No._____

In the
Supreme Court of the United States

Cedric A Gray,
Petitioner

v.

State of Wisconsin
Respondent

On Petition for Wit of Certiorari to the Wisconsin Court of Appeals District 2

Petition For a Writ of Certiorari

Steven Roy
Counsel of Record
1310 O'Keeffe Ave. #315
Sun Prairie, WI 53590
608.571.4732
Steven@stevenroylaw.com

Question Presented

Should this Court overturn the prophylactic procedures announced in *Miranda v. Arizona* and return to an interpretation of the Fifth Amendment which is supported by the text, history, and tradition of the Self-Incrimination Clause?

Parties to the Proceeding

The petitioner is Cedric A. Gray who was the defendant in the circuit court, defendant-appellant in the Wisconsin Court of Appeals, and the defendant-appellant-petitioner in the Supreme Court of Wisconsin.

The respondent is the State of Wisconsin, who was the plaintiff in the circuit court, and the plaintiff-respondent in subsequent appellate proceedings.

Statement of Related Proceedings

This case arises from the following proceedings:

- *State of Wisconsin v. Cedric Gray*, 2024 WI 6 (Wis. 2024)(Order denying review)
- *State of Wisconsin v. Cedric Gray*, *State v. Gray*, 21-AP-294, 2023 Wisc. App. LEXIS 721 (Wis. Ct. App.) (opinion affirming the judgement of conviction)
- *State of Wisconsin v. Cedric Gray*, Racine County 2018-CF-401

There are no other proceedings in state or federal trial or appellate courts, or in this Court directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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Mr. Gray respectfully petitions for a writ of certiorari to the Wisconsin Court of Appeals, District 2, in *State v. Gray*, 21-AP-294, 2023 Wisc. App. LEXIS 721.

Opinions Below

The Wisconsin Supreme Court's order denying review has been reproduced at Appendix B. The court of appeals opinion affirming the decision of the circuit court is unpublished, but can be found at 2023 Wisc. App. Lexis 721, or 2023 WL 4348548, and is reproduced at Appendix A..

Jurisdiction

The Supreme Court of Wisconsin issued its order denying review on October 30, 2023. A copy of this order is reproduced at Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

Constitutional, Statutory, and Regulatory Provisions Involved

The Fifth Amendment provides: "No person…shall be compelled in any criminal case to be a witness against himself".

The Fourteenth amendment provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law".

Introduction

In behavioral economics, there is a concept known as the "sunk cost fallacy". This concept describes the tendency of individuals and organizations to continue devoting resources to projects which fail to yield a profit simply because the organization has already invested significant resources into the project. A famous example of this concept is the development of the Concorde jet. Long before the supersonic jet was completed, it became clear the increasing costs would never be offset by the financial gains. Yet the manufacturers and governments involved in the project continued, simply because they had already devoted significant resources to the project. Unfortunately, this Court's Self-Incrimination Clause jurisprudence has become another example of the sunk cost fallacy.

The English common law developed a robust system of criminal procedures. The founding generation codified these common law traditions in the Fourth, Fifth, Sixth, and Eighth Amendments to our Constitution. Thus the maxim *nemo tenetur seipsum accusare* was rewritten as "No person…shall be compelled in any criminal case to be a witness against himself". *See e.g.* 3 Joseph Story, *Commentaries on the Constitution* §1782, at 660 (1833). Until the 20th century, this clause provided a robust, categorical protection. Confessions were

excluded from criminal trials if any degree of influence had been exerted. *Bram v. United States*, 168 U.S. 532, 543, 18 S.Ct. 183, 42 L.Ed. 568 (1897)(quoting 3 William O. Russell, *Treatise on Crimes and Misdemeanors* 478 (1896 ed.)).

