IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	**CRIMINAL ACTION**
	:	
v.	:	**NO. 18-576-5**
	:	
VONTEZ SCALES	:	

MEMORANDUM with Findings of Fact

KEARNEY, J. **October 16, 2019**

The United States seeks to introduce Mr. Scales's incriminating statements in an upcoming multi-defendant trial charging Mr. Scales and several other individuals with conspiring to, among other things, distribute methamphetamines. A Bucks County detective and a Special Agent with the Drug Enforcement Administration interrogated Mr. Scales shortly after his arrest. Following proper *Miranda* warnings and after two extended pauses, Mr. Scales said "I guess I need my lawyer then, right?" The agents did not stop the interview and Mr. Scales then spoke on tape for a couple minutes before saying, "I ain't trying to be smart or nothin' but, ya'll [sic] can just put me in the cell." He then made additional incriminating statements before the agents returned him to his cell.

We held an evidentiary hearing on Mr. Scales's motion to suppress statements after he first allegedly invoked his right to counsel and then invoked his right to remain silent. The United States presented one witness as the Bucks County detective inexplicably did not testify. We evaluated the credibility of the Special Agent's testimony which materially changed on cross-examination. His version of the timeline adduced on cross-examination conforms to the detective's notes. After carefully considering the detective's notes and evaluating the Special Agent's credibility, the timeline requires we deny Mr. Scales's motion based on a failed invocation of the right to counsel, but grant his motion to suppress his statements after he invoked his right to return to his cell and did not thereafter voluntarily initiate contact.

I. Findings of fact.

1. On March 26, 2019 at 10:20 AM, agents arrested Vontez Scales under a valid arrest warrant issued after our grand jury returned a superseding indictment charging him with, among other things, conspiring to distribute methamphetamine with several other individuals.

2. During his arrest and his transport to the Philadelphia Office of the Drug Enforcement Administration, Mr. Scales made no incriminating statements to officers.

3. Drug Enforcement Administration staff processed Mr. Scales in accordance with standard booking procedure when he arrived at its office.

4. Beginning at 11:15 AM, Bucks County Detective Jarrod Eisenhauer and Drug Enforcement Agency Special Agent Andrew Sammaciccia interviewed Mr. Scales in an interview room.

5. The Detective and the Special Agent asked Mr. Scales standard biographical questions before they turned on the recording device. The Special Agent swore they did not interrogate Mr. Scales before the recorded *Miranda* warning.

6. Before the Detective and the Special Agent turned on the recording device, Mr. Scales expressed hesitation to answer questions on a recording device.

Recorded conversation beginning at 11:19 AM

7. At 11:19 AM, the Detective began recording his questions by advising Mr. Scales of his *Miranda* rights, then asked, "Do you understand your rights as I just explained to them?" Mr. Scales did not respond. After a pause, the Detective said, "You gotta say yes or no."[1]

8. The interview continued:

Vontez Scales: Yes.

Detective Eisenhauer: Ok. And as you and I had discussed, you want to be advised of the reason why you're in here today, correct?

Vontez Scales: Yes.

Detective Eisenhauer: And you didn't feel comfortable with that on the actual recording so I'm going to shut the recording off, right?

Vontez Scales: Yes.

Detective Eisenhauer: Ok, but you do wish to speak to us right now without a lawyer present, however if there's something that's said, you're going to invoke your right to have a lawyer here or you're gonna not answer the question, correct?

9. The tape recording reflects a pause of nine seconds without a response from Mr. Scales. The Special Agent swore as to his recollection of the events during each pause as Mr. Scales "was just sitting there. You can tell he was thinking about what was happening."[2]

10. The Detective said, "In other words, you want to hear, be advised of what's going on and we want to have a conversation about it, correct?"[3]

11. A pause of twenty-six seconds followed the Detective's question.

12. The Detective then volunteered, "What are you questioning?"

13. Another twenty-one seconds passed without a response from Mr. Scales.

14. The interview continued after this extended pause:

Vontez Scales: I guess I need my lawyer then, right?

Detective Eisenhauer: That's up to you. Like I said, I'd like to interview you. I'd like to talk to you about things ...

Vontez Scales: I wanna talk, I mean I want ya'll to tell me what's going on, and ya'll not telling me what's going on ..... Recordings ..... shits too much going on for me.

Detective Eisenhauer: So, I'm going to turn this off, and I'll advise you of what's going on but I just want you to know, I wanted you to be advised of your rights. You understand your rights at this time?

Vontez Scales: I understand my rights.

Detective Eisenhauer: Ok. And right now you're saying you may talk to us but you want to be advised first of what's going on, correct?

Vontez Scales: I ain't trying to be smart or nothin' but, ya'll can just put me in the cell.

Detective Eisenhauer: Ok. Alright. Fair enough.

15. Mr. Scales wanted to end questioning and be placed in his cell. The Detective's rough notes, beginning at 11:15 AM and covering the recorded interview, admit Mr. Scales "understood his rights: wants to be put in his cell."[4]

16. The tape ended after three minutes and fourteen seconds, bringing the end of the recorded portion of the interview to 11:22 or 11:23 AM.

The unrecorded conversation began at 11:25 AM after Mr. Scales asked to be placed in his cell.

17. After the Detective turned off the tape, he and the Special Agent did not put Mr. Scales in his cell. Instead, they continued to question him.

