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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

-vs-

Supreme Court No. _____
Court of Appeals No. 367926
Circuit Court No. 23-000412-01-FC

DAREN DONELL FENDERSON,
Defendant-Appellant.

_____/

Notice of Filing

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PLEASE TAKE NOTICE that on **July 30, 2024,** the undersigned moves this Honorable Court to grant Daren Fenderson's **Interlocutory Application for Leave to Appeal.**

Undersigned counsel hereby certifies that one copy of the application and Notice of Filing was e-served on the County Prosecutor's Office and one copy of this Notice of Filing was served on each of the court clerks listed above by regular mail.

Respectfully submitted,

BY: /s/ Coral M. Watt

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Dated: July 30, 2024

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Defendant-Appellant.

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DAREN FENDERSON'S INTERLOCUTORY APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF QUESTIONS PRESENTED

I. Is the accused's waiver of the right to counsel voluntary when made after he invoked the right to counsel and was told by police that he does not get an attorney? Can his subsequent inculpatory statements be used against him?

Daren Fenderson answers, "No."

The government answers, "Yes."

The trial court answered, "No."

The Court of Appeals answered, "Yes."

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JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Mr. Fenderson invoked his right to counsel during a custodial interrogation. (Preliminary Examination Transcript, January 5, 2023 ("PE I") at 29). The detective did not immediately cease the interrogation, but instead said he was going to see if there was an attorney available to talk to Mr. Fenderson. (Interrogation Video, August 3, 2023 ("8/3 Interrogation") at 2:29). Even though, according to detectives, it appears they spent only 10-15 minutes before determining there was no attorney available, they left Mr. Fenderson alone in the interrogation room for over two and a half hours. (PE I at 46; 8/3 Interrogation at 2:32-5:14). Mr. Fenderson spent the majority of that time in handcuffs and without updates. (*Id.* at 3:13-5:14).

When the detective returned to the interrogation room, Mr. Fenderson asked, "Where's my lawyer?" (*Id.* at 5:15). The detective said, "You don't get one." (*Id.*). The detective said, "Ain't nobody coming and you ain't got the money." The detective said that Mr. Fenderson was going to be returned to the detention center and that the detective would be submitting a warrant request based on the statements Mr. Fenderson already made. (*Id.*). The detective said he would not talk to Mr. Fenderson further unless Mr. Fenderson said he wanted to talk to the detective without an attorney. (*Id.* at 5:17). Mr. Fenderson, who was confused and upset, agreed, signing a second waiver of his right to counsel. (*Id*. at 5:18-5:20).

The trial court found that the detectives' conduct of saying they were calling for an attorney, leaving Mr. Fenderson alone for an extended period, and then returning and telling him he was not getting an attorney amounted to a scare tactic. (Motion Hearing, September 6, 2023 ("MH") at 5-6). The trial court concluded that this scare tactic had a coercive effect and undermined the advice of rights. As a result, Mr. Fenderson's second waiver of his right to counsel was not voluntary or valid and the court suppressed his subsequent statements. (*Id.*).

The Court of Appeals majority reversed. See *People v Fenderson,* unpublished per curiam opinion of the Court of Appeals, issued June 6, 2024 (Docket No. 367926) (attached as Appendix A). It did not expressly find the trial court made any clearly erroneous findings

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of fact, but disagreed that the detectives' conduct was a scare tactic or had a coercive effect. In reaching this conclusion, the Court of Appeals failed to afford the trial court the deference required by the clearly erroneous standard of review. In contrast, dissenting Judge Garrett properly analyzed this issue and afforded the trial court appropriate deference. See *People v Fenderson,* unpublished per curiam opinion of the Court of Appeals, released June 6, 2024 (Docket No. 367926) (Garrett, J. dissenting) (attached as Appendix B).

More significantly, the Court of Appeals majority failed to recognize or consider how the detectives' conduct directly frustrated the purpose of the advice of rights. Even though Mr. Fenderson was told he had the right to counsel, when he asked for that counsel, the detective suggested that if Mr. Fenderson could retain an attorney he could have one. Then, the detective in no uncertain terms told Mr. Fenderson that he would not get an attorney. When officers engage in conduct that directly undermines the *Miranda* warnings, they eviscerate the critical procedural safeguard of the right against self-incrimination. The Court of Appeals conclusion to the contrary is legally erroneous and, left uncorrected, will cause Mr. Fenderson material harm by allowing his coerced statements to be used against him at trial. MCR 7.305(B)(5)(a). Further, left uncorrected, this decision will inform law enforcement officers that it is acceptable for them to obtain waivers of the right to silence or counsel even when they have shown and told the suspect those rights are not actually available to them.

