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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

-vs-

Supreme Court No. 167391
Court of Appeals No. 367926
Circuit Court No. 23-000412-01-FC

DAREN DONELL FENDERSON,
Defendant-Appellant.

_____/

Appellant Daren Fenderson's Appendix

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*Appendix A is a video file that will be provided to the Court via mail.

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Register of Actions

Case No. 23-000412-01-FC

Party Information

Defendant	**Fenderson, Daren Donell**	**Attorneys** **Coral M. Watt** *Court Appointed* (313) 963-8464(W)
Plaintiff	**State of Michigan**	**Anna Elizabeth Bickerstaff** (313) 224-7308(W)

Charge Information

Charges: Fenderson, Daren Donell	**Statute**	**Level**	**Date**
1. Homicide - Murder First Degree - Premeditated	750/316-A	.	08/03/2022
2. Weapons Felony Firearm	750/227B-A	.	08/03/2022
3. Escape - Lawful Custody	750/197A	.	08/03/2022

Events & Orders of the Court

DISPOSITIONS

08/05/2022 **Plea** (Judicial Officer: Judge, District Court, 36th)
1. Homicide - Murder First Degree - Premeditated
Defendant Stand Mute: Plea of Not Guilty Entered by Court
2. Weapons Felony Firearm
Defendant Stand Mute: Plea of Not Guilty Entered by Court
3. Escape - Lawful Custody
Defendant Stand Mute: Plea of Not Guilty Entered by Court

OTHER EVENTS AND HEARINGS

08/05/2022 **Recommendation for Warrant**
08/05/2022 **Case Needs to Be Abstracted to MI Secretary of State**
08/05/2022 **Warrant Signed**
08/05/2022 **Arraignment on Warrant** (9:00 AM) (Judicial Officer Judge, District Court, 36th)
Parties Present
Result: Defendant Stands Mute; Plea Of Not Guilty Entered By Court
08/05/2022 **Interim Condition for Fenderson, Daren Donell**
- Remand
08/19/2022 **Pre Exam Hearing** (9:00 AM) (Judicial Officer King, Kenneth J)
Parties Present
Result: Held
08/19/2022 **Bond Continued**
08/22/2022 **Refer To Pre-Trial Services For a Bond Review**
09/27/2022 **Refer To Pre-Trial Services For a Bond Review**
11/28/2022 **Competency Hearing** (9:00 AM) (Judicial Officer King, Kenneth J)
Parties Present
Result: Adjourned at the Request of the Court
11/28/2022 **Bond Continued**
11/29/2022 **Competency Hearing** (9:00 AM) (Judicial Officer King, Kenneth J)
Parties Present
Result: Found Competent
11/29/2022 **Bond Continued**
11/29/2022 **Interim Condition for Fenderson, Daren Donell**
- Remand
01/05/2023 **Bound Over**
01/05/2023 **Preliminary Examination** (9:00 AM) (Judicial Officer King, Kenneth J)
Parties Present
Result: Held
01/05/2023 **Bond Continued**
01/26/2023 **Preliminary Examination** (9:30 AM) (Judicial Officer King, Kenneth J)
Parties Present
Result: Held: Bound Over
01/26/2023 **Interim Condition for Fenderson, Daren Donell**
- Remand
01/26/2023 **Order For Production Of Exam Transcript Signed and Filed**
01/27/2023 **Bindover Packet**
02/01/2023 **Information Filed**
02/01/2023 **Proof of Service, Filed**
02/09/2023 **Arraignment On Information** (9:00 AM) (Judicial Officer Evans, Wanda A.)

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Parties Present

02/02/2023 Reset by Court to 02/09/2023

Result: Held

02/09/2023 **Order For Production Of Exam Transcript Signed and Filed**
02/09/2023 **Motion To Withdraw As Attorney**
02/09/2023 **Proof of Service, Filed**
02/09/2023 **Disposition Conference** (9:00 AM) (Judicial Officer Evans, Wanda A.)

Parties Present

Result: Held

02/09/2023 **Calendar Conference** (9:00 AM) (Judicial Officer Evans, Wanda A.)

Parties Present

Result: Held

03/02/2023 **Motion Hearing** (9:00 AM) (Judicial Officer Evans, Wanda A.)

Parties Present

Result: Held

03/02/2023 **Motion To Withdraw As Attorney**
03/03/2023 **PE PDF Transcript, filed**
Vol./Book 1 18 pages
03/13/2023 **PE PDF Transcript, filed**
Vol./Book 1 62 pages
04/21/2023 **Review Date** (9:00 AM) (Judicial Officer Evans, Wanda A.)

Parties Present

03/30/2023 Reset by Court to 04/21/2023

Result: Held

06/02/2023 **Motion For Suppression Of Evidence**
06/02/2023 **Proof of Service, Filed**
06/09/2023 **Final Conference** (9:00 AM) (Judicial Officer Evans, Wanda A.)

Parties Present

Result: Adjourned at the Request of the Prosecutor

06/14/2023 **Proof of Service, Filed**
06/14/2023 **People's Response (Answer) to Motion**
06/26/2023 **Final Conference** (9:00 AM) (Judicial Officer Evans, Wanda A.)

Parties Present

Result: Continued

07/12/2023 **Final Conference** (9:00 AM) (Judicial Officer Evans, Wanda A.)

Parties Present

Result: Adjourned at the Request of the Court

07/18/2023 **Final Conference** (9:00 AM) (Judicial Officer Evans, Wanda A.)

Parties Present

Result: Adjourned at the Request of the Court

08/30/2023 **Proof of Service, Filed**
08/30/2023 **Motion To Withdraw As Attorney**
09/06/2023 **Final Conference** (9:00 AM) (Judicial Officer Evans, Wanda A.)

Parties Present

08/08/2023 Reset by Court to 08/30/2023

08/30/2023 Reset by Court to 09/06/2023

Result: Held

09/06/2023 **Motion**
09/06/2023 **Heard And Granted - Order Signed and Filed** (Judicial Officer: Evans, Wanda A.)
09/06/2023 **Order Signed and Filed** (Judicial Officer: Evans, Wanda A.)
09/06/2023 **Stay of Appeal - Interlocutory Appeal Granted**
10/04/2023 **Order For Production of Prosecutor Transcript**
10/20/2023 **Notice of Transcript Filed - Prosecutor**
Vol./Book 1, Page 1, 8 pages
10/20/2023 **Stenographers Certificate Filed**
11/10/2023 **Pre-Trial** (9:00 AM) (Judicial Officer Evans, Wanda A.)

Parties Present

Result: Held

11/15/2023 **Opinion/Order Higher Court Signed and Filed (COA)**
01/12/2024 **Documents Prior to eFiling**
02/13/2024 **Motion to Reduce Bond**
02/13/2024 **Proof of Service, Filed**
03/04/2024 **Motion Hearing** (9:00 AM) (Judicial Officer Evans, Wanda A.)

Parties Present

02/27/2024 Reset by Court to 03/04/2024

Result: Held

03/04/2024 **Heard And Denied - Order Signed and Filed** (Judicial Officer: Evans, Wanda A.)
03/05/2024 **Opinion/Order Higher Court Signed and Filed (COA)**
03/25/2024 **Motion To Reconsider**
03/25/2024 **Proof of Service, Filed**
06/06/2024 **Opinion/Order Higher Court Signed and Filed (COA)**
06/13/2024 **Motion Hearing** (9:00 AM) (Judicial Officer Evans, Wanda A.)

05/31/2024 Reset by Court to 06/13/2024

Result: Held

06/13/2024 **Stay of Appeal Lifted**

06/13/2024	**Heard And Granted - Order Signed and Filed** (Judicial Officer: Evans, Wanda A.)
06/13/2024	**Letter Received**
06/13/2024	**Letter Received**
07/08/2024	**Attorney Appointed Order, S/F**
07/30/2024	**Notice of Filing - Supreme Court**
08/02/2024	**Pre-Trial** (9:00 AM) (Judicial Officer Evans, Wanda A.) Parties Present Result: Held
08/02/2024	**Letter Received**
08/02/2024	**Stay of Appeal - Interlocutory Appeal Granted**
09/23/2024	*CANCELED* **Jury Trial** (9:00 AM) (Judicial Officer Evans, Wanda A.) *Scheduling Error* *05/06/2024 Reset by Court to 09/23/2024*
10/25/2024	*CANCELED* **Pre-Trial** (9:00 AM) (Judicial Officer Evans, Wanda A.) *Adjourned:At The Request Of The Court* *10/25/2024 Reset by Court to 10/25/2024*
01/10/2025	*CANCELED* **Pre-Trial** (9:00 AM) (Judicial Officer Evans, Wanda A.) *Adjourned:At The Request Of The Court*
03/04/2025	**Review Date** (9:00 AM) (Judicial Officer Evans, Wanda A.) Parties Present *03/03/2025 Reset by Court to 03/03/2025* *03/03/2025 Reset by Court to 03/04/2025* Result: Held
03/19/2025	**Proof of Service, Filed**
03/19/2025	**Motion to Reduce Bond**
03/20/2025	**Motion to Reduce Bond**
03/25/2025	**Letter Received**
09/02/2025	**Review Date** (9:00 AM) (Judicial Officer Evans, Wanda A.)

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

DAREN D. FENDERSON,

Defendant.
_____/

Case No. 22-058981-01-FY

Circuit Court No. 23-000412-01-FC

Honorable Kenneth J. King

PRELIMINARY EXAMINATION

BEFORE THE HONORABLE Kenneth J. King

36th District Court Detroit, Michigan on

Thursday, January 5, 2023

APPEARANCES:

On Behalf of the People: **ANNA E. BICKERSTAFF** (P-82215)
1441 Saint Antoine Street,
Floor 12
Detroit, MI 48226
(313) 224-7308

On Behalf of Defendant: **WENDY H. BARNWELL** (P-42505)
22805 Kelly Road, #5
Eastpointe, MI 48021
(313) 333-3407

REPORTED BY: KATHY A. FEARS, CMSR 5681
Official Court Reporter
(313) 224-7430

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I N D E X

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Appellant Fenderson's Appendix C, p. 7

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Detroit, Michigan

Thursday, January 5, 2023 – 11:56 A.M.

- - -

THE COURT: Calling case 22-058981, People of the State of Michigan versus Daren Darnell Fenderson.

Defendant is charged in count one, homicide, murder first degree pre-meditated; count two, felony firearm; count three, escape lawful custody.

Appearances for the record, please.

MS. BICKERSTAFF: Good morning, Your Honor. Anna Bickerstaff on behalf of the People, P-82215.

MS. BARNWELL: Good morning, Your Honor. Wendy Barnwell, P-42505 on behalf of Mr. Daren Fenderson. We're both present in the courtroom.

And we would move for sequestration of witnesses, including those on U-Tube.

THE COURT: All right.

Ladies and gentlemen out there in U-Tube land, if you are a witness or a potential witness, I'm ordering you to log off at this time. If there appears to be no other witnesses in the

courtroom, I should know who the young lady with the red jacket is.

MS. BICKERSTAFF: Judge, that's a new intern with the Prosecutor's Office. And we do also have Sergeant Beasley seated in the first row here, who is acting as officer in charge, as the officer in charge is on FMLA, well, for a while. I'm not sure when he comes back.

THE COURT: Any objection to Officer Beasley remaining?

MS. BICKERSTAFF: He will be testifying.

MS. BARNWELL: I would respectfully object.

THE COURT: All right. So his prospective testimony is just a statement that was allegedly given to him by the Defendant, is that it?

MS. BICKERSTAFF: Yes. And the People will also be, he was sergeant at the crime scene so some crime scene pictures.

THE COURT: Okay. Did you want to take him out of order?

MS. BICKERSTAFF: Sure. The People can call Sergeant Beasley at this time.

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THE COURT: All right.

Do you have any other preliminary matters before we begin with Sergeant Beasley's testimony?

MS. BICKERSTAFF: Yes, Judge. I have spoken to Defense Counsel. I believe we have a stipulation as to the identification of the victim in this case, as William Allen.

MS. BARNWELL: So stipulated for preliminary examination purposes.

THE COURT: The Court receives that stipulation.

MS. BICKERSTAFF: The People would also move at this time for the admission of People's proposed exhibit number one, which is a medical examiner's report pursuant to MCL 766.11(B).

MS. BARNWELL: No objection.

THE COURT: Admitted.

MS. BICKERSTAFF: Thank you, Judge. And this report is authored by Dr. Carl Schmidt on August, September 26th, 2022, an autopsy performed on the body of William Allen on August 1st, 2022.

Dr. Schmidt opined that the death was caused by multiple gunshot wounds as follows: A

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gunshot wound on the right chest, a gunshot wound to the left arm, a gunshot to the left buttock, a gunshot wound to the left interior thigh, a gunshot wound to the left buttocks. In addition to the injuries, in addition to injuries attributed to gunshot wounds, multiple blunt force injuries via motor vehicle are as below: External injuries include abrasions to the right side of the face, chest, back, left arm, right arm, right left and left leg.

Dr. Schmidt opined that the manner of death is homicide.

THE COURT: Okay.

MS. BICKERSTAFF: Permission to publish to the Court.

THE COURT: Yes, please.

Anything further before you call your first witness?

MS. BICKERSTAFF: Nothing else preliminary, Judge.

THE COURT: Okay. Call your first witness.

MS. BICKERSTAFF: Thank you, Judge.

At this time, the People would call Sergeant Beasley to the stand.

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THE COURT: All right. Sir, please step forward, tell us your name and spell it for us.

MR. BEASLEY: Hello, Your Honor. My name is Sergeant Reginald Beasley. That's R-e-g-I-–a-l-d, last name is B-e-a-s-l-e-y.

THE COURT: Please raise your right hand.

Do you swear or affirm to tell the truth, the whole truth and nothing but the truth, so help you God?

MR. BEASLEY: Yes, sir.

THE COURT: Thank you, sir. Please have a seat in the box.

You may begin when you're ready.

MS. BICKERSTAFF: Thank you, Judge.

R E G I N A L D B E A S L E Y

Called by the Petitioner, having been sworn by the Court, testified as follows:

D I R E C T E X A M I N A T I O N

BY MS. BICKERSTAFF:

Q Can you please state your name for the record?

A Reginald Beasley.

Q And how are you currently employed?

A I'm employed with the City of Detroit on the

Police Department.
Q Are you with a particular unit or group with the Detroit Police Department?
A Yes, Homicide Section.
Q How long have you been with Homicide?
A I was appointed to Detective in 2016 through ‘18. I made Sergeant and came back in 2020.
Q And how long have you been with the Detroit Police Department?
A Eighteen and a half years.
Q All right. And were you working as a Sergeant with the Detroit Police Homicide Section back on August 3rd of 2022?
A Yes I was.
Q And back on that date, did you have the occasion to make the area of 12910 Greiner Street in the City of Detroit, County of Wayne?
A Yes.
Q And what is at that location?
A That was the crime scene of a fatal shooting.
Q Okay. And can you describe that area?
A It’s in a residential neighborhood on Greiner, I believe the cross Street was Westphalia, if I’m not mistaken.
Q All right.

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A That was a vehicle that was crashed into the front porch of a single family residence. And the decedent's body was pinned between the vehicle and the front porch.

Q All right. I'm going to approach with People's Proposed exhibits two and three.

MS. BICKERSTAFF: May I approach the Witness?

THE COURT: You may.

Q I'm handing you People's proposed exhibits two and three. Do you recognize what I've handed you?

A I do but I want to make a correction on the date. The day we responded I believe it was the 2nd, not the 3rd.

MS. BICKERSTAFF: I don't know if the officer can do something with the mask because the end of his words are being captured by the mask; do you know what I mean? So I don't know if he can pull the mask maybe like down when he's testifying. We have these barriers here.

THE COURT: If I could just get you to project a little louder for us, okay.

THE WITNESS: Yes, sir.

THE COURT: All right.

