STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v **No. 167391**

DAREN DONELL FENDERSON,
Defendant-Appellant.

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

PLAINTIFF-APPELLEE'S ANSWER OPPOSING APPLICATION FOR LEAVE TO APPEAL

Filed under AO 2019-6

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STATEMENT OF JURISDICTION

On September 6, 2023, Third Circuit Court Judge Wanda A. Evans granted defendant's motion to suppress and entered an order suppressing defendant's statement made on August 3, 2022. This suppression order is a non-final order that is appealable by leave.[1] The Court of Appeals granted leave to appeal in an order dated November 15, 2023, and affirmed in a split, unpublished per curiam opinion dated June 6, 2024. Defendant now seeks interlocutory leave to appeal in this Court.

[1] See MCR 7.202(6)(b) (defining final orders); MCR 7.203(B)(1).

STATEMENT OF QUESTION PRESENTED

I

The police may not question a defendant after an assertion of the *Miranda* right to counsel unless the defendant re-initiates contact. Here, after asserting his right to counsel, defendant later asked to talk again, saying, "I agree to talk without an attorney," and then gave a second statement after again being informed of his *Miranda* rights. Was defendant's second statement voluntary under the Fifth Amendment?

The trial court answered, "No."

The Court of Appeals answered, "Yes."

The People answer, "Yes."

Defendant would answer, "No."

STATEMENT OF FACTS

Defendant was charged with first-degree murder pursuant to MCL 750.316(1)(a), felony firearm pursuant to MCL 750.227b, and escaping from lawful custody pursuant to MCL 750.197a. On April 19, 2023, defendant filed a motion seeking to suppress all oral and written statements made by defendant at the time of and after defendant's arrest, specifically focusing on defendant's statement made after re-initiation of questioning on August 3, 2022, on the ground that defendant had previously asserted his Fifth Amendment right to counsel. On June 14, 2023, the People filed an answer to defendant's motion, arguing that questioning of defendant ceased after defendant asserted his Fifth Amendment right to counsel, and that questioning only resumed after defendant re-initiated contact, was advised again of his Fifth Amendment rights, and again waived those rights. On September 6, 2023, after a hearing on the motion, Judge Wanda A. Evans granted defendant's motion to suppress and issued a stay of proceedings pending appeal. The People sought leave to appeal this order, which was granted in an order dated November 15, 2023. The Court of Appeals reversed the trial court's order of suppression in a split, unpublished per curiam opinion dated June 6, 2024. [2]

[2]Further facts will be discussed as necessary below. References to the transcript will be noted using the date of the hearing, followed by the page number. References to the interview video will be noted using the date of the interview, followed by the time stamp.

ARGUMENT

I.

The police may not question a defendant after an assertion of the *Miranda* right to counsel unless the defendant re-initiates contact. Here, after asserting his right to counsel, defendant later asked to talk again, saying, "I agree to talk without an attorney," and then gave a second statement after again being informed of his *Miranda* rights. Defendant's second statement was voluntary under the Fifth Amendment.

Standard of Review

When reviewing the lower court's decision on a motion to suppress evidence, the Court must apply two distinct standards of review. First, the Court "review[s] for clear error a trial court's findings of fact in a suppression hearing[.]"[3] "A ruling is clearly erroneous if the reviewing court is left with a definite and firm conviction that the trial court made a mistake."[4] Although the reviewing Court must give "regard…to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it[,]"[5] the critical piece of evidence at issue at the suppression hearing was video of defendant's statements.[6] Because the trial court was in no better position to assess this video evidence, this Court has no reason to give special deference to "the trial court's conclusions as to what the video contains."[7]

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[3] *People v Hyde*, 285 Mich App 428, 436 (2009) (citing reference omitted).
[4] *People v Bylsma*, 493 Mich 17, 26 (2012).
[5] MCR 2.613(C).
[6] See People's Appendix G (video).
[7] *People v Kavanaugh*, 320 Mich App 293, 298 (2017); see also *Scott v Harris*, 550 US 372, 378-381 (2007).