The Bill of Rights did not originally apply to the states, but this changed with the adoption of the Fourteenth Amendment. Shortly after its adoption, this Court was called upon to interpret the meaning of the Privileges and Immunities Clause in the *Slaughter-House Cases*. 83 U.S. 36. 16 Wall. 36, 21 L.Ed. 394 (1873). Rather than interpreting the clause with its plain meaning, Justice Miller embarked on a dissertation regarding the differences between the rights of federal and state citizenship, and effectively interpreted the Privileges and Immunities Clause out of the Constitution. *Id.* at 78.

This Court has never disturbed this holding. *See*, *McDonald v. City of Chicago*, 561 U.S. 742, 758, 130 S.Ct. 3020, 177 L.Ed. 2d 894 (2010). Rather, in piecemeal fashion, this Court has incorporated most of the privileges and immunities from the Bill of Rights through the Fourteenth Amendment's Due Process Clause.

Initially, this Court concluded the privilege against self-incrimination was a just and useful principle of law, but not fundamental to due process. *Twinning v. New Jersey*, 211 U.S. 78,

107, 29 S. Ct. 14, 53 L.Ed. 97 (1908). Thus the *Twinning* Court refused to apply the privilege to the states.

Twenty-eight years later, the State of Mississippi would use *Twinning* to defend confessions obtained by repeated lynchings and whippings. *Brown v. Mississippi*. 297, U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682 (1936). The Court reaffirmed *Twinning*, but held the use of torture to secure a confession violated the Fourteenth Amendment's Due Process Clause. *Id*. at 285-287. For the next three decades this Court was inundated with the abuses of state interrogators. This gradually developed into a totality of the circumstances test used to determine if a suspects will had been overcome. *See*, *e.g. Chambers v. Florida*, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716 (1940); *Ward v. Texas*, 316 U.S. 547, 62 S.Ct. 1139, 86 L.Ed. 1663 (1942); *Ashcraft v. Tennessee*, 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 1192 (1944); *Ashcraft v. Tennessee*, 327 U.S. 274, 66 S.Ct. 544, 90 L.Ed. 667 (1946); *Watts v. Indiana*, 338 U.S. 49, 69 S.Ct. 1347, 93 L.Ed. 1801 (1949); *Leyra v. Denno*, 347 U.S. 556, 74 S.Ct. 716, 98 L.Ed. 948 (1954); *Reck v. Pate*, 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed. 948 (1961); *Culombe v. Connecticut*, 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961); *Davis v. North Carolina*, 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed.2d 895 (1966).

In 1964, this Court corrected its mistake in *Twinning*. *Malloy v. Hogan* held the privilege against self-incrimination was applicable to the states. *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed. 2d 653 (1964). But this return to reasoned constitutional analysis was short lived. In 1966, this Court sanctioned custodial interrogation, if the interrogator informed the arrested suspect of their judicially crafted rights. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The common law required an arrested suspect to be promptly taken before a magistrate and made no provision for interrogation prior to judicial examination. 4 William Blackstone, Commentaries *293.

This Court has spent fifty-eight years attempting to make sense of *Miranda*. *See, Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971); *Lego v. Twomey*, 404 S.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972); *Michigan v. Tucker*, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974); *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975); *Michigan v. Mosley*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed. 2d 313 (1975); *Fare v. Michael C.*, 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979); *North Carolina v. Butler*, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979); *New York v. Quarles*, 467 U.S. 649, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984); *Minnesota v. Murphy*, 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed. 2d 409 (1984); *Arizona v. Roberson*, 486 U.S.

675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988); *Davis v. United States*, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994); *Dickerson v. United States*, 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000); *Berghuis v. Thompkins*, 560 U.S. 370, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010); *Maryland v. Shatzer*, 559 U.S. 98, 130 S.Ct. 1213, 175 L.Ed.2d 1045 (2010); *Salinas v. Texas*, 570 U.S. 178, 133 S.Ct. 2174, 186 L.Ed.2d 376 (2013); *Vega v. Tekoh*, 142 S.Ct. 2095; 213 L.Ed. 479 (2022).