This Court should grant leave to appeal and/or other peremptory relief, and reach the same conclusion as Judge Garrett, affirming the trial court below.

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STATEMENT OF FACTS

Introduction

The trial court determined that Daren Fenderson unequivocally invoked his right to counsel during a custodial interrogation. The trial court found that officers then engaged in a course of conduct that served as a scare tactic, saying they would try to find an attorney for Mr. Fenderson, leaving him restrained in the interrogation room for over two and a half hours, after which they told him he would not get an attorney. The trial court held that the officers' conduct rendered Mr. Fenderson's subsequent waiver of his right to counsel and statements involuntary and violated Mr. Fenderson's rights to due process and against self-incrimination.

Police Interrogation of Mr. Fenderson

Mr. Fenderson was arrested on August 2, 2022, because he was a suspect in a potential homicide. Police brought Mr. Fenderson to Detroit Public Safety Headquarters, where he was informed of his *Miranda* rights (Preliminary Examination Transcript, January 5, 2023 ("PE I") at 26). Mr. Fenderson agreed to waive his rights, but police believed Mr. Fenderson was too intoxicated to interrogate at that time. (*Id.* at 18-23). Police then transported Mr. Fenderson to the Detroit Detention Center where he remained in custody. (*Id*.).

The following day, police transported Mr. Fenderson back to the Public Safety Headquarters. (PE I at 23). At around 1 p.m., Detective Beasley advised Mr. Fenderson of his constitutional rights by reading them to Mr. Fenderson. (*Id.* at 23, 27). Mr. Fenderson initialed the written advice of rights form and signed it. (*Id.* at 23).

About an hour later, Mr. Fenderson said he wanted an attorney. Detective Beasley agreed that Mr. Fenderson invoked his right to counsel. (*Id.* at 29). In response, Detective Beasley did not immediately cease the interrogation. Instead, he asked Mr. Fenderson if he had an attorney. (Interrogation Video, August 3, 2023 ("8/3 Interrogation") at 2:29). Mr. Fenderson said, "No, but y'all is gonna appoint one, right?" (*Id.*). The detective said "Okay," and then told Mr. Fenderson to "hang tight." (*Id.*). Mr. Fenderson asked how long it would take and the detective responded by saying "…don't know, might take a minute, be quick…"

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(*Id.*). The detective said he was going to "make a couple of phone calls." (*Id.*). Then the detective left Mr. Fenderson alone in the interrogation room.

Detectives Beasley and Williams called the control center to get "a show cause" or "show-up" attorney. (PE I at 31-32, 43). Detective Williams understood there to be an attorney on duty that day, but she said she was only available for line-ups. (*Id.* at 43). Detective Williams testified there were ongoing efforts to try to get an attorney after that, but did not specifically describe them. (*Id.* at 43-44). In total, Detective Williams estimated that he only spent about 10 or 15 minutes actually trying to find an attorney. (*Id.* at 46). He did not document his efforts. (*Id.*). The detectives were not able to locate an attorney to come attend the interrogation. (*Id*.).

During that time, Mr. Fenderson remained in the interrogation room. (*Id.* at 47). While he was alone in the interrogation room, Mr. Fenderson, expressed concern that the police were going to try to make him confess. (8/3 Interrogation at 2:32). After about 40 minutes, the door opened and someone told Mr. Henerson that they were working on getting an attorney for him. (*Id.* at 3:11). After that, detectives did not give Mr. Fenderson any further updates for about two hours. Mr. Fenderson spent that time alone in the interrogation room in handcuffs. (*Id.* at 3:13-5:14).