18. We reach this conclusion after carefully evaluating how the Special Agent changed his testimony during our evidentiary hearing. He first testified on direct examination he and the Detective put Mr. Scales in his cell after Mr. Scales asked to cease questioning and they turned off the recording device. According to the Special Agent's testimony on direct examination, he and the Detective only reinitiated questioning after another ten to twenty minutes following asking Mr. Scales if he wished to speak with them again during a routine well-check of him in the cell.[5] According to this version of the facts presented in direct testimony, Mr. Scales changed his mind and agreed to return to the interview room with the officers.

19. But the Special Agent's testimony changed. On cross examination, the Special Agent swore he and the Detective did not take Mr. Scales back to his cell after turning off the recording as Mr. Scales requested. Instead, as the Special Agent swore on cross-examination, they continued to ask Mr. Scales questions off the record. The Special Agent swore, "I got the feeling

that he didn't want to be recorded because he was worried about where that recording may end up . . . and that as soon as that recording device was turned off, that he would be more susceptible to talk to us."[6]

20. The Special Agent's materially changed testimony on cross-examination regarding never returning Mr. Scales to his cell after his request is consistent with the Detective's rough notes and post-interview report.

21. Both the Special Agent's testimony on cross-examination and the Detective's notes confirm the officers did not return Mr. Scales to his cell between the end of the recorded interview and the start of the unrecorded interview.

22. The Detective's rough notes represent he began the unrecorded interview at 11:25 AM. These notes admit only a two-minute gap between the end of the recording and continuing the interview off-tape after Mr. Scales asked to be placed in his cell.

23. The Special Agent swore they then proceeded to interview Mr. Scales without a recording for forty minutes to an hour.[7]

24. According to the Detective's post-interview report, Mr. Scales said he did not have much to say but wanted to know why he was being arrested.[8]

25. During this unrecorded interview after Mr. Scales asked to be returned to his cell, the Detective and Special Agent confronted Mr. Scales with some of the evidence against him, including information gained by wiretap, such as the weight of methamphetamine he allegedly sold. The conversation, as he remembered it, is also confirmed by the Detective's post-interview report:

> Detective Eisenhauer: You are part of a federal investigation involving a wiretap on multiple telephones.
>
> Mr. Scales: It was a while ago right.

Detective Eisenhauer: Not too long ago. But yes it was from before.

Mr. Scales: I don't know what you are talking about with meth, I don't have anything to do with that.

Detective Eisenhauer: I am going to tell you how I know you had messed with it. When you bought it the meth it was short by 40 grams. So you called Meech and told him it was short by 40, then you sent him a picture of the meth on a scale showing the weight of the meth, and it being short by 40 grams. So with saying that you know I know what I am talking about right.

Mr. Scales: You all are good at your job, you got me, you are right. I don't have nothing else to say I respect you guys and what you do but all I can say is you got me and you are good.

Detective Eisenhauer: That's ok but you can help yourself out because I know you hold information that can really help you out, I would like to see you cooperate.

Mr. Scales: I can't didn't nobody have anything to do with that but me, when can I plead guilty.

Detective Eisenhauer: Well that is going to take a little bit yet but I would still like to see you help yourself out.

Mr. Scales: Nah I can't do that.

Detective Eisenhauer: Do you want to sit in the cell for a little bit and think about it?

Mr. Scales: Yeah.

Detective Eisenhauer: Ok I will get you some water and we can talk about it later on.

26. The Special Agent swore they then returned Mr. Scales to his cell. After five to ten minutes, they went back to see Mr. Scales in his cell and said, "Hey, you know, you said you wanted a little bit of time to think about things, do you want to talk now?"[9] Mr. Scales agreed.

27. They later returned Mr. Scales to the interview room and, according to the Detective's post-interview report and the Special Agent's testimony, the following conversation occurred:[10]

> Mr. Scales: Ok, when can I have people visit me?
>
> Detective Eisenhauer: What now while you are in custody in Philly or when you get sentenced.
>
> Mr. Scales: When I plead guilty, you got me.
>
> Detective Eisenhauer: I don't know how that works, this is the Feds so they may send you to Alaska, they can send you anywhere, and I don't know how they handle the visitation.
>
> Mr. Scales: Ok.

28. The Detective and Special Agent returned Mr. Scales to his cell.[11]

29. After another ten to twenty minutes, the Detective and Special Agent returned to Mr. Scales's cell. They took him back to the interview room. Mr. Scales asked to call his father and have some water. The officers arranged for water and returned him to his cell.[12]

30. After another ten to twenty minutes, the Detective and Special Agent conducted another well-check and asked Mr. Scales if he wanted to talk to them again. He said he did not. The Detective provided Mr. Scales his phone to call his father.[13]

31. The officers turned Mr. Scales over to the custody of the United States Marshal.

II. Analysis

Mr. Scales seeks to suppress statements he allegedly provided after he stated "I guess I need my lawyer then, right?" We find he did not clearly invoke his right to counsel. But Mr. Scales also seeks to suppress statements made after he requested the Detective and Special Agent return him to his cell. At this time Mr. Scales properly invoked his right to remain to silent by requesting a return to his cell requiring we suppress statements after Mr. Scales asked to be placed in his cell and the officers turned off the recording, including statements reported in the Detective's rough notes and the Detective's post-interview report.