Miranda's progeny require many questions to be answered. Was the suspect in custody? Are the words and actions of the interrogators reasonably likely to elicit a response? Did the suspect waive their rights? Was the waiver express or implied? Was there a subsequent invocation of any of *Miranda*'s rights? Was there any ambiguity in the invocation? How long has it been since the suspect last invoked their rights? Is there a reason to apply a public safety exception?

Conversely, the Self-Incrimination Clause asks one question:

Was there any influence exerted?

The time has come to stop wasting judicial resources on *Miranda*'s failed policy project. Replacing this categorical constitutional guarantee with vague, manipulable standards has done enough damage to the constitution and country.

Statement of the Case

On Sunday, March 18, A.G.[1] heard a crash outside her home, saw a crashed van, and called 911. (R.77:32).[2] Officer Heriberto Benitez was en route to the area in response to a report of "shots fired", and secured the crash scene. (R.77:43-46). Officer Benitez noticed the driver was slumped over into the passenger seat, and was unresponsive when Officer Benitez attempted to wake him. (R.77:47). The driver was later identified as T.B. (R.77:49). When rescue personnel arrived, it was determined T.B. had been shot, and the scene became a homicide investigation. (R.77:65).

Police interviewed a number of citizens in the neighborhood surrounding the scene. K.C. thought she heard a gun shot, and ran out to her front porch. (R.77:104-105). She did not see the incident, but did see a black male walking away from the area. (R.77:106). L.B. saw the entire incident but was unable to identify the two men involved in the shooting of T.B. (R.77:119-123, 129). J.K. saw much of the incident, but was not able to identify the men involved in the shooting. The only description he gave was a person of average height with dreadlocks, or wearing a hat, and wearing a puffy vest. (R.77:139).

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[1] Pursuant to the policy goals identified in Wis. Stat. 809.86(1) and Wis. Stat. 950.01, the victim and civilian witnesses are identified by initials only.

[2] (R.x:y) references the document number and page of the record as it was filed in the Wisconsin Court of Appeals and Supreme Court of Wisconsin.

An area homeowner had a video recording doorbell, and provided footage of the shooting the doorbell captured to police. (R.77:270-274). The video quality and capture was poor. Investigator Jepson was only able to describe the shooter's clothing. (R.77:272). There was no DNA, fingerprint, toolmark, or any other form of scientific, or physical evidence which tied Mr. Gray to the shooting.

Investigators identified Mr. Gray as a suspect, and received a warrant so they could interview him. (R:78:12). They interrogated Mr. Gray in a booking cell in Chicago. (R.78:16). They brought still pictures from the video with them when the interviewed Mr. Gray, and Mr. Gray admitted to being the individual in the video wearing the puffy coat. (R.25:59-62). Approximately half way through the interrogation, Mr. Gray told investigators "I'm just done with the conversation". (R.25:77). At the point Mr. Gray told investigators he was done speaking with them, Mr. Gray was adamant he did not possess a firearm, and his cousin M.L. was the individual who shot T.B. (R.25:76).

Investigators continued to pressure Mr. Gray telling him:

> Cedric, what you have to think about now is what is going to be the best thing that can help you out in this situation… Okay? And -- hear me out. Okay. Hear me out. The best thing that I can tell you is you have to be upfront with everything. Okay? Again, we -- we basically see and know what happened out there.

> This is your chance to say dude, it -- this is what happened. This is not where this is. And this is where this is. This is what I did with that. I'm sorry. I messed up. I fucked up. And I'm sorry.
> And I get it. I mean, he's your cousin (R.25:77).

Eventually Mr. Gray confessed to shooting T.B. as he saw T.B. reaching down to get what Mr. Gray believed was a gun. (R.25:101-102).