About two hours and 45 minutes after Mr. Fenderson first asked for an attorney, Detective Beasley returned to the interrogation room. (*Id.* at 5:14). Mr. Fenderson asked, "Where's my lawyer?" (*Id.* at 5:15). The detective said, "You don't get one." (*Id.*). Mr. Fenderson expressed confusion and the detective clarified that they did not have a lawyer for Mr. Fenderson. (*Id.*). The detective said, "Ain't nobody coming and you ain't got the money." (*Id.*). Mr. Fenderson mentioned the money he had on his person when he was arrested. (*Id.*). The detective told him he could not use that money. (*Id.*). Mr. Fenderson said he was confused. (*Id.*). The detective said that Mr. Fenderson was going to be returned to the detention center and that the detective would be submitting a warrant request based on the statements Mr. Fenderson already made. (*Id.* at 5:16). The detective said he would not talk to Mr. Fenderson further unless Mr. Fenderson said he wanted to talk to the detective without an attorney. (*Id.* at 5:17).

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Detective Beasley left Mr. Fenderson alone in the interrogation room. (*Id.* at 5:18). Mr. Fenderson became increasingly upset and started crying. (*Id.*). Sargent Brown came into the interrogation room. (*Id.* at 5:19). Mr. Fenderson told Sargent Brown that he was confused, that things were not going right, that "this cannot be right." (*Id.* 5:19). Sargent Brown responded that Mr. Fenderson could "talk to the detectives about that" and explained that he was just there to review the *Miranda* rights with Mr. Fenderson. (*Id.*). Sargent Brown said he was going to review the same rights with Mr. Fenderson that the detectives previously reviewed with him. (*Id.* at 5:20). Sargent Brown read the advice of rights form aloud to Mr. Fenderson. (*Id.*). Sargent Brown asked if anyone had forced or coerced Mr. Fenderson into giving a statement. (*Id.*). Mr. Fenderson responded that he did not understand what was going on. (*Id.* at 5:21). He ultimately signed the advice of rights form and said he wanted to talk to the detectives. (*Id.*).

After Sargent Brown obtained the second waiver from Mr. Fenderson, Mr. Fenderson continued crying. (*Id.* at 5:23). Detective Beasley returned and resumed interrogating Mr. Fenderson. (PE I at 52). During the interrogation, Detective Beasley used profanity. (*Id.* at 54-55). When Mr. Fenderson cried, Detective Beasley repeatedly told him to stop crying. (*Id.* at 55). Eventually, Mr. Fenderson made inculpatory statements. (*Id.* at 52-53).

The entirety of the August 3rd interrogation was recorded on video and a copy of the recording was admitted into evidence at the preliminary examination. (PE I at 36; 8/3 Interrogation).

Procedural History

At the preliminary examination, Mr. Fenderson's counsel objected to the admission of his inculpatory statements on the basis that they were involuntary and obtained in violation of *Miranda.* (PE I at 48-49). The District Court overruled the objection, considered the statements, and bound Mr. Fenderson over on charges of first-degree murder, felony-firearm, and escaping from lawful custody. (*Id.*; Preliminary Examination, January 26, 2023 ("PE II") at 16-17).

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In the Circuit Court, Mr. Fenderson sought suppression of his inculpatory statements, based on the violation of his *Miranda* rights. (Motion to Suppress Statement, May 31, 2023).

After briefing and argument, the Circuit Court made the following determinations:

(1) Mr. Fenderson invoked his right to counsel during a custodial interrogation (Motion Hearing, September 6, 2023 ("MH") at 4);

(2) Officers made unusual attempts to locate an attorney for Mr. Fenderson (*Id.*);

(3) Officers returned to the interrogation room, where Mr. Fenderson remained, and told him they were not able to provide him an attorney (*Id.*);

(4) Officers confirmed that Mr. Fenderson could not afford to retain an attorney (*Id.* at 4-5);

(5) Officers sought a waiver of Mr. Fenderson's *Miranda* rights after telling him that he did not get an attorney (*Id.*); and

(6) Officers' communications with Mr. Fenderson frustrated the advice of rights required by *Miranda* (*Id.* at 5-6).

Based on these findings, the Circuit Court determined that Mr. Fenderson's inculpatory statements were not voluntary because the waiver of his *Miranda* rights was not voluntary. (*Id.* at 6-7). The Circuit Court granted the motion and suppressed the statements extracted from Mr. Fenderson after he invoked his right to counsel (*Id.*).

