument[s] entitling them to relief."

United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020) (cleaned up).

Recognizing the need to hew closely to the arguments presented in the Wisconsin courts, Smith's habeas counsel has not argued that "I don't want to talk about this" was a selective invocation of the right to remain silent about the robbery alone. That argument would be procedurally defaulted. See *White*, 8 F.4th at 554. Instead, in line with his state-court submissions, Smith's main argument—the one we have discussed to this point—is all-or-nothing: that he invoked his right to remain silent as to all topics.

But Smith does press an alternative argument that relies upon selective invocation, albeit in roundabout fashion. In Smith's view, even if his statements were not an unambiguous invocation of the right to remain silent as to *all topics*, they were an unambiguous invocation as to *some topics*—either the robberies, the van, or everything. "Each of those options," Smith contends, "is an invocation of the right to remain silent." And Smith says that the Wisconsin Supreme Court should have resolved this "ambiguity as to the scope of [his] invocation" in his favor by requiring all questioning to end. For this proposition he relies on the Supreme Court's statement in *Barrett* that courts must "give a broad, rather than a narrow, interpretation to a defendant's" invocation of his *Miranda* rights. 479 U.S. at 529. The dissent sees things the same way. See *post* at 31–36.

To our eyes, though, Smith never presented this argument to the Wisconsin courts. Nowhere in his briefs before the Wisconsin Supreme Court did he

reference *Barrett* or suggest that his statements could be interpreted as selective invocations as to the robbery. His failure to do so leaves us without a state-court decision to review on the issue. See *Perruquet v. Briley*, 390 F.3d 505, 514 (7th Cir. 2004) (explaining that a procedural default occurs where a petitioner's "claim was not presented to the state courts and it is clear that those courts would now hold the claim procedurally barred") (citing *Coleman*, 501 U.S. at 735 & n.1).

Regardless, we have already observed that, in line with *Michael C.*, it was not unreasonable for the Wisconsin Supreme Court to determine that Smith's statements could be viewed as reflecting "selective refusals to answer specific questions" about the robbery but a continued willingness to talk about the van. *Cummings*, 850 N.W.2d at 928 (citation omitted). And that means the Wisconsin Supreme Court was within its rights to conclude that the statement was not an unambiguous all-or-nothing invocation under *Thompkins*.

Make no mistake: Smith—aided here by talented pro bono counsel—has advanced a serious *Miranda* claim. All judges to have considered it, including the Justices of the Wisconsin Supreme Court, have struggled with the issue. And we share the dissent's concerns about Detective Guy's conduct during the interrogation and the effect it had on Smith's ability to exercise his rights. But we are limited to the task Congress set for us in § 2254(d)(1). In our view, nothing in this case reflects an "extreme malfunction[ ]" of the judicial process beyond all "possibility for fair minded disagreement." *Richter*, 562 U.S. at 102–03 (citations omitted). To the

contrary, in the competing opinions of the Wisconsin Supreme Court we see only a state court doing its level best to answer a difficult question of Fifth Amendment law. And in that case § 2254 bars relief.

For these reasons we AFFIRM the denial of Smith's habeas petition.

JACKSON-AKIWUMI, *Circuit Judge*, dissenting. In *Miranda*, the Supreme Court made clear that if an individual "indicates in any manner, at any time" during an interrogation that he wishes to cut off questioning, "the interrogation must cease." *Miranda v. Arizona*, 384 U.S. 436, 473–74 (1966). The right to terminate questioning, the Supreme Court explained, is a "critical safeguard" that must be "'scrupulously honored.'" *Michigan v. Mosley*, 423 U.S. 96, 103 (1975) (citation omitted). Without it, an interrogator "through badgering or overreaching—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself notwithstanding [an individual's] earlier request" to terminate questioning. *Smith v. Illinois*, 469 U.S. 91, 98–99 (1984) (cleaned up).[1]

This case is a poster child for what *Miranda* and its progeny were designed to prevent. Adrean Smith, at the time eighteen years old, stated "I don't want to talk about this" and "I don't want to talk" multiple times. Smith's statements were all he needed to unambiguously invoke his right to terminate questioning. But instead of honoring Smith's request, Detective Travis Guy continued the interrogation and falsely asserted that he had a right to ask Smith questions. Eventually, Detective Guy obtained a

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[1] The Supreme Court has stated that "there is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel[.]" *See Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010); *see also Davis v. United States*, 512 U.S. 452 (1994). Accordingly, both the majority opinion and I cite right to counsel cases like Smith in our analysis.

confession. This was a violation of Smith's right to cut off questioning.

Yet, a closely divided Wisconsin Supreme Court concluded otherwise. The Wisconsin Supreme Court reasoned that although Smith's statements standing alone, "might constitute the sort of unequivocal invocation required to cut off questioning," when placed in context, it was unclear whether Smith—who previously answered questions about a stolen van—intended to cut off questioning about unsolved robberies, the stolen van, or cut off questioning completely. I see several issues with this reasoning: (1) the fact that Smith initially cooperated cannot be used to render his invocation ambiguous—he had a right to cut off questioning "at any time[.]" *Miranda*, 384 U.S. at 473–74; (2) Smith is not required to speak with a high level of specificity or use particular words to unequivocally invoke his right to cut off questioning, *see Emspak v. United States*, 349 U.S. 190, 194 (1955), and the number of topics discussed during an interrogation does not change this; and (3) Smith's request to cut off questioning is entitled to a "'broad, rather than a narrow'" interpretation, *Connecticut v. Barrett*, 479 U.S. 523, 529 (1987) (citation omitted), and any ambiguity as to the scope of the invocation must be resolved in his favor, *see Michigan v. Jackson*, 475 U.S. 625, 633 (1986).[2]

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[2] *Jackson* was overruled by *Montejo v. Louisiana*, 556 U.S. 778 (2009), on grounds not relevant here. *Jackson*'s discussion about the scope of waivers and resolving doubts in favor of protecting the constitutional claim remains good law. *See Jackson*, 475 U.S. at 633.

Smith clearly invoked his right to cut off questioning and his statements should have been suppressed. The Wisconsin Supreme Court's decision to the contrary was the result of an unreasonable application of *Miranda* and its progeny.[3] For these reasons, even under the deferential and "difficult to meet" standard for relief under § 2254, *Harrington v. Richter*, 562 U.S. 86, 102 (2011), I cannot join the majority opinion in affirming the denial of Smith's habeas petition.

I. The Interrogation

A brief recap of the facts is necessary. In November 2010, Detective Guy conducted a custodial interrogation of eighteen-year-old Smith about a stolen van used in a string of armed robberies. The interrogation was captured on three audio recordings.

In the first audio recording, Detective Guy began the interrogation by reading Smith his *Miranda* rights and specifically informed Smith that he had "the right to stop questioning or remain silent anytime" he wished. After Smith agreed to talk, Detective Guy told Smith they had "multiple things to talk about," including a stolen van. During questioning about the van, Smith insisted that he did not steal the van but explained that because he was

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[3] Under Title 28, Section 2254—promulgated as part of the Antiterrorism and Effective Death Penalty Act of 1996, otherwise known as AEDPA—a federal court may grant relief if a state-court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]" 28 U.S.C. § 2254(d)(1).

caught driving the van, he would pay the owners for any damages.

By the start of the second audio recording, Smith said all he could say about the van, and the discussion about the van ended. At that point, Detective Guy transitioned to describing a robbery. Within seconds of Detective Guy's transition, Smith interrupted and said: "I don't want to talk about this." Smith briefly explained that he knew nothing about the robbery. He twice repeated "I don't want to talk about this." He also said once, "I don't want to talk." Smith then stopped talking.

From Smith's view, the interrogation should have ended there. Instead, Detective Guy falsely stated: "I got a right to ask you about it." And Detective Guy continued the interrogation.

After Detective Guy said that he had a right to ask questions, Smith resumed talking. He again claimed that he did not know anything about a robbery but was there to discuss the van. Detective Guy reminded Smith that they had multiple things to talk about, stating: "You're here for some other things that we're going to talk about, so let me finish." Detective Guy then asked Smith questions about the robbery. When Smith denied any knowledge about the robbery, Detective Guy returned to discussing the van, but three minutes later, resorted to asking Smith about the same robbery. Despite Detective Guy's repeated attempts to get Smith to talk about the robbery, including informing Smith that police had evidence of his involvement, Smith maintained that he did not know anything about a robbery. Detective Guy then

suggested a break. This ended the second audio recording.

There are no details about what happened during the break. Thirty minutes later, the third audio recording begins with Smith confessing to participating in an armed robbery.

The state charged Smith with several armed robberies and other offenses. Smith filed a motion to suppress his incriminating statements, but after the trial court denied the motion, he pled guilty to three counts of armed robbery as party to a crime and one count of first-degree reckless injury by use of a dangerous weapon. Smith was sentenced to twenty-five years of initial confinement and ten years of extended supervision.

Smith appealed the denial of his motion to suppress in state court, arguing that he invoked his right to cut off questioning, thus Detective Guy's failure to end the interrogation violated *Miranda*. The Wisconsin Supreme Court affirmed the denial of his suppression motion and concluded that Smith did not unambiguously invoke his right to cut off questioning. The Wisconsin Supreme Court reasoned:

> We agree that, standing alone, Smith's statements might constitute the sort of unequivocal invocation required to cut off questioning, and we further acknowledge that Smith's statement presents a relatively close call. In the full context of his interrogation, however, Smith's statements were not an unequivocal invocation of the right to remain silent.
>
> When placed in context it is not clear whether Smith's statements were intended to cut off

> questioning about the robberies, cut off questioning about the minivan, or cut off questioning entirely ... Prior to Smith's statement, Detective Guy had been asking Smith about his involvement in the theft of the minivan. Smith had been participating in this portion of the questioning in a fairly straightforward and cooperative fashion.

The Wisconsin Supreme Court's decision led three justices to dissent; they concluded that Smith unambiguously invoked his right to cut off questioning. When the state courts failed to grant relief, Smith sought habeas corpus relief in federal court arguing that the Wisconsin Supreme Court's decision was an unreasonable application of clearly established federal law. The district court disagreed, taking the position that Smith's use of the words "about this" expressed a desire not to talk about the robberies, which was insufficient to invoke the right to cut off questioning altogether.

Although the district court denied Smith a certificate of appealability, we decided to hear the case on appeal. Today, the majority opinion, citing the deferential § 2254 standard, affirms the district court's decision to deny Smith habeas relief. But § 2254(d)(1) was designed to address the very circumstance before our court—when a state court's decision results from an unreasonable application of clearly established law.

II. The "Clearly Established" Law

The analysis begins and ends with the Fifth Amendment and the *Miranda* line of cases. The Fifth Amendment, made applicable to the states via the

Fourteenth Amendment, provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. The Fifth Amendment's prohibition against compelled self-incrimination allows an individual to refrain from answering an official's questions where the answers might incriminate the individual in a criminal proceeding. *See, e.g.*, *Minnesota v. Murphy*, 465 U.S. 420 (1984).

In *Miranda*, the Supreme Court established procedural safeguards to protect the right against compulsory self-incrimination during custodial interrogations. This includes a suspect's right to remain silent and cut off questioning. *See Miranda,* 384 U.S. at 467–70. The Supreme Court advised that if an individual indicates in "any manner, at any time" that he does not wish to be interrogated, "the interrogation must cease." *Id.* at 473–74. It does not matter that the individual "may have answered some questions or volunteered some statements on his own"—this does not deprive him of his right to cut off questioning. *Id.* at 445. "Without the right to cut off questioning," the Supreme Court explained, "the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked." *Id.* at 474.

The Supreme Court elaborated on this "critical safeguard" in subsequent cases like *Michigan v. Mosley*, 423 U.S. 96 (1975). In *Mosley*, the Court explained that "[t]hrough the exercise of his option to terminate questioning [a suspect] can control the time at which questioning occurs, *the subjects discussed*, and the duration of the interrogation." *Id.* at 103–04

(emphasis added). Once an individual invokes the right to cut off questioning, the right must be "'scrupulously honored.'" *Id.* (quoting *Miranda*). Meaning, the interrogation must cease. *Id.* If an interrogator fails to honor an individual's request, any statements obtained during the interrogation may not be admitted against the individual in a criminal proceeding. *See id.* at 99–100. That is because "'any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.'" *Id.* at 100–01 (citing *Miranda*, 384 U.S. at 473–74).

In *Berghuis v. Thompkins*, the Supreme Court explained that an individual must invoke the right to remain silent, or to cut off questioning, "unambiguously." 560 U.S. 370 (2010). The Court rejected Thompkins's argument that his silence during an interrogation was enough to invoke the right to remain silent. *Id.* at 381–82. The Court explained that had Thompkins said that "he wanted to remain silent or that he did not want to talk with the police[,]" he would have invoked his right to end questioning. *Id.* at 382.

Although a suspect must invoke his right unequivocally, "[n]o ritualistic formula or talismanic phrase" is required. *Emspak*, 349 U.S. at 194; *see also Davis v. United States*, 512 U.S. 452, 459 (1994) (a suspect need not "'speak with the discrimination of an Oxford don'") (citation omitted). At minimum, a suspect's invocation requires "'some statement that can reasonably be construed to be an expression of a desire'" to cut off questioning. *Davis*, 512 U.S. at 459 (citation omitted).

To determine whether an individual invoked the right to cut off questioning, courts employ an objective standard. Under this objective standard, the focus is whether a reasonable officer would regard the suspect's statements to be an unequivocal invocation of the right to cut off questioning. *Davis*, 512 U.S. at 458–59. In undertaking this inquiry, a court may look at context to interpret an invocation when an individual's statement is ambiguous as understood by ordinary people. *Connecticut v. Barrett*, 479 U.S. 523, 529 (1987). But even then, courts must not use context to turn an unambiguous statement into an ambiguous one. *See id.* at 529–30.

This rule is particularly important in a case like the instant one, where the existence of the invocation is unambiguous, but the scope of the invocation *might* be ambiguous. In *Barrett*, the suspect agreed to confess orally but refused to make a written statement without the presence of a lawyer. The Supreme Court found that there was no ambiguity as to the existence or the scope of the suspect's invocation, and therefore concluded that there was no violation when the interrogators did not end the interrogation. But in so holding, the *Barrett* court emphasized that courts must apply a "'broad, rather than a narrow, interpretation'" to a suspect's invocation of the right to cut off questioning. 479 U.S. at 529 (citation omitted). That is, any ambiguity as to the scope of the invocation must be construed broadly and in a suspect's favor. *Id.*; *see also Jackson*, 475 U.S. at 633 ("[d]oubts must be resolved in favor of protecting the constitutional claim[]"). Had the scope of Barrett's invocation been ambiguous, the result might have been different.