A criminal complaint charging Mr. Gray with First Degree Homicide and Possession of a Firearm by a Felon was issued on March 22, 2018. (R.1:1-2). Mr. Gray filed a motion to suppress his statements to police as they were not made voluntarily. (R.16:1-2). After the jury was selected, the circuit court conducted a perfunctory evidentiary hearing to determine the admissibility of Mr. Gray's confession. (R.76:78). Counsel for Mr. Gray expanded upon his original motion and focused the circuit court's attention on Mr. Gray's attempts to cut off police questioning. (R.76:113). The circuit court denied the motion to suppress, and the case continued to trial the next morning. (R.76:116).

Mr. Gray was convicted on both counts. (R.78:162-163). On count one, Mr. Gray was sentenced to life in prison without the possibility of extended supervision, and was sentenced to 10 years in prison for possession of a firearm. (R.79:131). Mr. Gray filed a timely

notice of intent to pursue post-conviction relief. (R.55). Subsequently Mr. Gray filed a timely notice of appeal. (R.61).

Mr. Gray appealed, arguing the state violated his right against self-incrimination. He reasoned his statement "I'm just done with this conversation" was an unambiguous desire to end questioning, as there was only one conversation he was having with officers. The court of appeals affirmed, concluding a reasonable officer could construe the statement as referring to a narrow subset of their conversation. (App. A). The Supreme Court of Wisconsin denied review on October 30, 2023. (App. B)

Reasons for Granting the Petition

I. *Miranda* and its progeny replaced a categorical constitutional guarantee with malleable tests. The lower Courts are divided in the application of these tests.

The Fifth Amendment protects against the use of compelled self-incriminating testimony in criminal trials. U.S. Const. Amend. V. Like many of the protections codified in the Constitution, this clause comes from the English common law. The founding generation had witnessed the British Crown ignore and abuse these protections, and so they amended the Constitution so these protections against government encroachment would be a part of the highest law in the land. *Bram*, 168 U.S. at 543-545.

By 1897, this Court considered the development of the self-incrimination law to be well settled. Only voluntary confessions were admissible. If the confession had been obtained by any threat, violence, promise, or any other sort of improper influence, the confession was inadmissible. *Id.* at 548. Politely telling a suspect it would be better for them if they confessed was sufficient to render a confession inadmissible. *Id*. at 559-561 (surveying American decisions)

In 1964, this Court corrected its error in *Twining* and held the self-incrimination clause was applicable to the states. Less than two

years after incorporating this privilege against the states, this Court embarked on a new course. *Malloy v. Hogan* 378 U.S. 1. Station-house interrogation had become an entrenched and abused practice. Rather than root out this practice which was at odds with the Fifth Amendment, *Miranda* at 457-58, the Court created a judicial compromise. Now custodial interrogations must be proceeded with a set of warnings. *Miranda*, at 444-45. If the suspect indicated in "any manner and at any state" they wish to consult with an attorney, or indicated they did not wish to be interrogated, questioning must cease.

Subsequent members of this court have disagreed with this bright line principle. To avoid difficulties of proof and to provide guidance to interrogators, this Court now allows to continuing questioning if a suspect's reference to an attorney is ambiguous or equivocal to a reasonable officer in light of all the circumstances. *Davis v. United States*, 512 U.S. 452 (1994) This reasoning applies to general questioning as well. *Berghuis v.* Thompkins, 560 U.S. 370 (2010).

The lower courts have largely been able to parrot this legal standard. But the results of this test demonstrate how unworkable it is. In Maine, telling officers you don't want to answer the questions they have posed is inadequate to invoke *Miranda*'s right to silence. *State v. McNaughton*, 2017 ME 173, 168 A.3d 807 (ME 2017).