The government sought leave to appeal in the Court of Appeals. After granting leave to appeal, briefing, and argument, the Court of Appeals reversed. *People v Fenderson,* unpublished per curiam opinion of the Court of Appeals, issued June 6, 2024 (Docket No. 367926) (attached as Appendix A). Judge Garrett dissented. *People v Fenderson,* unpublished per curiam opinion of the Court of Appeals, released June 6, 2024 (Docket No. 367926) (Garrett, J. dissenting) (attached as Appendix B).

Mr. Fenderson now seeks leave to appeal in this Court.

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ARGUMENT

I. Where the accused invokes his right to counsel and is then informed by police that he does not get an attorney, his subsequent waiver of the right to counsel is not voluntary. The statements made by the accused after an invalid waiver cannot be used against him without violating his state and federal constitutional rights to due process and against self-incrimination.

Standard of Review

This Court reviews questions of constitutional law *de novo*. *People v Lucynski*, 509 Mich 618, 633 (2022). This Court reviews a trial court's factual determinations for clear error. *People v Vaughn*, 491 Mich 642, 650 (2012). Reversal is only appropriate where the determination is so weakly grounded in the underlying evidence as to warrant appellate intervention. See, e.g. *People v Reese*, 491 Mich 127, 156-157 (2012) (the Court of Appeals erred by rejecting the trial court's finding of fact where there was evidence to support the finding).

Discussion

Mr. Fenderson invoked his constitutional right to counsel during a custodial interrogation. (PE I at 29). Detectives did not immediately make arrangements to transport Mr. Fenderson from headquarters. Instead, they left him in the interrogation room, telling him they were going to see if they could find him an attorney. (8/3 Interrogation at 2:29). Detectives called their control center to see if there was an attorney available. (PE I at 31-32, 43). According to Detective Williams, he spent only about 10 to 15 minutes actively trying to locate an attorney. (*Id.* at 46). Detectives then left Mr. Fenderson confined in the interrogation room for over two and a half hours. (8/3 Interrogation at 2:32-5:14). Mr. Fenderson spent two hours of that time in handcuffs and without any update from the detectives. (*Id.* at 3:13-5:14). When Detective Beasley returned, Mr. Fenderson asked about the attorney. (*Id.* at 5:15). Detective Beasley responded, "You don't get one." (*Id.*).

The trial court properly found that this course of conduct amounted to a scare tactic that frustrated the critical advice of rights that serves to protect the right against self-incrimination. The detectives' conduct and express statements told Mr. Fenderson that even though he invoked the right to counsel, it was meaningless. The trial court reasonably

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concluded that rendered his subsequent waiver of the right to counsel involuntary. The trial court correctly applied the law to its findings of fact and properly suppressed the statements Mr. Fenderson made after the invalid waiver.

Mr. Fenderson invoked his right to counsel – police were required to scrupulously honor his right

Both the United States and Michigan Constitutions provide that no one can be compelled to be a witness against himself. US Const, Am V; XIV; Const 1963, art 1, § 17. Our courts have long recognized that when police take a citizen into custody, deprive them of their freedom, and subject them to interrogation, "the privilege against self-incrimination is jeopardized." *Miranda v Arizona*, 384 US 436, 478 (1966). This is because "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." *Id.* at 455. The "incommunicado police-dominated atmosphere" is designed to overbear the will of the accused. *Id.* 455-457. The *Miranda* Court observed that, "It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner." *Id.* at 457-458.

It is undisputed that Mr. Fenderson was subject to custodial interrogation. As a result, he had the right to have counsel present during the interrogation. *Id.* at 479. Before they could begin interrogating him, police were required to advise Mr. Fenderson he had the right to counsel and that if he could not afford an attorney, that one would be appointed for him. *Id.* The United States Supreme Court has declared that in the absence of "adequate protective devices" like these warnings, "no statement obtained from the defendant can truly be the product of his free choice." *Id.* at 458.

Not only must police provide *Miranda* warnings before beginning an interrogation, if the accused invokes those rights during an interrogation, police must immediately cease questioning. *Id.* at 473-474. At the outset of the August 3 interrogation, Detective Beasley advised Mr. Fenderson in accordance with *Miranda* of his rights to remain silent and have counsel present. (PE I at 23, 27). Initially, Mr. Fenderson agreed to waive his *Miranda* rights and answer Detective Beasley's questions. (*Id.*). But then, Mr. Fenderson invoked his right to counsel by directly asking Detective Beasley if he could have an attorney. (*Id.* at 29). Detective Beasley responded by asking Mr. Fenderson if Mr. Fenderson had an attorney.