This is the clearly established law as outlined in *Miranda* and the cases that followed. The Wisconsin Supreme Court identified *Miranda's* right to cut off questioning. But the Wisconsin Supreme Court's application of the above rules—and failure to apply *Barrett's* broad interpretation rule—"resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established" Supreme Court precedent. 28 U.S.C. § 2254(d)(1).

III. The Wisconsin Supreme Court's application of the law was objectively unreasonable

In holding that Smith did not clearly invoke his right to cut off questioning, the Wisconsin Supreme Court explained: "Prior to Smith's statement, Detective Guy had been asking Smith about his involvement in the theft of the minivan. Smith had been participating in this portion of the questioning in a fairly straightforward and cooperative fashion." The Wisconsin Supreme Court then concluded: "When placed in context it is not clear whether Smith's statements were intended to cut off questioning about the robberies, cut off questioning about the minivan, or cut off questioning entirely." This analysis runs counter to Supreme Court precedent for the following reasons.

First, the fact that Smith initially cooperated cannot be used against him to render his invocation ambiguous. *See Miranda*, 384 U.S. at 445 ("[t]he mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries"). *Miranda* allows a suspect to cut

off questioning "at any time," effectively accounting for those situations where a suspect may initially waive his right, and then later decide to invoke the right to remain silent. *Id.* at 474. The Supreme Court recognized that, during an interrogation, a suspect might receive evolving information and a suspect's reactions and decisions may evolve over time. In *Thompkins*, the Court wrote:

> Interrogation provides the suspect with additional information that can put his or her decision to waive, or not to invoke, into perspective. As questioning commences and then continues, the suspect has the opportunity to consider the choices he or she faces and to make a more informed decision, either to insist on silence or to cooperate. When the suspect knows that *Miranda* rights can be invoked at any time, he or she has the opportunity to reassess his or her immediate and long-term interests.

Thompkins, 560 U.S. at 388. That a suspect may freely cut off questioning at any point in the interrogation, without his prior cooperation casting doubt on his later invocation, is essential to the protection of *Miranda*. *See Barrett*, 479 U.S. at 528 (*"Miranda* ... [gives] the defendant the power to exert some control over the course of the interrogation") (citation omitted). This remains the rule regardless of the number of topics discussed during an interrogation. *See Mosley,* 423 U.S. at 103–104 ("[t]hrough the exercise of his option to terminate questioning" a suspect can control "the subjects discussed").

This leads me to the second reason I see an unreasonable application of clearly established law here: the notion that a suspect must be specific about the scope of his invocation because of the number of topics discussed during an interrogation finds no support in Supreme Court precedent. The majority opinion concludes that because Smith's interrogation covered "*two* topics"—opposed to one topic like the interrogation in *McGraw v. Holland*, 257 F.3d 513 (6th Cir. 2001)—it was not "objectively unreasonable" for the Wisconsin Supreme Court to hold that Smith did not meet the *Thompkins* clear-invocation rule. Ante at 16–17 (emphasis in original). But whether Smith's interrogation included one topic or twelve topics does not matter. The Supreme Court has never required a suspect to use particular words to cut off questioning, or to be specific about the scope of his invocation. *See Miranda*, 384 U.S. at 445 (a suspect can invoke his right in "any manner"); *Emspak*, 349 U.S. at 194 (no "talismanic phrase" or "ritualistic formula" is required); *Davis*, 512 U.S. at 458–59 (a suspect need not "speak with the discrimination of an Oxford don."). Yet, under the Wisconsin Supreme Court's application of the *Miranda* case law, each time an interrogation covers multiple topics, a suspect who initially waives his right to remain silent will have to be specific about the scope of his invocation or use particular words to invoke the right to cut off questioning. Implicit in the Wisconsin Supreme Court's decision is the conclusion that if Smith had stated "I don't want to talk about the van, the robberies, or anything else," he might be granted the relief he seeks. This places a heavy burden on suspects. Even in *McGraw*, the very case the majority

opinion seeks to distinguish, the Sixth Circuit specifically rejected any suggestion that a suspect needs to be specific about the scope of an invocation when the court concluded that a similar statement, "I don't want to talk about it," was sufficient to invoke the right to cut off questioning. *See* 257 F.3d at 518–19.

This brings me to the final reason the Wisconsin Supreme Court's reasoning was contrary to clearly established law: Even if Smith's invocation was ambiguous, any ambiguity went to the scope of his invocation and *Barrett* requires courts to apply a "'broad, rather than a narrow'" interpretation resolving any ambiguity in Smith's favor. 479 U.S. at 529 (citation omitted). The majority opinion quickly dispenses with this argument in two ways: (1) by taking the position that any argument about the scope of Smith's invocation is procedurally defaulted because Smith failed to raise *Barrett* before the state courts, ante 18–19, and (2) by concluding that the Wisconsin Supreme Court's reliance on one sentence in *Fare v. Michael C.*, 442 U.S. 707 (1979), was not "objectively unreasonable," ante 15, 19. I disagree with the majority opinion on both fronts.

Smith's argument regarding the scope of his invocation under *Barrett* is not procedurally defaulted. To survive procedural default, a petitioner must exhaust state remedies. *See Coleman v. Thompson*, 501 U.S. 722, 735 n. 1 (1991); *Perruquet v. Briley*, 390 F.3d 505, 514 (7th Cir. 2004) ("when the habeas petitioner has failed to fairly present to the state courts the claim on which he seeks relief in federal court and the opportunity to raise that claim in state court has passed, the petitioner has

procedurally defaulted that claim"). To exhaust state remedies, a petitioner must "fairly present" federal claims to the state courts to give the state an "opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Picard v. Connor*, 404 U.S. 270, 275 (1971) (cleaned up). This requires a petitioner to present the necessary facts and identify the specific constitutional right violated. *Gray v. Netherland,* 518 U.S. 152, 162–63 (1996). A mere variation in legal theory does not automatically lead to a finding of failure to exhaust. *Picard*, 404 U.S. at 277. So long as a federal petition includes claims that are the "substantial equivalent" of the claims presented to the state courts, a claim is exhausted. *Id.* at 278; *Boyko v. Parke*, 259 F.3d 781, 788 (7th Cir. 2001) ("petitioner may reformulate his claims somewhat, so long as the substance of his arguments remains the same").

In his state courts briefs, Smith fairly presented the facts necessary to state a claim for relief. He also identified the specific constitutional right violated (his Fifth Amendment right to be free from self-incrimination) and the specific issue (that he unambiguously invoked his right to cut off questioning but the detective did not honor his request). This is sufficient to meet the fair presentment requirement of exhaustion. *See Gray*, 518 U.S. at 162–63. I therefore see no failure to exhaust as it relates to Smith's argument that, under *Barrett*, the scope of his invocation should have been interpreted broadly in his favor. At most, this argument constitutes a mere variation in legal theory, which does not prevent the court from considering the argument on habeas review. *See Picard*, 404 U.S. at

277. Further, that Smith did not directly cite *Barrett* before the state courts is of no consequence, particularly on habeas review, where we are tasked with determining whether the Wisconsin Supreme Court applied *Miranda* and its progeny in a way that is "objectively unreasonable."[4]

Now to the merits of *Barrett* as it applies to Smith's case. The Wisconsin Supreme Court did not construe the scope of his invocation broadly. Instead, the Wisconsin Supreme Court looked to *Michael C.*, 442 U.S. at 707, a pre-*Barrett* case about whether a juvenile's request for a probation officer constituted an invocation of the right to counsel (the Supreme Court held it did not). The Wisconsin Supreme Court relied on a single sentence in *Michael C.* to conclude that Smith did not clearly invoke his right to cut off questioning:

> And respondent's allegation that he repeatedly asked that the interrogation cease goes too far: at some points he did state that he did not know the answer to a question put to him or *that he could not, or would not, answer the question*, but these statements were not assertions of his right to remain silent.

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[4] Unfortunately for Smith, I am unable to reach the same conclusion about any argument related to Detective Guy's troubling and false statement that he had a right to ask Smith questions despite Smith's desire to end questioning. As Justice Prosser of the Wisconsin Supreme Court noted in his dissent, Detective Guy's statement "undercut [Smith's] constitutional right to remain silent." It is unclear why Smith's counsel did not make this argument before the Wisconsin Supreme Court. And because counsel did not, the argument is unexhausted.

Michael C., 442 U.S. at 727 (emphasis added). The majority concludes that it was not "unreasonable" for the Wisconsin Supreme Court to determine, based on this one sentence in *Michael C.*, that Smith's statements could be viewed as reflecting "'selective refusals to answer specific questions.'" Ante at 19 (citation omitted). But without a transcript or a retelling of the specific words that the suspect spoke in *Michael C.*, neither of which the Supreme Court opinion contains, it is hard to fathom how *Michael C.* bears any resemblance to Smith's interrogation.

More importantly, Smith did not refuse to answer a single question here and there as in *Michael C.*—he sought to cut off questioning completely. In fact, when Smith invoked his right to cut off questioning by stating "I don't want to talk about this" and "I don't want to talk," he did so not in response to a question, but in response to Detective Guy's description of a robbery. Detective Guy's specific questions about the robbery came *after* Smith invoked his right to cut off questioning and *after* Detective Guy falsely asserted that he had a right to ask Smith questions. The Wisconsin Supreme Court relied on these post-invocation questions-and-answers in its analysis, contrary to *Smith v. Illinois*, which held that "[u]sing an accused's subsequent responses to cast doubt on the adequacy of the initial request" is "intolerable." 469 U.S. 91, 98–99 (1984).[5]

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[5] The Wisconsin Supreme Court also pointed to Smith's proclamations of innocence. In doing so, the Wisconsin Supreme Court conflated waiver and invocation, inquiries the Supreme Court has clarified are separate and distinct. *Smith*, 469 U.S. at

Critically, nothing in *Michael C.* limits or calls into question the broad interpretation rule outlined in *Barrett*, which has neither been overruled nor called into question by subsequent cases. To the extent there was any ambiguity about the scope of Smith's request, the Wisconsin Supreme Court was required to construe the ambiguity in Smith's favor. But it did not. The broad interpretation rule is nowhere to be found in the Wisconsin Supreme Court's decision. This resulted in an unreasonable application of *Miranda* and its progeny to Smith's case.

IV. Smith's incriminating statements should have been suppressed

Smith clearly invoked his right to cut off questioning. His statements, standing alone, were unambiguous as ordinary people would understand them, and this is sufficient to invoke the right. *Barrett*, 479 U.S. at 529; *see Thompkins*, 560 U.S. at 382 (a defendant's statement that "he [does] not want to talk with the police" is a "simple, unambiguous statement[]" that invokes the defendant's "right to cut off questioning") (citations omitted); s*ee State v. Cummings*, 850 N.W.2d 915, 933 (Wis. 2014) (Abrahamson, C.J., dissenting) (concluding that "'I don't want to talk about this' ... mean[t] the conversation [wa]s at an end"). At the very least, Smith's statements "can reasonably be construed to be an expression of a desire" to cut off questioning. *See Davis*, 512 U.S. at 459.

98–96 ("invocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together").

For added context, Smith's statements are similar to statements that courts have found to be "unambiguous" and sufficient to invoke the right to cut off police questioning. *See, e.g., Thompkins*, 560 U.S. at 382 ("[I do] not want to talk with the police"); *McGraw*, 257 F.3d at 518 (6th Cir. 2001) ("I don't want to talk about it"); *Tice v. Johnson*, 647 F.3d 87, 107 (4th Cir. 2011) ("I have decided not to say any more"); *Jones v. Harrington*, 829 F.3d 1128, 1140 (9th Cir. 2016) ("I don't want to talk no more"); *Anderson v. Terhune*, 516 F.3d 781, 784 (9th Cir. 2008) ("I don't even wanna talk about this no more" and "Uh! I'm through with this" and "I plead the Fifth").

Smith's statements are also substantially like statements the Wisconsin Supreme Court has found sufficient to invoke the right to cut off police questioning. *See State v. Goetsch*, 519 N.W.2d 634, 636 (Wis. Ct. App. 1994) ("I don't want to talk about this anymore. I've told you, I've told you everything I can tell you."); *see State v. Cummings*, 850 N.W.2d 915, 931 (Wis. 2014) (Prosser, J., dissenting) ("Like Goetsch, Smith told his interrogator that he has given all the information he had. Smith's statement—"I don't want to talk about this"—is identical to one of Goetsch's statements ... [T]here is no basis for the different result in [Smith's] case.").

By contrast, Smith's statements are markedly different from the cases in which courts have decided that a suspect's invocation was ambiguous or equivocal. *See, e.g., Thompkins*, 560 U.S. 370 (mere silence insufficient to invoke the right to remain silent); *Davis*, 512 U.S. 452, 455 ("Maybe I should talk to a lawyer"); *United States v. Hampton*, 885 F.3d 1016, 1018 (7th Cir. 2018) ("Maybe I should have a

lawyer"); *United States v. Walker*, 272 F.3d 407, 413–14 (7th Cir. 2001) (suspect "wasn't sure whether he should talk to" detective); *United States v. Thousand*, 558 F. App'x 666, 671–72 (7th Cir. 2014) ("I think I need a lawyer, I don't know, but I want to cooperate and talk"); *United States v. Shabaz*, 579 F.3d 815, 819 (7th Cir. 2009) ("am I *going to be able* to get an attorney?") (emphasis in original); *Mueller v. Angelone*, 181 F.3d 557, 573–74 (4th Cir. 1999) ("Do you think I need an attorney here?"); *Diaz v. Senkowski*, 76 F.3d 61, 63 (2d Cir. 1996) ("Do you think I need a lawyer?"); *United States v. March*, 999 F.2d 456, 460 (10th Cir. 1993) ("Do you think I need an attorney?").

The majority opinion and the Wisconsin Supreme Court insist that because Smith included "this" at the end of "I don't want to talk," his statement was ambiguous. *See* ante at 9, 14–17. As stated previously, if Smith's statement was ambiguous at all, it was as to the *scope* of his invocation, not the *existence* of his invocation. As such, a reasonable officer would have understood Smith's statements to be an unequivocal invocation of the right to cut off questioning, or at least an expression of his desire to do so. *See Davis*, 512 U.S. at 458–59. Indeed, Detective Guy, embodying the reasonable officer, understood this, or else he would not have protested Smith's invocation by falsely insisting on his right as a police officer to continue the interrogation. *See Oregon v. Bradshaw*, 462 U.S. 1039, 1046 (1983) (considering officer's response to suspect's statement); *Cf. McGraw*, 257 F.3d at 518 ("[a]ny reasonable police officer, knowing that exercise of the right to silence must be 'scrupulously honored,' would have

understood that when [the suspect] repeatedly said she did not want to talk about the rape, she should not have been told that that she *had* to talk about it") (emphasis in original). Therefore, Detective Guy's refusal to end the interrogation was a violation of Smith's *Miranda* right. *Mosley*, 423 U.S. at 103; *see also United States v. Crisp*, 435 F.2d 354, 357 (7th Cir. 1970) ("[o]nce the privilege has been asserted ... an interrogator must not be permitted to seek its retraction, total or otherwise. Nor may he effectively disregard the privilege by unreasonably narrowing its intended scope.").