A. Mr. Scales did not sufficiently invoke his right to counsel.

Mr. Scales argues he unambiguously invoked his right to counsel when, during the recorded portion of his interview, he said, "I guess I need my lawyer then, right?" Mr. Scales argues his silence leading up to his statement and the language of the statement itself are an unambiguous invocation. Mr. Scales concludes we must suppress all statements made after this invocation. The United States argues Mr. Scales's statement is, at best, an ambiguous and equivocal reference to his right to counsel, as Mr. Scales phrased the statement as a question beginning with the equivocal phrase "I guess." Under the applicable case law, the United States argues ambiguous invocations of the right to counsel are insufficient and we should not suppress Mr. Scales's later statements. We conclude Mr. Scales did not unambiguously invoke counsel through the question, "I guess I need my lawyer then, right?" and we decline to suppress later statements based on Mr. Scales invoking his right to counsel.

We must decide whether Mr. Scales unambiguously invoked his right to counsel by asking "I guess I need my lawyer then, right?" If so, he may not have waived this invoked right by later responding to police-initiated interrogation.[14]

In *Davis v. United States*, the Supreme Court held, "after a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney."[15] "[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning."[16] The state arrested Mr. Davis and read him his rights, which he waived. An hour and a half into his interview, Mr. Davis said, "Maybe I should talk to a lawyer."[17] The officers asked for clarification to understand whether he was asking for a lawyer, and Mr. Davis responded, "No, I'm not asking for a lawyer . . . No, I don't want a lawyer."[18] The Supreme Court held Mr. Davis's statement was not a request for counsel, so it did not have grounds to suppress his statements.[19]

Contrary to the United States' arguments during the evidentiary hearing, the Supreme Court instructs us to look beyond mere words and consider pre-invocation context and circumstances, but not post-invocation discussion.[20] In *Smith v. Illinois*, the Supreme Court considered an accused's continued responsiveness to police questioning after valid invocation of his right to counsel. The Illinois Supreme Court held the accused's willingness to answer to police questions rendered his invocation ambiguous. The Supreme Court held, "[w]here nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous, all questioning must cease. In these circumstances, an accused's subsequent statements are relevant only to the question whether the accused waived the right he had invoked."[21] The Supreme Court held the Illinois Supreme Court erroneously considered an accused's post-invocation statements to "cast retrospective doubt on the clarity of the initial request itself."[22]

Our Court of Appeals addressed ambiguous invocations of counsel in *United States v. Briggs*.[23] The accused, Mr. Briggs, allegedly told the investigating agents he "did not want to answer any questions until he found out if his mother obtained counsel for him."[24] Our Court of Appeals held, even assuming Mr. Briggs made this statement, he did not clearly and unambiguously invoke the right to counsel requiring the agents stop the interrogation.[25] Our Court of Appeals later held an accused's request to call his mother "to inquire about . . . possible representation" did not trigger his right to invoke counsel in *Flamer v. Delaware*.[26]

The United States focuses on Mr. Scales's qualifier: "I guess I need my lawyer . . ." The Court of Appeals for the Eighth Circuit addressed the ambiguous character of the phrase "I guess" in reviewing whether an accused properly invoked a right to counsel. In *United States v. Havlik*, the accused, after hearing his right to counsel, stated, "I don't have a lawyer. I guess I need to get one, don't I?"[27] The officer told the accused an attorney would be appointed if he could not afford one.[28] The accused responded, "I guess you better get me a lawyer then."[29] Before the officer could finish reading the *Miranda* rights, the accused suffered health complications necessitating medical attention.[30] After the medical examination, the officer read the accused the full *Miranda* warnings, the accused then waived his rights, and he then made inculpatory statements.[31] The Court of Appeals for the Eighth Circuit held the phrase "I guess" is equivocal, drawing on dictionary definitions to show lack of conviction or strength of feeling.[32] Because the police are not required to ask clarifying questions, the accused's statement was ambiguous and did not act to invoke his right to counsel.[33]

In *United States v. Posada-Rios*, the Court of Appeals for the Fifth Circuit held an accused did not unambiguously invoke her right to counsel when she asked her mother to contact an attorney during her arrest.[34] Her comment she "might have to get a lawyer then, huh?" after an

officer reiterated her right to counsel did not validly invoke counsel.[35]

The Court of Appeals for the Tenth Circuit considered the context of an accused's statement he "might want to talk to an attorney."[36] In *United States v. Zamora,* the court of appeals held this statement as ambiguous, comparable to the statement made by the accused in *Davis*, and relied on the agents' testimony the accused "seemed to be thinking aloud" when he made the statement. This context suggested the accused had not decided on whether he wanted a lawyer, but considered the idea out loud.[37]

In *Diaz v. Senkowski*, the Court of Appeals for the Second Circuit held an accused's question, "Do you think I need a lawyer?" as an improper invocation of counsel because it did not "express his intent reasonably clearly."[38] The Court of Appeals for the Fourth Circuit in *Burket v. Angelone* also held "I think I need a lawyer" as not sufficiently unambiguous to invoke counsel.[39] The court of appeals reasoned this statement mirrored *Davis*.