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(8/3 Interrogation at 2:29). Mr. Fenderson responded, "No, but y'all gonna appoint one, right?" (*Id.*). Then, Detective Beasley said, "okay," and left the interrogation room, saying that he needed to make some phone calls. (*Id.*).

"[T]he assertion of the right to counsel was a significant event." *Edwards v Arizona,* 451 US 477, 485 (1981). It required officers to immediately cease interrogating Mr. Fenderson "until an attorney is present." *Id.*, citing *Miranda*, 384 US at 474. Our state and federal constitutions required officers to scrupulously honor Mr. Fenderson's invocation of his right to counsel. This means they could not resume questioning Mr. Fenderson in the absence of counsel, "*unless the accused himself initiates* further communication exchanges, or conversations with the police" *and* voluntarily waives the right to counsel. *Id.* at 484-485 (emphasis added).

Police cannot engage in a course of conduct to undermine the advice of rights required by *Miranda*

While the *Miranda* warnings have become the universal procedural safeguard used by officers during custodial interrogation, it is not the only possible safeguard. For this reason, "the rigidity of *Miranda* does not extend to the precise formulation of the warnings given," and "no talismanic incantation is required to satisfy its strictures." *Duckworth v Eagan,* 492 US 195, 202-203 (1989) (cleaned up). Whatever words are used, the advice of rights must "convey to a suspect his rights as required by *Miranda.*" *California v Prysock,* 453 US 355, 359 (1981) (cleaned up).

The United States Supreme Court has characterized police tactics and methods that "undermine the suspect's will to invoke his rights once they are read" as "inherently coercive." *Oregon v Elstad,* 470 US 298, 317 (1985). For example, the practice of questioning a suspect first and only giving the *Miranda* warnings after the suspect has confessed is one that "render[s] *Miranda* warnings ineffective." *Missouri v Seibert*, 542 US 600, 611 (2004). The Court noted that this technique is intended to get a suspect to give a confession he would not give if he understood his rights from the outset. *Id.* at 613. In this scenario, "a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again." *Id.* This is especially so because the two interrogations (before and after the warnings) were

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"close in time and similar in content." *Id.* The Court observed that a more likely reaction would be for a suspect to be confused by the discussion of rights, which is "an unpromising frame of mind for knowledgeable decision." *Id.*

Officers' conduct and statements that Mr. Fenderson did not get an attorney was false and directly undermined the advice of rights

The detectives' course of conduct and statements left Mr. Fenderson confused and inaccurately conveyed to him that he did not have the right to counsel because he could not afford to retain an attorney.

In *Duckworth*, the United States Supreme Court considered whether informing a suspect that he has a right to counsel and that an attorney will be appointed "if and when" the suspect goes to court is an adequate warning. *Duckworth*, 492 US at 201. The Court held that it was, emphasizing that the statement that counsel would be appointed "if and when" a suspect goes to court was an accurate descript of the procedure for appointment of counsel in that jurisdiction. *Id.* at 204.

In contrast, Mr. Fenderson was told in no uncertain terms that he did not get an attorney – Detective Beasley said, "You don't get one." (8/3 Interrogation at 5:15). The detective's statement was false. The detective could have explained that Mr. Fenderson would be appointed an attorney at his first court appearance, which would have been an accurate statement. If he had, then this case would be like *Duckworth* and the warnings would likely have been adequate to allow for a voluntary waiver. Instead, the detective said "You don't get one." (*Id.*). When Mr. Fenderson expressed confusion, the detective continued by saying, "Ain't nobody coming and you ain't got the money." (*Id.*). The only reasonable way to understand these statements was that Mr. Fenderson did not have the right to an attorney because one was not immediately available and he could not afford to pay for one himself.

Further, without the additional explanation like the one in *Duckworth*, that the suspect would be appointed an attorney when he went to court, Mr. Fenderson was left with the impression he might not be appointed an attorney at all. This exchange had the effect of nullifying the advice of rights and made it impossible for Mr. Fenderson to

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voluntarily waive his right to counsel. Mr. Fenderson could not make a voluntary, knowing, and intelligent decision to waive a right he was just told he did not have.