BY MS. BICKERSTAFF: (Continuing)

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Q I'm sorry, would that be August, August 1st of 2022; would that be the correct date?
A Correct.
Q Okay. My apologies.
And I've handed you People's proposed exhibits two and three. Do you recognize those?
A Yes I do.
Q And do those fairly and, well, explain what's in those pictures?
A Exhibit number one, it shows the front end of a red Dodge --
MS. BARNWELL: You said number one or two and three?
MS. BICKERSTAFF: Two and three, he has that.
May I approach the Witness?
THE COURT: Yes.
MS. BARNWELL: Sorry about That. I'm sorry I interrupted because he said exhibit number one. I thought he said that in his answer even though he said two and three. That's all.
THE COURT: Okay.
BY MS. BICKERSTAFF: (Continuing)
A So in my hand I have exhibit number two. It depicts a picture of a red Dodge Journey against

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the front porch of a residence.
Q And does that picture fairly and accurately reflect the scene you responded to on August 1st of 2022?
A Yes, ma'am.
Q And can you explain what you see in People's proposed exhibit three?
A Number three, the picture I'm holding in my hand now, this the picture of the front porch once the vehicle was removed from the porch by a tow truck. And it shows the victim's remains on the porch.
Q And does that picture fairly and accurately reflect the scene you responded to?
A Yes, ma'am.
MS. BICKERSTAFF: At this time, I'd move for the admission of People's two and three.
THE COURT: Any objection?
MS. BARNWELL: None.
THE COURT: Admitted.
BY MS. BICKERSTAFF: (Continuing)
Q And did you make any other observations at the scene?
A I did.
Q And did you observe potential evidence at the scene?

A Yes I did.
Q Okay. Can you explain what you observed?
A When I arrived on the scene, I observed several shell casings in the street. They were marked by I believe, water bottles. Other debris was placed next to them to mark them. And also, I observed blood droplets in the street as well.
MS. BICKERSTAFF: May I approach the Witness?
THE COURT: You may.
MS. BICKERSTAFF: I'm approaching with People's proposed exhibits 4 through 14.
And permission to publish two and three to the Court?
THE COURT: Okay.
BY MS. BICKERSTAFF: (Continuing)
Q Have you had an opportunity to review People's 4 through 14?
A Yes, ma'am.
Q And do those pictures fairly and accurate reflect the scene you responded to on August 1st?
A Yes it does.
MS. BICKERSTAFF: At this time the People would move for the admission of People's exhibits 4 through 14.

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MS. BARNWELL: No objection, Judge.

THE COURT: Admitted.

MS. BICKERSTAFF: All right.

BY MS. BICKERSTAFF: (Continuing)

Q And can you describe to the Court the evidence that's depicted in People's 4 through 14?

A Okay. Exhibit number four, the photo I have in my hand now, you can see the intersection of Greiner and Westphalia. And you could see several items which are shell casings marked by evidence markers and other debris.

Q All right.

A In exhibit number four, the, I believe this is evidence marker number six or either nine, a big liquor box with a signal on top of it next to the shell casing.

MS. BICKERSTAFF: And permission to publish People's 4 to the Court.

THE COURT: Yes.

Q And People's number five?

A And People's exhibit number five, this is marker number two and evidence marker number three. They're also marked by evidence markers and I believe the water bottles, pieces of paper and there's shell casings next to these as well.

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MS. BICKERSTAFF: Permission to publish to the Court?

THE COURT: Yes.

Q Can you explain to me what is People's six?

A People's six, this is a close up photograph of LS marker number two and a brass colored shell casing.

MS. BICKERSTAFF: Permission to publish to the Court?

THE COURT: Yes.

Q Can you explain what is People's seven?

A People's exhibit number seven is also another evidence marker, number three next to a brass colored shell casing.

MS. BICKERSTAFF: Permission to publish to the Court?

THE COURT: Yes.

Q Can you explain People's exhibit eight?

A People's exhibit number eight is evidence marker number one which is next to a brass colored shell casing.

MS. BICKERSTAFF: Permission to publish to the Court?

THE COURT: Yes.

Q Okay. And can you explain People's nine?

A In People's number nine, it appears to be suspected blood droplets that's marked by marker number nine.

Q Thank you.

MS. BICKERSTAFF: Permission to publish to the Court?

THE COURT: Yes.

Q Can you explain what's in People's ten?

A In People's exhibit number ten, there is additional evidence markers, I see four or five. And two additional off in the distance that's marking the shell casings.

MS. BICKERSTAFF: Permission to publish to the Court?

THE COURT: Yes.

Q Can you explain what's in People's eleven?

A People's exhibit number eleven is evidence marker number four next to a spent brass colored shell casing.

Q Thank you. Can you explain what's in People's twelve?

A In People's exhibit number twelve is evidence marker number five next to a brass colored spent shell casing.

Q Can you explain what's in People's thirteen?

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A People's number thirteen, evidence marker number six next to a brass colored shell casing.
Q Can you explain what's in People's fourteen?
A People's exhibit fourteen is a overall photo of the intersection that shows evidence that's marked in the street.
Q And I'm going to approach with People's proposed fifteen. Can you explain what I've handed you?
A Yes. This is a Google map view of the intersection.
Q And would the address where he crashed occurred be on that map?
A Yes. 12910 Greiner, Detroit, Michigan, 48205.

MS. BICKERSTAFF: Permission to publish. I would move for the admission first, Judge.

THE COURT: Any objections?

MS. BARNWELL: No objections.

THE COURT: Admitted.

MS. BICKERSTAFF: Permission to publish?

THE COURT: Yes.

MS. BICKERSTAFF: Thank you.

BY MS. BICKERSTAFF: (Continuing)
Q And Sergeant, how many casings do you recall

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observing at this scene?
A I believe it was six.
Q And did you make any observations as to the caliber of these casings?
A Yes, I believe they were 9 millimeter.
Q Did they all appear to be the same caliber?
A They did.
Q Okay. And did you receive or learn any information about the vehicle on the porch?
A Yes. The vehicle was registered to the Defendant, Mr. Fenderson.
Q Okay. And did you ultimately arrive at a suspect in this case?
A Yes we did.
Q And did you take any statements from any potential suspects?
A Yes I did.
Q Who did you take a statement from?
A Mr. Daren Fenderson.
Q And do you recognize, do you see that person in the courtroom today?
A Yes.
Q Could you please describe what they're wearing and where they're seated?
A He's seated in the first row. He's wearing a

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green Wayne County jumpsuit with a surgical mask and his hair is an Afro.

MS. BICKERSTAFF: Will the record reflect the Witness had identified the Defendant in this case.

THE COURT: So noted.

BY MS. BICKERSTAFF: (Continuing)

Q And on what date did you first attempt to speak to Mr. Fenderson?

A The first time was the 8th, I'm sorry, the 2nd.

Q All right.

A Yes.

Q And were you alone or with anyone else?

A I was with Detective Douglas Williams.

Q And can you explain what happened at the interrogation on August 2nd?

A We entered the room, the Defendant, he appeared to be with a lethargic, maybe under the influence of some type of narcotic or alcohol. I believe he said that he was tired or sleepy, something along those lines.

Q And what did you do based on that information?

A Well, I read him his, well, I firmly advised him of his constitutional rights. I allowed him to first write out loud so that I could see that he

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could read. He read the first one out loud, then he continued to read the rest of the document to himself. He appeared to be reading from the document. Then he initialed each right and he signed his name on the Rights of Advice form.

Q All right. I'm going to approach with People's proposed sixteen. Do you recognize that document?

A Yes.

Q What is that document?

A This is the constitutional rights presentation of notification form that DPD uses.

Q And is that form filled out?

A It is.

Q Can you explain how that form is annotated?

A At the top of the form, I wrote the Defendant's name, age, date of birth, his address. Between right number one and five, his initials are placed on there. He placed his signature on there. And I asked him questions regarding his educational level. He stated he completed eleventh grade before being expelled from school. He obtained his diploma while he was in placement. Then I dated it, typed my name and Detective Williams' name at the bottom.

Q All right. And did Mr. Fenderson also sign and

initial that document?

A He did.

MS. BICKERSTAFF: At this time, I would move for the admission of People's sixteen.

MS. BARNWELL: Judge, I would like to do a voir dire.

THE COURT: Okay.

MS. BARNWELL: I'd respectfully ask if I can retrieve the document.

THE COURT: Sure.

V O I R D I R E

BY MS. BARNWELL:

Q You indicated that my client, Mr. Fenderson, was lethargic; correct?

A Correct.

Q And I'm not sure if I heard you correctly. You indicated that he was under, appeared to be under the influence of narcotics and/or alcohol?

A Correct.

Q Okay. But you still proceeded in talking with him?

A Originally, I believe he was laying against the seat. I thought maybe he was just laying there. So I advised him of his rights. And during our conversation, I realized that, I made my

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observations, realized that he appeared to be under the influence and that's why during the interview, I didn't ask him any questions.

Q Okay.

THE COURT: So you didn't ask him any questions?

THE WITNESS: No. We ended the interview and had him transported back to DDC.

Q Okay. I see a purported signature on People's exhibit sixteen?

A Yes.

Q You're indicating that he signed that?

A Correct.

Q That's your impression?

A Yes.

Q Okay. Nothing further at this point.

THE COURT: Okay.

MS. BARNWELL: Your Honor, I'm objecting to the admission of that. I don't believe it's under voluntary circumstances. He's inebriated.

THE COURT: The admission of what?

MS. BARNWELL: Of exhibit sixteen. I don't know if you moved. Did you move?

MS. BICKERSTAFF: The People would

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move for the admission of People's sixteen which is the Advice of Rights, just the document, the Advice of Rights document from August 2nd, 2022. That's what the People are moving to admit, is the Advice of Rights documents.

THE COURT: Okay. So my understanding is that an officer observed the Defendant to possibly be under the influence.

MS. BICKERSTAFF: Yes.

THE COURT: And decided not to interview him at that time?

MS. BICKERSTAFF: Correct.

THE COURT: So did an interview happen at another time?

MS. BICKERSTAFF: Yes, Judge.

THE COURT: And prior to that interview, was another Advice of Rights given?

MS. BICKERSTAFF: Yes, Judge.

THE COURT: So why are you moving to admit this one?

MS. BICKERSTAFF: I can move on. I don't have to admit it then.

THE COURT: Okay. I mean, just to keep it clean because if there's an issue as to whether or not he made a knowingly and voluntary

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decision to give a statement, then that may be somewhat suspect if he was possibly under the influence. But if the officer did not question him at that time, he chose to do it at another time and gave his rights at another time, then maybe you should proceed with those.

MS. BICKERSTAFF: Absolutely, Judge.

BY MS. BICKERSTAFF: (Continuing)

Q Now, Sergeant Beasley, did you, after you decided to end the interview, what happened?

A We contacted Communications and requested a scout car come to Headquarters to transport Mr. Fenderson to the Detention Center.

Q And, I'm sorry.

A The following day, we had Mr. Fenderson dropped back off at Headquarters where we conducted an interview.

Q All right. And can you explain how the beginning of the conversation with Mr. Fenderson went?

A Once again, on August 3rd, he was formally advised of his constitutional rights. I read them to him and he acknowledged them. And he placed his initials on the document and signed it.

Q And did he appear to be understanding everything you were saying?

A He did.
Q And did he appear to need any medical attention at that point?
A No he did not.
Q And did he appear to be under the influence at that point?
A No he did not.
Q And would it be fair to say he had been given the opportunity to sleep and use the bathroom between the first time you spoke to him and the second?

MS. BARNWELL: Your Honor, I'll object to use the bathroom. I don't believe he would know that unless he was there continuously.

THE COURT: Repeat your question.

MS. BICKERSTAFF: I asked was Mr. Fenderson given the opportunity or the resources to sleep and use the bathroom between your first statement on August 2nd and this statement on August 3rd.

THE COURT: You can rephrase because if he offered him bathroom privileges or sleep, then that's one thing. But to ask if he was ever offered, he wouldn't know that.

MS. BICKERSTAFF: Okay. I can rephrase the question.

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BY MS. BICKERSTAFF: (Continuing)

Q Do you know was Mr. Fenderson offered any food or snacks on your interview on August 3rd?

A Yes.

Q And did you also ascertain his level of education at this point?

A I don't recall if I asked him on that day or not. I'd have to look at the document to refresh my recollection.

Q Okay. Would it be fair to say you had ascertained his education the day prior?

A Yes.

Q Okay. I'm going to approach with People's proposed sixteen. Do you recognize what I've handed you?

MS. BARNWELL: Your Honor, just for the record, exhibit sixteen is not the initial Advice of Rights so it was not admitted into evidence.

MS. BICKERSTAFF: Correct. This is a new --

MS. BARNWELL: It is now being re-numbered.

MS. BICKERSTAFF: Yes.

MS. BARNWELL: The one for, on the 3rd?

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MS. BICKERSTAFF: Yes.

BY MS. BICKERSTAFF: (Continuing)

Q Do you recognize what I've handed you?

A Yes I do. This item, People's exhibit number sixteen, this is the copy of the constitutional rights form that was done on August the 3rd.

Q All right. Does that document fairly and accurately reflect the document you filled out with Mr. Fenderson back on August 3rd?

A Yes.

MS. BICKERSTAFF: At this time the People would move, well, I guess the People would pass for voluntariness.

V O I R D I R E

BY MS. BARNWELL:

Q All right. So on August 2nd, 2022 was the first time you went to see him?

A Correct.

Q Okay. And that was at the DDC?

A Negative. That was at 1301 Third at Police Headquarters.

Q When you say Headquarters, here in downtown Detroit?

A Yes, ma'am.

Q Okay. So now I see that on your form, on the form

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that was not admitted into evidence, the Certificate of Constitutional rights from August 2nd, I see that the time was at 5:27 P.M.; correct?

A I would have to look at the document to see but if you say so.

MS. BARNWELL: Your Honor, may I approach the Witness?

THE COURT: You may.

MS. BARNWELL: All right.

BY MS. BARNWELL: (Continuing)

A Yes, 5:27 P.M.

Q Okay. So that was your handwriting, 5:27 P.M.; right?

A I'm not sure if it's my handwriting or not, ma'am.

Q All right. And then the second time you went back and the, People's proposed exhibit number sixteen, you had that with you there; right?

A Yes.

Q Okay.

MS. BARNWELL: May I approach, Judge?

THE COURT: You may.

Q The second time you went back, August 3rd, 2022 at 1:30 P.M.; correct?

A 1:03 P.M.

Q Okay. Sorry about that. 1:03 P.M.?

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A Yes.
Q And that was less than 24 hours from the time you observed him lethargic and either under the influence of narcotics or alcohol; correct?
A Correct.
Q Less than 24 hours. Okay. And you, who were you with on that date of August 3rd?
A Detective Douglas Williams.
Q Do you know if he spoke to him before you spoke to him?
A I believe he entered the room at the same time.
Q Okay.
A Yes.
Q Did you get him from a cell, did you or Detective Williams, you said Williams; right?
A Correct. No, we did not. He was transported by patrol officers.
Q Patrol officers brought him to the interview room?
A Correct.
Q Which was equipped with audio and video?
A Correct.
Q Okay. And at that time, you indicated that you read him his rights again?
A Yes.
Q He never read any rights out loud to you; right?

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A Not on August 3rd.
Q Okay. And you didn't take the time to ascertain his educational level on August 3rd?
A I do not recall if I did or didn't.
Q Okay. Did he ask for a lawyer?
A When?
Q On August 3rd, we're talking about August 3rd now.
A At some point he did during the interview.
Q Invoked his rights of counsel?
A Yes, at some point in the interview, yes.
Q Now, there's no notation on that form that he invoked his right to counsel; right?
A On this form, no.
Q Okay. Did you make any notation that he invoked his right to counsel?
A I believe I documented in my supplementary report that I completed.
Q What did you say, what kind of report?
A A supplement report.
Q A supplemental, sorry. Supplemental?
A Yes.
Q Okay. And you proceeded to talk to him?
A When? I'm sorry.
Q On August 3rd. Sorry, after you read him the rights?

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A After I read him the rights, yes.
Q Okay.
MS. BARNWELL: Nothing further at this point, Judge.
THE COURT: So after you read him his rights and proceeded to question him, you said at some point he invoked his right to have an attorney present?
THE WITNESS: Yes, Your Honor.
THE COURT: And when he did that, did you continue to talk to him?
THE WITNESS: No. Actually I left the interview room and I attempted to get a lawyer for him but was unsuccessful.
THE COURT: Okay. Was there any more questioning after he invoked his right to an attorney?
THE WITNESS: No. When we came back into the room, he said that he wanted to continue to talk to us, at which point Sergeant Brown entered the room and re-established his constitutional rights.
THE COURT: Okay.
MS. BICKERSTAFF: And Judge, I do have Sergeant Brown here, who I did intend to call in

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regards to the second Mirandized, issuance of the Miranda rights after the Defendant did ask for a lawyer.