Second, the trial court's "ultimate decision on a motion to suppress" is reviewed de novo.[8] This Court also "reviews de novo whether the Fifth Amendment was violated and whether an exclusionary rule applies."[9] Accordingly, this Court gives no deference to the lower court's legal analysis.[10]

The issues presented in this application are preserved because the People objected below, on the same grounds as are presented herein, to defendant's motion to suppress evidence.[11] In accordance with *Yee v City of Escondido, Cal.*,[12] the People have provided expanded argument and case citation in support of their preserved positions.

Discussion

In its September 6, 2023, order suppressing defendant's statements, the trial court found defendant's second statement involuntary because: (1) defendant had previously asserted his Fifth Amendment right to counsel; (2) defendant waited in the interrogation room while the police attempted to find counsel; and (3) the police told defendant that because they could not find counsel, they could not speak further to defendant and would be moving forward on charges with the statement defendant had already given, placing extra pressure on

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[8] *Hyde*, *supra*, 285 Mich App at 436.
[9] *Hyde, supra,* 285 Mich App at 436 (citing reference omitted); see also *People v Nelson*, 443 Mich 626, 631 n 7 (1993) (clarifying that "[a]pplication of constitutional standards by the trial court is not entitled to the same deference as factual findings.").
[10] See *People v Barrera*, 451 Mich 261, 268 (1996).
[11] See 9/1, 109-114, 119-121; People's Appendix D; see also *People v Metamora Water Service Inc*, 276 Mich App 376, 382 (2007).
[12] *Yee v City of Escondido, Cal.*, 503 US 519, 534 (1992).

defendant.[13] The trial court found that the police coming back and informing defendant that they could not find an attorney at that time, so they would have to "go with the statements we have," was a "scare tactic" to get defendant to talk again. 9/6, 6-7.

The Court of Appeals majority disagreed, holding:

> In this case, defendant was 24 years old at the time of the interrogation, and he had completed three years of high-school education. Defendant was in the interrogation room for over five hours, and he spoke to the officers for approximately two of those hours. When defendant was not speaking to the officers, he received snacks and bathroom breaks. Defendant was fully informed of his constitutional rights on three separate occasions, and he affirmed that he -4- understood his rights each time. The record does not indicate that there was any unnecessary delay in this process, and, further, there were no signs that defendant was intoxicated, drugged, or otherwise incapacitated during later attempts to interrogate him. Additionally, defendant made multiple unequivocal requests to speak to the officers without an attorney present, and he confirmed his reinitiation of the interrogation after being advised of his rights again.
>
> With respect to this reinitiation, the record shows that defendant knew that he was under no obligation to speak with the officers when they returned. Importantly, when the investigating officers returned to take defendant back to the detention center, they did not initiate any questioning of defendant. Had defendant remained silent, the officers would have taken him back to the center, as they explained. At no point before defendant stated that he wanted to speak with them again without an attorney did an officer ask him questions about the offense.

[13] 9/1, 122-123; 9/6, 6-7.

When defendant stated that he wanted to speak to them without an attorney, the officers confirmed that he wanted to speak, and then another officer, unrelated to the investigation, came in to remind defendant of his rights. Defendant repeatedly stated throughout these encounters that he wanted to speak to the officers. Explaining to defendant that they could not speak with him because he had requested an attorney, and then later confirming with defendant that he wanted to speak to them, in response to defendant's assertion that he wanted to speak, does not show that the officers reinitiated the conversation. See [*People v Ryan,* 295 Mich App 388, 479, 482 (2012)]. See also *People v Adams*, 245 Mich App 226, 236-239; 627 Mich App 623 (2001) (approving of an inquiry by police to clarify whether defendant is reinitiating a discussion with them without the presence of a lawyer). The officers were ending the contact—not reinitiating it—by returning defendant to the detention center. Thus, the record confirms that defendant was able to make a voluntary, informed decision to reinitiate the conversation. See *People v Kowalski*, 230 Mich App 464, 483-484; 584 NW2d 613 (1998) (holding that the "defendant, by unequivocally indicating that he no longer wanted an attorney and he wished to give a statement, initiated the conversation that ultimately led to his confession").