Because a reasonable officer would understand that Smith's statements invoked his right to cut off questioning or at least expressed a desire to do so, I view any debate about the scope of his invocation as unnecessary and unfortunate. But what stands out as equally troubling is that Smith's intentions, *no matter how you construe them*, were not honored during the interrogation. If Smith was trying to cut off questioning completely, Detective Guy did not "scrupulously honor" that request. If Smith was trying to cut off questioning only about the robberies, Detective Guy did not honor that request. And if Smith was trying to continue questioning only about the van, Detective Guy did not honor that request because Detective Guy continued to press Smith about the robbery. Detective Guy did not honor Smith's attempt to cut off questioning or control the subjects discussed in any fashion. *Miranda* gives a suspect "the power to exert some control over the course of the interrogation." *Barrett*, 479 U.S. at 528 (cleaned up). Detective Guy severely limited, if not eviscerated, the

power *Miranda* granted Smith during his custodial interrogation.

When we consider the big picture, the consequences of Detective Guy's actions were severe. Detective Guy falsely stated he had a right to ask Smith questions, demanded that Smith allow him to finish asking questions, and reminded Smith that they had "multiple things to talk about." When Detective Guy's attempts to elicit any information about a robbery failed, he suggested a break. Thirty minutes later, Detective Guy turned the recording on again, with Smith back on the record, confessing to a robbery. On these facts—and the information missing in the record about what happened during that thirty-minute break—I cannot be confident that Smith's confession was not the product of compulsion. And the law certainly assumes it was: "any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise." *Miranda*, 384 U.S. at 474.

V. Conclusion

The majority opinion emphasizes that it affirms the district court's denial of Smith's petition under the "difficult to meet" and deferential § 2254 standard. *Richter*, 562 U.S. at 102. While § 2254 sets a high bar for habeas relief, that bar is not impossible to clear. Here, the Wisconsin Supreme Court's application of the *Miranda* cases—including its failure to apply the standard in one of those cases, *Barrett*—was objectively unreasonable. Smith's incriminating statements should have been suppressed and because they were not, he was convicted. *See Brecht v. Abrahamson*, 507 U.S. 619 (1993). I would reverse the

judgment of the district court and remand with instructions to issue a writ of habeas corpus. I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ADREAN L. SMITH,
Petitioner,

v.

GARY BOUGHTON,
Warden,
Respondent.

Case No. 15-C-1235

DECISION AND ORDER

In 2011, Adrean Smith pleaded guilty in Milwaukee County Circuit Court to three counts of armed robbery, as party to a crime, and one count of first degree reckless injury by use of a dangerous weapon. The circuit court sentenced Smith to a total of twenty-five years of initial confinement and ten years of extended supervision. In state court, Smith challenged the admissibility of statements he made to detectives during an interrogation on the ground that they had been obtained after he invoked his right to remain silent. The state courts, including the Wisconsin Supreme Court, rejected Smith's challenge to the statements' admissibility. *See State v. Cummings*, 357 Wis. 2d 1 (2014).[1] Smith now seeks a writ of habeas corpus under 28 U.S.C. § 2254.

[1] The Wisconsin Supreme Court consolidated Smith's appeal with the appeal of Carlos Cummings, and its opinion was issued

I. BACKGROUND

In November 2010, while investigating a series of armed robberies involving a stolen van, Detective Travis Guy conducted a custodial investigation of Adrean Smith. At the beginning of the interrogation, the detective advised Smith of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). Smith agreed to waive those rights and make a statement. The statement was audio recorded. The parties have filed a disc containing three audio files. *See* ECF No. 9. Each file consists of a part of Guy's interrogation of Smith. (The parties have also filed a second disc that contains a single, lengthy audio recording. This recording is of a statement that Smith gave to a different detective following his interrogation by Guy.)

In the first part of the interrogation, Detective Guy administers Smith his *Miranda* rights and Smith agrees to make a statement. Guy then questions Smith about the circumstances that resulted in his arrest, namely, Smith's running from police after an unmarked police vehicle pulled over a van he was driving. The van was stolen, and Guy asked Smith how he came to be driving a stolen van. Guy continued to question Smith about the stolen van and why he fled from the police for about 10 minutes, at which point they took a break.

After the break, the following exchange took place:

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with the caption of Cummings's appeal listed first. Thus, citations to *State v. Cummings* refer to the Wisconsin Supreme Court's decision in Smith's appeal.

Detective Guy: . . . [Y]ou said you was gonna talk about what you did but not anybody else. So I'll let you talk and I'll talk about these two things when you get done. Is that cool? Alright.

Smith: What [unintelligible] talk about?

Detective Guy: I dunno, you told me, you said that, uh, you was going to talk about . . . what was going on with you but you're not going to bring them—

At this point, Smith said "the van" and began talking about having been caught in the stolen van:

Smith: The van was stolen. I didn't steal the van. It got stolen. But I got caught in the van. So, I'm gonna play my role. I'm a, you know what I'm sayin', whatever damage was done to the van, I'm do whatever I can to make sure that whoever owns the van gets their money back. Or—

Detective Guy: Was there damage to the van?

Smith: Yeah. There was damage to the ignition.

Detective Guy: Okay. But after that?

Smith: Nah, I didn't do it. But I'm the one who got caught drivin' it. [Unintelligible] might as well say.

Detective Guy:	But you didn't know it was stolen when you drove it?
Smith:	No, I ain't stole it. I ain't steal no van.
Detective Guy:	[Unintelligible] you know who stole it. If the—
Smith:	Yeah, I know it was stolen.
Detective Guy:	Did you steal the van?
Smith:	No, I didn't steal the van. And so, and that's what I'm saying . . . if anything, if I get out, I make sure that I take care of my responsibilities and I get my priorities straight, and start, which is, get a job, and pay whoever the van that was, the damage that was done. But, um, if anything, I would like to talk to the victims of the van, 'cause I want to tell them face-to-face, so they can see me and they can understand me more, or if they don't want to talk I would want them to show up at court. But, whatever happens, I just want them to know that I'll be responsible for payin' for the damages.

Smith then asked the detective: "Okay, so what else do you want to know about the van?" When Guy said he just wanted to let Smith talk, Smith responded: "See, I don't know what to say. What I'm sayin' is I

got caught in a van that's, that's pretty much all I can say."

At this point, Detective Guy then began talking about a robbery:

> Detective Guy: . . . . Okay, alright, um, we're going to talk about this incident here, okay? This is Milwaukee Police Incident number 1032710—correction, 0130, which is an armed robbery, attempted home invasion. This happened on 7205 West Brentwood, okay? In this incident here, a woman was approached in her side drive, okay? On here it says that actors intentionally removed the victim's purse, okay? The victim pulled in a driveway, and one of the suspects was armed with a handgun, a silver and chrome handgun. And then the actors pointed the gun at the victim and took her purse. Now she was getting out of her vehicle—

Here, Smith interrupted the detective, and the following exchange occurred:

> Smith: See, I don't want to talk about, I don't want to talk about this. I don't know nothing about this.
>
> Detective Guy: Okay.

Smith:	I don't know nothing. See, look, I'm talking about this van. I don't know nothing about no robbery. Or no—what's the other thing?
Detective Guy:	Hmmm?
Smith:	What was the other thing that this is about?
Detective Guy:	Okay.
Smith:	I don't want to talk . . . I don't know nothing about this, see. That's—I'm talking about this, uh, van. This stolen van. I don't know nothing about this stuff. So, I don't even want to talk about this.
Detective Guy:	I got a right to ask you about it.
Smith:	Yeah, you got a right but—
Detective Guy:	You know what I mean?
Smith:	—I don't know nothing about it. I don't know nothing about this. I'm here for the van.
Detective Guy:	You're here for some other things that we're going to talk about, so I'm not finished yet. You don't know anything about this robbery that happened at 7205 West Brentwood Avenue—
Smith:	Nah—
Detective Guy:	—on the 23rd of November—
Smith:	Nah—

Detective Guy:	—where a woman was approached?
Smith:	Uh-uh. I don't know nothing about this.

After this exchange and Smith's making a brief reference to a cell phone, Detective Guy returned to questioning Smith about the stolen van. Guy and Smith talked about the van for about five more minutes. Detective Guy then asked Smith about another robbery, one that occurred on a street named Bobolink. Smith replied, "What I got to do with it? What that got to do with me? I don't know nothing about no robbery, see, that's what I'm saying! I don't rob people." Detective Guy then shifted the conversation to Smith's cell phone and some pictures of him holding a gun. Eventually, Smith asked Guy if he thought that because he had a gun he committed the robberies. Guy told Smith that another suspect he had interviewed admitted to committing a robbery with Smith. Guy spent the next 15 to 20 minutes trying to convince Smith that the police already had enough evidence to convict him of something, and that it would be in his best interest to cooperate with the investigation concerning the robberies. Smith continued to deny that he was involved in the robberies. The parties then took a second break.

The third recorded part of the interrogation begins with Smith confessing to committing an armed robbery. In subsequent interrogations, Smith admitted to being involved with other robberies, burglaries, and shootings.

After the interrogations, the State of Wisconsin charged Smith with seven counts of armed robbery,

two counts of attempted armed robbery, three counts of being a delinquent in possession of a firearm, two counts of burglary with a dangerous weapon, two counts of false imprisonment with a dangerous weapon, one count of first degree reckless injury with a dangerous weapon, and one count of operating a motor vehicle without the owner's consent.

Smith filed a motion to suppress the statements he made to Detective Guy regarding the robberies. Smith argued that once Guy inquired about a robbery, Smith unequivocally invoked his right to "cut off questioning," *see Michigan v. Mosley*, 423 U.S. 96, 103–04 (1975), and thus any statement Smith made after that point was inadmissible. The trial court denied the motion to suppress, and Smith eventually pleaded guilty to three counts of armed robbery and one count of first degree reckless injury. On appeal, Smith again argued that when Detective Guy brought up the robberies, Smith unambiguously invoked his right to curt off questioning. The Wisconsin Court of Appeals rejected this argument and affirmed Smith's conviction.

The Wisconsin Supreme Court granted Smith's petition for review and decided Smith's case together with a companion case, *State v. Cummings*. The Wisconsin Supreme Court affirmed, finding that Smith's request to remain silent was ambiguous. The court reasoned as follows:

> Smith argues that his statement—"See, I don't want to talk about, I don't want to talk about this. I don't know nothing about this."—in response to Detective Guy's questions constituted an unequivocal invocation of his right to remain

silent. Smith further notes that he repeated his assertion that he didn't want to talk three different times within the space of just a few sentences.

We agree that, standing alone, Smith's statements might constitute the sort of unequivocal invocation required to cut off questioning, and we further acknowledge that Smith's statement presents a relatively close call. In the full context of his interrogation, however, Smith's statements were not an unequivocal invocation of the right to remain silent.

When placed in context it is not clear whether Smith's statements were intended to cut off questioning about the robberies, cut off questioning about the minivan, or cut off questioning entirely. Some of Smith's statements are also exculpatory statements or assertions of innocence, which do not indicate a desire to end questioning at all. Prior to Smith's statement, Detective Guy had been asking Smith about his involvement in the theft of the minivan. Smith had been participating in this portion of the questioning in a fairly straightforward and cooperative fashion.

When the topic of the armed robberies came up, Smith stated, "I don't want to talk about this" four times, but also stated, "I don't know nothing about this" a total of seven times. In some instances Smith seems to mean the van when he uses the words "this" or "that," but in other instances it seems he means the robberies. In listening to the recording of the interrogation, it

seems that he meant to refer to the robberies but this is not the only interpretation.

Further, while "I don't want to talk about this" seems to indicate a desire to cut off questioning, "I don't *know* nothing about this" is an exculpatory statement proclaiming Smith's innocence. Such a proclamation of innocence is incompatible with a desire to cut off questioning.

Given the apparent confusion, and although he was not required by law to do so, Detective Guy gave Smith an opportunity to clarify his statements when he asked, "Do you want to tell me about [the robberies]?" In response, Smith again proclaimed his innocence, stating: "I don't know nothing about no robbery, see, that's what I'm saying! I don't rob people."

Smith's own words also indicated a continued willingness to answer questions. Following the statement that Smith emphasizes—"See, I don't want to talk about, I don't want to talk about this. I don't know nothing about this."—Smith also stated: "I'm talking about this van. This stolen van. I don't know nothing about this stuff . . . I don't know nothing about this. I'm here for the van." These additional statements indicate that Smith was willing to continue answering questions about the van, but was unwilling, or perhaps unable, to answer questions about the robberies.

"[A] defendant may selectively waive his *Miranda* rights, deciding to 'respond to some questions but not others.'" *State v. Wright*, 196 Wis.2d 149, 156 (Ct.App.1995) (quoting *Bruni v.*

> *Lewis*, 847 F.2d 561, 563 (9th Cir.1988)). Such selective "refusals to answer specific questions," however, "do not assert an overall right to remain silent." *Id.* at 157 (citing *Fare v. Michael C.*, 442 U.S. 707, 726–27 (1979)).
>
> Finally, our determination regarding the meaning of Smith's statement need not be definitive to conclude that he did not unequivocally invoke the right to remain silent. The 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.
>
> Thus, under the facts and circumstances of the case at issue, Smith did not unequivocally invoke his right to remain silent, such that police were required to cut off their questioning. We therefore affirm the court of appeals.

Cummings, 357 Wis. 2d at 26–28 (citation omitted).

II. DISCUSSION

In seeking a writ of habeas corpus, Smith contends that he unambiguously invoked his right to cut off questioning when he told Detective Guy "I don't want to talk about this." He contends that the Wisconsin Supreme Court's conclusion to the contrary involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States. *See* 28 U.S.C. § 2254(d).

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court promulgated a set of safeguards to protect the constitutional rights of persons subjected to custodial

police interrogation, including the right to remain silent and the right to an attorney. The Court held that unless law enforcement officers give certain specified warnings before questioning a person in custody and follow certain specified procedures during the course of any subsequent interrogation, any statement made by the person in custody cannot over his objection be admitted in evidence against him at trial. In the present case, the parties agree that, at the outset of the interrogation, Detective Guy administered proper *Miranda* warnings to Smith and that Smith validly waived his right to remain silent and his right to an attorney.