By comparison, the Court of Appeals for the Fourth Circuit held an accused's statement of "I've decided not to say anymore" followed by "I might decide to say more after I talk to a lawyer or spend some time alone thinking about it" did unambiguously invoke counsel.[40] The Court of Appeals for the Ninth Circuit in *Sessoms v. Grounds* also held an accused unambiguously invoked his right to counsel when he asked, "[T]here wouldn't be any possible way that I could have a—a lawyer present while we do this?" and "Yeah, that's what my dad asked me to ask you guys . . . uh, give me a lawyer,"[41] before receiving *Miranda* warnings. The court of appeals differentiated the accused's use of the word "*could*" instead of the word "*should,*" which the Supreme Court in *Davis* held to be ambiguous and insufficiently invoked the right to counsel.[42] The accused did not ask "whether he *should* speak to a lawyer," but "deferentially ask[ed] whether he *could* have a lawyer."[43] The court of appeals also disagreed with the state court's interpretation of the second

statement, holding the accused unambiguously requested a lawyer and did not simply state his father's advice about a lawyer without intending to invoke.[44] Evaluating the interaction as a whole, the court of appeals held the accused unambiguously invoked counsel.[45]

The court of appeals in *Sessoms* analyzed the interrogating detectives' post-interrogation conduct to determine whether they understood the accused invoked counsel.[46] The detectives told the accused they would turn on a recording to protect him, then stated, "Uh, I want to back up to your question about an attorney."[47] They explained the accused could get an attorney but the attorney may not be able to help him because of the evidence against him. Interpreting this interaction as proof of the officer's understanding of proper invocation, the court of appeals observed, "Why would [the detective] need to talk [the accused] out of an attorney if he hadn't understood that [the accused] wanted an attorney?"[48]

In *United States v. Lee*, the Court of Appeals for the Seventh Circuit found an accused's question, "Can I have a lawyer?" to unambiguously invoke counsel.[49] Officers read the *Miranda* warnings, asked if the accused understood them, and the suspect affirmed he did.[50] The accused then asked, "Can I have a lawyer?"[51] The officer tried to dissuade him from wanting a lawyer, and he eventually incriminated himself.[52] The court of appeals compared the language of the accused's question to examples of properly invocating counsel and concluded the accused's question invoked his right to counsel and to stop questioning.[53]

The Court of Appeals for the Eleventh Circuit in *Cannady v. Dugger* held the state illegally obtained a confession after an accused said, "I think I should call my lawyer."[54] The court of appeals addressed the interrogating officer's response to the statement by pushing the telephone toward the accused and waiting for him to call. The court found this conduct confirmed the officer understood the accused unambiguously invoked his right to counsel.[55]

We also are persuaded by analysis of district judges in our Circuit evaluating both the circumstances and the specific language used by the accused when determining whether an accused invoked counsel so clearly, requiring all questioning to stop. In *United States v. Mejia*,[56] Judge Gomez held an accused's stating he "might need a lawyer" did not unequivocally invoke counsel. Judge Gomez compared the accused's statement with other ambiguous invocations using the word "maybe" or "might," such as in *Davis*. In *United States v. Sharp*,[57] the investigating officer read the accused his *Miranda* rights, asking him if he understood each element as the investigating officer went.[58] After the officer explained his right to counsel and asked if the accused understood, the accused said, "[Y]es. I can have a lawyer here?"[59] Judge Sleet held the timing of the accused's statement, coupled with its phrasing, indicated a mere "reiterat[ion] [of] the right of which [the officer] had just informed him."[60]

Following the established guidance, we now turn to Mr. Scales's statement, "I guess I need my lawyer then, right?" as recorded before a series of allegedly incriminating statements. A reasonable officer in the circumstances would interpret Mr. Scales's statement as an ambiguous and equivocal invocation of counsel. Mr. Scales did not invoke his right by unequivocally demanding counsel, rather he sought guidance on whether he needed his lawyer. "I guess I need my lawyer then, right?" is similar to the ambiguous statement in *Davis*: "Maybe I should talk to a lawyer."

The phrase "I guess" connotes equivocation. As analyzed by the Court of Appeals for the Eighth Circuit in *Havlik*, a statement beginning with "I guess" suggests the speaker's lack of conviction as to the rest of the sentence. The ambiguity in the phrase "I guess" is comparable to the equivocal phrases "maybe," "might," or "should." The Supreme Court and various courts of appeals have focused on these equivocal words to conclude an accused's or accuseds' statements

did not properly invoke counsel.[61] For the same reason, Judge Gomez held an accused's statement he "might need a lawyer" as an improper invocation of counsel.[62]

Mr. Scales also phrased his statement as a question, leading a reasonable officer in the circumstances to interpret the alleged invocation as soliciting advice. By ending his statement with the words "then, right?", Mr. Scales invited the interviewing agents to provide him with their opinions. Mr. Scales's question is similar to the improper invocations in *Diaz*, "Do you think I need a lawyer?"[63] and in *Lee*, "Can I have a lawyer?"[64] These statements, delivered as questions, are distinct from the demand "give me a lawyer" found to be unequivocal by the Court of Appeals for the Ninth Circuit.[65]

The context leading up to Mr. Scales's statement does not render his statement as unambiguously invoking counsel. Mr. Scales paused several times in response to the Detective's questions. The Special Agent testified Mr. Scales "was just sitting there. You can tell he was thinking about what was happening."[66] While this silence suggests Mr. Scales may have been considering his options, it does not necessarily follow Mr. Scales conclusively decided whether he needed a lawyer. Mr. Scales's statement again is soliciting the agents' advice on whether he needed his lawyer.