As to the motives and tactics of the officers, contrary to the what the dissent reads into the record, there is no reliable evidence to suggest that the investigators intentionally delayed or refused to find defendant an attorney. Rather, the record shows that they tried to find defendant an attorney who might have been available to represent defendant during the interview; that their efforts were not successful should not be grounds for blame or suppression of defendant's statement. Likewise, defendant was not physically or psychologically abused or threatened in any way, at any point—in fact, as noted earlier, defendant had ready access to food, drink, bathroom facilities, and room to walk around during the relatively

> short period of time when the officers were trying to find him an attorney. During this waiting period, the video shows that defendant certainly appeared to be bored, and he even lamented on occasion about being in this predicament, though this hardly can be considered as evidence of psychological abuse. There is, in short, no reliable evidence from which to conclude that the officers engaged in some kind of ruse about finding an attorney in the hope that having defendant placed alone in a room for a couple of hours would somehow psychologically break him into giving a confession.
>
> "[T]he rule announced in *Edwards* is designed to prevent police from badgering a defendant into waiving his previously asserted Miranda rights." [*People v Clark*, 330 Mich App 392, 418 (2019) (cleaned up).] Considering the totality of the circumstances, we conclude that the officers did not -5- badger or coerce defendant into continuing the interrogation, and defendant voluntarily waived his right to counsel. Thus, the circuit court erred when it suppressed defendant's confession.[14]

In her dissent, Judge Garrett would have found that by handcuffing defendant and informing him that he had to return to the Detention Center because he had requested an attorney and there was no attorney immediately available, the police created a coercive atmosphere and misled defendant into thinking that he could not have an attorney present at interrogation. Judge Garrett further would have found that defendant's subsequent waivers of his Fifth Amendment rights did not cure the error.[15]

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[14] See Defendant's Appendix A, *People v Fenderson*, June 6, 2024, unpublished per curiam opinion of the Court of Appeals, Slip Op at 3-5 (Docket No. 367926).
[15] See Defendant's Appendix B, *Fenderson, supra*, Slip Op at 5-6 (Garrett, J., dissenting).

A. Waivers of Fifth Amendment Rights

Both the United States and Michigan Constitutions provide that no one can be compelled to be a witness against himself.[16] In order to safeguard that right, a criminal defendant has a constitutional right to counsel during interrogation.[17] When a defendant unequivocally invokes his right to counsel, questioning must cease "*unless the accused himself initiates* further communication exchanges, or conversations with the police."[18] If the defendant does initiate communication and, in doing so, voluntarily waives his right to counsel, the Fifth Amendment does not preclude further discussion or questioning by the police.[19]

The waiver of any Fifth Amendment right must be done voluntarily, knowingly, and intelligently.[20] The prosecution has the burden of proving voluntariness by a preponderance of the evidence.[21] In *People v Cipriano*,[22] the Michigan Supreme Court gave a nonexhaustive list of factors to consider in determining whether a statement is voluntary, including: (1) the nature of the questioning—is it repeated and prolonged; (2) the length of detention before giving the statement; and (3) the nature of the advice to defendant regarding constitutional rights. No one factor is determinative, however, and the ultimate question is whether the totality of the circumstances

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[16] US Const, Am V; Const 1963, art 1, § 17.
[17] *Miranda v Arizona*, 384 US 436, 444-445 (1966).
[18] *Edwards v Arizona*, 451 US 477, 484-485 (1981) (emphasis added).
[19] *Edwards*, *supra,* 451 US at 482.
[20] *Miranda, supra,* 384 US at 444.
[21] *People v DeLisle,* 183 Mich App 713, 719 (1990).
[22] *People v Cipriano*, 431 Mich 315, 334 (1988).

surrounding the statement indicates it was made freely and voluntarily.[23]

B. The totality of the circumstances show that defendant's second statement was voluntary: defendant re-initiated contact after previously asserting his right to counsel, and then validly waived his Fifth Amendment rights before making the statement.