The issue in this case concerns a different aspect of the *Miranda* decision, which sets out what happens if a suspect who receives *Miranda* warnings and agrees to make a statement subsequently indicates that he does not want to answer further questions. The Court in *Miranda* stated as follows:

> Once warnings have been given, the subsequent procedure is clear. 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. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.

384 U.S. at 473–47 (footnote omitted). In *Michigan v. Mosley,* the Court discussed this aspect of the *Miranda* decision and stated that "[t]he critical safeguard identified in the passage at issue is a person's 'right to cut off questioning.'" 423 U.S. at 103. The Court continued:

> Through the [suspect's] exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting. We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his "right to cut off questioning" was "scrupulously honored."

Id. at 103–04 (footnote omitted). Subsequently, the Supreme Court held that, for a suspect to invoke his right to cut off questioning, he must do so unambiguously. *Berghuis v. Thompkins*, 560 U.S. 370, 381–82 (2010).

The issue in the present case is whether Smith unambiguously invoked his right to cut off questioning immediately after Detective Guy brought up the subject of the robbery. Before proceeding, however, I want to make clear that Smith does not argue, in the alternative, that he at least unambiguously invoked a right to cut off further questioning about the robberies. That is, Smith does not contend that if he did not validly invoke his right to remain silent on all matters, he at least

unambiguously informed Detective Guy that he did not want to talk about the robberies, and that therefore Detective Guy's continuing to question him about the robberies violated his federal rights, even if further questions about the van or other topics would have been allowed. Nor did Smith raise an alternative argument along these lines in state court. This may be because the Wisconsin courts have drawn a distinction between a suspect's declining to answer questions on a certain topic, on the one hand, and invoking a right to cut off all questioning, on the other. When discussing Smith's case, the Wisconsin Supreme Court stated that "[a] defendant may selectively waive his *Miranda* rights, deciding to respond to some questions but not others." *Cummings*, 357 Wis. 2d at 28. But it also stated that it did not view a selective waiver as the equivalent of asserting "an overall right to remain silent." *Id.* The court thus implied that a suspect does not have a right to cut off questioning on just a certain topic or topics; rather, unless the suspect invokes his right to cut off questioning altogether, the law-enforcement officer may continue to ask him questions on any topic, and it will be up to the suspect to refuse to answer any questions that fall outside the scope of his selective waiver. *See also* Pet'r's Br. at 7 (recognizing that Wisconsin Supreme Court reasoned that "the right to silence cannot be invoked as to only certain questions"). Again, Smith does not challenge this aspect of the court's decision.

I also want to make clear that Smith does not bring a separate claim based on Detective Guy's statement that he had a "right" to ask Smith about the robbery. Because under *Miranda* Smith at all times had the

right to cut off questioning, Guy's statement about having a right to ask him further questions was arguably false and arguably had the effect of undermining the *Miranda* warnings that Guy had previously administered. But Smith does not contend that this "reverse *Miranda*" warning itself constituted a violation of his rights. To be sure, Smith contends that Guy's statement about having a right to ask questions was unconstitutional because it came after Smith unambiguously invoked his right to cut off questioning. But he does not contend that Guy's claiming a right to ask questions was unconstitutional because it was false and undermined the *Miranda* warnings. Nor did Smith raise a separate claim in state court based on Guy's claiming a right to ask questions.

Turning, then, to the only issue presented, I conclude that the Wisconsin Supreme Court did not unreasonably apply federal law in finding that Smith did not unambiguously invoke his right to cut off questioning on all topics. When Detective Guy first began to ask about one of the robberies, Smith interrupted him. But Smith did not interrupt to say that he was done talking, that he did not want to talk anymore, or use any other language indicating that he wanted the interrogation to stop. Rather, he said that he did not want to talk "about this." Stating that one does not want to talk "about" something implies that the person does not want to talk about a particular topic. Moreover, "this," when used as a pronoun in the manner that Smith used it, generally refers to the topic most recently mentioned. *See Oxford English Dictionary* (online edition) (defining "this" as "[i]ndicating a thing or person present or near

(actually in space or time, or ideally in thought, esp. as having just been mentioned and thus being present to the mind)"). Because Smith interrupted Detective Guy as he was changing the subject to the robbery, the most natural interpretation of his interjection is that he did not want to talk about the robbery, as opposed to the other matters that had been under discussion until Guy brought up the robbery.

Indeed, it would be highly unusual for an ordinary user of the English language to express a desire to end all conversation on any topic by stating "I don't want to talk about this" in response to a questioner's attempt to change the subject. For example, assume that two people have been discussing sports for several minutes when one of them asks a question about politics. If the other person immediately says "I don't want to talk about this," the person who asked the question would not understand the other to have just expressed a desire to end the entire conversation. Rather, the questioner would understand that he could go back to talking about sports or could try another topic, but that his companion did not wish to talk about politics. The same applies here. Because Smith had been freely answering Detective Guy's questions about the van for more than 15 minutes before Guy brought up the robbery, Guy would not have understood Smith's statement about not wanting to talk "about this" as meaning that Smith was no longer willing to answer questions about the van or other topics and that he wanted the interrogation to end.

Moreover, nothing that Smith said after "I don't want to talk about this" suggests that Detective Guy should have understood him to be invoking his right

to cut off further questioning on all topics. In the same breath that Smith said that he did not want to talk "about this," he also said "I don't know nothing about this." As the Wisconsin Supreme Court recognized, Smith's stating that he did not know anything about "this" was a proclamation of innocence, not a request to remain silent. *Cummings*, 357 Wis. 2d at 27. Arguably, Smith's combining "I don't want to talk about this" with "I don't know nothing about this" into a single expression created ambiguity as to whether he even wanted to cut off questioning about the robberies. At the very least, his statement that he knew "nothing about this" did not signal a desire to remain silent on all topics. Furthermore, Smith's saying that he knew nothing "about this" makes clear that when he used the word "this," he was using it to refer only to the robbery, not to the van or to the robbery and the van together. That is because Smith had just spent 15 minutes talking about the van, and thus he obviously knew quite a bit about it. So the only sensible interpretation of his statement "I don't want to talk about this. I don't know nothing about this" is that "this" meant the robbery.

As Smith continued his interjection, he again said "I don't know nothing" and then he added "See, look, I'm talking about this van. I don't know nothing about no robbery." These statements only reinforce the conclusion that Smith was, at most, refusing to answer questions about the robbery. Smith's stating that "I'm talking about this van" was clearly a reference to his willingness to give a statement about why he was caught with the stolen van. He then explained that he did not know anything about the

robbery and thus implied that he could not answer any questions on that topic.

Before Detective Guy said anything other than "Hmmm?" or "Okay" to Smith's interjection, Smith added the following: "I don't want to talk . . . I don't know nothing about this, see. That's—I'm talking about this, uh, van. This stolen van. I don't know nothing about this stuff. So, I don't even want to talk about this." Once again, these statements do not express a desire to cut off questioning on all topics. Rather, at most, they express a desire to cut off questioning about the robbery, which was what Smith was referring to when he used words such as "this" and "this stuff."

Most of the arguments that Smith advances in his briefs depend on ignoring his use of the phrase "about this" or assuming that his use of that phrase did not affect the meaning of his interjection. For example, in his reply brief, Smith's attorney writes that "Mr. Smith's statement—'I don't want to talk about this'—unambiguously meant that he did not want to talk anymore." Reply Br. at 7. But, as I have explained, "I don't want to talk about this" does not mean "I don't want to talk anymore." The former expresses a desire to cease talking about a particular subject, while the latter expresses a desire to stop talking altogether. Thus, I reject Smith's attempt to equate these two statements.

Smith also argues that his use of the phrase "about this" necessarily was a reference to both the robberies and the van because the van was used in the robberies. Reply Br. at 3–4. However, as I have explained, Smith's also stating that he did not know

anything about "this" makes clear that "this" referred to just the robberies, not to the van and the robberies, as Smith had just finished demonstrating that he knew quite a bit about the van. In any event, the van and the robberies could be discussed as separate topics even though the van was used in the robberies. Indeed, for the first fifteen minutes of the interrogation, Smith and Detective Guy talked about Smith's having been caught driving the stolen van without once mentioning that the van had been used to commit robberies. Perhaps Smith's making statements about the van necessarily implicated him in the robberies, but nonetheless the robberies and Smith's being caught in the van were separate events and thus could be discussed separately. So, when Smith said he did not want to talk "about this," the only reasonable interpretation is that he was making a distinction between the robbery that Detective Guy had just brought up, on the one hand, and his being caught in the van, on the other. Smith was not expressing a desire to cut off questioning on all topics.

Smith also argues that the Wisconsin Supreme Court wrongly used "Smith's responses to the continued interrogation" to "cast doubt on his invocation of the right to silence," contrary to the Supreme Court's decision in *Smith v. Illinois*, 469 U.S. 91 (1984). Br. at 15. *Smith*, which involved the right to counsel, holds that "an accused's postrequest responses to further interrogation may not be used to cast doubt on the clarity of his initial request for counsel." 469 U.S. at 92. In the right-to-silence context, *Smith* stands for the proposition that an accused's post-invocation responses to further interrogation may not be used to cast doubt on the

clarity of his initial invocation of his right to cut off questioning. But here, as I have discussed, Smith's initial statement—"I don't want to talk about this"—was not an invocation of his right to cut off all further questioning. His later statements thus do not qualify as post-invocation responses to further interrogation.

Smith also contends that the Wisconsin Supreme Court unreasonably applied federal law when it faulted him "for intermingling a denial with his request to end questioning." Br. at 12. This is a reference to Smith's repeatedly stating during his interjection both that he did not want to talk "about this" and that he did not know anything about "no robbery" or "this" or "this stuff." As I mentioned earlier, Smith's saying in the same breath both that he did not want to talk about the robbery and that he did not know anything about the robbery arguably created ambiguity over what he meant: did he want questioning on the topic of the robbery to end, or was he simply informing the officer that he could not talk about the robbery because he was not involved in it? Smith argues that there is nothing in the relevant Supreme Court cases "that prevents a suspect from denying an offense, then subsequently invoking the right to silence." Br. at 12. While this is true, it does not follow that when a suspect both expresses a desire to remain silent and denies the offense in the same breath, he has made an unambiguous invocation of his right to cut off questioning. In any event, even if Smith's statements of innocence were excised from his interjection, his remaining statements would not add up to an unambiguous invocation of his right to cut off questioning. That is because, as I have explained, Smith's statement "I don't want to talk about this"

meant, at most, that he did not want to talk about the robberies.

My interpretation of Smith's statements should not be thought to imply that a suspect could never invoke his right to cut off questioning by stating "I don't want to talk about this." Depending on the context in which such a statement is uttered, it could unambiguously mean that the suspect does not want to answer any further questions. For example, assume that while Detective Guy was asking Smith questions about the stolen van, but before Detective Guy mentioned any robbery, Smith said "I don't want to talk about this." In this context, "this" would be a reference to the stolen van. And because the stolen van was the only subject of the interrogation up to that point, Smith's statement would arguably constitute an unambiguous invocation of his right to cut off further questioning. But in this case, because Smith said "I don't want to talk about this" in response to Detective Guy's first mentioning the robbery, his statement implied that he was at least willing to continue answering questions about the van. Thus, the statement was not an unambiguous invocation of Smith's right to cut off all questioning.

Finally, Smith argues that this case is similar to two other cases in which federal courts granted habeas relief to criminal defendants on the ground that their statements were admitted in violation of their right to cut off questioning. *Anderson v. Terhune*, 516 F.3d 781 (9th Cir. 2008); *Saeger v. Avila*, 930 F. Supp. 2d 1009 (E.D. Wis. 2013). In *Anderson*, the Ninth Circuit held that the state court had wrongfully used "'context' to transform an unambiguous invocation into open-ended ambiguity."

516 F.3d at 787. In that case, however, the suspect stated in response to a question that he "was through with this," that he wanted to be taken into custody, and that he "plead[ed] the [F]ifth." *Id.* at 786. These statements, the court held, together conveyed a clear desire to cut off further questioning, and no amount of "context" could create an ambiguity about what the statements meant. *Id.* at 787–88. The court also singled out the statement "I plead the Fifth" as being, on its own, an unambiguous invocation of the right to remain silent and cut off further questioning. *Id.* In the present case, the statements at issue are materially different from the statements in *Anderson*. Smith did not reference the Fifth Amendment or otherwise indicate that he wanted all questioning to cease. Instead, he merely declined to answer questions about the robbery. Thus, *Anderson* does not support Smith's argument that the Wisconsin Supreme Court unreasonably applied Supreme Court cases in deciding his appeal.

In *Saeger*, Judge Griesbach of this court granted a writ of habeas corpus to a criminal defendant who said during an interrogation "I got nothin[g] more to say to you. I'm done. This is over." 930 F. Supp. 2d at 1011. I think it is obvious that Saeger's statement is quite different from Smith's and unambiguously expresses a desire to cut off further questioning. Indeed, in *Saeger*, the state court did not doubt that, taking Saeger's words at face value, he unambiguously invoked his right to end the interrogation. *Id.* at 1012–13. The reason the state court did not exclude the statement is that it viewed Saeger's invocation of the right to cut off questioning as a negotiating ploy designed to get the officers to make him a better deal.

Id. at 1013. That is, the court looked behind the meaning of Saeger's words and examined Saeger's motive for invoking his right to remain silent. *Id.* at 1015 (explaining that state court found that "while Saeger's actual words were clear, *he did not really mean them*" (emphasis in original)). Judge Griesbach determined that, in refusing to take Saeger's words at face value, the Wisconsin court unreasonably applied federal law. *Id.*

The present case does not present the problem Judge Griesbach confronted in *Saeger*. The Wisconsin Supreme Court did not look past the plain meaning of Smith's statements and decide that he meant something different than what he said. Rather, the court simply recognized, correctly, that Smith did not use words that unambiguously indicated that he wanted to cut off further questioning.

In sum, I conclude that Smith did not unambiguously invoke his right to cut off further questioning. I therefore also conclude that the Wisconsin Supreme Court did not render a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States.

III. CONCLUSION

For these reasons, **IT IS ORDERED** that the petition for a writ of habeas corpus is **DENIED**. The Clerk of Court shall enter final judgment. Pursuant to Rule 11 of the Rules Governing § 2254 Cases, I find that the petitioner has not made the showing required by 28 U.S.C. § 2253(c)(2), and therefore I will not issue a certificate of appealability.