The Detective's and the Special Agent's reaction to Mr. Scales's statement further supports our conclusion. After Mr. Scales asked about counsel, the Detective is heard on the recording saying, "That's up to you. Like I said, I'd like to interview you. I'd like to talk to you about things . . ." The Detective did not interpret Mr. Scales's statement as invoking counsel, but as a question seeking his opinion. In contrast to the officers' reaction in *Sessoms*, where the officers tried to talk the accused out of his request for an attorney, and the officer's reaction in *Cannady*, where he pushed the telephone toward the accused and waited, the Detective and the Special Agent

interpreted Mr. Scales's statement "I guess I need my lawyer then, right?" as a question, not as Mr. Scales invoking his right to counsel.

B. In the context of his custodial interview, Mr. Scales properly invoked his right to silence.

To properly invoke the right to remain silent, a person accused of a crime must unambiguously state his or her intention to claim the right.[67] But an accused cannot invoke the right to silence by not responding to police interrogation; he or she must vocally claim the right so a reasonable officer in the circumstances would understand the statement as an invocation.[68] Courts addressing whether an accused invoked the right to remain silent apply the same standard applied in evaluating whether the accused invoke his right to counsel under *Edwards* and *Davis.* In their briefs and arguments at the suppression hearing, the parties focused on the invocation of counsel issue and did not address Mr. Scales's potential invocation of the right to remain silent. But we find Mr. Scales's recorded statement, "I ain't trying to be smart or nothin' but, ya'll can just put me in the cell," properly invokes his right to remain silent. This is clear and unambiguous. Unlike his earlier statement suggesting guesswork and seeking advice, Mr. Scales directed the officers to put him in the cell. Following the established guidance, we conclude a reasonable officer in the circumstances would interpret this statement as an unequivocal invocation of Mr. Scales's intention to remain silent. We suppress Mr. Scales's statements made after he invoked his right to remain silent.

In *Berghuis v. Thompkins*, the accused refused to sign a waiver of rights form and remained silent through three hours of questioning.[69] The Supreme Court held the accused never invoked his right to silence because invocation of this right, like the right to counsel, must be unambiguous and unequivocal: "[The accused] did not say that he wanted to remain silent or that he did not want to talk with the police. Had he made either of these simple, unambiguous statements, he would

have invoked his 'right to cut off questioning.'"[70]

In *Salinas v. Texas*, the Supreme Court considered the silence of an accused in response to a noncustodial, voluntary interview question.[71] The accused spoke with police and answered questions for about an hour but went silent when the officers asked whether his shotgun would match the shells found at the scene of a crime.[72] After a few minutes of silence, he started answering questions again and eventually incriminated himself.[73] The court held, "Although 'no ritualistic formula is necessary in order to invoke the privilege,' a witness does not do so by simply standing mute."[74]

In *United States v. Tyree*, our Court of Appeals applied the *Davis* standard for invocation of counsel to invocation of the right to remain silent.[75] The accused argued his response to questioning, "I told you I didn't even want to do none of this at all," clearly invoked his right to remain silent.[76] Recognizing all other circuits to consider the issue applied the *Davis* standard to the right to remain silent, our Court of Appeals held the accused's statement as not even an equivocal invocation of the right to remain silent and did not need to reach the issue of a possible application of the *Davis* standard to the right to remain silent.[77] Our Court of Appeals reasoned the accused's statement could have been reasonably interpreted as a lack of desire to snitch on other people involved in the crime.[78]

In *Dorsey v. United States*, an *en banc* panel of the Court of Appeals for the District of Columbia held an accused's attempt to end a multi-hour police interview unambiguously invoked his right to remain silent.[79] During the interrogation, the accused repeatedly indicated tiredness/fatigue/sleepiness and he wanted to go to sleep. At one point, he responded to an officer's comment, asking to "go back [to the cell] to sleep. Take me back now . . . Take me back there and put me [indiscernible]."[80] The court held the accused clearly and unambiguously invoked his right

and end the interrogation.[81] "A suspect need not refer explicitly to his constitutional rights or use any particular form of words in order to convey his unwillingness to be questioned further; any declaration of a desire to terminate the contact or inquiry (e.g., 'Don't bother me') should suffice."[82]

The Court of Appeals for the Ninth Circuit similarly refused requiring formulaic phrasing for an accused to properly invoke the right to silence. In *United States v. Poole*, the court held a suspect's statement he had "nothing to talk about" as an assertion of his right to remain silent.[83] In *Arnold v. Runnels*, the court held an accused's indication he did not want to speak with officers on tape as an unambiguous invocation of his desire to not be interrogated.[84] "Neither the Supreme Court nor this court has required that a suspect seeking to invoke his right to silence provide any statement more explicit or more technically-worded than 'I have nothing to say.'"[85] Emphasizing the importance of interpreting such statements as ordinary people would understand them, the court did not require a "talismanic phrase, such as 'I invoke my right to silence under the Fifth Amendment.'"[86]

By contrast, in *Kirk v. Carroll,* former Chief Judge Farnan held an accused's statements indicating a desire to end an interview to be ambiguous and did not amount to an invocation of right to silence.[87] The accused, Mr. Kirk, stated, "I don't have anything to tell you" and "I can't. Just take me away, please. Take me away."[88] Judge Farnan compared this statement to an accused's statement, "I don't think I should say anything," found ambiguous by the Court of Appeals for the Fourth Circuit,[89] holding they were sufficiently similar.