The Florida Court of Appeals held "I don't want to talk about that" invoked the right to remain silent. *Dixon v. State*, 72 So. 3d 171, 36 Fla. L. Weekly D 1815 (Fla. Dist. Ct. App. 2011). The Supreme Court of Oregon has effectively admitted doctrinal defeat: "It's not something I want to talk about" could be ambiguous, but it could be unambiguous as well. *State v. Nichols*, 361 Ore. 101, 390 P.3d 1001 (Or. 2017)

In a habeas proceeding, the 9th Circuit held "I don't want to talk no more" was an unambiguous invocation and granted relief. *Jones v. Harrington*, 829 F. 3d 1128 (9th Cir. 2016) But in Ohio, "I'm ready to quit talking now and I'm ready to go home too" was insufficiently clear. *State v. Murphy*, 91 Ohio St. 3d 516,747 N.E.2d 765 (Ohio 2001) . "I've got nothing to say" is a clear invocation in both Missouri, *State v. Rice*, 573 SW 3d 53 (Mo. 2019), and in Minnesota, *State v. McInnis*, 962 N.W. 2d 874 (Minn. 2021), but would be ambiguous in Rhode Island, *State v. Munir*, 209 A.3d 545 (R.I. 2019), Arizona*, State v. Cornman*, 237 Ariz. 350, 351 P.3d 357 (Ariz. Ct. App. 2015), Montana, *Nixon v. State*, 2013 MT 81, 369 Mont. 359, 298 P.3d 408 (Mont. 2013), and Arkansas*, Fritts v. State*, 2013 Ark 505, 431 S.W.3d 227 (Ark. 2013).

Similarly, the statements "I don't want to talk anymore*",* "I'm not going to talk about nothing", and "I don't want to say nothing" have all been held ambiguous and insufficient to invoke *Miranda's* prophylaxis. *State v. Payne*, 233 Ariz 484, 314 P.3d 1239 (Ariz. 2013);

U.S. v. Sherrod, 445 F. 3d 980 (7th Cir. 2006); *Williams v. State*, 445 MD 452, 128 A.3d 30 (Md. 2015).

Over and over, this Court has emphasized *Miranda*'s principle strength is the ease and clarity of its application. But panels of erudite judges with the benefit of written transcripts, dictionaries, thesauruses, and case law cannot agree if "I've got nothing to say" is ambiguous. If our best legal minds struggle to make this common sense determination, how are suspects and interrogators supposed to know which talismanic words must be uttered to invoke *Miranda*?

The Fifth Amendment provides a simple, bright line rule. If any degree of influence has been exerted on the suspect, the confession cannot be received into evidence. *Bram* at 543; *Malloy* at 7. *Miranda*'s prophylaxis obscures this simple determination with endless difficult questions providing little clarity to any party involved. This Court should abandon *Miranda*'s failed experiment, and return to reasoned analysis based on the text, history, and tradition of the Fifth Amendment. Doing so will actually provide ease and clarity to the nation's courts and interrogators.

II. The unpardonable vice of *Miranda* is not its unpredictability, but its demonstrated capacity to admit confessions the Self-Incrimination Clause plainly meant to exclude.

It is regrettable our constitutional doctrines have become so complex they lose sight of their foundational purposes. *Miranda* sought to ameliorate the inherently compulsive nature of custodial interrogation. The Court recognized this practice was "at odds with one of our Nation's most cherished principles -- that the individual may not be compelled to incriminate himself." History has shown an interrogator intoning ritualistic words prior does little to dispel the effects of environment designed to subjugate the suspect. Rather, this invocation serves as a judicial blessing as interrogators attempt to divine the answers they want from their subjects mind.

Carl Mathiason was interrogated by a police officer regarding a burglary. The officer told Mathiason his truthfulness would possibly be considered by the district attorney or judge, they believed he was involved, and followed this up with a lie his fingerprints had been found at the scene. *Oregon v. Mathiason,* 429 U.S. 492, 493, 97 S.Ct. 711, 50 L.Ed. 2d 714 (1977). The Court reversed the suppression of Mathiason's subsequent confession. But under the Fifth Amendment, an interrogator saying "the suspicion is general against you, and you had as well tell all about it, the prosecution will be no greater, I don't

expect to do anything with you; I am going to send you home to your mother" is enough of an inducement to exclude a confession. *Bram*, at 560, quoting *State v. Bostick*, 4 Harr. 563 (Del. 1845).