V O I R D I R E

BY MS. BARNWELL:

Q So you ignored the fact that he requested an attorney and you saw, yes?

A No.

Q Okay. So you indicated that you tried to get him a lawyer, yes? You tried to get him a lawyer?

A Yes.

Q You tried to get him a lawyer on August 3rd?

A Yes.

Q Instead of ceasing and desisting the interview, you tried to get him a lawyer immediately?

A He requested an attorney. And I tried to contact our Control Center to get a show cause attorney and I was unsuccessful.

Q A show cause attorney?

A Yes. I tried to get a defense attorney to come to the Headquarters to speak with your client.

Q Okay.

A So when he requested an attorney I did not speak to him until his rights were re-established.

Q When you contacted the Control Center, you talked

about a line of attorneys that talked about an ID, if there was a line-up; right?

A If there's a Defense Attorney, that's who I try to contact.

Q Did you make contact with any defense attorney?

A No, ma'am.

Q Did you have information that any defense attorney was on 24-hour call for line-up, line-up?

A I don't understand your question. Could you repeat that?

Q Did you, all right. You know, can you repeat that for me, if you can? I can't remember the exact question but let me, I understand where I'm going with it.

Did you determine that an attorney was on call, 24-hour call for line-up, yes or no?

A Did I determine that? No, I did not determine that.

Q All right. So you know that the policy is to stop the interview; correct?

A No.

Q All right.

MS. BARNWELL: I'm moving to object for admission of the newly labeled exhibit three, Judge. Okay.

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THE COURT: On what basis?

MS. BARNWELL: There was not, there is no showing at this point in this testimony that that constitutional notification form needs to be entered into evidence. There's voluntary and knowing and intelligence of anything on that form is at question with him. He's made the conclusion that somebody else cleared it up. We're talking about that form. That's between him and my client. I'm not talking about what somebody else did.

He now says oh, somebody else cleaned it up after he tried to get him a lawyer. I don't know if you ever heard of that. Have you ever heard of that, Judge, that the police is trying to get him a lawyer?

THE COURT: What I have heard is that this Witness initially, when he came in contact with the Defendant, observed that Defendant was not coherent, was otherwise under the influence and decided not to interview him. He came back some time later when he appeared to be cognizant of what was going on. And he read him his rights, he began questioning him. And during some partes of that, some time during that questioning,

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Defendant asserted his right to have an attorney present.

He stopped the interview and tried to fulfill the Defendant's request in finding an attorney. Whether this attorney was a line-up attorney or whatever, they are an attorney, a defense attorney. So he tried to find an attorney.

And then he came back into the room and the Defendant, according to this Witness, said that he wanted to talk further. That is what he said. You're shaking your head no. That's what he said.

MS. BARNWELL: He said that.

THE COURT: Then he said that another officer that was with him, read him, re-established his rights. He read him his Miranda warning again. Were you present when that happened?

THE WITNESS: I stepped out of the room to monitor from my computer, from my desk.

THE COURT: You monitored it from your computer?

THE WITNESS: Yes, sir.

THE COURT: And that was in real time?

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THE WITNESS: Yes.

THE COURT: All right. So perhaps this is as far as we can go with this Witness.

MS. BARNWELL: Exhibit number, I'm sorry about that.

THE COURT: Well, she said she has the other witness here to testify that he gave him his rights.

MS. BARNWELL: Well, I'm moving for objection of admission of this particular --

THE COURT: I don't know if she's moving to admit it right now.

MS. BARNWELL: Did you move, I don't remember if she moved.

MS. BICKERSTAFF: Judge, I would like to ask a couple questions and admit another exhibit to lay the foundation for this exhibit.

THE COURT: Okay. Go ahead.

MS. BICKERSTAFF: Okay.

BY MS. BICKERSTAFF: (Continuing)

Q Sergeant, earlier today, did you have the opportunity to review a video of this interrogation?

A Yes.

Q And did that video fairly and accurately reflect

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the interrogation you conducted back on August 3rd?

A Yes it did.

MS. BICKERSTAFF: At this time the People would move for the admission of People's seventeen.

MS. BARNWELL: Seventeen is the video?

MS. BICKERSTAFF: Yes.

MS. BARNWELL: Okay. Let's see the video.

MS. BICKERSTAFF: Thank you.

THE COURT: You have no objections to its admission?

MS. BARNWELL: Well, I want to see the video. Just so, I mean, we have to see, look at the video.

THE COURT: Have you seen the video in discovery?

MS. BARNWELL: Yes. However, I want to see where he specifically is talking about, Judge. I want so see where he specifically is talking about.

THE COURT: And so how do you propose we go from there? How do you want to do that?

MS. BARNWELL: Your Honor, I got to see. She said she's asking him questions based on

this exhibit so she can clear it up. The video is the best evidence as to what was happening there.

THE COURT: I agree. And my question is do you object to the admission of the video?

MS. BARNWELL: No, not for purposes of our looking at it. Sorry, Judge. I didn't understand you.

MS. BICKERSTAFF: Judge, it says it's disabled screen sharing.

THE COURT: Okay. You should be all set now.

BY MS. BICKERSTAFF: (Continuing)

Q All right. Sergeant Beasley, do you see People's exhibit seventeen, the interrogation video on the screen?

A Yes.

Q Okay. Do you recognize the people in the video?

A Yes.

Q Okay. Can you point out who is who is this video?

A The Defendant, Mr. Fenderson is seated, wearing a white T-shirt. I'm standing with my back to the camera, wearing a orange colored shirt. And Detective Williams is wearing all grey, seated, on his cell phone.

Q All right.

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MS. BICKERSTAFF: And for the record, I'm going to begin playing the video at 1.00.37 P.M.

(Whereupon the video is played into the record at 12:32 P.M.)

THE COURT: Can you pause this for a second?

So we've just jumped to the Sergeant giving the Defendant his rights but he testified that Defendant before that, indicated that he wanted to talk. Where is that in the video?

MS. BICKERSTAFF: I can back up.

For the record, I'm playing at 12:58:56.

THE COURT: Okay.

(Whereupon playing of video into the record is continued at 12:33 P.M.)

MS. BICKERSTAFF: For the record, I've paused the video at 1:05:01.

At at this time I would move for the admission of People's sixteen.

THE COURT: Ms. Barnwell?

MS. BARNWELL: Is that sixteen or --

MS. BICKERSTAFF: This is seventeen. I'm moving for the admission of sixteen which is

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the Advice of Rights form.

MS. BARNWELL: All right. So one second. Let me think clearly.

All right. So Your Honor, I would still respectfully object as to number sixteen, exhibit sixteen.

What I did observe on the video, we're looking at it, is that he was just told where to initial. He wasn't given the opportunity to review the rights that were listed.

THE COURT: He was asked if he understood the rights and he indicated yes.

MS. BARNWELL: Okay.

Same objection. You can rule, Judge.

THE COURT: All right.

Objection noted. Overruled.

Admitted.

MS. BICKERSTAFF: Thank you, Judge.

And for the record, I'm going to jump to 2:29:41 in the video. I'm playing the video.

(Whereupon playing of video into the record is continued at 12:41 P.M.)

MS. BICKERSTAFF: For the record, I've paused the video at 2:30:46.

BY MS. BICKERSTAFF: (Continuing)

Q Now, Sergeant Beasley, would it be fair to say that this time stamp on the bottom is the time stamp and the date that's accurate?
A It is.
Q So this would be an hour and a half after you initially read his Advice of Rights; is that correct?
A Yes.
Q And would it be fair to say after he asked for a lawyer, you asked him if he had a lawyer and then stepped out of the room?
A Yes, ma'am.
Q And questioning ceased?
A Yes.
Q All right. After you leave the room, do you make efforts to try to find a lawyer?
A I did.
Q Do you also enlist the help of Sergeant Brown to help find a lawyer?
A I don't recall if I asked Sergeant Brown to help find a lawyer. I know I tried.

MS. BICKERSTAFF: And Judge, at this point I would ask if we could pass this Witness and call Sergeant Brown to the stand and then recall Sergeant Beasley for the remainder of his

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statement.

THE COURT: You want me to call Sergeant Brown?

MS. BICKERSTAFF: Oh, I'm sorry. Nothing further.

THE COURT: All right. Thank you, sir. You may step down.

(Whereupon the Witness is excused).

MS. BICKERSTAFF: At this time the People would call Sergeant Brown to the stand.

MR. BROWN: Good morning, Your Honor.

THE COURT: Good morning, sir. Or good afternoon.

Do you swear or affirm to tell the truth, the whole truth and nothing but the truth, so help you God?

MR. BROWN: Yes, sir, I do.

THE COURT: Tell us your name for the record.

MR. BROWN: Sergeant Paul Brown, P-a-u-l, B-r-o-w-n.

THE COURT: All right. Thank you, sir. Please have a seat.

MR. BROWN: Happy New Year.

THE COURT: Happy New Year.

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You may begin when you're ready.

MS. BICKERSTAFF: Thank you.

P A U L B R O W N

Called by the Petitioner, having been sworn by the Court, testified as follows:

D I R E C T E X A M I N A T I O N

Q Could you please state your name for the record?

A Yes, ma'am. That's Sergeant Paul Brown, P-a-u-l, B-r-o-w-n.

Q And how are you currently employed?

A City of Detroit Police Department.

Q Are you with a particular unit or group?

A Yes, ma'am. I'm with the Tenth Precinct Detective Unit at the time.

Q How were you employed back on August 3rd of 2022?

A In the Homicide Unit of the Detroit Police Department.

Q And how long had you been with the Homicide Unit at that point?

A Five years, ma'am.

Q Okay. And back on August 3rd of 2022, did you have the occasion to become involved in an interrogation of a suspect?

A Yes I did.

Q All right. And can you describe what your

involvement was?
A In that, in this particular incident, I did the Advice of Rights form, Constitutional Rights form.
Q And would that be for Defendant Daren Fenderson?
A That is correct, ma'am.
Q All right. Now, before you read Mr. Fenderson his Advice of Rights, did you do anything else in relation to Mr. Fenderson's constitutional rights?
A Yes I did.
Q Can you explain to the Judge what you did?
A Yes, Your Honor. On this particular day, I believe, I'm sorry, not believe. He spoke with Sergeant Reginald Beasley. He asked for an attorney to be present and from that point on, we were trying to contact and see if we can get him an attorney to be appointed to be present for him during his interview.
Q And did you specifically make efforts to try to locate an attorney?
A Several of us did. We work as a team but I personally contacted notification and Control and tried to get a show of attorney for him. The show of attorney that were on duty that particular day said she only do photo line-ups. So from there, the continuation of trying to get an attorney

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there was ongoing.
Q Okay. And were you successful in obtaining an attorney?
A No, ma'am. I never was successful at actually getting one there.
Q All right. And for the record, I'm going to, well, Sergeant Brown, were you aware that the room that you were in was audio and video recorded?
A Yes, ma'am.
Q Okay. For the record, I'm going to resume playing the video at 5:18:51.

(Whereupon playing of video into the record is continued at 12:46 P.M.)

MS. BICKERSTAFF: For the record, I've paused the video at 5:23:06.

BY MS. BICKERSTAFF: (Continuing)
Q And Sergeant Brown, I'm going to approach with People's proposed eighteen.

MS. BICKERSTAFF: May I approach the Witness?

THE COURT: You may.

Q Sergeant Brown, I'm approaching with People's proposed eighteen. Do you recognize this document?
A Yes, ma'am. This is the constitutional Advice of

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Rights form of the Detroit Police Department.

Q And as you read Mr. Fenderson his rights, did he appear to be acknowledging and understanding what you were telling him?

A Yes, ma'am.

Q Okay. And he did freely and voluntarily initial and sign that form?

A He did, ma'am.

Q And that form fairly and accurately reflects the form you filled out with Mr. Fenderson back on August 3rd of 2022?

A It is.

MS. BICKERSTAFF: At this time I'd move for the admission of People's exhibit eighteen.

MS. BARNWELL: I need an opportunity to voir dire.

THE COURT: Okay.

MS. BARNWELL: I'm approaching the Witness with --

THE COURT: That's fine.

V O I R D I R E

BY MS. BARNWELL:

Q So Sergeant Brown, good afternoon to you.

A Good afternoon.

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Q Now, your purpose of coming in there was to re-establish the constitutional rights, that was your purpose?
A Yes. I went through the re-establishment of the constitutional rights.
Q But you testified just now that you tried to get a lawyer, you tried to supply him with a lawyer?
A Yeah, he was talking to another detective and the, he requested a lawyer. I just assisted their unit in trying to obtain one.
Q Who did you talk to in Notification and Control?
A That I don't recall, ma'am.
Q Okay. And how long did that take, your efforts to procure a lawyer?
A My individual efforts, maybe a few phone calls, probably just know, 10, 15 minutes.
Q Right. And did you write that down anywhere that you tried to do that?
A No I did not, ma'am.
Q Okay. Do you think it's unusual to try to bring in the lawyer rather than just ceasing and desisting?
A Well, for my part of this ma'am, that isn't what I was there for. At some point in time, he requested to speak with, and that's when I went

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in, independent of the investigation, I had no knowledge of the investigation.

Q You have, did you, you had some knowledge that he never left that interrogation room that exhibited there in exhibit 17 that's on the screen; right?

A I'm sorry, repeat that.

Q You know he never left that interrogation room from the time he left, he asked for a lawyer, I'm talking about the time he asked for a lawyer and the time you tried to secure him a lawyer, you know he never left that room?

A Did he, no, he didn't leave that room.

Q Okay. Good.

A Not that I know of, no.

Q He, meaning Mr. Fenderson did not leave that room?

A Not that I know of.

Q He didn't leave and go to a cell somewhere; right?

A Not that I know of.

Q Okay. Good. And you had assured him after he said, just talk to them, just be open and honest with him when they resume questioning; right?

A Repeat.

Q You assured him just be open and honest with them when they resume questioning you?

A Yeah, I did say that.

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Q All right. Now, he never read these rights out loud that you show here in exhibit 18; correct? He, meaning Mr. Fenderson, he himself didn't read them, you read them?
A No, he did not read them,.
Q You were reading them?
A I did.
Q And then you told him, you didn't give him an opportunity to read them after you read them, instead you told him initial here; right?
A No he did not read them.
Q Okay. So you told him where to initial and where to sign?
A Yes, just --
Q Just say yes or no. And you told him the date and the time; yes?
A Yes.
Q Okay. All right.

MS. BARNWELL: Your Honor, my position remains the same. I'm objecting to admission of the exhibit 18, 16.

THE COURT: What's the objection?

MS. BARNWELL: And bringing in any statement that he may have given further based on his indications of the Fifth Amendment and unusual

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nature of what I have observed with respect to the testimony here, of them trying to get him a lawyer and their review.

So at some point they recognize, they knew, their advantage, you know. It's a game. You know you're in a trying position. So they, these detectives know that this guy could go back to his cell. Go back to his cell, he's resting and leave this room because he invoked that Fifth Amendment right. Okay.

But they capitalized on something, but he's clearly not clear about it. So I'm going to object.

Thank you very much.

THE COURT: People?

MS. BICKERSTAFF: Judge, I think the testimony has shown that Sergeant Brown, that he was read his rights. Sergeant Brown indicated that Mr. Fenderson made some sort of acknowledgment that he understand what Sergeant Brown was reading to him. At that point, he then initialed these.

Sergeant Brown also testified that while he was waiting in the room while the other sergeants tried to get him a lawyer, he popped his

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head out and he wanted to speak to the officers. And that's when they sent Sergeant Brown in at that point.

Mr. Fenderson initiated contact with the officers. And I think there's nothing on this record to prove that this Advice of Rights and this Miranda statement being given was involuntary and everything past this being involuntary.

THE COURT: I don't think we have a Fifth Amendment violation here in that although the Defendant supposedly requested to have an attorney present, those officers ceased the interview and attempted to find an attorney for him.

And subsequent to that, the Defendant initiated contact and said that he wanted to speak to the officers.