The police conduct here is more like the conduct criticized and prohibited in *Seibert*. It was a course of conduct that "by any objective measure" undermined the *Miranda* warnings. *Seibert*, 542 US at 616. And like in *Seibert*, the repetition of the advice of rights after Mr. Fenderson invoked his right to counsel and was then told he did not get an attorney, did "nothing to counter the probable misimpression" that Mr. Fenderson did not get an attorney. *Id.* "Nothing was said or done to dispel the oddity of" the detectives' conduct. *Id.* As noted by Mr. Fenderson's counsel at the preliminary examination, this course of conduct was "unusual." (PE I at 48). The significant period of time Mr. Fenderson spent in the interrogation room waiting for detectives to "find him an attorney" in combination with Detective Beasley's statements, including that Mr. Fenderson did not get an attorney, would leave any reasonable person with the impression that the right to counsel mentioned in the advice of rights is meaningless. Worse, by also reminding Mr. Fenderson that he could not afford to retain an attorney, Detective Beasley suggested that Mr. Fenderson did not have a right to have counsel appointed then or at any point in the future. Nothing the detectives did after that dispelled this misinformation.

After being informed he did not get an attorney, even when Mr. Fenderson was again read the advice of rights, he could "hardly think he had a genuine right to [counsel], let alone persist in so believing once the police began to lead him over the same ground again." *Seibert,* 542 US at 613. Like in *Seibert,* the second portion of the interrogation was "close in time and similar in content" to the first portion of the interrogation, and immediately followed the police conduct that undermined the advice of rights. *Id.* Under these circumstances, Mr. Fenderson was understandably and demonstratively confused. (8/3 Interrogation at 5:15-5:20). He repeatedly expressed confusion about his right to counsel. (*Id.*). Mr. Fenderson was distraught after the nearly three-hour delay and being told he did not get an attorney, crying and lamenting "this cannot be right," before signing the second advice of rights. (*Id.*). Much like Ms. Seibert, the police conduct left Mr. Fenderson in "an unpromising frame of mind for knowledgeable decision." *Seibert,* 542 US at 613.

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The government bears a "heavy burden" of showing a waiver of *Miranda* rights is voluntary

The waiver of any constitutional right must be voluntary, knowing, and intelligent. *Miranda*, 384 US at 444; see also *Johnson v Zerbst*, 304 US 458 (1938). If the government seeks to admit statements obtained from a custodial interrogation, the government bears "a heavy burden" to show the accused waived the privilege against self-incrimination and the right to counsel. *Miranda,* 384 US at 475.

This burden requires the government to establish any waiver is voluntary by a preponderance of the evidence. *Colorado v Connelly,* 479 US 157, 168 (1986). In *People v Cipriano*, 431 Mich 315, 334 (1988), this Court provided a non-exhaustive list of factors to consider in determining whether a statement is voluntary, including: (1) the nature of the questioning, including whether it is repeated and prolonged; (2) the length of detention before giving the statement; and (3) *the nature of the advice to defendant regarding constitutional rights*. *Id.* (emphasis added). No one factor is dispositive and a court must consider the totality of the circumstances to determine whether a waiver or statements made after a waiver were made freely and voluntarily. *Id.*

As it relates to delays during interrogations, court should pay particular attention to the length of the delay, as well as, "what occurred during the delay and its effect on the accused." *Id.* at 335. In addition, "[t]he fact that a suspect chooses to speak after being informed of his rights is, of course, highly probative." *Elstad*, 470 US at 318. However, the adequacy of the warnings and intervening events are critical factors in determining just how probative a suspect's decision to speak is. *Cipriano*, 431 Mich 334-335; e.g. *Seibert,* 542 US at 615-616.

Mr. Fenderson's second *Miranda* waiver was not voluntary and so was not valid

The police conduct in this case directly undermined the advice of rights and frustrated Mr. Fenderson's invocation of the right to counsel. Instead of scrupulously honoring his right and ceasing the interrogation, detectives delayed the interrogation, leaving Mr. Fenderson isolated in restraints, while purportedly looking for an attorney to represent him. After nearly three hours, Detective Beasley told Mr. Fenderson in no uncertain terms that he did not get an attorney. He then told Mr. Fenderson, who was

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confused and upset, that he would only continue speaking to him if Mr. Fenderson took back his request to speak with an attorney.