Telling a suspect there were witnesses who would swear the suspect committed the crime rendered a confession involuntary under the Fifth Amendment. *Bram* at 552, *quoting Rex v. Mills*, 6 Car. &P. 146 (1833). But this Court refused to suppress Richard Mosley's confession after he was told there was Anthony Smith implicated Mosley as the shooter. *Michigan v. Mosley*, 423 U.S. at 324.

Mr. Gray's interrogation reveals how thoroughly courts have failed to protect the privilege against self-incrimination. The interrogators began with a page out of the prerogative courts of the Stuart Monarchy; establish facts so you may entrap the suspect in fatal contradictions. *Bram* at 544; (R.257-27)(App. C). Then the interrogators began to dole out their evidence, "We have people out there saying that you and [M.L] were in the area. Okay? The witnesses are saying it's the same time that this crash occurred". (R.25:28). "Cedric, you've seen the pictures…You know we've talked to people…So that is you in the picture?" (R.25:58-59).

Once Mr. Gray tried to invoke his right to silence under *Miranda*, the interrogator's switched to a full court press.

> Cedric, what you have to think about now is what is going to be the best thing that can help you out in this situation…The best thing that I can tell you is is you have to be upfront with everything…This is your chance to say dyed, it -- this is what happened. (R.25:77).

Bram provided more than a dozen cases where confessions had been ruled inadmissible because of interrogators telling the suspect the best thing to do is confess. *Bram* at 559-561. But under *Miranda's* progeny, these tactics are permissible.

Illegitimate and unconstitutional practices get their first footing by slight deviations from legal modes of procedure. *Boyd v. United States*, 116 U.S. 616, 635, 6 S.Ct. 524, 29 L.Ed. 746 (1885). *Miranda* is a significant departure from the procedures authorized by the Fifth Amendment. Custodial interrogation has become an accepted element of American policing, in spite of the constitutional protections enacted to prevent an inquisitorial system. Uprooting this unconstitutional practice is something only this Court can do. Until this Court abandons *Miranda* and restores the Fifth amendment to prominence, the American inquisition will continue.

III. This case is an ideal vehicle for constitutional analysis.

This case is an ideal vehicle for certiorari. The judgement against Mr. Gray is final, and the state appellate courts have each declined to vindicate Mr. Gray's constitutional rights. The interrogation was recorded and transcribed; there are no material questions of fact. The only question is whether Mr. Gray's confession was properly admitted.

Certiorari is the only remaining vehicle for relief. A habeas petition in the federal courts will be foreclosed by Seventh Circuit precedent. The Seventh Circuit is one of the worst offenders in reading ambiguity into a suspect's plain English. It has held "[a] suspects telling a police officer that he's 'not going to talk about nothin' is as much a taunt -- even a provocation -- as it is an invocation of the right to remain silent." *Sherrod*, 445 F.3d at 982. In a habeas proceeding, the Seventh Circuit recently held it was not objectively unreasonable for the Wisconsin Supreme Court to conclude "I don't want to talk about this" was ambiguous. *Smith v. Boughton*, 43 F.4th 702, 710-711. (7th Cir. 2022).

Ordinary people would understand "I don't want to talk about this" I'm "not going to talk about nothin" and "I'm just done with the conversation" to be an invocation of *Miranda*'s right to silence. This

Court should grant certiorari to prevent the lower courts extraordinary interpretations of the English language from spreading.

Conclusion

The petition for certiorari should be granted.

Dated: Monday, January 29, 2024

Respectfully submitted,

Steven Roy
Counsel of Record
1310 O'Keeffe Ave. #315
Sun Prairie, WI 53590
608.571.4732
Steven@StevenRoyLaw.com