Defendant's Interviews and Statements

Sergeant Reginald Beasley first sought to interrogate defendant on August 2, 2022.[24] When Beasley presented defendant with the Rights of Advice form explaining defendant's constitutional rights under *Miranda,* he had defendant read the first right out loud.[25] Defendant then read the rest of the document to himself before initialing each right and signing his name.[26] During this interaction, however, Beasley realized defendant was lethargic and possibly under the influence of some drug or alcohol.[27] Beasley then decided not to ask defendant any questions and had defendant transferred to the Detroit Detention Center.[28]

The next day, on August 3, 2022, Beasley had defendant brought to Detroit Police Department headquarters to conduct an interview. [29] With Detective Douglas Williams joining the interview, Beasley again

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[23] *Cipriano*, *supra*, 431 Mich at 334.
[24] 1/5, 18.
[25] 1/5, 18-19.
[26] 1/5, 19.
[27] 1/5, 18, 20-21.
[28] 1/5, 21.
[29] 1/5, 23.

advised defendant of his constitutional rights by reading the rights to defendant, who again initialed and signed the document.[30] Around an hour and half into the interview, defendant asserted his Fifth Amendment right to counsel.[31] Immediately after defendant asserted his right to counsel, Beasley and Williams left the interview room and attempted, unsuccessfully, to find an attorney for defendant.[32] Defendant remained in the interview room for a little over 2.5 hours while police searched for an attorney.[33] During this time, defendant asked for and received a Coke, and went to the bathroom twice.[34]

After the police could not locate an attorney,[35] Beasley walked into the interview room with a uniformed officer.[36] Beasley informed defendant that he could not find an attorney.[37] After defendant asked, "What's going on?" Beasley replied, "You said you wanted an attorney, I can't talk to you without an attorney, so the story you gave is the story we have to go with."[38] As the uniformed officer was patting defendant down and Beasley was cleaning up the interview room, defendant said,

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[30] 1/5, 23, 28.
[31] 1/5, 27, 29.
[32] 1/5, 30.
[33] 1/5, 40, 47; 8/3, 02:05:42 – 04:49:58.
[34] See 8/3, 02:11:57 – 02:13:30, 02:48:53, 04:24:46.
[35] Although the Court of Appeals dissent states that, "[a]t oral argument, both the prosecution and the defense agreed that the officers' actions to locate appointed counsel to represent Fenderson were highly unusual," the dissent neglects to include defense counsel's statement at oral argument that he wished the police would always try immediately to locate counsel for defendants, as they did here. *Fenderson, supra,* Slip Op at 4 (Garrett, J dissenting).
[36] 8/3, 04:49:58.
[37] 8/3, 04:50:27.
[38] 8/3, 04:49:58 – 04:50:56.

"So confusing."[39] Beasley asked defendant what he was confused about, and defendant responded, "I don't know what's going on from this point you didn't tell me nothing."[40] Beasley then replied, "What's going to happen now, we're going to take you back to the [Detroit Detention Center], and we're going to submit a warrant, and the prosecutor is going to review it, all right?"[41] Defendant then responded, "I'm not sure what all that mean," to which Beasley replied, "You requested an attorney, I can't talk to you any more about the case. You wanted to talk, you just say, you wanted to talk to an attorney. If you say you want an attorney, I can't talk to you by law."[42]

After Beasley's second explanation that he could not talk to defendant because defendant requested an attorney, defendant stated, "I just want to get this over with. That's it. I just wanna get this over with."[43] Beasley then informed defendant. "I can go over your rights again with you, and if you agree to talk without an attorney—" and defendant interrupted, "I agree to talk without an attorney. Y'all heard that? I agree. I just want to get this over with."[44] Beasley and defendant then have the following exchange:

> Beasley: I don't want you to feel compelled to talk to me because you don't want to go with them. That's the thing. Now if you reasonably want to talk to me without an attorney present, I'll talk to you, but you gotta understand it's gotta be something you want to do.

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[39] 8/3, 04:51:08.
[40] 8/3, 04:51:10 – 04:51:13.
[41] 8/3, 04:51:21.
[42] 8/3, 04:51:25 – 04:51:54.
[43] 8/3, 04:51:47 – 04:52:04.
[44] 8/3, 04:52:05 – 04:52:14.

Defendant: Yeah

Beasley: I don't want you to feel like you're forced to, okay, do anything. Is that something you want to do?