Dated at Milwaukee, Wisconsin, this 4th day of May, 2017.

s/ Lynn Adelman
LYNN ADELMAN
District Judge

APPENDIX C

2014 WI 88

SUPREME COURT OF WISCONSIN

CASE NO.:	2011AP1653-CR & 2012AP520-CR
COMPLETE TITLE:	State of Wisconsin, Plaintiff-Respondent, v. Carlos A. Cummings, Defendant-Appellant-Petitioner. State of Wisconsin, Plaintiff-Respondent, v. Adrean L. Smith, Defendant-Appellant-Petitioner. REVIEW OF A DECISION OF THE COURT OF APPEALS Reported at 346 Wis. 2d 279 (Ct. App. 2013 – Unpublished) REVIEW OF A DECISION OF THE COURT OF APPEALS Reported at 346 Wis. 2d 280, 827 N.W.2d 929 (Ct. App. 2013 – Unpublished)
OPINION FILED:	July 24, 2014
SUBMITTED ON BRIEFS:	
ORAL ARGUMENT:	March 19, 2014

SOURCE OF APPEAL:	
COURT:	Circuit/Circuit
COUNTY:	Portage/Milwaukee
JUDGE:	Thomas T. Flugaur/ Thomas P. Donegan
JUSTICES:	
CONCUR/ DISSENT:	PROSSER, BRADLEY, JJ., concurs in part, dissents in part. (Opinion filed.)
DISSENTED:	ABRAHAMSON, C.J., dissents. (Opinion filed.)
NOT PARTICIPATING:	

ATTORNEYS:

For defendant-appellant-petitioner Carlos A. Cummings, there were briefs by *David R. Karpe*, Madison, and oral argument by *David R. Karpe*.

For the plaintiff-respondent, the cause was argued by *Jacob J. Wittwer*, assistant attorney general, with whom on the briefs was *J.B. Van Hollen*, attorney general.

For defendant-appellant-petitioner Adrean L. Smith, there were briefs by *Dustin C. Haskell*, assistant state public defender, and oral argument by *Dustin C. Haskell*.

For the plaintiff-respondent, the cause was argued by *Thomas J. Balistreri*, assistant attorney general, with whom on the brief was *J.B. Van Hollen*, attorney general.

2014 WI 88

NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

Nos. 2011AP1653-CR & 2012AP520-CR (L.C. Nos. 2008CF418 & 2010CF5837)

STATE OF WISCONSIN : IN SUPREME COURT

State of Wisconsin,
Plaintiff-Respondent,
v.
Carlos A. Cummings,
Defendant-Appellant-Petitioner.

FILED
JUL 24, 2015
Diane M. Fremgen
Clerk of Supreme Court

State of Wisconsin,
Plaintiff-Respondent,
v.
Adrean L. Smith,
Defendant-Appellant-Petitioner.

REVIEW of decisions of the Court of Appeals. *Affirmed.*

¶1 ANNETTE KINGSLAND ZIEGLER, J. This is a review of two per curiam decisions of the court of appeals, *State v. Cummings*, No. 2011AP1653-CR,

unpublished slip op. (Wis. Ct. App. Jan. 10, 2013), and *State v. Smith*, No. 2012AP520-CR, unpublished slip op. (Wis. Ct. App. Jan. 23, 2013). In *Cummings* the court of appeals affirmed the orders of the Portage County Circuit Court,[1] denying Carlos A. Cummings' ("Cummings") motion to suppress and motion for postconviction relief. In *Smith* the court of appeals affirmed the order of the Milwaukee County Circuit Court[2] denying Adrean L. Smith's ("Smith") motion to suppress.

¶2 Both Cummings and Smith argue that they unequivocally invoked the right to remain silent prior to making incriminating statements to police.[3] Both Smith and Cummings argue that, as a result, their incriminating statements should have been suppressed. Cummings separately argues that the circuit court should have granted his motion for postconviction relief because the sentence imposed on him was unduly harsh.

¶3 The State argues that neither Cummings nor Smith unequivocally invoked the right to remain silent, and further argues that Cummings' sentence was not unduly harsh.

¶4 We conclude that neither Cummings nor Smith unequivocally invoked the right to remain silent

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[1] The Honorable Thomas T. Flugar presided.

[2] The Honorable Thomas P. Donegan presided.

[3] We note at the outset that in both cases, the asserted invocations of the right to remain silent occurred after the suspects had been taken into custody, had received *Miranda* warnings, had waived their *Miranda* rights, and were being interrogated by police. *See Miranda v. Arizona*, 384 U.S. 436 (1966).

during their interrogations. As a result, the circuit court properly denied each defendant's motion to suppress the incriminating statements made to police. We also conclude that Cummings' sentence was not unduly harsh. We therefore affirm the court of appeals in both cases.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. *State v. Cummings*

¶5 On November 18, 2008, police responded to a reported shooting at a park in Stevens Point, Wisconsin. On arriving at the scene, officers found the victim, James Glodowski ("Glodowski"), conscious and responsive despite having been shot a number of times in the head and upper body.[4] Glodowski told police that he had been shot by a woman named "Linda," later identified as Linda Dietze ("Dietze").

¶6 Glodowski explained that Dietze had called him and asked him to meet her at the park. Dietze had told Glodowski during the call that she wanted to repay $600 that she had previously borrowed from him. Dietze also told Glodowski that she had video evidence of an affair between his wife, Carla Glodowski ("Carla"), and a man named "Carlos." When Glodowski arrived at the park, Dietze handed him the videotape, pulled out a .22 caliber pistol, and shot him. Before fleeing the scene on foot, Dietze told Glodowski that she was sorry for shooting him but that it was his wife's fault.

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[4] As a result of the shooting, Glodowski lost the use of his eye. He continues to have a bullet lodged near his brain stem that cannot be removed surgically.

¶7 As part of their investigation, Stevens Point police officers interviewed Cummings on the afternoon of the shooting. During his interview with police, Cummings denied any knowledge or involvement in the shooting, though he admitted that he was friendly with both Dietze and Carla. At this point, Cummings had not been arrested, nor had he been advised of his *Miranda* rights. *See Miranda v. Arizona*, 384 U.S. 436 (1966). Cummings was subsequently released.

¶8 Later that evening, police located Dietze at her apartment and arrested her. Dietze admitted to shooting Glodowski, but told police that meeting Glodowski at the park had been Cummings' idea. Dietze further stated that Cummings had driven her to and from the shooting, and that she had left a backpack containing the pistol used in the shooting in Cummings' vehicle. Officers also obtained surveillance footage of Dietze being dropped off at a gas station near her apartment after the shooting. The vehicle which dropped Dietze at the gas station was similar to Cummings' vehicle.

¶9 Following the interrogation of Dietze, police returned to Cummings' home and asked whether he would be willing to return to the station for further questioning. After being assured that he was still not in custody, Cummings agreed. Officers then transported Cummings back to the police station.

¶10 Following some preliminary questions, Cummings was advised of his *Miranda* rights. Cummings agreed, both orally and in writing, to waive those rights and speak with the officers. The officers then questioned Cummings about the

inconsistency between his prior statements and the version of events given by Dietze. During that discussion the following exchange took place:

> [OFFICER]: You've got a lot to lose, and at this point, I'm telling you right now Carlos, no . . . all bullshit aside, there's enough to charge you right now! Okay? This is your opportunity to be honest with me, to cut through all the bullshit and be honest about what you know.
>
> [CUMMINGS]: I'm telling you.
>
> [OFFICER]: So why then do we got Carla and [Dietze] telling us different?
>
> [CUMMINGS]: What are they telling you?
>
> [OFFICER]: I'm not telling ya! I'm not gonna fuckin' lay all my cards out in front of you Carlos and say, "This is everything I know!"
>
> [CUMMINGS]: Well, then, take me to my cell. Why waste your time? Ya know?
>
> [OFFICER]: Cuz I'm hoping . . .
>
> [CUMMINGS]: If you got enough . . .
>
> [OFFICER]: . . . to get the truth from ya.
>
> [CUMMINGS]: If you got enough to fuckin' charge me, well then, do it and I will say what I have to say, to whomever, when I plead innocent. And if they believe me, I get to go home, and if they don't . . .
>
> [OFFICER]: If who believes you?
>
> [CUMMINGS]: . . . and if they don't, I get locked up.

¶11 The interrogation continued and Cummings eventually admitted that he had driven Dietze to a

location near the park where the shooting had occurred. Cummings further stated that, when Dietze returned to Cummings' car she told him that she had shot someone and asked to be taken home. Cummings admitted that Dietze left her backpack with him but claimed that he found only Dietze's wallet and keys inside. Cummings denied that he knew Dietze intended to shoot Glodowski before driving her to the park. He further denied that he ever possessed the gun used in the shooting. Cummings was then informed that he was being placed on a probation hold.[5]

¶12 Police then questioned Carla regarding the shooting. Carla claimed to be having an affair with Cummings.[6] She stated that her husband would never grant her a divorce. Carla explained that she and Cummings planned to have a third person shoot and kill her husband so that they could collect his life insurance policy and then flee together. Carla admitted her part in the plan, which included a contribution of money towards hiring the shooter.

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[5] At the time of the shooting, Cummings was on probation term for three misdemeanor convictions of issuing worthless checks, contrary to Wis. Stat. § 943.23(1) (2007–08).

[6] Subsequent investigation would reveal that Cummings and Carla were not, in fact, having an affair. Rather, it appears from the record that Cummings was using Carla's affection for him to secure the proceeds of her husband's life insurance policy and never intended to have a relationship with her. This fact, along with Dietze's documented mental health issues, supports the circuit court's later conclusion that Cummings "was using two women [who] were basically . . . cognitively disabled for financial gain."

¶13 On November 19, 2008, the day following the shooting, police conducted a search of Cummings' home.[7] The search uncovered a case and magazine for a .22 caliber Smith & Wesson pistol, and five .22 caliber shell casings hidden in the basement. A subsequent search of the garage revealed the .22 caliber Smith & Wesson pistol used to shoot Glodowski hidden in a box.

¶14 On December 2, 2008, Cummings made his initial appearance on a criminal complaint filed by the State. The complaint charged Cummings with Attempted First Degree Intentional Homicide As a Party to the Crime, contrary to Wis. Stat. §§ 939.05, 939.32, and 940.01(1) (2007–08),[8] a Class B felony. On December 17, 2008, the court held a preliminary hearing and bound Cummings over for trial.

¶15 On January 5, 2009, Cummings was arraigned on the information which charged him with one count of Attempted First Degree Intentional Homicide With a Dangerous Weapon, As a Party to the Crime, contrary to Wis. Stat. §§ 939.05, 939.32, 939.63, and 940.01(1), a Class B felony, and two counts of Aiding a Felon, contrary to § 946.47(1)(a) and (b), a Class G felony. Due to Cummings' prior convictions for passing worthless checks, all three charges included habitual criminal penalty enhancers pursuant to Wis.

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[7] Cummings had provided his consent for the search the previous day, and thus no warrant was required. *State v. Sobczak*, 2013 WI 52, ¶11, 347 Wis. 2d 724, 833 N.W.2d 59 (citing *Georgia v. Randolph*, 547 U.S. 103, 109 (2006)).

[8] All subsequent references to the Wisconsin Statutes in this section of the opinion are to the 2007–08 version.

Stat. § 939.62. Cummings entered pleas of not guilty to all three charges.

¶16 On November 25, 2009, Cummings filed a motion to suppress all the statements he made to police prior to being given *Miranda* warnings and all the statements he made to police after he asked, "Well, then, take me to my cell. Why waste your time? Ya know?" during his interrogation.

¶17 In support of his motion, Cummings asserted that he was "in custody" prior to being given *Miranda* warnings, and that he had unequivocally invoked his right to remain silent when he asked to be taken to a cell. He therefore argued that allowing the prosecution to use those statements would violate his right against self-incrimination. *See* U.S. Const. amend. V; Wis. Const. Art. I, § 8.

¶18 The State opposed Cummings' motion. The State argued that Cummings was not in custody at the time the interrogation began, and was not interrogated until after he had received *Miranda* warnings. The State further argued that Cummings' statement—"Well, then, take me to my cell. Why waste your time? Ya know?"—was not an unequivocal invocation of his right to remain silent.

¶19 On December 2, 2009, the court held a hearing on Cummings' motion. With respect to the first issue, the court concluded that Cummings was "in custody" prior to being read *Miranda* warnings and that a brief portion of the interrogation occurred prior to Cummings being given the warnings. The court therefore suppressed the "limited responses" that Cummings gave to police prior to being given *Miranda* warnings.

¶20 On second issue, however, the court concluded that Cummings' statement was not an unequivocal invocation of the right to remain silent, and therefore denied his motion to suppress. The court determined, relying on *State v. Markwardt*, 2007 WI App 242, 306 Wis. 2d 420, 742 N.W.2d 546, that Cummings was "clearly" making an "attempt[] to get information from the detectives" and was thus not attempting to end the interrogation.

¶21 On January 8, 2010, Cummings pled no contest to First Degree Reckless Injury, As a Party to the Crime, contrary to Wis. Stat. §§ 939.05 and 940.23(1), a Class D felony, pursuant to a plea agreement.[9] In exchange for Cummings' plea, the State agreed to dismiss and read in the remaining counts for sentencing purposes and to dismiss the penalty enhancers. The court accepted Cummings' plea, adjudged him guilty, and ordered a presentence investigation report.

¶22 On March 5, 2010, the circuit court sentenced Cummings to 24 years of imprisonment, with 14 years of initial confinement to be followed by 10 years of extended supervision. The court further ordered that Cummings pay $110,188.37 in restitution to Glodowski.

¶23 On December 13, 2010, Cummings filed a motion for postconviction relief in the circuit court. In his motion, Cummings alleged that his trial counsel had been ineffective for failing to ask the court for a

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[9] The State filed an amended information on the day of Cummings' no contest plea which substituted the charge of Attempted First Degree Intentional Homicide with the charge of First Degree Reckless Injury.

risk reduction sentence, and that the sentence imposed by the court was unduly harsh. On this basis, Cummings asked to be resentenced or alternatively, for a modification of his sentence. Cummings subsequently added a request that the court vacate the DNA surcharge it had imposed, pursuant to *State v. Cherry*, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393.

¶24 On July 1, 2011, the circuit court granted in part and denied in part Cummings' postconviction motion. The court granted the portion of Cummings' motion related to the DNA surcharge, but denied his request for resentencing or sentence modification. The court rejected Cummings' claim that his trial counsel had been ineffective for failing to request a risk reduction sentence. The court concluded that, given the seriousness of the offense, requesting a risk reduction sentence would have been "a complete waste of time." The court further concluded that the sentence it had imposed was not unduly harsh:

> [T]his court rarely gives a sentence that is maximum or something close to the maximum.
>
> But in this case, it felt that it was required, it was necessary, or it would unduly depreciate the seriousness of the offense, and there was a real need to protect the public. When the court finally learned what the motive was behind this, it was rather shocked that Mr. Cummings was using two women [who] were basically . . . cognitively disabled for financial gain.