And these officers trying to play by the rules, tried to play by the book didn't come in themselves, they sent another officer in to re-initiate the contact with the Defendant and give the Defendant his rights which is evidenced by People's exhibit, is that 17?

MS. BICKERSTAFF: Eighteen.

THE COURT: Eighteen, People's exhibit

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18 which is the Advice of Rights form that is signed and initialed by the Defendant.

So for probable cause purposes, this Court is going to find a finding that the statement was voluntarily given.

You may proceed. And I will admit 18.

MS. BICKERSTAFF: Thank you, Judge.

I have no further questions for this Witness.

THE COURT: Any other questions?

MS. BARNWELL: No.

THE COURT: Okay. Thank you, sir.

You may step down.

THE WITNESS: Thank you.

(Whereupon the Witness is excused).

MS. BICKERSTAFF: And Judge, at this time, the People would recall Sergeant Beasley to the stand.

THE COURT: Okay.

Sergeant Beasley, we're going to have you retake the stand. Let me remind you that you're still under oath.

MR. BEASLEY: All right.

THE COURT: You may begin when you're

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ready.

MS. BICKERSTAFF: Thank you.

R E G I N A L D B E A S L E Y

Recalled by the Petitioner, having been previously sworn by the Court, testified as follows:

D I R E C T E X A M I N A T I O N

MS. BICKERSTAFF: (Continuing)

Q Sergeant Beasley, after Sergeant Brown exits the room, do you subsequently re-enter the interrogation room?

A Yes, ma'am.

Q And what do you do after that?

A Continue the interview.

Q Are you alone or with another officer when you re-enter?

A Detective Williams.

MS. BICKERSTAFF: For the record, I'm going to resume playing the video at 5:29:23.

(Whereupon playing of video into the record is continued at 1:00 P.M.)

MS. BICKERSTAFF: For the record, I've paused the video at 5:35:18.

BY MS. BICKERSTAFF: (Continuing)

Q Now, Sergeant Beasley, before Mr. Fenderson told you about the gun jamming and having to run over

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Will because he couldn't let him live, did Mr. Fenderson tell you something different than that?

A Yes.

Q What did he tell you the first time?

A Initially --

Q I'm sorry. Let me rephrase that question. What did he tell you before?

A The initial story?

Q Yes.

A The first story was he was in the area with Will. They parked north of Greiner and Westphalia at Will's friend's house. They were seated in a car. Will and the Defendant was in the car smoking marijuana. He stated that Will's friend came out of the house, snatched him out his car and I believe either tried to carjack him or tried to fight him. He said that's when he fled on foot to either a nearby gas station, then his mother came and picked him up, I believe or a female dropped him off at home to his mother's house. And the mother dropped him off back at the gas station. That's what I can recall.

Q All right.

MS. BICKERSTAFF: I'd pass the Witness.

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THE COURT: Ms. Barnwell?

C R O S S E X A M I N A T I O N

BY MS. BARNWELL:

Q As to the conversation you just talked about, the one, the first rendition of what Mr. Fenderson said to you, am I missing something; was it captured on the video there?

A Yes.

Q It was captured on this video, sir?

A Not the video that was just played, but it was captured on video in the fact interview room.

Q There's an audio video?

A It's the same video, ma'am. She just played part of the clip.

Q Okay. So let me say this. You and, that was not Sergeant Brown there; right? I know that wasn't Sergeant Brown 'cause I know him from cases. That was not Sergeant Brown who was just played in this clip?

A With me, no.

Q Right.

A It was Detective Williams.

Q Right. You and him were cursing at him, right? You were cursing, you were using the "F" word, right, you, you?

A Yes, I used profanity. Yes.
Q Correct. And you were telling him don't cry, stop crying, stop crying; right?
A Yes.
Q So you could see that he's under, he's under pressure; yes?
A I don't know exactly what was going through his mind at the time. Sorry.
Q But that crying, you had to overcome that crying in order to get that second statement; right?

MS. BICKERSTAFF: Judge, I'd object. I think that's argumentative that this officer to overcome the Defendant crying, the Defense crying or his emotions.

THE COURT: I don't think that's argumentative.

MS. BICKERSTAFF: Thank you.

THE COURT: Overruled. You may proceed.

BY MS. BARNWELL: (Continuing)
A I don't believe I had to overcome him crying. Is that the question?
Q You could have asked him something without cuss out. You had to do that cussing out, you cussed him out to get that second statement; right?

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A That's your opinion.
Q I'm asking you, yes or no. He's listening.
A I didn't cuss him out to get that statement, no.
Q Okay. And you cussed him out in his moment of weakness; yes?
MS. BICKERSTAFF: I'd object. I think that's a mischaracterization of the testimony that was just said. He didn't cuss him out.
Q You saw him crying, you saw him --
MS. BARNWELL: Judge, do you want to rule what the Counsel just said?
THE COURT: I don't know if I have to. Go ahead. Next question.
MS. BARNWELL: Okay.
BY MS. BARNWELL: (Continuing)
Q You cussed him out at the moment when he reflected he was at his weakest; yes or no?
THE COURT: I think what the Prosecutor is arguing --
MS. BARNWELL: All right.
THE COURT: Objected to is the terminology of cussing him out.
Q You were using the "F" word, right, you were saying fuck and fuck, right, more than one time; yes, am I wrong?

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A I used profane language, yes.
Q Okay. And so your partner jumped in, two against one; right?
A It was two interviewers in the room so I don't understand. There were two of us in there, we asked him a question.

MS. BARNWELL: I'll save that one for argument. All right.

All right. That's it.

THE COURT: Any re-direct?

MS. BICKERSTAFF: No, Judge.

THE COURT: Thank you, sir. You may step down.

(Whereupon the Witness is excused).

MS. BICKERSTAFF: And Judge, I did indicate previously, I know we weren't on the record at the time, there is one other witness the People would like to call. But at the current moment he has COVID. I was hoping if we could pick another day potentially two weeks. I guess I'm not sure –

THE COURT: Are you out of witnesses today?

MS. BICKERSTAFF: Yes.

THE COURT: Okay. All right.

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So we're holding this in part?

MS. BICKERSTAFF: Yes, Judge.

THE COURT: And you have another witness to be called, just one witness; right?

MS. BICKERSTAFF: Correct.

THE COURT: How is January 19th at 10:00 o'clock?

MS. BICKERSTAFF: Judge, could we do the 20th?

THE COURT: Tuesdays and Thursdays are my homicide days.

MS. BICKERSTAFF: I'm supposed to start a trial on that Tuesday that I think it'll carry over into Thursday.

MS. BARNWELL: I'm in front of you on the 20th in the afternoon, Judge. I have a Hassan Burber and I have -- oh, no, I'm don't have that Quinton Robinson guy. He retained counsel. But I'm in this building, hold on, in the afternoon. Now, in the morning it's jammed. It's crazy in there.

THE COURT: Again, that's my homicide day, the 20th.

MS. BARNWELL: But then the next week is when I have a, an attempted murder trial in

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front of Judge Kevin Cox. And that's been pending and we're ready and raring to go on that.

THE COURT: And so what about January 12th?

MS. BICKERSTAFF: That's fine for the People as long as the Court thinks that complies with the COVID rules. I'm not sure what's all at length, do you to quarantine for a certain period of time?

THE COURT: Ten days.

MS. BARNWELL: Oh, it's two days?

THE COURT: Ten days.

MS. BICKERSTAFF: Oh, ten days.

MS. BARNWELL: They switched it up from the onset of the symptoms.

MS. BICKERSTAFF: Oh.

MS. BARNWELL: So his symptoms started already.

MS. BICKERSTAFF: Yes.

MS. BARNWELL: Today is what, the 5th?

MS. BICKERSTAFF: Yeah.

MS. BARNWELL: When did the symptoms start?

MS. BICKERSTAFF: I'm not sure, I didn't ask when they started. I know he's been,

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he has symptoms today, though.

THE COURT: The 17th?

MS. BICKERSTAFF: Judge, I'm supposed to start a jury trial that day.

THE COURT: Is it going to go?

MS. BICKERSTAFF: I think so.

THE COURT: 24th?

MS. BICKERSTAFF: That works for the People.

MS. BARNWELL: Now, you're in my zone with my jury trial in front of Judge Kevin Cox. It starts on the 23rd. One second. It starts on Monday, the 23rd.

THE COURT: What kind of trial is it?

MS. BARNWELL: Attempted murder.

THE COURT: Do you think you'll be done by the 26th?

MS. BARNWELL: One second. I think so. Give me the afternoon of the 26th.

THE COURT: Okay. The 26th at 1:30.

MS. BICKERSTAFF: Thank you.

THE COURT: People, I'm going to give you your exhibits back.

MS. BICKERSTAFF: Thank you.

THE COURT: Okay. And we are going to

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be in recess ‘til 2:15, 2:17.

MS. BARNWELL: Your Honor, my client did want me to address bond. But I myself can tell you that this is not, we’re in the middle of all this. So I’ll do that again on the 26th.

THE COURT: All right.

MS. BARNWELL: You said 1:30; right?

THE COURT: Yes, 1:30. And what was the date I gave, the 26th?

MS. BICKERSTAFF: Yes.

THE COURT: The 26th at 1:30, yes.

- - -

(Whereupon proceedings concluded at 1:15 P.M.).

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S T E N O G R A P H E R ' S C E R T I F I C A T E

STATE OF MICHIGAN)
) SS
COUNTY OF WAYNE)

I, **Kathy Fears**, CSMR-5681, Certified Court Reporter in and for the 36th District Court, Wayne County, State of Michigan, do hereby certify that the foregoing pages 1 through 61 inclusive, was reduced to typewritten form by means of Computer-Assisted Transcription and comprise a true and accurate transcript of the proceedings in the above-entitled matter, on Thursday, January 5, 2023.

Kathy A. Fears
_____
Kathy A. Fears, CSMR-5681
Certified Steno Mask Reporter
36th District Court
421 Madison Avenue - Room 438
Detroit, MI 48226

DATED: March 7, 2023

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STATE OF MICHIGAN
IN THE 36th DISTRICT COURT FOR THE CITY OF DETROIT
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,

-vs- CIRCUIT COURT CASE NO. 23-000412-01-FC

DAREN FENDERSON,
Defendant.
_____/

PRELIMINARY EXAMINATION
BEFORE THE HONORABLE KENNETH J. KING
36th District Court Judge
Detroit, Michigan - Thursday, January 26, 2023

APPEARANCES:

For the People: ANNA BICKERSTAFF, ESQ. (P82215)
Assistant Wayne County Prosecutor

For Defendant: WENDY BARNWELL, ESQ. (P42505)

REPORTED BY: COURTNEY PRZEADZKI, CSR-8061
Certified Shorthand Reporter
(313) 965-6654

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EXHIBITS

	Marked	Admitted
None offered.		

Detroit, Michigan

January 26, 2023

At 1:57 p.m.

* * *

THE COURT: All right.

Calling case, 22-58981; People of the State of Michigan versus Daren Darnell Fenderson. The Defendant is charged in Count 1, homicide murder first-degree premeditated; Count 2, felony firearm; Count 3, escape lawful custody.

Appearances for the record, please.

MS. BICKERSTAFF: Good afternoon, your Honor. Anna Bickerstaff, on behalf of the people, P82215.

MS. BARNWELL: Good morning, your Honor -- or good afternoon. Wendy Barnwell, P42505, on behalf of Mr. Daren Fenderson. We are both present physically in the courtroom.

THE COURT: Mr. Fenderson, tell me your name for the record.

THE DEFENDANT: Daren Fenderson.

THE COURT: Okay. Today is the date and time set for a preliminary examination. This matter was held in-part back on January 15th and continued to today's date. Are we ready to proceed?

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MS. BICKERSTAFF: The People are ready to proceed. The people do just want to bring to the Court's attention there is an amended complaint and warrant which does have a corrected date of offense of August 1st of 2022.

THE COURT: Okay. I am in receipt of that. Did you give a copy to counsel as well?

MS. BARNWELL: Yes. She did e-mail me a copy. One second.

THE COURT: So what's the difference in this information as opposed to the other one?

MS. BICKERSTAFF: I'm sorry?

THE COURT: What's the amendment?

MS. BICKERSTAFF: The previous date of offense was August 4th. And when the witnesses testified, the incident date was August 1st.

THE COURT: Okay.

MS. BICKERSTAFF: So that was the change, just the date of offense.

MS. BARNWELL: Thank you.

THE COURT: All right.

Are we ready to call your next witness?

MS. BICKERSTAFF: The people are ready to proceed.

THE COURT: Proceed.

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MS. BICKERSTAFF: At this time the people would call Anthony Jackson to the stand.

MS. BARNWELL: Your Honor, I would respectfully move that a sequestration order be continued here and on YouTube.

THE COURT: Ladies and gentlemen out there in YouTube land, if you are a witness or a potential witness and may testify in this matter at some point in time, I am ordering you to log off at this time.

And there are no other witnesses in the courtroom. I'm not sure who the gentleman in the first row is there.

MS. BICKERSTAFF: Judge, I would ask for an exception to the order for my officer-in-charge, who is seated in the first row.

THE COURT: Any objection, Ms. Barnwell?

MS. BARNWELL: No objection.

THE COURT: Okay.

MS. BARNWELL: He's not testifying today; right?

MS. BICKERSTAFF: No.

MS. BARNWELL: Okay.

THE COURT: Good afternoon, sir. Please step forward. Tell me your name and spell it for me, please.

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MR. JACKSON: Anthony Jackson.

A-n-t-h-o-n-y, J-a-c-k-s-o-n.

THE COURT: Please raise your right hand.

Do you swear or affirm to tell the truth, the whole truth, and nothing but the truth, so help you God?

MR. JACKSON: I do.

THE COURT: Thank you, sir. Please have a seat in the witness box next to me. I'm going to give you that microphone so you can speak into it nice and loud for me. Okay?

You may begin when you're ready.

MS. BICKERSTAFF: Thank you, Judge.

ANTHONY JACKSON,

At 2:00 p.m., took the stand and testified as follows:

DIRECT EXAMINATION

BY MS. BICKERSTAFF

Q. Can you please state your name for the record.

A. Anthony Jackson.

Q. And Mr. Jackson, back on August 1st of 2022, were you living on Griner street in the City of Detroit, County of Wayne?

A. Yes, ma'am. Been there 34 years.

Q. All right. And back on that date, did something catch

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your attention or did something wake you up?
A. It was about 1:30 to midnight. I heard a -- I heard some shooting. I didn't get up, but I heard some shooting out there. And right before I turned the TV on to go to bed, I got up and looked out my window and I was looking at my vehicles and I saw a young man hopping on the sidewalk between my house and the next door neighbor's house, hopping on one leg.
Q. And Mr. Jackson, can you describe what that person looked like, if you remember.
A. He was tall, slim, and dark.
Q. Okay.
A. A black young man.
Q. Okay. And you said you heard some gunshots; is that correct?
A. Yeah. I heard gunshots prior to that, yes.
Q. Before you saw the man running. Do you remember about how many gunshots you heard?
A. No, I can't recall how many gunshots. I don't know. I can't recall that.
Q. Was it more than one?
A. Oh, yeah. It was more than one.
Q. Okay. So a handful; a few?
A. Yeah, a few. I would say a few.
Q. Okay. Now what happens after you see this man running

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down your sidewalk?

A. He wasn't running down my sidewalk. He was on my sidewalk.

Q. Okay. What do you see him doing on your sidewalk?

A. He was hopping around on one leg.

Q. Okay.

A. Hopping around on one leg.

Q. Okay. And what do you see next?

A. Then, I looked up and I saw a car flying down, coming towards my house, coming in on West Dalia (ph) heading south, heading towards my house -- heading towards my house and my neighbor's house.

Q. And what do you see that car do?

A. Actually, after I saw it come flying towards my house, when it got towards the curb, it kind of backed to my door. I thought it was going to parachute, you know, towards my house.