Defendant: Yes.[45]

Beasley then stepped out of the room and Sergeant Paul Brown, an officer uninvolved in the investigation of this case, came in and told defendant, "I just gotta re-establish your rights so you can speak to them, ok, cause you said you wanted to talk to them."[46] Defendant responded, "Yeah," and Brown read defendant his *Miranda* rights for the third time, with defendant initialing after each right and signing his name on the form.[47] After defendant initialed and signed the form, Brown asked, "And you want to talk to them freely?"[48] Defendant responded, "Yeah, I want to talk to them."[49]

After defendant re-initiated contact, was advised of his rights by Brown, and informed Brown he was now waiving his right to counsel and wanted to talk, Beasley and Williams returned to interview defendant.[50] Defendant then admitted that he killed the decedent.[51]

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[45] 8/3, 04:52:15 – 04:53:19.
[46] 1/5, 46-47; 8/3, 04:54:05 – 04:54: 36.
[47] 1/5, 45; 8/3, 04:54:37 – 4:55:45.
[48] 8/3, 04:55:50 – 04:55:57.
[49] 8/3, 04:55:57.
[50] 1/5, 43, 45, 52.
[51] 8/3, 05:05:07 – 05:05:18:32.

The Trial Court's Ruling

After hearing on defendant's motion to suppress and watching the interrogation video, the trial court held that defendant's second statement admitting guilt was involuntary and ordered it suppressed.[52] The court noted that defendant had been in the interrogation room for at least two hours, although he had been provided with water, a Coca-Cola, and to use the restroom as needed.[53] The trial court found that although "[i]t's a very thin line there," defendant's second statement was involuntary because, after "many hours of interrogation," "I think that they used that, that he can't have a lawyer and we can't find one for you, as a scare tactic and that's really in violation of the *Miranda* rights because they have to provide a lawyer."[54]

Defendant's second statement was voluntary.

The Court of Appeals majority correctly held that defendant's statement was voluntary. When defendant asserted his Fifth Amendment right to counsel, the police immediately ended the interview as required by *Edwards*. That Beasley re-entered the room, told defendant they could not find an attorney, and, *in response to defendant's questions*, further explained that the police could not legally talk to defendant and so would seek charges on the information they had, in no way violates the Fifth Amendment right to counsel.

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[52] See People Appendix A.
[53] 9/6, 4.
[54] 9/6, 5-6.

In *People v Kowalski,* this Court noted that *Edwards* does not prohibit "all communication between the police and a suspect who has requested an attorney," but only prohibited "further 'police-initiated custodial interrogation.'"[55] Our Court of Appeals has held, "As a general principle, mere inquiry into whether an accused has changed his mind about wanting to speak without an attorney present is not considered 'interrogation' within the meaning of *Edwards*."[56] Further, *People v McCuaig*[57] held that "statements made by the police officer, which merely advised defendant of the crime with which he was charged and which described the events which led to that charge, cannot be characterized as further interrogation by the officer or its functional equivalent."[58] Later, in *People v White*,[59] the Court of Appeals noted that "a number of cases have established that in general an officer's statements that provide a defendant with information about the charges against him, about inculpatory evidence located by the police, or about statements made by witnesses or codefendants, which allow a defendant to make an informed and intelligent reassessment of his decision whether to speak to the police, do not constitute interrogation."[60]

Here, Beasley immediately stopped questioning defendant once he asserted his Fifth Amendment right to counsel. Defendant stayed in the interrogation room for less than three hours while the police tried to

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[55] *People v Kowalski*, 230 Mich App 464, 478 (1998).
[56] *Kowalski, supra,* 230 Mich App at 479.
[57] *People v McCuaig*, 126 Mich App 754, 759-760 (1983).
[58] *Kowalski, supra*, 230 Mich App at 482-483 (quoting *McCuaig, supra*, 126 Mich App at 759-760).
[59] *People v White*, 294 Mich App 622 (2011).
[60] *White, supra*, 294 Mich App at 630.

locate an attorney, during which time he was provided a Coke and had two trips to the bathroom. After the police could not locate an attorney, Beasley took another uniformed officer into the interrogation room to handcuff defendant for transport to the Detention Center for the night, telling defendant that they could not find a lawyer.