But in *United States v. Womble*, the district judge found an accused's statement, "If I am under arrest, take me to my bunk; all these questions, we can just skip them because I want to go to court," as an unambiguous and unequivocal invocation of the right to remain silent.[90] The judge

reasoned the accused's statement did not include equivocal or ambiguous words, such as "should," "might," or "maybe."[91] Instead, the statement indicated "a certain and present desire to cease questioning."[92] The judge held a reasonable officer under the circumstances would have understood the accused's statement to mean he intended to invoke his right to remain silent.[93] Both parts of his statement were declarative, lacking equivocation.

Mr. Scales's statement, "I ain't trying to be smart or nothin' but, ya'll [sic] can just put me in the cell," unambiguously invokes the right to remain silent. Mr. Scales's statement is declarative and conveys his wish to end the interview. Mr. Scales expressed his discomfort with the interrogation several times leading up to invoking his right to silence by returning to the cell. A reasonable officer under the circumstances would—and the Detective and the Special Agent did—interpret Mr. Scales as invoking his right to remain silent.

Mr. Scales's statement unambiguously conveyed his desire to end questioning. Mr. Scales did not sit silently in response to questioning, as the accused did in *Berghuis* and *Salinas*. Mr. Scales did not use ambiguous words subject to being interpreted in several ways, as the accused did in *Tyree*. Instead, Mr. Scales's statement demanded he be put back in the holding cell. The first clause of the sentence, "I ain't trying to be smart or nothing' but," is an attempt to respectfully and politely initiate his request. The second clause, "ya'll [sic] can just put me in the cell," does not contain ambiguous words muddling its meaning. His demand to be put in his cell is similar to the unambiguous statement in *Dorsey*, "[T]ake me back now . . . take me back there and put me [indiscernible]," and the unambiguous statement in *Wombles*, "If I am under arrest, take me to my bunk; all these questions, we can just skip them because I want to go to court." Though Chief Judge Farnan found Mr. Kirk's similar statement, "Just take me away, please. Take me away," did not properly invoke the right to remain silent, Mr. Kirk's statement is more vague than Mr. Scales's

statement. Mr. Scales explained where he wanted to be taken—his cell—with a specific demand and not a request.

In addition to the unambiguous language of the statement, Mr. Scales expressed his desire to invoke his right to remain silent several times. Before the Detective and Special Agent turned the recording device on, Mr. Scales said he did not want to be interviewed on tape. In *Arnold*, the Court of Appeals for the Ninth Circuit held an accused's similar statement properly invoked his right to counsel. On the recording, Mr. Scales hesitated to answer questions, pausing up to twenty-six seconds between each of the Detective's questions. Though silence alone is not an invocation of the right to remain silent under *Berghuis* and *Salinas*, this unresponsiveness suggests Mr. Scales contemplated his options under *Miranda*. Mr. Scales's question to the agents about counsel and his overt reluctance conveyed in his statement, "shits too much going on for me," shows he continued deciding whether he wanted to speak to the agents. Finally, when the Detective asked, "And right now you're saying you may talk to us but you want to be advised first of what's going on, correct?" Mr. Scales decided not to respond to the question and instead invoked his right to remain silent by going to his cell.

The Detective's reaction confirms he recognized Mr. Scales's invocation. He responded, "Ok. Alright. Fair enough," then turned off the recording. A reasonable officer in the circumstances would have reacted comparably as Mr. Scales invoked his right to remain silent and made clear his desire to return to the holding cell. The Special Agent testified he and the Detective realized turning the recording device off would make Mr. Scales "more susceptible to talk" to them.[94]

By continuing to interrogate Mr. Scales off the recording, the Detective and the Special Agent violated his rights to remain silent. The agents realized he properly invoked his right to remain silent, but sought incriminating statements, so they turned off the recording device and

continued to interview him. This attempt to end-run Mr. Scales's proper invocation provides more support for our conclusion.

Even if we credited the Special Agent's testimony on direct examination when he stated he and the Detective put Mr. Scales back in the cell at his request after they turned off the recording, the agents would still have violated Mr. Scales right to remain silent. The Special Agent initially testified he and the Detective reinitiated the conversation with Mr. Scales, returning to his cell after ten to twenty minutes to ask him if he wanted to talk. Under *Edwards*, police-initiated custodial interrogation after an accused properly invoked his rights is not a valid waiver of an accused's invocation.[95] Any statements provided by Mr. Scales after the Detective and the Special Agent reinitiated the interrogation would be suppressed.

After carefully evaluating the credibility of the sole witness Special Agent and examining the Detective's notes, the plain meaning of Mr. Scales's statement conveys his desire to invoke his right to remain silent. A reasonable officer under the circumstances would have understood his statement as properly invocating the right to remain silent. As many courts before us, we refuse to require accused people to regurgitate a talismanic phrase to invoke their constitutional right against self-incrimination.