Q. Okay. And what do you see happen -- what do you do next?

A. I didn't do nothing. I went back and looked out the window and the car was on my porch; on my front yard on my porch.

Q. Okay. Do you see anything else on your porch?

A. I saw a young man jump on my porch, looking down -- looking down at the vehicle. Nobody was out there.

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Q. And let me ask you this. So you see the car up on your porch; correct?
A. Yes.
Q. And then you see a man up on your porch?
A. Jumped on my porch, yes.
Q. Okay. Did you see where he came from?
A. He had to get out the car --
Q. Okay.
A. -- out the truck. It's a truck.
Q. Okay. What do you see that guy do after he gets out of the car?
A. Jump back down and jump back up again.
Q. Onto your porch --
A. Yeah.
Q. -- is that what you're talking about?
A. Jumped on the porch a couple times, yes.
Q. Okay. And what does he do next?
A. I think he into his vehicle -- went into the vehicle and tried to move it and it wouldn't move.
Q. Okay. And what do you see him do next?
A. That, I lost. I lost it.
Q. You lost it?
A. I think he walked back towards the truck. I don't know if he ran there or ran which way. I think he went to his right.

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Q. Okay.
A. Heading towards Gratiot.
Q. And walks away?
MS. BARNWELL: Your Honor, object --
THE WITNESS: Yeah. Like, he walked away, yes.
MS. BARNWELL: -- to speculation, Judge.
THE COURT: Well, the testimony pretty much speaks for itself. He told us what he thinks. I will take it for that value.
You may proceed.
BY MS. BICKERSTAFF
Q. Now Mr. Jackson, what do you do after you watch this man walk away?
A. I mean, like I said, I don't know if he walked away or ran away. I got on the phone call and called 911.
Q. Okay.
A. Then I proceed to go out on my porch and I turned my light on.
Q. Okay. What do you see when you go out on your porch?
A. I saw the truck into my porch. It crashed and tore my whole porch up.
And about four or five minutes later, I have my light on my phone and I noticed the body on my porch. The head -- from the shoulders and the head

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laying on my porch. And the vehicle is on top of him.

Q. Now Mr. Jackson, do you remember what the person looked like who walked down the -- walked away from the car?

A. Yeah. He had a bunch of braids in his hair.

Q. Do you remember anything else about what he looked like?

A. No. He just had a bunch of braids in his hair.

Q. Okay.

A. Kind of a light complexion.

Q. And you said you called 911; is that correct?

A. Yes, I called 911.

Q. And do the police show up to your home?

A. They showed up about five to ten minutes later.

Q. Okay.

A. They actually didn't come to my house. They parked on the street in front of my house.

Q. Okay.

A. One car parked on the street.

Q. Okay. And you gave a statement to police about everything that you saw?

A. Yeah. I told them exactly what I saw and exactly what I told them the same thing.

MS. BICKERSTAFF: The people have no further questions.

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THE COURT: Cross-exam?

CROSS-EXAMINATION

BY MS. BARNWELL

Q. You didn't know any of these people; right?

A. No. I didn't know none of the people, no.

Q. Okay.

A. I never saw them.

Q. So when you were making the phone calls, were you leaving -- where were you making the phone calls?

A. In my house.

Q. Okay. But where in your house?

A. At my front door.

Q. Okay. Was it a cell phone or what kind of a phone?

A. My cell phone.

Q. Okay. So you witnessed when the police removed the vehicle?

A. I beg your pardon?

Q. You witnessed when the police removed the vehicle?

A. Oh, yes. Yes. I didn't go to sleep until about 7:00. They were there about seven hours out there.

Q. Okay.

A. Yeah. They asked me to go in my house and I said, "No. I'll stand near my door." And then they blocked me to where I can't see nothing.

MS. BARNWELL: Okay. No further questions,

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Judge.

THE COURT: Any redirect?

MS. BICKERSTAFF: No, Judge. Thank you.

THE COURT: Thank you, sir.

You may step down.

THE WITNESS: All right, sir.

THE COURT: I appreciate you.

THE WITNESS: All right.

(At 2:06 p.m., witness excused.)

MS. BICKERSTAFF: The people have no further witnesses at this time.

THE COURT: Any witnesses for the defense?

MS. BARNWELL: Zero, Judge.

THE COURT: The people?

MS. BICKERSTAFF: Judge, the people would move to bind the Defendant over on the counts contained in the information.

In this case, your Honor did hear a couple weeks ago from Sergeant Beasely, who did testify that he responded to this scene. That when they responded to the scene, there were six casings on the corner that all appear to be fired from the same gun. There was also pools of blood or spots of blood in the street near those casings leading to this location.

They did then respond to the home where the

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car was crashed up on the porch. The victim they subsequently found underneath the vehicle.

The medical examiner's report did indicate that the victim sustained five different gunshot wounds, including two to the back and one to the thigh. One that was in the back was also to the buttocks -- two to the buttocks and one to the thigh. As well as injuries sustained from the car accident.

Sergeant Beasely also testified that there were no weapons found near the victim in this case and that the vehicle was registered to the Defendant, Mr. Fenderson.

And, your Honor, you also heard testimony from Sergeant Beasely and Sergeant Krah (ph) who testified in regard to the Defendant's statement. The Defendant did indicate to police that he got into the car and then both him and the victim, Will, jumped out of the car. The victim grabbed the gun. The gun jammed and then the victim subsequently ran away. At that time the Defendant picked up the gun, fired two to three shots at the Defendant -- or at the victim, I'm sorry. And the Defendant indicated that after he fired the shots at the victim, the victim turned around and looked at him. And the Defendant said, "At that point I knew I couldn't let him walk away. I knew I couldn't

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let that man live."

And we also heard testimony today from Mr. Anderson, who indicated that he saw a guy hopping down the sidewalk, Judge, which I would indicate is consistent with someone who had already been shot, as the medical examiner's report indicates two gunshot wounds to the buttock and one to the thigh.

Hopping down the sidewalk and then suddenly this vehicle is driving at him and crushes him into Mr. Jackson's porch. And then subsequently, Mr. Jackson testified that the individual that was driving the car appeared to be trying to move the car off of the porch more than once.

So, Judge, the people do believe that we have proven to a probable cause standard first-degree premeditated murder, as well as felony firearm, and the misdemeanor count of escape lawful custody.

And I would save any argument for rebuttal.

THE COURT: Ms. Barnwell?

MS. BARNWELL: Your Honor, I will object to a bind over on this case. I don't believe that the people have proven by a probable cause the elements of first-degree murder.

I think what's happened here is you have a situation where the corpus delecti; they're trying to

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prove the case against my client based on his statement.

THE COURT: Well, corpus delecti is satisfied by virtue of the medical examiner's report, which says that he died as a result of a homicide.

MS. BARNWELL: That is my argument and I'm sticking to it.

THE COURT: Okay.

If we're just saying things, go ahead.

MS. BARNWELL: All right, Judge. So, that's my argument with respect to that and I oppose the bind over. Thank you so much.

THE COURT: All right.

So I don't believe that there's any question that the complaining witness in this matter died as a result of a first-degree murder. The multiple gunshots he sustained as well as being run over by a vehicle, if that wasn't enough, to shoot a person to then run them down, there's ample enough time to reflect on your actions before you take them.

If there is any question whatsoever involved in this case, it would be the identity of the person who did so, but that's resolved by the Defendant's own statement. He tells us that he is the person who's involved in this, so there's really no

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question as far as this Court sees that the Defendant is responsible for the death of -- his name is --

MS. BICKERSTAFF: William Allen is the name of the victim.

THE COURT: William Allen.

The Court finds the charges contained in the complaint and warrant have been satisfied by a probable cause standard and the Court finds probable cause to believe this Defendant comitted them and the Court finds probable cause to believe this Defendant did them.

The Defendant will be bound over to the Wayne County Third Circuit Court criminal division for further proceedings. His arraignment on the information date and time will be February 2, 2023 at 9:00 a.m.

Bond will be continued.

MS. BARNWELL: Thank you, Judge.

(At 2:11 p.m., proceedings concluded.)

* * *

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REPORTER'S CERTIFICATE

I, COURTNEY PRZEADZKI, Certified Court Reporter in and for the State of Michigan, do hereby certify that the foregoing transcript was produced by me, and comprises a true and accurate transcript of the proceedings taken in the above-entitled matter.

Courtney Przeadzki

_____

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Dated: March 3, 2023

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STATE OF MICHIGAN
IN THE THIRD CIRCUIT COURT FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

Case No. 23-000412-01-FC
HON. WANDA A. EVANS

vs.

DAREN DONELL FENDERSON,

Defendant.

_____/

MOTION TO SUPPRESS STATEMENT AND REQUEST FOR EVIDENTIARY HEARING

NOW COMES the Defendant herein, DAREN DONELL FENDERSON, by and through his attorney, PATRICK E. NYENHUIS, and respectfully moves this Court for an order suppressing all oral and written statements made by the Defendant at the time of and subsequent to his arrest, Defense is specifically focusing on the re-initiation by the Officers, or in the alternative schedule an evidentiary hearing.

1. The government bears the burden of demonstrating both that the *Miranda* warnings were properly provided and that a suspect voluntarily, knowingly, and intentionally waived his rights. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of the interrogation can be used against him. *Miranda v. Arizona*, 384 U.S. 436, 479; 86 S Ct 1602, 1630; 16 L Ed 2d 694 (1966).

2. Once challenged, it is the prosecutor's burden to establish by a preponderance of the evidence that the defendant voluntarily made the statement. *People v. Etheridge*, 196 Mich. App. 43, 57; 492 NW2d 490 (1992).

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3. Whether a waiver is coerced involves "two distinct dimensions." *Moran v. Burbine*, 475 U.S. 412, 421; 106 S Ct 1135; 89 L Ed 2d 410 (1986).
4. The relinquishment of ones rights must be (1) voluntary in the sense that it is "the product of a free and deliberate choice rather than intimidation, coercion, or deception," and (2) the waiver must me made with "a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." *Colorado v. Spring*, 479 U.S. 564, 573; 107 S Ct 851, 857; 93 L Ed 2d (1987).
5. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. *Moran v. Burbine*, 475 U.S. 412, 421; 106 S Ct 1135, 1141; 89 L Ed 2d 410 (1986).
6. The waiver of the right to remain silent analysis must be bifurcated, i.e., considering (1) whether the waiver was voluntary, and (2) whether the waiver was knowing and intelligent." *People v. Eliason*, 300 Mich. App. 293, 304; 833 NW2d 357, 366 (2013) *citing People v. Tierney*, 266 Mich. App. 687, 707; 703 NW2d 204 (2005).
7. Government coercion or state action was necessary for a determination that a confession or waiver of *Miranda* rights was involuntary under federal constitutional law. *Colorado v. Connelly*, 479 U.S. 157, 167; 107 S Ct 515; 93 L Ed 2d 473 (1986).
8. Whether the waiver was voluntary depends on the absence of police coercion; the defendant's waiver must be his or her own "free and deliberate choice," rather than the product of intimidation. *Eliason*, at 304.
9. The voluntariness of a defendant's statements is determined by examining the totality of the circumstances surrounding the interrogation. A court should consider factors such as:

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a. The duration of the defendant's detention and questioning;

b. The age, education, intelligence, and experience of the defendant;

c. Whether there was unnecessary delay of the arraignment;

d. The defendant's mental and physical state;

e. Whether the defendant was threatened or abused; and

f. Any promise of leniency. *People v. Gipson*, 287 Mich. App. 261, 265; 787 NW2d 126, 129-30 (2010)

10. Coercion is defined as the "[c]ompulsion of a free agent by physical, moral, or economic force or threat of physical force." Coercion, Black's Law Dictionary (11th ed. 2019).

11. Coercion may take many forms; it "may be actual, direct, or positive, as where physical force is used to compel act against one's will, or implied, legal or constructive, as where one party is constrained by subjugation to other to do what his free will would refuse." *People v. Premo*, 2013 Mich. App. 406, 410-11; 540 NW2d 715 (1995).

12. Coercion can also exist where those in an authoritative position exploit the "special vulnerability" of those under their general control. *People v. Reid*, 233 Mich. App. 457, 471-72; 592 NW2d 767 (1999).

13. The United States Supreme Court has said that:

> "[T]his court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition. A number of cases have demonstrated, if demonstration were needed, that the efficiency of the rack and thumbscrew can be matched, given the proper subject, by more sophisticated modes of 'persuasion.'" *People v. Manning*, 243 Mich. App. 615, 625; 624 NW2d 746, 751 (2000).

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14. An Advice of Rights is required when an interrogation occurs when a person is subjected to either express questioning or to words or actions, other than those normally attendant to arrest and custody, reasonably likely to elicit incriminating responses. *Rhode Island v. Innis*, 446 US 291; 100 SCt 1682; 64 L.Ed2d 297 (1980); *People v. Paintman*, 412 Mich 518, 529 (1982); *People v. Anderson*, 209 Mich App 527, 532-533 (1995).

15. "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked." *Miranda*, 384 U.S. at 473-474.

16. Per the discovery, Defense counsel believes Defendant exercised his rights under *Miranda*, when he told Detective Beasley would only speak with a lawyer present at about 2:30:46pm on August 3, 2022, but after an extended period of time (from about 2:30:46pm until 5:14:55pm), Detective Beasley and two patrol, fully uniformed, officers entered the interrogation room and had an interaction with the Defendant, where Defendant was told that he could not have a lawyer at that time because none were available and the Defendant did not have any money.[1]

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[1] Defense counsel is trying to be as accurate as possible in recounting the interactions, but the video is the best evidence and should be played at any evidentiary hearing.

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17. After that request for information by the Defendant of where his lawyer was, Detective Beasley said something to the effect that after the Defendant said he wanted a lawyer, the Detective was not able to talk to him and that the "story you gave is the story we are going to go with."

18. This interaction was not initiated by the Defendant. In *Edwards v. Arizona*, 451 U.S. 477 (1981), the United States Supreme Court held that after an accused has exercised his right to remain silent, or right to have a lawyer present for all interactions with the police, the police must honor that request unless the accused initiates further communication, exchanges, or conversations with the police.

19. When a suspect has initiated the dialogue, *Edwards* makes clear that the right to have a lawyer present can be waived:

> "If, as frequently would occur in the course of a meeting initiated by the accused, the conversation is not wholly one-sided, it is likely that the officers will say or do something that would clearly be 'interrogation.' In that event, the question would be whether a valid waiver of the right to counsel and the right to silence had occurred, that is, whether the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities." *Edwards*, 451. U.S. at 486, n. 9.

20. The question is whether the Defendant initiated contact with the police after he invoked his *Miranda* rights.

> "[T]here are undoubtedly situations where a bare inquiry by either a defendant or by a police officer should not be held to "initiate" any conversation or dialogue. There are some inquiries, such as a request for a drink of water or a request to use a telephone, that are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation. Such inquiries or statements, by either an accused or a police officer, relating to routine incidents of the custodial relationship, will not generally "initiate" a conversation in the sense in which that word was used in *Edwards*." *Oregon v. Bradshaw*, 462 U.S. 1039, 1045 (1983).

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21. After Defendant requested a lawyer, he was left alone for an extended period. When the Detective, and other officers, finally did have contact with him again, the Defendant merely asked generalized questions relating to his custodial relationship, including "what's going on now" as the police are removing his handcuffs and inquiring into where his lawyer was. The Defendant did not re-initiate conversation relating directly or indirectly to the investigation until after Detective Beasley informed him that the "story you gave is the story we are going to go with."[2]

22. The police are not barred from having any further communication whatsoever with a defendant after he or she has invoked the right to counsel under *Miranda*. Rather, officers may engage in further communications that do not amount to express questioning or statements likely to elicit an incriminating response from the defendant. *People v. Kowalski*, 230 Mich App 464, 480-484; 584 NW2d 613 (1998).

23. "It is easy to believe that a suspect's later waiver was coerced or badgered when he has been held in uninterrupted *Miranda* custody since his first refusal to waive. He remains cut off from his normal life and isolated in a "police-dominated atmosphere," *Miranda v. Arizona*, 384 U.S. 436, 456, 86 S.Ct. 1602, 16 L.Ed.2d 694 [(1966)], where his captors "appear to control [his] fate," *Illinois v. Perkins*, 496 U.S. 292, 297, 110 S.Ct. 2394, 110 L.Ed.2d 243 [(1990)]." *Maryland v. Shatzer*, 130 S.Ct. 1213, 1216, 559 U.S. 98 (2010).

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[2] Again, Defense counsel is doing his best to capture what happened in the interrogation room, but knows that the video is the best evidence and expects that to be played for the court at an evidentiary hearing.