Mr. Fenderson signed the second waiver after a lengthy (and apparently unnecessary delay) and after being misinformed of his right to counsel. While under *Cipriano,* no one factor is dispositive, these two factors demonstrate that Mr. Fenderson's second waiver was not knowing or voluntary. It was not knowing because he was told that he did not get an attorney because one was not immediately available and he could not afford to retain one himself. His confusion about his right to counsel was obvious and he expressed that confusion directly to Detective Beasley who only made matters worse by suggesting Mr. Fenderson might not get an attorney at all. The second waiver was not voluntary because the detective's unusual conduct wore down Mr. Fenderson's will and resulted in him feeling compelled to give a statement in the absence of counsel that he expressly did not want to give in the absence of counsel at the time he invoked his *Miranda* rights.

Detective Beasley's course of conduct failed to scrupulously honor Mr. Fenderson's invocation of the right to counsel and improperly reinitiated the interrogation

In addition to resulting in an invalid waiver of the right to counsel, the detectives' course of conduct violated *Edwards* by reinitiating the interrogation.

After Mr. Fenderson invoked his right to counsel, rather than cease the interrogation and return Mr. Fenderson to the detention center, the detectives held him in the interrogation room. (8/3 Interrogation at 2:29). Detectives left Mr. Fenderson alone in the same room for nearly three hours, most of which time he spent in handcuffs and without any updates from the detectives. (*Id.* at 2:32-5:14). After that time, it was Detective Beasley who reinitiated contact. (*Id.* at 5:14). Mr. Fenderson did not knock on the door or request to speak to anyone until Detective Beasley entered the room. (*Id.*). At that time, Mr. Fenderson's only question was about where his attorney was. (*Id.*). In response, Detective Beasley told Mr. Fenderson he did not get an attorney. (*Id.*). Ultimately, Detective Beasley said that because Mr. Fenderson was not getting an attorney, he would be sending Mr. Fenderson back to the detention center, requesting a warrant, and that "the story you gave is the story we are going to go with." (*Id.* at 5:17). This course of conduct was the functional

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equivalent of interrogation because it was intended to (and did) engage Mr. Fenderson in further interrogation. See *Rhode Island v Innis*, 446 US 291, 300-303 (1980).

In *Innis*, the United States Supreme Court defined interrogation to include "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response." *Id.* at 301. Here, the detectives purported to make efforts to find an attorney for Mr. Fenderson and then told him he did not get an attorney, after which they told Mr. Fenderson they were using the story he'd previously given them to get a warrant charging him with murder. (8/3 Interrogation at 5:17). A reviewing court must focus "primarily upon the perceptions of the suspect, rather than the intent of the police." *Innis*, 446 US at 301. Applying *Innis* to the factual record here, the detectives should have known that their conduct and words were reasonably likely to evoke an incriminating response from Mr. Fenderson. See also, *Martinez v Cate,* 903 F 3d 982, 996 (2018) (finding an officer improperly reinitiated interrogation by telling a suspect "you're going to be booked for murder because I only got one side of the story."

The detectives' conduct was contrary to Mr. Fenderson's rights and the procedure required by *Edwards.* See *Edwards*, 451 US 477. After Mr. Fenderson invoked his right to counsel, there was no break in custody or change in location. Instead detectives engaged in a course of conduct that left Mr. Fenderson with the mistaken impression that his right to counsel was meaningless and causally linked his invocation of his right to counsel with detectives' decision to obtain a warrant. As discussed above, Mr. Fenderson did not initiate further interrogation, nor did he subsequently give a voluntary and knowing waiver of his right to counsel, so his statements made after detectives reinitiated the interrogation should be suppressed. *Edwards*, 451 US at 484-485.

The Court of Appeals Majority Failed to Properly Review the Trial Court's Findings of Fact

The Court of Appeals majority reviewed the factual record in this case without regard to the trial court's findings of fact. It ignored the key factual finding that led the trial court to conclude that the police conduct had a coercive effect that rendered Mr.

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Fenderson's second waiver and subsequent statements involuntary. In doing so, the Court of Appeals majority reversibly erred.