When defendant asked what was happening, Beasley responded, "You said you wanted an attorney. I can't talk to you no more without an attorney, so the story you gave is the story we have to go with."[61] When defendant still expressed confusion, saying "I don't know what's going on from this point, you didn't tell me nothing," Beasley further explained, "What's going to happen now, we're going to submit a warrant, and prosecutor is going to review it," continuing, "You requested an attorney. I can't talk to you any more about the case. You wanted to talk, you just say, you wanted to talk to an attorney. If you say you want an attorney, I can't talk to you by law."[62]

After this explanation of what would happen next in defendant's case and why Beasley could no longer talk to defendant, defendant then asked to talk without an attorney.[63] Beasley did not immediately begin to interrogate defendant, but instead cautioned defendant that defendant should not feel compelled to talk and should not feel forced to do so. Defendant again stated that he would like to talk.[64] Further, after this re-initiation of contact by defendant, Brown came in to again inform

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[61] 8/3, 04:50:56.
[62] 8/3, 04:51:13 – 04:51:54.
[63] 8/3, 04:52:14.
[64] 8/3, 04:52:18 – 04:53:02.

defendant of his Fifth Amendment rights, and defendant again initialed and signed the form, repeating that he wanted to talk with Beasley.[65]

The police immediately honored defendant's assertion of his Fifth Amendment right to counsel. It is clear from the case law discussed above that Beasley's explanation to defendant that he could no longer talk to defendant and would be pursuing charges on the information already obtained did not constitute further interrogation under *Miranda* and its progeny. Finally, there is no evidence that defendant's less-than-three-hour wait (in which he was supplied with his requested beverage and bathroom access) somehow rendered defendant's second statement, given after he re-initiated contact and after he was informed of and waived his rights for the third time, involuntary.

The facts here are very similar to those in *People v Manning*,[66] in which the Court found the defendant's statement voluntarily made:

> The record indicates that Manning, who was nineteen years old at the time of her arrest, received *Miranda* warnings before giving her inculpatory statement. Manning testified that she both read and understood her rights. She further testified that the police did not deprive her of food, water, or sleep. Detective Darian Williams testified that Manning did not appear to be under the influence of any drug or other intoxicant and that she did not appear to need medical attention. Finally, we note that Manning, rather than the police, initiated the discussion that resulted in her giving the inculpatory statement.[67]

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[65] 1/5, 45-46; 8/3, 04:55:57 – 04:56:11

[66] *People v Manning,* 243 Mich App 615 (2000).

[67] *Manning, supra,* 243 Mich App at 644.

Here, defendant also initiated the discussion that resulted in him giving the inculpatory statement. Defendant also received and waived (multiple) *Miranda* warnings before giving his statement. The police similarly did not deprive defendant of food, water, or sleep. Not only did defendant here not appear to be under the influence of any drug or intoxicant, but police had previously declined to interview defendant when he did appear to be under the influence.

Given the police's immediate observation of defendant's assertion of his Fifth Amendment right to counsel, defendant's re-initiation of contact and indication he wished to speak without counsel, and the fact that police again advised defendant of his Fifth Amendment rights before again interviewing defendant, defendant's resulting second statement was not involuntary under the Fifth Amendment. To hold otherwise would effectively hold that once a defendant requests a lawyer, (1) any unsuccessful attempt by police to locate a lawyer, and (2) any subsequent explanation to that defendant of the process followed after the defendant has requested an attorney render any subsequent reinitiation of contact and waiver of rights by defendant involuntary. The police here did everything required: (1) they ceased questioning immediately once defendant requested an attorney, (2) they attempted to locate an attorney for defendant, (3) they informed defendant that they could not locate an attorney, and so all interrogation would cease, (4) when asked, they explained to defendant what the next steps in the process would be, and (5) when defendant stated he wanted to talk without an attorney, they asked defendant to make sure that is what he wanted, told him not to feel compelled to speak to them, and informed

defendant of his rights again before accepting his waiver. Defendant's waiver of rights and subsequent statement were voluntary under the Fifth Amendment.

C. Conclusion

Both case law and factual context show that defendant's second statement was voluntary under the Fifth Amendment; therefore, the Court of Appeals correctly found defendant's statements admissible and reversed the trial court's order suppressing defendant's statements.

RELIEF

THEREFORE, the People request that this Honorable Court DENY defendant's interlocutory application for leave to appeal.

Respectfully submitted,

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Dated: August 28, 2024

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with AO 2019-6. The body font is 12 pt. Century Schoolbook set to 150% line spacing. This document contains 4,958 countable words.

/s/ *Lori Baughman Palmer*

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