¶25 On July 15, 2011, Cummings appealed both his conviction and the court's denial of his motion for postconviction relief. Cummings argued that the

circuit court had erred in concluding that his statement—"Well, then, take me to my cell. Why waste your time? Ya know?"—was not an unequivocal invocation of his right to remain silent. Cummings further argued that the sentence imposed by the circuit court was unduly harsh.

¶26 On January 10, 2013, the court of appeals affirmed the circuit court in all respects. *Cummings*, No. 2011AP1653-CR, unpublished slip op., ¶1.

¶27 The court of appeals first concluded that Cummings' statement was not an unambiguous invocation of the right to remain silent. The court found that "a competing, and indeed more compelling, interpretation [of Cummings' statement] is that he was merely attempting to obtain more information from the police about what his co-conspirators had been saying." *Id.*, ¶9. Because Cummings' statement was subject to a "reasonable competing inference" the court concluded that it was not unambiguous. *Id.*, ¶7 (citing *Markwardt*, 306 Wis. 2d 420, ¶36).

¶28 The court further concluded that Cummings' sentence was not unduly harsh, finding that "a sentence of fourteen years of initial confinement and ten years of supervision, for involvement in an offense that left the victim with the loss of an eye and a bullet lodged near his brain stem, does not shock the conscience of this court." *Id.*, ¶14.

¶29 On February 15, 2013, Cummings petitioned this court for review, which we granted on December 17, 2013.

B. *State v. Smith*

¶30 In late November 2010 Smith was interviewed by Milwaukee Police Department Detective Travis Guy ("Detective Guy") regarding a series of violent armed robberies involving a stolen van.[10] At the outset, Smith was given *Miranda* warnings and agreed to waive his rights and speak to police. Smith then discussed his involvement in the theft of the van, and readily answered Detective Guy's questions.

¶31 When Detective Guy began asking about the armed robberies, however, Smith stated as follows:

> Smith: See, I don't want to talk about, I don't want to talk about this. I don't know nothing about this.
>
> Detective Guy: Okay.
>
> Smith: I don't know nothing. See, look, I'm talking about this van. I don't know nothing about no robbery.[11] Or no — what's the other thing?
>
> Detective Guy: Hmmm?
>
> Smith: What was the other thing that this is about?
>
> Detective Guy: Okay.

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[10] The record does not reveal the precise date of Detective Guy's initial interview with Smith.

[11] The context of this statement, following extensive discussion of Smith's knowledge of the stolen van, and his later statement—"I'm talking about this van. This stolen van."—strongly indicate that Smith intended this sentence to convey that he didn't know anything about the involvement of a van in any robberies.

> Smith: I don't want to talk . . . I don't know nothing about this, see. That's —I'm talking about this uh van. This stolen van. I don't know nothing about this stuff. So, I don't even want to talk about this.
>
> Detective Guy: I got a right to ask you about it,
>
> . . .
>
> Smith: I don't know nothing about this. I'm here for the van.
>
> . . .
>
> Detective Guy: You don't know anything about this robbery that happened at [address] on the 23rd of November where a woman was approached . . . ?
>
> Smith: No. Uh-uh. I don't know nothing about this.

¶32 Following this exchange, Detective Guy returned his questioning to the topic of the stolen van. Later during the interrogation, Detective Guy again returned to the topic of the robberies, asking Smith "do you want to tell me about [the robberies]?" Smith replied, "What I got to do with it? What that got to do with me? I don't know nothing about no robbery, see, that's what I'm saying! I don't rob people." Detective Guy continued to ask Smith for information, and Smith subsequently admitted his involvement in the armed robberies.

¶33 On November 29, 2010, the State filed a criminal complaint against Smith charging him with seven counts of Armed Robbery, as a Party to the Crime, contrary to Wis. Stat. §§ 943.32(2),

939.50(3)(c), and 939.05 (2009–10),[12] a Class C felony; three counts of Possession of a Firearm by a Felon, contrary to Wis. Stat. §§ 941.29(2)(b) and 939.50(3)(g), a Class G felony; two counts of Attempted Armed Robbery, as a Party to the Crime, contrary to Wis. Stat. §§ 943.32(2), 939.50(3)(c), 939.05, and 939.32, a Class C felony; two counts of Burglary, as a Party to the Crime, by Use of a Dangerous Weapon, contrary to Wis. Stat. §§ 943.10(2)(e), 939.50(3)(e), 939.05, and 939.63(1)(b), a Class E felony; two counts of False Imprisonment, as a Party to the Crime, by Use of a Dangerous Weapon, contrary to Wis. Stat. §§ 940.30, 939.50(3)(h), 939.05, and 939.63(1)(b), a Class H felony; one count of First Degree Reckless Injury by Use of a Dangerous Weapon, contrary to Wis. Stat. §§ 940.23(1)(a), 939.50(3)(d), and 939.63(1)(b), a Class D felony; and one count of Operating a Vehicle Without the Owner's Consent, contrary to Wis. Stat. §§ 943.23(3), and 939.50(3)(i), a Class I felony.

¶34 On November 30, 2010, Smith made his initial appearance. Smith received a copy of the complaint, and waived its reading. The court found probable cause to continue holding Smith, and set cash bail of $200,000. On December 9, 2010, Smith waived his right to a preliminary hearing.

¶35 On January 10, 2011, Smith was arraigned on the Information, which charged him with six counts of Armed Robbery, as a Party to the Crime, contrary to Wis. Stat. §§ 943.32(2), 939.50(3)(c), and 939.05, a Class C felony; and one count of First Degree Reckless Injury While Armed, contrary to Wis. Stat.

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[12] All subsequent references to the Wisconsin Statutes in this section are to the 2009–10 version.

§§ 940.23(1)(a), 939.50(3)(d), and 939.63(1)(b), a Class D felony. Smith acknowledged receipt of the Information, waived its reading, and pled not guilty to all counts.

¶36 On March 30, 2011, Smith filed a motion to suppress the statements he made to Detective Guy regarding the robberies. Smith argued that he had unequivocally invoked his right to remain silent prior to admitting his involvement in the crimes, and that his statements had been the product of coercion on the part of Detective Guy.

¶37 The State opposed Smith's motion, arguing that Smith's statements regarding the right to remain silent were ambiguous and that his admissions had not been obtained through coercion.

¶38 On July 14, 2011, the circuit court held a hearing on Smith's motion to suppress. After hearing brief argument from the parties, the court denied Smith's motion. With respect to Smith's invocation of the right to remain silent, the court concluded that "[t]he defendant did not clearly assert his right to remain silent. There was ambiguity." The court further rejected Smith's argument regarding coercion, stating that it "didn't find anything close to what would be considered coercive tactics under the case law."

¶39 On July 27, 2011, Smith pled guilty to three counts of armed robbery and one count of first degree reckless injury, pursuant to a plea agreement. In exchange for Smith's pleas, the State agreed to dismiss and read in the remaining counts for sentencing purposes. The court accepted Smith's pleas and adjudged him guilty. The court then

sentenced Smith to 35 years imprisonment, with 25 years initial confinement to be followed by 10 years of extended supervision.

¶40 On March 8, 2012, Smith appealed his convictions, again arguing that he unambiguously invoked his right to remain silent and that his incriminating statements should have been suppressed.

¶41 On January 23, 2013, the court of appeals affirmed. *Smith*, No. 2012AP520-CR, unpublished slip op., ¶1. The court concluded that Smith was not attempting to terminate the interview when he made his statements, but was rather indicating that he did not wish to discuss one particular line of questions. *Id.*, ¶9. Because Smith continued his conversation with police despite stating that he "[didn't] want to talk about this," he had not unequivocally invoked his right to remain silent. *Id.*, ¶8.

¶42 On February 21, 2013, Smith petitioned this court for review, which we granted on December 17, 2013.

II. STANDARD OF REVIEW

¶43 Whether a person has invoked his or her right to remain silent is a question of constitutional fact. *Markwardt*, 306 Wis. 2d 420, ¶30 (citing *State v. Jennings*, 2002 WI 44, ¶20, 252 Wis. 2d 228, 647 N.W.2d 142; *State v. Moats*, 156 Wis. 2d 74, 94, 457 N.W.2d 299 (1990)).

¶44 "When presented with a question of constitutional fact, this court engages in a two-step inquiry." *State v. Robinson*, 2010 WI 80, ¶22, 327 Wis. 2d 302, 786 N.W.2d 463 (citations omitted). "First, we review the circuit court's findings of historical fact

under a deferential standard, upholding them unless they are clearly erroneous." *Id.* (citations omitted). "Second, we independently apply constitutional principles to those facts." *Id.* (citations omitted).

¶45 "'We review a trial court's conclusion that a sentence it imposed was not unduly harsh and unconscionable for an erroneous exercise of discretion.'" *State v. Grindemann*, 2002 WI App 106, ¶30, 255 Wis. 2d 632, 648 N.W.2d 507 (emphasis in original) (quoting *State v. Giebel*, 198 Wis. 2d 207, 220, 541 N.W.2d 815 (Ct. App. 1995)). "We will not set aside a discretionary ruling of the trial court if it appears from the record that the court applied the proper legal standards to the facts before it, and through a process of reasoning, reached a result which a reasonable judge could reach." *Id.* (citing *Loy v. Bunderson*, 107 Wis. 2d 400, 414–15, 320 N.W.2d 175 (1982)).

III. ANALYSIS

A. The Right to Remain Silent

¶46 "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); *see also* U.S. Const. amend. V; Wis. Const. art. I, § 8.[13] In order to protect suspects

[13] This court has previously held that "[t]he state constitutional right against compulsory self-incrimination is textually almost identical to its federal counterpart." *State v. Jennings*, 2002 WI 44, ¶40, 252 Wis. 2d 228, 647 N.W.2d 142. Where "the language of the provision in the state constitution is 'virtually identical' to that of the federal provision or where no difference in intent is discernible, Wisconsin courts have normally construed the state constitution consistent with the United States Supreme Court's construction of the federal

from the "inherently compelling pressures" of custodial interrogation, the United States Supreme Court has developed procedural guidelines to be followed by police during such interrogations. *See Miranda*, 384 U.S. at 467; *see also Markwardt*, 306 Wis. 2d 420, ¶23. "A suspect's right to counsel and the right to remain silent are separately protected by these procedural guidelines." *Markwardt*, 306 Wis. 2d 420, ¶23 (citing *Miranda*, 384 U.S. at 467–73).

¶47 After a suspect has been taken into custody, given the *Miranda* warnings, and waived his *Miranda* rights, the right to remain silent still guarantees a suspect's "right to cut off questioning" during a custodial interrogation. *Id.*, ¶24 (citing *Michigan v. Mosley*, 423 U.S. 96, 103–04 (1975)).

¶48 Under these circumstances, a suspect must "unequivocally" invoke the right to remain silent in order to "cut off questioning." *See Berghuis v. Thompkins*, 560 U.S. 370, 386 (2010) (quotation marks omitted); *Markwardt*, 306 Wis. 2d 420, ¶26 (citing *State v. Ross*, 203 Wis. 2d 66, 75–79, 552 N.W.2d 428 (Ct. App. 1996)); *see also Fifth Amendment-Invocation of the Right to Cut Off Questioning*, 124 Harv. L. Rev. 189, 196–97 (2010).

¶49 This standard, sometimes called the "clear articulation rule," was originally developed by the United States Supreme Court to govern invocation of the right to counsel. *See Davis v. United States*, 512 U.S. 452 (1994). In *State v. Ross*, the Wisconsin Court

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constitution." *State v. Agnello*, 226 Wis. 2d 164, 180–81, 593 N.W.2d 427 (1999) (citing *State v. Tompkins*, 144 Wis. 2d 116, 133, 423 N.W.2d 823 (1988); *Kenosha County v. C&S Management, Inc.*, 223 Wis. 2d 373, 588 N.W.2d 236 (1999)).

of Appeals extended the rule to cover invocations of the right to remain silent, requiring suspects to "unequivocally" invoke the right in order to cut off questioning by police. *Ross*, 203 Wis. 2d at 70.

¶50 Recently, the Supreme Court confirmed that invocation of the right to counsel and invocation of the right to cut off questioning both required unequivocal invocation by a suspect. *See Berghuis*, 560 U.S. at 381–82 (citing *Davis*, 512 U.S. at 459). *Berghuis* further confirmed that the unequivocal invocation standard is an objective test. 560 U.S. at 381; *see also* Davis, 512 U.S. at 458–59.

¶51 If a suspect's statement is susceptible to "reasonable competing inferences" as to its meaning, then the "suspect did not sufficiently invoke the right to remain silent." *Markwardt*, 306 Wis. 2d 420, ¶36 (citation omitted). If a suspect makes such an ambiguous or equivocal statement, "police are not required to end the interrogation . . . or ask questions to clarify whether the accused wants to invoke his or her *Miranda* rights." *Berghuis*, 560 U.S. at 381 (citing *Davis*, 512 U.S. at 461–62).

¶52 Once a suspect has invoked the right to remain silent "all police questioning must cease—unless the suspect later validly waives that right and 'initiates further communication' with the police." *Ross*, 203 Wis. 2d at 74 (quoting *Miranda*, 384 U.S. at 473–74; *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981)). Thus, the "key question" is whether the suspect unequivocally invoked the right to cut off questioning during the interrogation. *Markwardt*, 306 Wis. 2d 420, ¶25 (citing *Ross*, 203 Wis. 2d at 74).

1. *State v. Cummings*

¶53 Cummings argues that his statement—"Well, then, take me to my cell. Why waste your time? Ya know?"—constituted an unequivocal invocation of his right to remain silent, and thus, should have served to cut off further questioning. We disagree.

¶54 In the context of the ongoing back and forth between Cummings and the officers, this statement was susceptible to at least two "reasonable competing inferences" as to its meaning. *Markwardt*, 306 Wis. 2d 420, ¶36. Cummings is correct that his statement could be read literally: as a request that he be removed from the room because he was no longer interested in talking to the officers. Another possibility, however, is that his statement was a rhetorical device intended to elicit additional information from the officers about the statements of his co-conspirators. Indeed, the plain language of the statement seems to be an invitation to the *officer* to end the interrogation, presumably because continued questioning would prove fruitless unless the officer provided additional information to Cummings. Such a statement is not an unequivocal assertion that Cummings wanted to end the interrogation.