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24. "Any subsequent waiver that has come at the authories' behest, and not at the suspect's own instigation, is itself the product of the 'inherently compelling pressures' and not the purely voluntary choice of the suspect." *Arizona v. Roberson*, 486 U.S. 675, 68`, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988).

25. "Under this rule, a voluntary *Miranda* waiver is sufficient at the time of an initial attempted interrogation to protect a suspect's right to have counsel present, but it is not sufficient at the time of the subsequent attempts if the suspect initially requested the presence of counsel. The implicit assumption, of course, is that the subsequent requests for interrogation pose a significantly greater risk of coercion. That increased risk results not only from the police's persistence in trying to get the suspet to talk, but also from the continued pressure that begins when the individual is taken into custody as a suspect and sought to be interrogated – pressure likely to "increase as custody is prolonged." *Minnick, v. Mississippi*, 498 U.S. 146, 153, 111 S.Ct. 486, 112 L.Ed. 2d 489 (1990)." *Maryland v. Shatzer*, 130 S.Ct. 1213, 1220, 559 U.S. 98 (2010).

26. Interrogation is either express questioning or its functional equivalent. *Rhode Island v. Innis*, 446 U.S. 291, 300-301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). The functional equivalent of interrogation is defined as "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* This definition "focuses primarily upon the perceptions of the suspect, rather than the intent of the police," but is an objective standard such that the police "cannot be held accountable for the unforeseeable results of their words or actions." *Id.*

27. At the *Walker Hearing*, the Prosecution should be required to produce any and all Police Officers present or involved in questioning Defendant, along with copies of any and all written reports, activity logs, arrest cards, handwritten notes, audio and/or video tapes and any other information regarding Defendant or the above allegations and the surrounding circumstances.

Respectfully submitted,

/s/ Patrick E. Nyenhuis
PATRICK ERWIN NYENHUIS P76343
Attorney for Defendant
1446 Kensington Avenue
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Cell: 313-244-3500

DATE: May 31, 2023

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STATE OF MICHIGAN
IN THE THIRD CIRCUIT COURT FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

Case No. 23-000412-01-FC
HON. WANDA A. EVANS

vs.

DAREN DONELL FENDERSON,

Defendant.

_____/

BRIEF FOR MOTION TO SUPPRESS STATEMENT AND REQUEST FOR EVIDENTIARY HEARING

NOW COMES the Defendant, Daren Donell Fenderson, through his attorney, Patrick E. Nyenhuis, and requests that this Honorable Court suppress the Defendant's statement or schedule this for an evidentiary hearing based on the following:

I. FACTS

Early in the morning on August 1, 2022, Officers went to a scene in Detroit (12910 Greiner St.) and began investigating a potential homicide. On August 2, 2022, Defendant Fenderson was arrested and brought to Detroit Public Safety Headquarters where he was read his constitutional rights, which he waived, prior to the Detectives questioning the Defendant, they determined that the Defendant was unable to make a statement on that date.

On August 3, 2022, Defendant was again interrogated. This interrogation was conducted by Detective Beasley and Detective Williams. Defendant was provided his *Miranda* Rights, waived them and gave a statement before requesting an attorney. After Defendant requested his attorney, the Detroit Police Officers attempted to locate an attorney for the Defendant and left

him alone for about an hour and forty-five minutes, before checking on the Defendant and re-initiating conversation with the Defendant.

The Detroit Police Department re-initiated any conversations with the Defendant when Detective Beasley and two uniformed officers entered the interrogation room and interacted with the Defendant. It was during this interaction where Defendant asked where his lawyer was located and while he was in the process of being handcuffed by the uniformed officers, Defendant inquired into what the uniformed officers were doing and his custodial relationship after he was not provided an attorney.

After inquiring into his custodial status, Defendant was informed that Detective Beasley could not talk to him without an attorney and that the "story [the Defendant] gave is the story we are going with." This statement constituted the functional equivalent of express questioning. Again defense counsel is trying to be as accurate as possible, but the best evidence would be the recording of the interrogation.

After the Defendant was told that the story he gave is the story the police were going with, Defendant again asked what was going on and how he did not understand what was going on prior to being told that Defendant "if you want to talk to me, [Detective Beasley], you can say that you want to talk without an attorney." At that time Defendant's will was broken, the interrogation had been re-initiated by the Detroit Police Department, and Defendant said that he just wanted to get it over with.

After Defendant stated that he wanted to get it over with, the Detroit Police Department's Officers then had Detective Paul Brown enter into the interrogation room and provide the *Miranda* Rights to the Defendant again. Defendant waived those rights again and gave an incriminating statement.

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II. LAW

The use of an accused individual's involuntary statements is forbidden by the due process clauses of The Michigan and United States Constitutions. US Const, Ams V, XlV; Michigan Const. 1963, Art l, 17. *Mincey v Arizona*, 437 US 385,398 (1978); *Brown v Mississippi*, 297 US 278,287 (1936); People v Conte, 421 M.704,722 (1984).

The prosecution's burden is to show by a preponderance of the evidence that the defendant's statements were voluntarily made. *People v Sears*, 124 MA 735,738 (1983). This Honorable Court must make an independent determination of the statement's voluntariness. *People v Inman*, 54 MA 5,8 (1974).

The United States Supreme Court has discussed several issues underlying this fundamental restriction against the use of involuntary confessions; including ensuring the trust worthiness of evidence, deterrence of questionable police conduct, and preserving the individual's "freedom of will." *Brady v United States*, 397 US 742 (1970). Yet, the appropriate test of voluntariness is the totality of the circumstances. *Brown v Illinois*, 422US 590, 603-4 (1975); *People v Cipriano*, 431 M 315 (1988). Our Courts have defined this test as follows:

> "Whether, considering the totality of all the surrounding circumstances, the confession is the product of an essentially free and unconstrained choice by its maker, or whether the accused's will was overborne and his capacity for self-determination was critically impaired …." The line of demarcation is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps propel the confession." Id. at (333-4).

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Decisions have focused on the defendant's state of mind and the effect of surrounding circumstances on the ability to make a rational judgment. *Conte*, 421 M at 704. A non-exhaustive list of circumstances courts consider includes length and conditions of detention; the defendant's age and mental and physical state; mentality and prior experience with the criminal justice system; nature of inducements offered; the police officer's conduct; and the adequacy and frequency of the advice of rights. Id. See *People v DeLisle*, 183 M A 713; 455 NW 2d 401 (1990). And more than a century ago the Michigan Supreme Court recognized that confessions extracted by psychological coercion of weak-minded defendants are inadmissible. *People v Flaff*, 40 Mich 706, 709 (1879). Modern decisions have treated the defendant's mental condition as a factor to be weighed in the voluntariness analysis. *People v Price*, 112 Mich App 791, 797; 317 NW2d 249 (1982); *People v Smith*, 124 Mich App 723, 725; 335 NW2d 137 (1983).

In *People v DeLisle*, supra, the Court affirmed a finding that a confession extracted through psychological coercion was involuntary. Relying on *Leyra v Denno*, 347 US 556, 559-560; 74 S Ct 716; 98 L Ed 948 (1954), the Court noted that even 90 minutes of psychological coercion from a trained psychiatrist could render a confession involuntary *Delisle*, 183 Mich App 721-722.

Considering the totality of the circumstances – the time duration and conditions of the interrogation; Defendant's mental and physical state; his inability to resist and exercise self-control over the promises of leniency – the statement was involuntary and should not have been admitted. See *People v Price*, 112 Mich App 791; 317 NW 2d 249 (1982); *People v. Smith*, 124 Mich App 723; 335 NW2d 137 (1983).

The controlling case on the issue of Defendant's voluntarily waiving of his *Miranda* Rights after requesting an attorney is *Edwards v. Arizona*, 451 U.S. 477 (1981). The critical facts of *Edwards* is that "Edwards asserted his right to counsel and his right to remain silent on January

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19, but that the police, without furnishing him counsel, returned the next morning to confront him and as a result of the meeting secured incriminating oral admissions." *Id.* at 482.

The United State Supreme Court found that "without making counsel available to Edwards, the police returned to him the next day. This was not at his suggestion or request." *Id.* at 487. The court said that Edward's "statement, made without having had access to counsel, did not amount to a valid waiver and hence was inadmissible." *Id.* "Had Edwards initiated the meeting on January 20, nothing in the Fifth and Fourteenth Amendments would prohibit the police from merely listening to his voluntary, volunteered statement and using them against him at the trial." *Id.* at 486.

Unfortunately, there is more to the analysis than whether or not the Defendant requested an attorney and if the police honored that request. After a person requests an attorney *Edwards* held that a Defendant "is not subject to 'further interrogation' in the absence of counsel, unless the accused himself 'initiated' further communication. Thus the holding in *Edwards*, rests upon the concepts of 'initiation' and 'interrogation.'" *People v. Kowalski*, 584 N.W.2d 613, 619, 230 Mich. App. 464 (1998). "For the purposes of *Miranda*, interrogation refers to express questioning or its 'functional equivalent.' . . . The 'functional equivalent' of interrogation includes '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 from the suspect.'" *Id.* (internal citations omitted). "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." *Edwards*, 451 U.S. at 484.

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In an unpublished case, *People v. Norton*, unpublished, Docket No. 356835 (December 16, 2021), the Court of Appeals explained what it means to initiate further communication. The court, in quoting *Edwards*, stated "an officer may again interrogate a suspect who has asserted the right to remain silent, without first providing the suspect with the requested lawyer, if the suspect 'initiates further communication, exchanges, or conversations with the police." *Id.* (internal citations omitted). The Court of Appeals analyzed the proper application of the *Edwards* rule in *Oregon v. Bradshaw*, 462 U.S. 1039; 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983), "even after a defendant reinitiates a conversation with police – the burden remains on the prosecution to show that the defendant waived his Fifth Amendment rights. *Id.* The Supreme Court, in *Oregon v. Bradshaw*, "explained that the relevant question was whether the defendant validly waived his right to counsel and the right to remain silent under the totality of the circumstances, which included the necessary fact that *the accused, not the police officer, reopened the dialogue*." *Id.* (emphasis added).

The court analyzed the *Edwards* rule and found it required two inquiries. First, did the Defendant invoke his right to counsel and then, fi the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) made a knowing and intelligent waiver of the right he had invoked. *Id.* quoting *Edwards*, 1044-1046.

In *Oregon v. Bradshaw*, 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983), the United States Supreme Court analyzed a suspect initiating a conversation with the police after requesting a lawyer. The court held that "after the right to counsel had been asserted by an accused, further interrogation of the accused should not take place "unless the accused himself initiates further communications, exchanges, or conversations with the police. *Id.* citing *Edwards*, 451 U.S. at 485.

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The court restated that "before a suspect in custody can be subjected to further interrogation after he requests an attorney, there must be a showing that the "suspect himself initiates dialogue with the authorities." *Id.* citing *Wyrick v. Fields*, 459 U.S. 42 (1982) (*per curiam*).

The court in *Oregon v. Bradshaw*, seemed to analyze a specific quotation:

> There can be no doubt in this case that in asking, "Well, what is going to happen to me now?", respondent "initiated" further conversation in the ordinary dictionary sense of that word. While we doubt that it would be desirable to build a superstructure of legal refinements around the word "initiate" in this context, there are undoubtedly situations where a bare inquiry by either a defendant or by a police officer should not be held to "initiate" any conversation or dialogue. There are some inquiries, such as a request for a drink of water or a request to use a telephone, that are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation. Such inquiries or statements, by either an accused or a police officer, relating to routine incidents of the custodial relationship, will not generally "initiate" a conversation in the sense in which that word was used in *Edwards*. *Id.* at 1045.

The court held that "[a]lthough ambiguous, the respondent's question in this case as to what was going to happen to him evinced a willingness and a desire for a generalized discussion about the investigation; it was not merely a necessary inquiry arising out of the incidents of the custodial relationship. The *Oregon v. Bradshaw* case is different from our present case as the Defendant asked about what was going on as two uniformed officers entered into the interrogation room and were removing the Detective's handcuffs and re-cuffing the Defendant. Defendant, as is seen on the video, was merely inquiring about the custodial relationship after being left alone for an extended period of time.

A case that is persuasive, but not binding, *Martinez v. Cate*, 903 F.3d 982 (2018), helped explain what direct questioning was, restating that "*Innis* defined 'interrogation' as either express questioning or its functional equivalent. [*Innis*], 466 U.S. at 300-301."

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Innis recognizes that words and actions that are normally attendant to arrest and custody should be excluded from the definition of interrogation. *Id.*

Martinez v. Cate involved a statement of "What am I being booked under?" by a Defendant and then analyzed what happens when a Detective states "[a]ll I wanted was your side of the story. That's it. OK. So, I'm pretty much done with you then. Um, I guess I don't know another option but to go ahead and book you. OK. Because . . ." *Id.* at 994. The court found that the "clearest evidence of the interrogating nature of [the Detective's] statements is their plain language. By stating, "your [sic] going to be booked for murder *because* I only got one side of the story," [the Detective] causally links [Defendant's] assertion of his constitutional right to the detective's decision to book the suspect for murder." *Id.*

The court found that the "obvious implication of that linkage is that if [the Defendant] were to give his side of the story, by waiving his just-invoked right to counsel, he will not be booked, or not be booked for murder. At the very least the detective should know that his statement would be perceived this way and was "reasonably likely to elicit an incriminating response." See *Innis*, 446 U.S. at 302." *Martinez v. Cate*, at 995.

The court could not ignore the implications of the Detective's statement because "the *Innis* test explicitly calls for considering the "perceptions of the suspect, rather than the intent of the police. 446 U.S. at 301 . . ." *Id.* The analyzing court must still consider how a suspect would perceive the statements. The court found that the Defendant's statement of "What am I being booked under" could not be interpreted as a re-initiation of the conversation. *Id.* at 996. The detective's statements linking the Defendant's

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booking "to his invocation of the right to counsel, and the detective's comments that [the Defendant] would need to call his own attorney from jail are exactly the type of badgering that *Edwards* was crafted to prevent." *Id* at 997.

In *Maryland v. Shatzer*, 559 U.S. 98, 130 S.Ct. 1213 (2010), the court analyzed *Edwards* finding that "*Edwards* created a presumption that once a suspect invokes the *Miranda* right to the presence of counsel, any waiver of the right in response to a subsequent police attempt at custodial interrogation is involuntary. *Edwards*' fundamental purpose is to '[p]reserve[e] the integrity of an accused's choice to communicate with the police only through counsel,' *Patterson v. Illinois*, 487 U.S. 285, 291; 108 S.Ct. 2389; 101 L.Ed.2d 261, by 'prevent[ing] police from badgering [him] into waiving his previously asserted *Miranda* rights." *Michigan v. Harvey*, 494 U.s. 344, 350; 110 S.Ct. 1176, 108 L.Ed 293." *Id*. "It is easy to believe that a suspect's later waiver was coerced or badgered when he has been held in uninterrupted *Miranda* custody since his first refusal to waive. He remains cut off from his normal life and isolated in a "police-dominated atmosphere," *Miranda v. Arizona*, 384 U.S. 436, 456; 86 S.Ct. 1602, 16 L.Ed.2d 694, where his captors "appear to control [his] fate," *Illinois v. Perkins*, 496 U.S. 292, 297; 110 S.Ct. 2394, 110 L.Ed.2d 243.

III. **ARGUMENT**

This is clearly a case that requires an *Edwards* analysis followed by an *Oregon v. Bradshaw* analysis. It is acknowledged by the officers, as they are interrogating the Defendant, that the Defendant requested a lawyer. After the Defendant requested a lawyer, the Detroit Police Officers then left the interrogation room and left the Defendant alone in the same room for an extended period of time. After an extended period of time,

Detective Beasley and two uniformed officers entered the room. At this time, any interaction was initiated by the police who had Defendant in custody. Defendant did not knock on the door and request to speak to anyone or do anything else until the officers entered the interrogation room.

While the Defendant was interacting with the uniformed officers, he merely asked what was going on and where was his lawyer. That did not re-initiate the interrogation or express a want to re-initiate the conversation. The fact that the Detective told the Defendant that there was no attorney available and that the "story you gave is the story we are going to go with" is similar to *Martinez v. Cate*, where the federal court suppressed that defendant's statement when the Detective said that he "only got one side of the story."

