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

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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.

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]

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

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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.

[3] Under Title 28, Section 2254—promulgated as part of the Antiterrorism and Effective Death Penalty Act of 1996, otherwise known as AEDPA—a

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 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

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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).

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.

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

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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.

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]

Critically, nothing in *Michael C.* limits or calls into question the broad interpretation rule outlined in *Barrett*, which has

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

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.

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.