III. Conclusion

We grant in part and deny in part Mr. Scales's motion to suppress. We grant the motion to suppress as to statements made after Mr. Scales said, "I ain't trying to be smart or nothin' but, ya'll [sic] can just put me in the cell." We suppress the Detective's rough notes beginning at 11:25 am, the Detective's post-interview report after they shut the recording device off, and any testimony about statements made by Mr. Scales after they turned the recording device off. We deny the motion to suppress as to statements made before Mr. Scales invoked the right to remain silent. The

recording of Mr. Scales's interview up to his invocation of the right to remain silent is admissible.

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[1] Transcript of March 26, 2019 Recorded Interview, as attached at tab 1. On Sept. 30, 2019, the United States asked for leave to produce a transcript of the March 26, 2019 recorded interview of Mr. Scales. On Oct. 1, 2019, the United States delivered its attached transcript of the recorded interview for our review.

[2] Notes of Testimony ("N.T."), Sept. 30, 2019, at 45.

[3] Transcript of March 26, 2019 Recorded Interview, at 2, attached.

[4] Rough notes of March 26, 2019 interview, as attached at tab 2. On Sept. 30, 2019, the United States produced Detective Eisenhauer's rough notes from his interview of Mr. Scales.

[5] N.T., Sept. 30, 2019, at 46-47.

[6] *Id.* at 66.

[7] *Id.* at 53.

[8] Gov. Ex. 1, at 2.

[9] N.T., Sept. 30, 2019, at 69.

[10] Gov. Ex. 1, at 2.

[11] N.T., Sept. 30, 2019, at 79.

[12] Gov. Ex. 1, at 3.

[13] *Id.*

[14] In *Edwards v. Arizona*, 451 U.S. 477 (1981), the Supreme Court held invoking the right to counsel is not defeated by later responsiveness to police-initiated custodial interrogation, even after the state advised the accused of his *Miranda* rights. The accused in *Edwards* invoked his right to counsel after an officer advised him of his rights. *Id.* at 479. The next day, two detectives visited the accused in jail to talk to him, informed him again of his rights, and then obtained a confession. *Id.* The Supreme Court held the confession must be suppressed, "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused

himself initiates further communication, exchanges, or conversations with the police." *Id.* at 484-85. Following *Edwards*, we would need to examine whether Mr. Scales voluntarily initiated further conversations should we find he clearly invoked his right to counsel. As we find he did not clearly invoke his right to counsel, we do not reach this issue.

[15] *Davis v. United States*, 512 U.S. 452, 461 (1994).

[16] *Id.* at 459.

[17] *Id.* at 455.

[18] *Id.*

[19] *Id.* at 462.

[20] *Smith v. Illinois*, 469 U.S. 91 (1984).

[21] *Id.* at 98.

[22] *Id.* at 100.

[23] *United States v. Briggs*, 347 F. App'x 750 (3d Cir. 2009).

[24] *Id.* at 753-54.

[25] *Id.* at 754.

[26] *Flamer v. Delaware*, 68 F.3d 710, 725 (3d Cir. 1995).

[27] *United States v. Havlik*, 710 F.3d 818, 820 (8th Cir. 2013).

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.* at 822.

[33] *Id.*

[34] *United States v. Posada-Rios*, 158 F.3d 832, 867 (5th Cir. 1998).

[35] *Id.*

[36] *United States v. Zamora*, 222 F.3d 756, 766 (10th Cir. 2000).

[37] *Id.*

[38] *Diaz v. Senkowski*, 76 F.3d 61, 63-64 (2nd Cir. 1996).

[39] *Burket v. Angelone*, 208 F.3d 172, 197 (4th Cir. 2000).

[40] *Tice v. Johnson*, 647 F.3d 87, 98 (4th Cir. 2011).

[41] *Sessoms v. Grounds*, 776 F.3d 615, 617-18 (9th Cir. 2015).

[42] *Id.* at 626.

[43] *Id.*

[44] *Id.* at 627.

[45] *Id.*

[46] *Id.* at 629.

[47] *Id.*

[48] *Id.*

[49] *United States v. Lee*, 413 F.3d 622, 626 (7th Cir. 2005).

[50] *Id.* at 624.

[51] *Id.*

[52] *Id.*

[53] *Id.* at 626.

[54] *Cannady v. Dugger*, 931 F.2d 752, 754 (11th Cir. 1991).

[55] *Id.* at 755.

[56] *United States v. Mejia*, No. 2011-35, 2016 WL 7191630, at *19 (D.V.I. Dec. 10, 2016).

[57] *United States v. Sharp*, No. 02-58, 2002 WL 31855064, at *4-5 (D. Del. Dec. 20, 2002).

[58] *Id.* at *4.

[59] *Id.* at *5.

[60] *Id.* at *4.

[61] *Davis*, 512 U.S. at 462; *Havlik*, 710 F.3d at 820; *Zamora*, 222 F.3d at 766; *Posada-Rios*, 158 F.3d at 867.

[62] *Mejia*, 2016 WL 7191630, at *22.

[63] *Diaz*, 76 F.3d at 63.

[64] *Lee*, 413 F.3d at 626.

[65] *Sessoms*, 776 F.3d at 617-18.

[66] N.T., Sept. 30, 2019, at 45.

[67] *Salinas v. Texas*, 570 U.S. 178, 182 (2013).