In this present case, there was no break in custody, or location, between Defendant's request for an attorney and when the police re-entered the room to transport the Defendant. It was at this time, when Defendant actually inquired into his right to have an attorney present when Detective Beasley stated that the Defendant does not get a lawyer. This was after Defendant was left alone for an extended period and had requested an attorney. After being told that the Defendant does not get a lawyer, he asks what is going on with his current status as he was at the Detroit Public Safety Headquarters and had spent the previous night at the Detroit Detention Center.

This is clearly a violation of the *Edwards* analysis and the *Oregon v. Bradshaw* analysis. After a Defendant requests an attorney, the only further communication with the Defendant should be booking questions and the Defendant should never have been

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told that he does not get an attorney, despite the Defendant validly exercising his *Miranda* Rights.

Defendant, after requesting an attorney, was not released from custody and his waiver of that right in response to a subsequent police attempt at custodial interrogation is involuntary. The Defendant's right to speak to the police only through counsel was infringed when the police went back into the interrogation room and said that the Defendant does not get an attorney. Without a break in custody and being left in the interrogation room, the Defendant was coerced or badgered into waiving his previously asserted *Miranda* rights. The Defendant was cut off from his normal life and isolated in a police-dominated atmosphere, first being arrested and transported to the Detroit Detention Center, then being transported to the Detroit Public Safety Headquarters, then back to the Detroit Detention Center for less than 24 hours, and finally back to the Detroit Public Safety Headquarters where the second and third *Miranda* Rights were given.

The mere fact that the Defendant believed that he could make a statement that would prevent him from going back to the Detroit Detention Center, shows how the pressures coerced him into making a statement. When the Detective informed the Defendant that the "story you gave is the story we are going to go with," the Detective should have known that telling someone that the story they gave is the story the police are going to use to maintain his custody would elicit a response.

Detective Beasley did the functional equivalent of express questioning. The definition of interrogation "focuses primarily upon the perceptions of the suspect, rather than the intent of the police," but is an objective standard such that the police "cannot be held accountable for the unforeseeable results of their words or actions." *Rhode Island v.*

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Innis, 446 U.S. 291, 300-301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). It was foreseeable that after being told that the Defendant does not get an attorney and that the police are going with that story that the Defendant would respond to Detective Beasley's statements.

IV. CONCLUSION

WHEREFORE, Defendant asks that this Honorable Court suppress Defendant's statement after he exercised his Constitutional right to have an attorney present during questioning, or in the alternative, order an evidentiary hearing.

Respectfully submitted,

/s/ Patrick E. Nyenhuis
PATRICK ERWIN NYENHUIS P76343
Attorney for Defendant
1446 Kensington Avenue
Grosse Pointe Park, MI 48230
Cell: 313-244-3500

DATE: May 31, 2023

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STATE OF MICHIGAN
IN THE THIRD CIRCUIT COURT FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

Hon. Wanda Evans
Case No. 23-000412-01-FC

v.

DAREN DONELL FENDERSON,

Defendant.

Anna Bickerstaff P82215
Assistant Prosecuting Attorney
Wayne County Prosecutor's Office
1441 St. Antoine, 12th Floor
Detroit, MI 48226
313-224-7308

Patrick Nyenhuis P76343
Attorney for Defendant
1446 Kensington Ave
Grosse Pointe Park, MI 48230
313-244-3500

PEOPLE'S RESPONSE TO DEFENSE MOTION SUPPRESS STATEMENT AND REQUEST FOR EVIDENTIARY HEARING

NOW COME the People of the State of Michigan by and through KYM WORTHY, Prosecuting Attorney for the County of Wayne, ANNA BICKERSTAFF, Assistant Prosecuting Attorney, and ask this Honorable Court to DENY Defense Counsel's Motion to Suppress Statement.

Defense Counsel filed a Motion to Suppress on June 2, 2023. The People do not disagree with the caselaw supplied therein, but believe pertinent facts were not included, as well as misapplied to the caselaw.

In this matter, the homicide incident occurred on August 1, 2022. The Defendant was taken into custody on this matter on August 2, 2022. The Defendant was transported to Detroit

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Police Department (DPD) Headquarters for an interrogation to be conducted. On August 2, 2022, the Defendant was read his Miranda Rights, but it was apparent to the police officers that the Defendant was exhausted, and the Defendant was taken back to the Detroit Detention Center (DDC) without a statement being given. On August 3, 2022, the Defendant was transported from the DDC back to DPD Headquarters for an interrogation to be conducted. An interrogation occurred as follows:

At 12:25 PM	The Defendant is brought into the interrogation room
At 12:54 PM	Defendant is brought a bottle of water
At 1:00 PM	Detectives Beasley and Williams enter the room.
At 1:01 PM	Detectives go over Defendant's Miranda Rights. Defendant verbally confirms he understands each right.
At 1:01:55 PM	Detectives collect defendant's information: spelling on first name and last name, age, date of birth, highest level of education, some criminal history of the defendant,
At 1:02 PM	Defendant reviews Miranda form and initials next to each right
At 1:03:08 PM	Detectives confirms with the Defendant he has not been promised or threatened to give a statement. Defendant says yes. The Detective asks if the Defendant wishes to speak with them, the Defendant says yes. Defendant signs the Miranda form.
At 1:03:55 PM	Defendant: I have a question. Is it best to have a lawyer here? Detective: that is up to you, sir Defendant: I mean, I don't know. Is it going to take long for one to get here? Detective: I have no idea. Do you have a lawyer? Defendant: No. I see the one where it say one will be appointed, but I don't want to take up yall time, and I damn aint trying to take up more of my time so I might as well just answer the questions here and get this over with. Detective: so you're willing to talk to us without a lawyer? Defendant: yeah, I mean, there nothing to do yall want the truth, I'll tell yall the truth we don't need nobody else to witness that
1:06:24 PM	Defendant: just so you know, I have a stutter problem, want to put that out there
1:06-2:29 PM	Defendant talks with police
2:29:49 PM	Defendant: how about this, I'll tell yall what you want to hear, can I have a lawyer first? Det: you want a lawyer? Defendant: yeah Det: do you have a lawyer?

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	Defendant: no, yall is going to appoint one right? Det: ok. Who retained you last time? What judge-not what judge-what lawyer? You have the house lawyer? You get a paid lawyer? Defendant: I haven't been in trouble in a long time so idk. Det: ok. Just hang tight. Defendant: How long this going to take? Det: don't know. It might take a minute, could be quick. Gotta make phone calls. (detective exits)
2:30-3:13 PM 2:36 PM 2:38 PM	Defendant sits in room Defendant asks for a coke and a cigarette Defendant is given a Coke
3:13 PM	Defendant goes to bathroom
3:16-4:49 PM 4:49 PM	Defendant sits in room Defendant goes to the bathroom
5:14 PM	Detective Beasley walks in with uniform officer. Officer handcuffs Defendant behind his back. Defendant: Wait Beasley: we don't got one, so D: wait, huh? Beasley: you don't have a lawyer. you got one? Defendant: No, do Beasley: We tried to call one, aint no one in the building, and you aint got no money, so Defendant: Yeah I do. The money I came in with, you cant use that? Beasley: No Defendant: what's going on? (Uniform officer taking Defendant out of the room) Beasley: you said you wanted an attorney, I cant talk to you without an attorney, so the story you gave is the story we have to go with. (Uniform officer patting Defendant down) (Beasley cleaning up interview room) Defendant: so confusing. Beasley: what you confused about? (Uniform officer guides Defendant out of the room) Defendant: I don't know what's going on from this point, you didn't tell me nothing. Beasley: what's going to happen now, were going to take you back to the DDC, and were going to submit a warrant, and the prosecutor is going to review it. Alright? Defendant: I'm not sure what all that mean Beasley: you requested an attorney, I cant talk to you anymore about the case. You wanted to talk, you just say, you wanted to talk to an attorney, I you say you want an attorney, I cant talk to you by law. Defendant: I just want to get this over with, you trying to talk, ill talk, I just want to get this over with. That's it. I just want to get this over with. Beasley: like I said, I can go over your rights again with you, you agree to

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	talk without an attorney… Defendant: I agree to talk without an attorney. I agree. I just want to get this over with. 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 you originally wanted to talk to me, without an attorney present, ill talk to you, but you gotta understand it gotta be something you want to do. Defendant: yeah Beasley: I don't want you to feel like you're forced to Defendant: OK Beasley: is that something you want to do? Defendant: yes Beasley: (has uniform officer take handcuffs off)
5:19 PM	Sgt Brown enters Brown: I'm independent from the investigation, I have no idea what's going on. Defendant: This cannot be right. This case is not going right for me. I request everything and its not going right. I … Brown: well check this out, you'll talk with the detectives about that, I just gotta reestablish your rights so you can speak to them, ok, cause you said you want to talk to them again Defendant: yeah Brown gets Defendant's information: name, date of birth,
5:20:11 PM	Brown reads Miranda rights. Defendant nods head after each right is read
5:21:06 PM	Defendant initials Miranda rights and signs form
5:21:37 PM	Brown: and you want to talk to them freely? Defendant: yeah I want to talk to them.
5:22:04 PM	Defendant: this is bull shit, I swear Brown: well, when they come in, just, like I said, I'm independent from it, Defendant: I just got so much….. I didn't even do anything…. Oh no Brown: well just talk to them about it, man. Be open and honest Defendant: I literally just left the streets alone, I got my own (inaudible), I been trying, every time I try to do good something else happens. I cant believe this shit I didn't do Brown: the one thing is this, get through this right here, first, and you can always work on the rest. Defendant: thank you. Its hard. You know as well as I do, its hard. I'm tryin
5:22:45	Brown: I know how it go. The main thing is, be open and honest and clear. And if there is something you don't understand, say that. I'm going to go out there and get them. I just needed to reestablish your rights and at 5:21 you said you wanted to talk with them ok? Defendant nods head Brown: ok, I'll be right back Defendant: (cries) I got so much to lose.

5:24 – 5:52	Defendant talks with Detectives Beasley and Det Williams.

Sargent Reginald Beasley testified at the preliminary examination in this matter. He testified that on August 3, 2022, he read the Defendant his Miranda rights, the Defendant acknowledged them, and the Defendant initialed and signed the Miranda form. PE TX p. 23. The Defendant appeared to be understanding everything Sgt. Beasley was asking. PE TX. 23-24. The Defendant did not appear to need any medical attention nor did the Defendant appear to be under the influence at this point. PE TX p. 24. The Defendant was offered food and drink during the interrogation on August 3. *Id.* Sgt. Beasley had established the Defendant's education history. *Id.* Sgt. Beasley testified that after the Defendant's rights were read, the Defendant spoke with police, then requested an attorney. PE TX p. 31.

When the Defendant requested an attorney, Sgt. Beasley made efforts to obtain an attorney. PE TX p. 30. Sgt. Beasley testified that after being unsuccessful in obtaining an attorney, they returned to the interrogation room, where the Defendant initiated conversations with the Detective and stated he wanted to continue to talk to the Detectives. *Id.* Even once the Defendant stated he wanted to keep talking with the Detectives, Sgt. Beasley stepped out of the room and sent in Sgt. Brown to reestablish the Defendant's Miranda rights. *Id.* Sgt. Beasley testified that once the Defendant requested an attorney, he did not speak with the Defendant again until his Miranda rights were reestablished. Id.

Sargent Paul Brown testified at the preliminary exam on this matter and testified that he spoke with Sgt. Beasley regarding the Defendant's interrogation. Sgt. Brown testified that he made several efforts to try to obtain an attorney for the Defendant after he requested one. PE TX p. 43. Sgt. Brown testified that he contacted Notification and Control to try to get a show-up

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attorney, which was unsuccessful, so he made additional efforts to obtain an attorney for the Defendant. PE TX. P 43-44.

The preliminary exam testimony is corroborated by the interrogation video, which the People will submit to this Court as Exhibit 1. The People have attached the first Advise of Rights form from August 3, 2022 as Exhibit 2, and the second Advise of Rights form from August 3, 2022 as Exhibit 3. All three of these exhibits were admitted as exhibits at the preliminary exam.

Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waives his Fifth Amendment rights. *Miranda v. Arizona,* 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966); *People v. Garwood,* 205 Mich.App. 553, 555–556, 517 N.W.2d 843 (1994). In a case soon after *Miranda*, the Supreme Court addressed what happens when a person in custody asserts his right to counsel. The Court explained in *Edwards v. Arizona*, 451 U.S. 477, 484-485, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981) that an accused, "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." The Court emphasized that it was inconsistent with *Miranda* to allow police officers, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." *Id.* There is, however, an exception to this rule—an officer may again interrogate a suspect who has asserted the right to remain silent, without first providing the suspect with the requested lawyer, if the suspect "initiates further communication, exchanges, or conversations with the police." *Id.*

As a general principle, a 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. People v. Kowalski*, 230 Mich. App. 464, 479, 584 N.W.2d 613, 620

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(1998). Communications between police and a suspect in custody are commonplace. *Id.* "For example, police do not impermissibly initiate renewed interrogation by engaging in routine conversations with suspects about unrelated matters. And police legitimately may inquire whether a suspect has changed his mind about speaking to them without an attorney." *Id.* "It is not unusual for a person in custody who previously has expressed an unwillingness to talk or a desire to have a lawyer, to change his mind and even welcome an opportunity to talk. Nothing in the Constitution erects obstacles that preclude police from ascertaining whether a suspect has reconsidered his original decision." *Id.*

In *People v. McCuaig,* 126 Mich.App. 754, 759–760, 338 N.W.2d 4 (1983), the Michigan Court of Appeals made a similar ruling in regard to police statements to a suspect who has requested a lawyer. In *McCuaig,* the defendant invoked his right to an attorney while being questioned. *Id.* The officer responded that he would comply with the request and that no further questioning would be conducted. *Id.* However, the officer then advised the defendant of the nature of the charge against him and described the circumstances that led the police to believe that the defendant was the culprit. *Id.* The defendant responded by stating that the officer had been fair with him and that he had changed his mind and wished to give a statement. *Id.* This Court held that the defendant's statement was not made in response to further interrogation by the police: The Michigan Court of Appeals held that "the 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." *People v. Kowalski*, 230 Mich. App. 464, 482–83, 584 N.W.2d 613, 621 (1998) (citing *People v. McCuaig,* 126 Mich.App. 754, 759–760 (1983),

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Here, Defense Counsel claims that the Detectives initiated contact with the Defendant after the Defendant asked for a lawyer. This is incorrect. Defense counsel also claims the statement given after the Defendant asked for a lawyer was coerced. This is incorrect.

As we can see in the video, after the Defendant asked for a lawyer, the questioning ended immediately. The officers left the room and began to try to find a lawyer for the Defendant. Defense Counsel claims in their motion that the Defendant was left in the room for an "extended period of time." This is directly due to the Defendant's request for a lawyer. Both Sgt Beasley and Sgt Brown testified at the preliminary exam that they made efforts to try to obtain a lawyer for the Defendant. When they were not able to obtain an attorney, Sgt Beasley went back into the interrogation room with a uniform officer, notably, not Det Williams, in an effort to take the Defendant back to the DDC, not continue questioning. You can see in the video, the uniform officer handcuffs the Defendant and pats him down, while Sgt Beasley picks up the trash from the interrogation room. These are clearly actions consistent with ending an interview and not reinitiating questioning.

The Defendant then stated he was confused, so Sgt Beasley laid out the procedure or logistics of the process moving forward for the Defendant. Sgt Beasley does not reinitiate interrogation by explaining to the Defendant that they will use the statement the Defendant gave to police, he will go to the DDC, and the police will submit a warrant to the prosecutor's office. This is similar to the facts in in *People v. McCuaig*. In *McCuaig,* the defendant requested a lawyer, then officer then advised the defendant of the nature of the charge against him and described the circumstances that led the police to believe that the defendant was the culprit. *Id.* The defendant responded by stating that the officer had been fair with him and that he had changed his mind and wished to give a statement. The court ruled "the 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." *Id.* The same ruling applies in this case. The Defendant stated he was confused, so the police explained what would happen moving forward. Sgt Beasley explaining the judicial process does not constitute reinitiating the interrogation.