¶55 Both the circuit court and the court of appeals considered this second interpretation to be the more compelling one of the two. *See Cummings*, No. 2011AP1653, unpublished slip op., ¶8. We need not choose one as more compelling than the other in order to conclude that Cummings' statement was not an unequivocal invocation of the right to remain silent. *See Markwardt*, 306 Wis. 2d 420, ¶36.

¶56 Cummings further argues that his statement was an unequivocal invocation because it was very similar to the statements of the suspect in *State v. Goetsch*, 186 Wis. 2d 1, 519 N.W.2d 634 (1994). In *Goetsch* the suspect stated, "I don't want to talk about this any more. I've told you, I've told you everything I can tell you. You just ask me any questions and I just want to get out of here. Throw me in jail, I don't want to think about this." *Id*. at 7. The court of appeals in *Goetsch* concluded that this statement constituted an unequivocal invocation of the right to remain silent. *Id*. at 7–9.

¶57 While the statement in *Goetsch* is superficially similar to the one at issue in this case, there are critical differences. First, the suspect in *Goetsch*, in addition to referencing jail, clearly stated that he did not wish to speak with police. Cummings did not make any such additional statements. Second, the suspect in *Goetsch* expressed that he was exhausted, and he had disengaged from the conversation. Cummings, on the other hand, made his statement while verbally sparring with police. Finally, the suspect in *Goetsch* had nothing to gain from being thrown in jail except the end of the interview. Thus his statement is not susceptible to any "reasonable competing inferences" as to its meaning. *Markwardt*, 306 Wis. 2d 420, ¶36. As we have discussed, this is not the case with Cummings' statement.

¶58 In fact, Cummings' statement in the case at issue is more similar, in terms of context, to the statement in *Markwardt* than the one in *Goetsch*. In *Markwardt* the suspect stated "[t]hen put me in jail. Just get me out of here. I don't want to sit here anymore, alright. I've been through enough today."

Markwardt, 306 Wis. 2d 420, ¶35. The suspect in *Markwardt* made her statement during a sequence of verbal "fencing," wherein the interrogating officer repeatedly caught the suspect "in either lies or at least differing versions of the events." *Id*., ¶36. Because of this context, the court of appeals concluded that the suspect's statement was subject to "reasonable competing inferences" as to its meaning. As a result, the court of appeals concluded that the suspect's statement was not an unequivocal invocation of the right to remain silent, and thus did not serve to cut off questioning. *Id*.

¶59 Cummings' statement—"Well, then, take me to my cell. Why waste your time? Ya know?"—similarly occurred during a period of verbal back and forth between Cummings and the officers, and is thus similarly subject to reasonable competing inferences. As a result of these competing inferences, we conclude that Cummings' statement was not an unequivocal invocation of the right to remain silent. We therefore affirm the court of appeals.

2. *State v. Smith*

¶60 Smith argues that his statement—"See, I don't want to talk about, I don't want to talk about this. I don't know nothing about this."—in response to Detective Guy's questions constituted an unequivocal invocation of his right to remain silent. Smith further notes that he repeated his assertion that he didn't want to talk three different times within the space of just a few sentences.

¶61 We agree that, standing alone, Smith's statements might constitute the sort of unequivocal invocation required to cut off questioning, and we

further acknowledge that Smith's statement presents a relatively close call. In the full context of his interrogation, however, Smith's statements were not an unequivocal invocation of the right to remain silent.

¶62 When placed in context it is not clear whether Smith's statements were intended to cut off questioning about the robberies, cut off questioning about the minivan, or cut off questioning entirely. Some of Smith's statements are also exculpatory statements or assertions of innocence, which do not indicate a desire to end questioning at all. Prior to Smith's statement, Detective Guy had been asking Smith about his involvement in the theft of the minivan. Smith had been participating in this portion of the questioning in a fairly straightforward and cooperative fashion.

¶63 When the topic of the armed robberies came up, Smith stated, "I don't want to talk about this" four times, but also stated, "I don't know nothing about this" a total of seven times. In some instances Smith seems to mean the van when he uses the words "this" or "that," but in other instances it seems he means the robberies. In listening to the recording of the interrogation, it seems that he meant to refer to the robberies but this is not the only interpretation.

¶64 Further, while "I don't want to talk about this" seems to indicate a desire to cut off questioning, "I don't *know* nothing about this" is an exculpatory statement proclaiming Smith's innocence. Such a proclamation of innocence is incompatible with a desire to cut off questioning.

¶65 Given the apparent confusion, and although he was not required by law to do so, Detective Guy gave Smith an opportunity to clarify his statements when he asked, "Do you want to tell me about [the robberies]?" In response, Smith again proclaimed his innocence, stating: "I don't know nothing about no robbery, see, that's what I'm saying! I don't rob people."

¶66 Smith's own words also indicated a continued willingness to answer questions. Following the statement that Smith emphasizes—"See, I don't want to talk about, I don't want to talk about this. I don't know nothing about this."—Smith also stated: "I'm talking about this van. This stolen van. I don't know nothing about this stuff . . . I don't know nothing about this. I'm here for the van." These additional statements indicate that Smith was willing to continue answering questions about the van, but was unwilling, or perhaps unable, to answer questions about the robberies.

¶67 "[A] defendant may selectively waive his *Miranda* rights, deciding to 'respond to some questions but not others.'" *State v. Wright*, 196 Wis. 2d 149, 156, 537 N.W.2d 134 (Ct. App. 1995) (quoting *Bruni v. Lewis*, 847 F.2d 561, 563 (9th Cir. 1988)). Such selective "refusals to answer specific questions," however, "do not assert an overall right to remain silent." *Id.* at 157 (citing *Fare v. Michael C.*, 442 U.S. 707, 726–27 (1979)).

¶68 Finally, our determination regarding the meaning of Smith's statement need not be definitive to conclude that he did not unequivocally invoke the right to remain silent. The 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. *Markwardt*, 306 Wis. 2d 420, ¶36.

¶69 Thus, under the facts and circumstances of the case at issue, Smith did not unequivocally invoke his right to remain silent, such that police were required to cut off their questioning. We therefore affirm the court of appeals.

B. Unduly Harsh Sentence

¶70 "Within certain constraints, Wisconsin circuit courts have inherent authority to modify criminal sentences." *State v. Harbor*, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828 (citing *State v. Hegwood*, 113 Wis. 2d 544, 546, 335 N.W.2d 399 (1983)). A circuit court may not, however, modify a sentence merely "on reflection and second thoughts alone." *Harbor*, 333 Wis. 2d 53, ¶35 (citing *State v. Wuensch*, 69 Wis. 2d 467, 474, 480, 230 N.W.2d 665 (1975)). Ordinarily a defendant seeking a sentence modification must show the existence of a "new factor" unknown to the court at the time of sentencing. *See, e.g.*, *State v. Ninham*, 2011 WI 33, ¶88, 333 Wis. 2d 335, 797 N.W.2d 451.

¶71 In the absence of a new factor, a circuit court has authority to modify a sentence only under certain narrow circumstances. Among those circumstances is if "the court determines that the sentence is unduly harsh or unconscionable." *Harbor*, 333 Wis. 2d 53, ¶35 n.8 (citing *State v. Crochiere*, 2004 WI 78, ¶12, 273 Wis. 2d 57, 681 N.W.2d 524; *Wuensch*, 69 Wis. 2d 467;

State v. Ralph, 156 Wis. 2d 433, 438, 456 N.W.2d 657 (Ct. App. 1990)).[14]

¶72 A sentence is unduly harsh or unconscionable "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975) (citations omitted).

¶73 Cummings argues that his sentence of 14 years of initial confinement to be followed by 10 years of extended supervision was unduly harsh. Cummings asserts that "near maximum sentences" are "deserving of greater scrutiny than sentences well within the normal statutory limits." Cummings claims that "[s]uch sentences may be due to the erroneous exercise of discretion." We agree with the court of appeals that Cummings' sentence was not unduly harsh.

¶74 Cummings is correct that "[a] sentence well within" the statutory limits is unlikely to be "so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *State v. Daniels*, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983) (citing

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[14] The circuit court may also modify a sentence without a new factor if it determines that the sentence originally imposed was illegal or void, *State v. Crochiere*, 2004 WI 78, ¶12, 273 Wis. 2d 57, 681 N.W.2d 524, or if it relied on inaccurate information when it imposed the original sentence. *State v. Tiepelman*, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1.

Ocanas, 70 Wis. 2d at 185). Near maximum sentences are not, however, automatically suspect.

¶75 "'What constitutes adequate punishment is ordinarily left to the discretion of the trial judge. If the sentence is within the statutory limit, appellate courts will not interfere unless clearly cruel and unusual.'" *Ninham*, 333 Wis. 2d 335, ¶85 (citation omitted). Further, we will not disturb the exercise of the circuit court's sentencing discretion so long as "it appears from the record that the court applied the proper legal standards to the facts before it, and through a process of reasoning, reached a result which a reasonable judge could reach." *Grindemann*, 255 Wis. 2d 632, ¶30 (citation omitted).

¶76 In the case at issue, the circuit court stated the proper legal standards to be considered at sentencing. *See State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. The circuit court stated the reasons for the severe sentence on the record, stating:

> [T]his court rarely gives a sentence that is maximum or something close to the maximum.
>
> But in this case, it felt that is was required, it was necessary, or it would unduly depreciate the seriousness of the offense, and there was a real need to protect the public.

¶77 Finally, while it is true that not every judge would impose a maximum or near maximum sentence for the offenses Cummings committed, it is hard to say that no reasonable judge would do so. As a result, we conclude that the circuit court did not erroneously exercise its discretion and we affirm the court of appeals.

IV. CONCLUSION

¶78 We conclude that neither Cummings nor Smith unequivocally invoked the right to remain silent during their interrogations. As a result, the circuit court properly denied each defendant's motion to suppress the incriminating statements made to police. We also conclude that Cummings' sentence was not unduly harsh. We therefore affirm the court of appeals in both cases.

By the Court.—The decisions of the court of appeals are affirmed.

¶79 DAVID T. PROSSER, J. *(concurring in part, dissenting in part).* In these cases, two defendants claim that they effectively asserted their right to remain silent. The majority concludes that both defendants failed. Majority op., ¶4. I agree with the majority that Carlos Cummings failed to unequivocally invoke his Fifth Amendment[1] right to remain silent after receiving a *Miranda*[2] warning, majority op., ¶4, and I join the majority opinion with respect to its Cummings analysis. However, I do not agree with the majority's conclusion that Adrean Smith (Smith) did not unequivocally invoke his right to remain silent when he said, "I don't want to talk about this." Accordingly, with respect to Adrean Smith, I respectfully dissent.

¶80 Detective Travis Guy (Detective Guy) of the Milwaukee Police Department conducted an interrogation of Smith regarding armed robberies that involved a stolen van. The majority quotes the exchange in paragraph 31. After Smith initially waived his *Miranda* rights, he talked briefly about the stolen van and then said, "That's pretty much all I can say."

¶81 Detective Guy proceeded to talk about an armed robbery, and Smith responded by saying, "See, I don't want to talk about, I don't want to talk about this." He also said, "I don't even want to talk about—I don't know nothing about this, see. I'm talking about this van. . . . So, I don't want to talk about this."

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[1] "No person shall be . . . compelled in any criminal case to be a witness against himself . . . ." U.S. Const. amend. V.

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

¶82 Detective Guy responded, "I got a right to ask you about it." Detective Guy then continued to question Smith.

¶83 Detective Guy did not have "a right" to question Smith after Smith said he did not want to talk. The detective's statement to the contrary undercut the defendant's constitutional right to remain silent.[3] Despite initially informing Smith that he had "the right to stop the questioning or remain silent at any time [he] wish[ed]," Detective Guy ignored a clear statement that Smith did not want to talk.

¶84 The majority concludes that Smith's statements were equivocal because, although he said "I don't want to talk about this" four times, according to the majority, it was unclear whether "this" was referring to the van, the robberies, or the interrogation in general. Majority op., ¶63. I disagree. True confusion can be remedied with follow-up questions. Even if not required, clarifying questions reduce the risk that further inquiry will violate the suspect's constitutional rights when an officer truly believes a suspect's statement was ambiguous.

¶85 The statements in this case are not appreciably different from the statements in *State v. Goetsch*, 186

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[3] An officer's assertion of authority in response to a defendant's assertion of a constitutional right is troubling when the asserted authority contradicts the right. *See State v. Wantland*, 2014 WI 58, ¶27, 355 Wis. 2d 135, 848 N.W.2d 810 (Prosser, J., dissenting). When Detective Guy asserted that he had a right to question Smith, he effectively precluded Smith from asserting his right to end questioning.

Wis. 2d 1, 7, 519 N.W.2d 634 (Ct. App. 1994). In *Goetsch*, the defendant said, "*I don't want to talk about this anymore. I've told you, I've told you everything I can tell you*. You just ask me any questions and I just want to get out of here. Throw me in jail, I don't want to think about this." *Id*. Despite the fact that Goetsch continued to speak after he said he did not want to talk, the court of appeals determined that he had invoked his right to remain silent. *Id*. at 7–9.

¶86 Like Goetsch, Smith told his interrogator that he had given all the information he had. Smith's statement—"I don't want to talk about this"—is identical to one of Goetsch's statements. *Id*. at 7. Thus, there is no basis for the different result in the present case.

¶87 The Supreme Court said that a defendant may invoke the right to cut off questioning by saying "that he want[s] to remain silent or that he [does] not want to talk with the police." *See Berghuis v. Thompkins*, 560 U.S. 370, 382 (2010). When Smith said, "I don't want to talk about this," he unambiguously indicated that he did indeed not want to talk anymore.

¶88 For the foregoing reasons, I respectfully concur in part and dissent in part.

¶89 I am authorized to state that Justice ANN WALSH BRADLEY joins this concurrence/dissent.

¶90 SHIRLEY S. ABRAHAMSON, C.J. *(dissenting).*

"I don't want to talk about it." (Smith)

"Take me to my cell." (Cummings)

¶91 *Miranda* guides us in understanding a suspect's invocation during interrogation of the right to remain silent: "[I]f [a defendant] . . . indicates *in any manner* that he does not wish to be interrogated, the police may not question him."[1]

¶92 Recently, the United States Supreme Court adopted the *Davis*[2] objective "unequivocal invocation" test for gauging a defendant's invocation of the right to remain silent. *See Berghuis v. Thompkins*, 560 U.S. 370 (2010).

¶93 The defendants and the State agree that *Davis*/*Thompkins* governs the instant cases but express concern that the court of appeals has not followed these Supreme Court holdings.