[68] *Berghuis v. Thompkins*, 560 U.S. 370, 375 (2010).

[69] *Id.*

[70] *Id.* at 382.

[71] *Salinas*, 570 U.S. at 182.

[72] *Id.*

[73] *Id.*

[74] *Id.* at 180.

[75] *United States v. Tyree*, 292 F. App'x 207 (3d Cir. 2008).

[76] *Id.* at 211.

[77] *Id.*

[78] *Id.*

[79] *Dorsey v. United States*, 60 A.3d 1171, 1189 n.27 (D.C. Cir. 2013).

[80] *Id.* at 1181.

[81] *Id.* at 1189 n.27.

[82] *Id.* (internal quotation marks omitted).

[83] *United States v. Poole*, 794 F.2d 462, 466 (9th Cir. 1986).

[84] *Arnold v. Runnels*, 421 F.3d 859, 866 (9th Cir. 2005).

[85] *Id.* at 865.

[86] *Id.* at 865.

[87] *Kirk v. Carroll*, 243 F. Supp. 2d 125, 133 (D. Del. 2003).

[88] *Id.*

[89] *Id.* (quoting *Burkett v. Angelone*, 208 F.3d 172, 200 (4th Cir. 2000)).

[90] *United States v. Womble*, No. 15-93, 2015 WL 7302769, at *2 (S.D.W.V. Nov. 18, 2015).

[91] *Id.* at *3.

[92] *Id.*

[93] *Id.*

[94] N.T., Sept. 30, 2019, at 66.

[95] *Edwards*, 451 U.S. at 484-85.

Tab 1

Transcription:

Arrest Interview with Vontez SCALES

March 26, 2019

Detective Eisenhauer:	This is Detective Jarrod Eisenhauer with the Bucks County District Attorney's Office, DEA TFO. I am present with Andrew Sammaciccia, a Special Agent with DEA. The day is Tuesday, March 26, at 11:19am. I am here with Vontez SCALES being advised of his rights. Vontez, you have the right to remain silent, you do not have to say anything at all. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer for advice before we ask you any questions and also have a lawyer with you during the questions if you desire. If you cannot afford to hire a lawyer and you want one, we will see that one is provided for you free of charge. If you're willing to answer our questions, you have the right to stop answering such questions at any time just as I discussed with you can tell me to move on to the next question and then we can go on from there. Do you understand your rights as I just explained to them? You gotta say yes or no.
Vontez Scales:	Yes
Detective Eisenhauer:	Ok. And as you and I had discussed, you want to be advised of the reason why you're in here today, correct?
Vontez Scales:	Yes.
Detective Eisenhauer:	And you didn't feel comfortable with that on the actual recording so I'm going to shut the recording off, right?
Vontez Scales:	Yes.
Detective Eisenhauer:	Ok, but you do wish to speak to us right now without a lawyer present, however if there's something that's said, you're going to invoke your right to have a lawyer here or you're gonna not answer the question, correct? In other words, you want to hear, be advised of what's going on and we want to have a conversation about it, correct? What are you questioning?
Vontez Scales:	I guess I need my lawyer then, right?
Detective Eisenhauer:	That's up to you. Like I said, I'd like to interview you. I'd like to talk to you about things...
Vontez Scales:	I wanna talk, I mean I want ya'll to tell me what's going on, and ya'll not telling me what's going on.....Recordings.....shits too much going on for me,
Detective Eisenhauer:	So, I'm going to turn this off, and I'll advise you of what's going on but I just want you to know, I wanted you to be advised of your rights. You understand your rights at this time?

Vontez Scales:	I understand my rights.
Detective Eisenhauer:	Ok. And right now you're saying you may talk to us but you want to be advised first of what's going on, correct?
Vontez Scales:	I ain't trying to be smart or nothin' but, ya'll can just put me in the cell.
Detective Eisenhauer:	Ok. Alright. Fair enough.

Tab 2

[redacted] /19
03/25

Vontez Scales
with Jarrod Eisenhauer

11:15 AM: - Stated he did not want to be recorded during interview
- Said he was willing to be interviewed
- Recording Miranda Rights by Eisenhauer Det.
- Read Miranda from DEA Miranda card
- Understood his rights: wants to be put in his call

11:25 AM: J. Eisenhauer reveals the wire and surv. of Scales
- Told us we are good at our jobs
- told us he has nothing else to talk about

From house
Took vehicle
Took 2 phones
Took US C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	**CRIMINAL ACTION**
	:	
v.	:	**NO. 18-576-5**
	:	
VONTEZ SCALES	:	

ORDER

AND NOW, this 16th day of October 2019, upon considering Vontez Scales's Motion to suppress as part of an omnibus motion (ECF Doc. No. 130), the United States' Response and supplemental Memorandum (ECF Doc. Nos. 136, 148), following a detailed evidentiary hearing where we carefully evaluated the credibility of the testifying Special Agent, and for reasons in the accompanying Memorandum, it is **ORDERED** Defendant Vontez Scales's Motion to suppress (ECF Doc. No. 130) is **GRANTED in part** and **DENIED in part** and the United States may not introduce evidence relating to statements including those in a Detective's post-interview notes made by Defendant Vontez Scales after he invoked his right to silence at the end of the March 26, 2019 tape recording.

KEARNEY, J.