The trial court reviewed the parties' pleadings and the record, including the interrogation video, and found as fact that the detectives engaged in a course of conduct that included telling Mr. Fenderson that they were calling for an attorney for him, leaving Mr. Fenderson alone for an extended period, and then returning and telling him he was not getting an attorney. (MH at 5-6). The trial court found that this was a scare tactic. (*Id.*). The trial court noted several times that before Mr. Fenderson's second waiver, the detective told him he was not getting an attorney. (*Id.* at 5, 6, 7). The trial court stated that this conducted added "extra pressure" on Mr. Fenderson to waive his right to counsel and these findings of fact were critical to the trial court's conclusion that Mr. Fenderson's second waiver was not voluntary. (*Id.* at 5, 7).

The trial court's findings of fact are consistent with the video footage of the interrogation. After being told detectives were going to call an attorney for Mr. Fenderson, and being left alone in the interrogation room for hours, Mr. Fenderson asked, "Where's my lawyer?" (8/3 Interrogation at 5:15). The detective said, "You don't get one." (*Id.*). Mr. Fenderson expressed confusion and the detective clarified that they did not have a lawyer for Mr. Fenderson. (*Id.*). The detective said, "Ain't nobody coming and you ain't got the money." (*Id.*). Mr. Fenderson mentioned the money he had on his person when he was arrested. (*Id.*). The detective told him he could not use that money. (*Id.*).

The Court of Appeals was required to review the trial court's factual determinations for clear error. *Vaughn*, 491 Mich at 650. Reversal is only appropriate where the trial court's determination is so weakly grounded in the underlying evidence as to warrant appellate intervention. See, e.g. *Reese*, 491 Mich at 156-157 (the Court of Appeals erred by rejecting the trial court's finding of fact where there was evidence to support the finding). This standard requires that a trial court's factual findings can only be disturbed if the appellate court has "a definite and firm conviction that the trial court made a mistake." *People v Burrell*, 417 Mich 439 (1983). Otherwise, the appellate court must defer to the trial court's factual findings and rely on them when analyzing legal questions.

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The Court of Appeals majority did not find that the trial court made any clearly erroneous findings of fact, nor could it have given how precisely the factual record supports the trial court's findings. See *People v Fenderson,* unpublished per curiam opinion of the Court of Appeals, released June 6, 2024 (Docket No. 367926) (attached as Appendix A). However, the Court of Appeals majority disregarded the trial court's findings. The Court of Appeals majority never once acknowledged the statements made by the detective that Mr. Fenderson did not get an attorney. Nor did it analyze how these statements directly undermined the advice of rights or the validity of the waiver.

An appellate court is not free to ignore the trial court's findings of fact unless they are clearly erroneous. But that is exactly what the Court of Appeals majority did here, ignoring the most problematic of the detective's statements – the one expressly telling Mr. Fenderson that he did not have a right he was then called upon to waive. By ignoring this portion of the factual record and failing to accord the trial court's findings of fact the deference required by the clearly erroneous standard of review, the Court of Appeals majority reversibly erred.

In contrast, dissenting Judge Garrett properly analyzed this issue and afforded the trial court appropriate deference. See *People v Fenderson,* unpublished per curiam opinion of the Court of Appeals, released June 6, 2024 (Docket No. 367926) (Garrett, J. dissenting) (attached as Appendix B). Judge Garrett reached the same conclusion that this Court, and any appellate court applying the appropriate standard of review, should reach – that the trial court's opinion suppressing Mr. Fenderson's statements made after the second waiver should be affirmed.

Conclusion

"To reduce the risk of a coerced confession, this Court in *Miranda* concluded that the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored. *Seibert*, 542 US at 608. That did not happen here. Detectives failed to scrupulously honor Mr. Fenderson's invocation of his right to counsel, left him alone in restraints for hours, and then misinformed him that he did not get an attorney. The trial court found that the detectives' unusual course of conduct amounted to an effective

scare tactic that overbore Mr. Fenderson's will and resulted in an involuntary waiver of the right to counsel and an involuntary statement. The trial court did not rely on any clearly erroneous findings of fact or make any errors of law in its analysis. This Court should reverse the Court of Appeals and remand for suppression of the statements that followed the invalid waiver.

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SUMMARY AND RELIEF REQUESTED

Daren Fenderson respectfully requests that this Honorable Court grant leave to appeal and/or other peremptory relief, reverse the Court of Appeals, and affirm the trial court's order suppressing Mr. Fenderson's involuntary statement.

Respectfully submitted,

BY: /s/ Coral M. Watt

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