¶94 Both defendant Cummings and the State agree, as do I, that under the *Davis* "unequivocal invocation" test, the determination of whether an invocation of a *Miranda* right is unequivocal uses an objective standard. Whether a defendant has unequivocally invoked a right is assessed by determining how a *reasonable* police officer would understand the suspect's statement in the circumstances.[3] Defendant Cummings and the State

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[1] *Miranda v. Arizona*, 384 U.S. 436, 445 (1966) (emphasis added).

[2] *Davis v. United States*, 512 U.S. 452 (1994).

[3] In addressing the unequivocal invocation test of whether a suspect seeks to invoke his or her right to counsel, the Court

agree that certain language in *State v. Ross*, 203 Wis. 2d 66, 552 N.W.2d 428 (Ct. App. 1996), referring to the suspect's subjective intent, is problematic under *Davis*/*Thompkins*.

¶95 The State explicitly asks the court to disavow language in *Ross* referring to the suspect's intent, language that has been cited in other court of appeals decisions. The State's request is framed as follows:

> The State agrees with Cummings that language in *Ross* referring to the suspect's subjective intent is problematic. As Cummings observes, the test in *Davis* (and *Thompkins*) is objective: whether a suspect has unequivocally invoked his or her rights under *Miranda* is "an objective inquiry that 'avoid[s] difficulties of proof and . . . provide[s] guidance to officers' on how to proceed in the face of ambiguity." *Thompkins*, 560 U.S. at 381–82 (quoting *Davis*, 512 U.S. at 458–59). To the extent that *Ross* suggests that courts and police must consider a suspect's subjective intent, as well as his or her statements and non-verbal cues, in determining whether an unequivocal invocation has been made, *Ross* is inconsistent with *Davis* and *Thompkins*. The State asks the court to address this issue in its opinion, and explicitly disavow language in *Ross* referring to the suspect's intent, which was also cited in

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explained: "Although a suspect need not 'speak with the discrimination of an Oxford don,' . . . 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." *Davis*, 512 U.S. at 459 (quoted source omitted).

> [*State v.*] *Markwardt*, [2007 WI App 242,] 306 Wis. 2d 420, ¶28, [742 N.W.2d 546,] and [*State v.*] *Hampton*, [2010 WI App 169,] 330 Wis. 2d 531, ¶46[, 793 N.W.2d 901].[4]

¶96 The majority opinion relies on *Ross* and *Markwardt*,[5] citing the cases frequently. The majority opinion does not, however, clarify *Ross* in the manner requested by both the State and Cummings.

¶97 The majority opinion, dwelling on the suspect's subjective motives, seems to apply a subjective "unequivocal invocation test," contrary to the holdings of the United States Supreme Court in *Davis* and *Thompkins*. I think federal district court Judge Griesbach got it right in *Saeger v. Avila*, 930 F. Supp. 2d 1009 (E.D. Wis. 2013), overturning an unpublished court of appeals decision.[6]

¶98 The federal court stated that the Wisconsin court of appeals "found that while Saeger's actual words were clear, *he did not really mean them*." The *Saeger* court concluded that "if this reasoning [of the court of appeals] 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." *Saeger*, 930 F. Supp. 2d at 1015–16.

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[4] Brief of Plaintiff-Respondent and Supplemental Appendix at 12–13.

[5] *State v. Markwardt*, 2007 WI App 242, 306 Wis. 2d 420, 742 N.W.2d 546.

[6] *State v. Saeger*, No. 2009AP133-CR, unpublished slip op. (Wis. Ct. App. Aug. 11, 2010). *Saeger* was a habeas case.

¶99 *Saeger* correctly stands for the proposition that a court should look to the words the suspect uses in the context in which they were spoken, but that a court cannot manufacture ambiguity "by examining a suspect's possible motive . . . ." *Saeger*, 930 F. Supp. 2d at 1019.

¶100 The majority opinion seems to assert that the defendants did not mean what they said.[7]

¶101 In addition to arguably employing the wrong test, the majority opinion finds equivocation where, in my opinion, none exists and ignores the plain meaning of the defendants' requests in both cases. The majority opinion's application of the "unequivocal invocation" test to the two instant cases, whether as a subjective or objective test, ignores the reality of colloquial speech.

¶102 In the end, I conclude that a reasonable person would understand that "I don't want to talk about this" and "take me to my cell" mean the conversation is at an end.

¶103 As the law currently stands, law enforcement officers are encouraged but not required to ask clarifying questions,[8] and courts are encouraged to resist creating ambiguity in straightforward statements. In both *Smith* and *Cummings*, had the officers viewed the statements at issue as unclear and

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[7] Majority op., ¶¶54, 58–59, 62 (speculating that Cummings was "fencing" with his interrogator and that Smith was professing his innocence).

[8] *Davis*, 512 U.S. at 461 ("Of course, when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney.")

asked clarifying questions, appellate review in the court of appeals and in this court might have been avoided.[9]

¶104 Although neither the State nor the defendants challenge the use of the *Davis*/*Thompkins* rule, I do.

¶105 I commented on the shortcomings of the "unequivocal invocation" test in my dissent in *State v. Subdiaz-Osorio* in the context of invoking one's *Miranda* right to counsel[10] and in my dissent in *State v. Wantland* in the context of withdrawal of consent to a search.[11] These comments apply to the present cases relating to invocation of a suspect's *Miranda* right to remain silent.

¶106 Because it is so difficult to find a clear, discernable, bright line between equivocal and unequivocal statements, courts employ "selective literalism," sometimes viewing a suspect's language as unequivocal, other times requiring very clear language.[12]

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[9] The interrogating officer in *Smith* did not merely fail to ask clarifying questions; he erroneously stated, "I got a right to ask you about it," asserting his authority and undercutting the defendant's constitutional right to remain silent. *Accord State v. Wantland*, 2014 WI 58, ¶¶81–82, 355 Wis. 2d 135, 848 N.W.2d 810 (Abrahamson, C.J., dissenting) (concluding that an officer cannot cut off a defendant's opportunity to refuse to give consent to a search by erroneously asserting legal authority).

[10] *State v. Subdiaz-Osorio*, 2014 WI 87, ¶¶___, 357 Wis. 2d 41, 848 N.W.2d 748 (Abrahamson, C.J., dissenting).

[11] *State v. Wantland*, 2014 WI 58, ¶¶84–91, 355 Wis. 2d 135, 848 N.W.2d 810 (Abrahamson, C.J., dissenting).

[12] Marcy Strauss, *Understanding Davis v. United States*, 40 Loyola L.A. L. Rev. 1011, 1062 (citing Peter M. Tiersma &

¶107 As I wrote in my dissents in *Subdiaz-Osorio* and *Wantland*, the "unequivocal invocation" test invites equivocation on the part of courts and has led to inconsistent, subjective results in the case law.

¶108 Inconsistencies are glaringly apparent in courts' use of the "unequivocal invocation" test in the context of the right to counsel. Comparing statements that have been deemed "unequivocal" by a court with those that have been deemed "equivocal" reveals an unsettling arbitrariness. For instance, one court deemed "Can I call my lawyer?" equivocal, whereas another deemed "Can I have my lawyer present when [I tell you my story]?" unequivocal.[13]

¶109 I agree with Justice Sotomayor's dissent in the recent 5–4 *Thompkins* decision, which comments on the weaknesses of the "unequivocal invocation" test in evaluating a suspect's statements as follows:

> The Court asserts in passing that treating ambiguous statements or acts as an invocation of the right to silence will only marginally serve *Miranda*'s goals. Experience suggests the contrary. In the 16 years since [*Davis v. United States*, 512 U.S. 452, 461 (1994)] was decided, ample evidence has accrued that criminal suspects often use equivocal or colloquial language in attempting to invoke their right to silence. A number of lower courts that have

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Lawrence M. Solan, *Cops and Robbers: Selective Literalism in American Criminal Law*, 38 Law & Soc'y Rev. 229, 256 (2004)).

[13] *Dormire v. Wilkinson*, 249 F.3d 801, 805 (8th Cir. 2001); *Taylor v. State*, 553 S.E.2d 598, 601–02 (Ga. 2001).

For a survey of statements that have and have not been deemed equivocal, see Strauss, *supra* note 12, at 1061–62.

> (erroneously, in my view) imposed a clear-statement requirement for invocation of the right to silence have rejected as ambiguous an array of statements whose meaning might otherwise be thought plain. At a minimum, these decisions suggest that differentiating "clear" from "ambiguous" statements is often a subjective inquiry.[14]

¶110 Because the majority opinion fails to uphold the broad protection mandated by *Miranda* and undermines the core principle of protecting the defendants' Fifth Amendment right against compelled self-incrimination, I dissent.

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[14] *Berghuis v. Thompkins*, 560 U.S. 370, 410–11 (2010) (Sotomayor, J., dissenting) (internal quotation marks, citation, and footnote omitted).

APPENDIX D

COURT OF APPEALS DECISION DATED AND FILED January 23, 2013 Dianne M. Fremgen Clerk of Court of Appeals	NOTICE This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports. A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.
Appeal No. 2012AP520-CR	Cir. Ct. No. 2010CF5837
STATE OF WISCONSIN	IN COURT OF APPEALS DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ADREAN L. SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: THOMAS P. DONEGAN, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Adrean L. Smith appeals from a judgment of conviction, entered upon his guilty pleas, on three counts of armed robbery and one count of first-degree reckless injury with use of a dangerous weapon. Smith contends that the circuit court erred in denying his motion to suppress incriminating statements he made while in custody. We affirm the judgment.

¶2 Detective Travis Guy was investigating a series of armed robberies and had occasion to conduct a custodial interrogation of Smith. Guy properly advised Smith of his ***Miranda*** rights, and Smith initially waived those rights.[1] During the interrogation, Guy asked Smith about a stolen van, prompting Smith to respond, in part, "I don't want to talk about this." Guy continued the interview and Smith subsequently gave incriminating statements in which he admitted to his involvement in a series of robberies, burglaries, and shootings.

¶3 As a result, the State charged Smith with eighteen various felonies. Smith moved to suppress the statements he had given during the custodial interrogation, claiming that he had unambiguously asserted his right to silence by saying, "I don't want to talk about this," but the invocation was not scrupulously honored. The circuit court ruled that

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

Smith "did not clearly assert his right to remain silent" and denied the suppression motion.

¶4 Smith pled guilty to three counts of armed robbery and one count of first-degree reckless injury with a dangerous weapon. The remaining counts were dismissed and read in for sentencing. Smith was sentenced to a total of twenty-five years' initial confinement and ten years' extended supervision. Smith appeals.[2]

¶5 A suspect's right to remain silent encompasses two protections: "to remain silent unless the suspect chooses to speak in the unfettered exercise of his or her own will" and "the right to cut off questioning." *See* ***State v. Markwardt***, 2007 WI App 242, ¶24, 306 Wis. 2d 420, 434, 742 N.W.2d 546, 553. The key question is whether the suspect, having been informed of his rights, invokes any of those rights during police interrogation. ***Id.***, 2007 WI App 242, ¶25, 306 Wis. 2d at 434, 742 N.W.2d at 553.

¶6 "A suspect must unequivocally invoke his or her right to remain silent before police are required either to stop an interview or to clarify equivocal remarks by the suspect." ***Id.***, 2007 WI App 242, ¶26, 306 Wis. 2d at 434–435, 742 N.W.2d at 554. That is, a suspect "must articulate his or her desire to remain silent or cut off questioning 'sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be' an invocation of the

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[2] "An order denying a motion to suppress evidence or a motion challenging the admissibility of a statement of a defendant may be reviewed upon appeal from a final judgment or order notwithstanding the fact that the judgment or order was entered upon a plea of guilty[.]" WIS. STAT. § 971.31(10).

right to remain silent." ***State v. Ross***, 203 Wis. 2d 66, 78, 522 N.W.2d 428, 433 (Ct. App. 1996) (citation omitted).

¶7 Whether a person has sufficiently invoked the right to remain silent is a question of constitutional fact, reviewed under a two-part standard. ***Markwardt***, 2007 WI App 242, ¶30, 306 Wis. 2d at 437, 742 N.W.2d at 555. We uphold the circuit court's findings of historical fact unless clearly erroneous, but we independently apply constitutional principles to those facts. ***Ibid.***

¶8 In his brief, Smith provided the text of the relevant portion of his recorded interview by Guy. The State responds that it does not dispute the accuracy of the transcription. Thus, the exchange we review is as follows:

Mr. Smith: See, I don't want to talk about, I don't want to talk about this. I don't know nothing about this.

Detective: Okay.

Mr. Smith: I don't know nothing. See, look, I'm talking about this van. I don't know nothing about no van. What's the other thing? What was the other thing that this is about?

Detective: Okay.

Mr. Smith: I don't even want to talk about – I don't know nothing about this, see. I'm talking about this van. This stolen van. I don't know nothing about this stuff. So, I don't want to talk about this.

Detective: I've got a right to ask you about it.

Smith asserts that his "statement that he did not want to talk about this anymore made it 'sufficiently clear' that he wanted to remain silent and the interrogation needed to stop." We disagree.

¶9 Smith did not say, "I don't want to talk about this" and then stop talking.[3] Instead, he kept talking. Police may continue an interrogation if a defendant validly waives his right to remain silent and later initiates further conversation. *See* ***Ross***, 203 Wis. 2d at 74, 522 N.W.2d at 431. More importantly, Smith's continued conversation with the detective indicates not that Smith wanted to stop talking about everything but, rather, that he simply did not wish to discuss a stolen van about which he professed to have no information. "[R]efusals to answer specific questions do not assert an overall right to remain silent." ***State v. Wright***, 196 Wis. 2d 149, 157, 537 N.W.2d 134, 137 (Ct. App. 1995).

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[3] The circuit court, in denying the motion to suppress, had ruled:

> This is a very human interaction. Defendant sometimes is saying "I'll talk about this but I'll not talk about that," or "I did some things, I am willing to do that but" — He's asking "what are you all talking about?" He is engaging in a conversation. He is never clearly saying "I'm done talking, I do not want to speak to you," nor is he saying "I won't speak to you unless I have a lawyer."

Smith complains that these factual findings are clearly erroneous because he never expressly makes those statements, as evidenced by the recording. However, our reading of the circuit court's comments is that it was not attributing particular quotes to Smith but was simply characterizing the nature of the ambiguities within his statements.

¶10 Accordingly, we conclude that Smith failed to make an unequivocal invocation of the right to remain silent, so the detective was not required to terminate the interview. The circuit court thus properly denied the motion to suppress Smith's statement.

By the Court.—Judgment affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

APPENDIX E

United States Constitution
Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. § 2254
State custody; remedies in Federal courts

* * *

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

* * *

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

* * *