It isn't until the Defendant stated that he wished to talk with Detectives again that Sgt Beasley changed his course of action from preparing to transport the Defendant to the DDC. Even once the Defendant indicated he wished to speak with Detectives again, Sgt Beasley didn't immediately question the Defendant again, but brought in a law enforcement office with no knowledge of the investigation to administer the Defendant his Miranda Rights.

Sgt Brown indicated multiple times to the Defendant that he had no knowledge of this investigation and was acting as a neutral party to make sure the defendant understood his rights. Before Sgt Brown began reading over the Miranda Rights, he confirmed that the Defendant did in fact wish to speak with the Detectives again after requesting a lawyer. Sgt Brown read the Miranda Rights, the Defendant nodded his head that he understood. The Defendant then initialed and signed the Advice of Rights form indicating he understood his rights. Even after reading the Defendant his Miranda Rights and signing the document, Sgt Brown clarified with the Defendant two additional times that the Defendant did in fact wish to speak with Detectives without a lawyer. The Defendant confirmed that he wanted to speak with the Detectives without a lawyer at 5:21:36, 5:22. There is nothing in the record to indicate the Defendant's waiver wasn't voluntarily, knowingly, and intelligently made.

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Based on the interrogation video, exam transcripts, and Advice of Rights forms, it is clear the Defendant initiated contact with the Detectives and the Defendant's subsequent statement was voluntarily, knowingly, and intelligently given.

WHEREFORE, the People respectfully ask this Honorable Court to DENY Defense Counsel's Motion to Suppress Custodial Statement and DENY Defense Counsel's request for an evidentiary hearing.

Respectfully submitted,

/s/ Anna Bickerstaff
Anna Bickerstaff P82215
Assistant Prosecuting Attorney
Wayne County Prosecutor's Office

Date: 6/14/2023

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STATE OF MICHIGAN

THIRD JUDICIAL CIRCUIT COURT FOR THE COUNTY OF WAYNE

THE PEOPLE OF THE STATE OF MICHIGAN,

-vs- Case No. 23-000412-01

DAREN DONELL FENDERSON,

Defendant.

_____/

FINAL CONFERENCE and MOTION

BEFORE THE HONORABLE WANDA A. EVANS,

403 Frank Murphy Hall of Justice, 1441 St. Antoine,

Detroit, Michigan - Wednesday, September 6, 2023

APPEARANCES:

ANNA BICKERSTAFF, (P82215)
Wayne County Prosecutor's Office
1441 St. Antoine
Detroit, Michigan 48226-2302

Appearing on behalf of the People.

PATRICK NYENHUIS, (P76343)
1446 Kensington Avenue
Grosse Pointe, Michigan 48230

Appearing on behalf of the Defendant.

REPORTED BY:
Betty Sanders, CSR-2931
Certified Shorthand Reporter

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EXHIBITS

IDENTIFICATION MARKED ADMITTED

NONE

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Detroit, Michigan

Wednesday, September 6, 2023

1:16 P.M.

- - -

THE CLERK: This is Case Number 23-412, state of Michigan versus Daren Fenderson; scheduled for final conference.

Appearance for the record.

MS. BICKERSTAFF: Good afternoon, Your Honor. Anna Bickerstaff on behalf of the People, P82215.

THE COURT: Good afternoon.

MR. NYENHUIS: Good afternoon, judge. Patrick Nyenhuis, P76343, on behalf of Mr. Fenderson who is present in court today.

Could you state your name, sir?

THE DEFENDANT: Daren Fenderson.

THE COURT: Okay. Good afternoon. Today is the date that the Court will give its decision regarding the Defense Motion to Suppress Statement and Request For an Evidentiary Hearing.

Arguments have been made in this matter. The Court has reviewed the DVD. I was able to open it at home without a problem, my DVD. I was never able to open it up on -- through the evidence.com. We had IT and everyone here.

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So the Court having read the pleadings and heard arguments, the issue that this Court is addressing is whether or not the defendant waived his Miranda rights the second time prior to making admissions, and whether or not the officers honored the Miranda rights.

And viewing the video, it's clear that the defendant was in the interrogation room for at least two hours and that -- but although the police did provide the defendant with water and I believe it was a Coca-Cola and allowed -- and took him to the restroom when he needed, the defendant later on -- and later on he asked the question, "Do I need a lawyer? Maybe I need a lawyer." And they said, "I don't know. I can't answer that question basically before you." And then he did say, "I want a lawyer."

They left to find a lawyer for him, came back and indicated that they couldn't find a lawyer. They asked him if he had a lawyer, did he have money to pay for a lawyer.

Well they had read his Miranda rights and part of the Miranda rights says that you can have a lawyer and if you cannot afford a lawyer one would be appointed for you. Nothing about -- oh, you don't have one. This is what they said, "You don't have the money to pay for one. You don't have one. We don't have any available, so you

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don't get a lawyer." That is the part that really causes some conflict for this Court because -- and once they said that, they said, "Well, we'll just go with the statements that we have," the implication -- or the story that we have. That's what was said by the police officer.

And so to not hold off further interrogation of the defendant until they got a lawyer for him, but to say we don't have any, you don't get one and have a conversation about, oh, if you can't afford to pay for one, that implies that you might not get a lawyer. And that is the point where I believe the extra pressure was apply -- was applied in this case after many hours of interrogation-- please sit up, sir, sit up -- that this Court has some issue with.

It's a very thin line there, in my mind. Had they not made those statements about having to pay for a lawyer and we don't have one, applying the extra pressure, this Court would consider the length of time, the pressure applied and not consider suppressing that statement but for the police officers coming back and telling him that he doesn't -- they can't find a lawyer for him. And then they send another independent person, probably a police officer, in to re-Mirandize him or reinstate those Miranda so that he can initial again that he understood them and waive and to continue to talk with him. And that's the

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reinitiation of the conversation by the police.

And because of that it's difficult to say with a certainty that his statements were -- I'm sorry, his statements were reasonable and voluntarily made under those circumstances. And 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. Yeah, if he can't afford one, yes, they do. Stop --

MS. BICKERSTAFF: Judge --

THE COURT: I'm not even asking you a question, but I wish you would stop shaking your head while I'm ruling.

MS. BICKERSTAFF: Yes, Your Honor.

THE COURT: That's part of the Miranda rights. If you -- you can have a lawyer, but if you can't afford to provide -- if you can't afford to hire one, one will be provided to you. And they used that I can't -- but there is no lawyer for you I think as a scare tactic for him to start talking again and saying, well, I want to get this over with and then he started to talk.

Now I acknowledge again that it's a very fine line, but for that tactic I would probably be on the other side. But we don't want officers to come in and then start saying to those that are being detained and are

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arrested, after having read them their Miranda rights, that we don't have a lawyer for you. And as part of their scare tactic, in addition to saying we're gonna go with the story that we have that you're a stone-cold killer, that was the part that makes it not voluntary.

And for that reason, I'm going to suppress the statement.

MR. NYENHUIS: Thank you, judge.

MS. BICKERSTAFF: Judge, the People would ask for this Court to stay the proceedings at this time so the people can pursue appellate matters of the Court's ruling, if the Court would rule.

THE COURT: The Court will grant a stay.

MS. BICKERSTAFF: Thank you, judge.

MR. NYENHUIS: Judge, I was just gonna say I would object to a stay since we have a trial date that's in March I think of 2024. So I think there would be plenty of time for them to do their appeal, their interlocutory appeal.

THE COURT: Well she has plenty of time, but I'll grant the stay.

MS. BICKERSTAFF: Thank you, judge.

THE COURT: That concludes this hearing.

MS. BICKERSTAFF: Thank you.

(The proceedings were concluded at about 1:27

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P.M.)

- - -

C E R T I F I C A T E

STATE OF MICHIGAN)
)
COUNTY OF WAYNE)

I, Betty Sanders, CSR-2931, an Official Court Reporter of the Third Judicial Circuit Court for the County of Wayne, Criminal Division, State of Michigan, do hereby certify that the foregoing pages 1 through 8, inclusive, comprise a full, true and correct transcript of the proceedings and testimony taken in the matter of the People of the State of Michigan versus Daren Fenderson, on Wednesday, September 6, 2023.

/s/ Betty Sanders

Betty Sanders, CSR-2931

Dated this 6th day of October, 2023.

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STATE OF MICHIGAN THIRD JUDICIAL CIRCUIT WAYNE COUNTY	ORDER DENYING/GRANTING MOTION	CASE NO. 23-000412-01-FC

ORI MI- 821095J Court Address 1441 St. Antoine, Detroit MI 48226 Courtroom 403 Court Telephone No.

THE PEOPLE OF THE STATE OF MICHIGAN

vs.

Daren Donell Fenderson
Defendant

At a Session of Said Court held in The Frank Murphy Hall of Justice

at Detroit in Wayne County on 9/6/2023

PRESENT: Wanda A. Evans

A Motion for: SUPPRESS STATEMENT

having been filed; and

the People having filed and answer in opposition; and the Court having reviewed the briefs and records in the Cause and being fully advised in the premises;

IT IS ORDERED THAT the Motion for SAME ABOVE

be and

is hereby ☐ denied ☒ granted.

Wanda A. Evans

23-000412-01-FC
CRHO
Heard And Granted – Order Signed and Filed
973837

1014-3CC (08/07) – ORDER DENYING/GRANTING MOTION

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STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v **No. ******

DAREN DONELL FENDERSON,
Defendant-Appellee.

Third Circuit Court No. 23-000412-01-FC

PLAINTIFF-APPELLANT'S INTERLOCUTORY APPLICATION FOR LEAVE TO APPEAL

Filed under AO 2019-6

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Prosecuting Attorney
County of Waynea
JON P. WOJTALA
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Appendix E	Preliminary exam transcripts
Appendix F	Expedited request for 9/6 hearing transcript[1]
Appendix G	Interview video[2]

[1] Transcript will be filed as soon as it is received.
[2] This video appendix will be sent via first-class U.S. mail.

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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.[3] This suppression order is a non-final order that is appealable by leave.[4]

This Court has jurisdiction to consider the People's interlocutory application because it was timely-filed within 21 days of the trial court's suppression order and it contains all of the materials required by MCR 7.205(B)(1)-(5).[5] The People will suffer substantial harm awaiting final judgment if they are forced to go to trial without important evidence in this case.[6] As the Michigan Supreme Court made clear in *People v Richmond*, the People "should be able to meet the requirements" of MCR 7.205 "with little difficulty…because requiring the prosecution to proceed to trial without the suppressed evidence could preclude appellate review given that the prohibition against double jeopardy could prevent the prosecution from trying the defendant a second time."[7]

[3] See People's Appendix A (order).
[4] See MCR 7.202(6)(b) (defining final orders); MCR 7.203(B)(1).
[5] See MCR 7.205(A)(1).
[6] See MCR 7.205(B)(1).
[7] *People v Richmond*, 486 Mich 29, 39 n9 (2010) (internal citations omitted).

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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 People answer, "Yes."

Defendant would answer, "No."

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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.[8] 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.[9] 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.[10] The People now seek leave to appeal this order.[11]

[8] See People's Appendix C (Defendant's Motion).
[9] See People's Appendix D (People's Answer).
[10] See People's Appendix A (Order).
[11] 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.

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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, this Court must apply two distinct standards of review. First, this Court "review[s] for clear error a trial court's findings of fact in a suppression hearing[.]"[12] "A ruling is clearly erroneous if the reviewing court is left with a definite and firm conviction that the trial court made a mistake."[13] Although this Court must give "regard…to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it[,]"[14] the critical piece of evidence at issue at the suppression hearing was video of defendant's statements.[15] 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."[16]

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

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Second, the trial court's "ultimate decision on a motion to suppress" is reviewed de novo.[17] This Court also "reviews de novo whether the Fifth Amendment was violated and whether an exclusionary rule applies."[18] Accordingly, this Court gives no deference to the lower court's legal analysis.[19]

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.[20] In accordance with *Yee v City of Escondido, Cal.*,[21] the People have provided expanded argument and case citation in support of their preserved positions.

Discussion

The People seek leave to appeal the trial court's September 6, 2023 order suppressing defendant's statements. In so ruling, the 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

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[17] *Hyde*, *supra*, 285 Mich App at 436.
[18] *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.").
[19] See *People v Barrera*, 451 Mich 261, 268 (1996).
[20] 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).
[21] *Yee v City of Escondido, Cal.*, 503 US 519, 534 (1992).

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defendant had already given, placing extra pressure on defendant.[22] As set forth below, the trial court erred in finding defendant's second statement involuntary under the Fifth Amendment and suppressing defendant's statements.

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.[23] In order to safeguard that right, a criminal defendant has a constitutional right to counsel during interrogation.[24] 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."[25] 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.[26]

The waiver of any Fifth Amendment right must be done voluntarily, knowingly, and intelligently.[27] The prosecution has the burden of proving voluntariness by a preponderance of the evidence.[28] In *People v Cipriano*,[29] the Michigan Supreme Court gave a

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[22] 9/1, 122-123; The contents of the trial court's ruling are provided on information and belief, as the transcript for the hearing is not yet available (see People's Appendix F). The transcript of the 9/6 hearing will be provided as soon as it is produced.
[23] US Const, Am V; Const 1963, art 1, § 17.
[24] *Miranda v Arizona*, 384 US 436, 444-445 (1966).
[25] *Edwards v Arizona*, 451 US 477, 484-485 (1981) (emphasis added).
[26] *Edwards*, *supra,* 451 US at 482.
[27] *Miranda, supra,* 384 US at 444.
[28] *People v DeLisle,* 183 Mich App 713, 719 (1990).
[29] *People v Cipriano*, 431 Mich 315, 334 (1988).

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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 surrounding the statement indicates it was made freely and voluntarily.[30]

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.[31] When Beasley presented defendant with the Advice of Rights form explaining defendant's constitutional rights under *Miranda,* he had defendant read the first right out loud.[32] Defendant then read the rest of the document to himself before initialing each right and signing his name.[33] During this interaction, however, Beasley realized defendant was lethargic and possibly under the influence of some drug or alcohol.[34] Beasley then decided not to ask defendant any

[30] *Cipriano*, *supra*, 431 Mich at 334.
[31] 1/5, 18.
[32] 1/5, 18-19.
[33] 1/5, 19.
[34] 1/5, 18, 20-21.

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questions and had defendant transferred to the Detroit Detention Center.[35]

The next day, on August 3, 2022, Beasley had defendant brought to Detroit Police Department headquarters to conduct an interview.[36] With Detective Douglas Williams joining the interview, Beasley again advised defendant of his constitutional rights by reading the rights to defendant, who again initialed and signed the document.[37] Around an hour and half into the interview, defendant asserted his Fifth Amendment right to counsel.[38] Immediately after defendant asserted his right to counsel, Beasley and Williams left the interview room and attempted, unsuccessfully, to find an attorney for defendant.[39] Defendant remained in the interview room for a little over 2.5 hours while police searched for an attorney.[40] During this time, defendant asked for and received a Coke, and went to the bathroom twice.[41]

After the police could not locate an attorney, Beasley walked into the interview room with a uniformed officer.[42] Beasley informed defendant that he could not find an attorney.[43] 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

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[35] 1/5, 21.
[36] 1/5, 23.
[37] 1/5, 23, 28.
[38] 1/5, 27, 29.
[39] 1/5, 30.
[40] 1/5, 40, 47; 8/3, 02:05:42 – 04:49:58.
[41] See 8/3, 02:11:57 – 02:13:30, 02:48:53, 04:24:46.
[42] 8/3, 04:49:58.
[43] 8/3, 04:50:27.

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we have to go with."[44] As the uniformed officer was patting defendant down and Beasley was cleaning up the interview room, defendant said, "So confusing."[45] 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."[46] 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?"[47] 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."[48]

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."[49] 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."[50] Beasley and defendant then have the following exchange:

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[44] 8/3, 04:49:58 – 04:50:56.
[45] 8/3, 04:51:08.
[46] 8/3, 04:51:10 – 04:51:13.
[47] 8/3, 04:51:21.
[48] 8/3, 04:51:25 – 04:51:54.
[49] 8/3, 04:51:47 – 04:52:04.
[50] 8/3, 04:52:05 – 04:52:14.

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> 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.
>
> 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.[51]

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."[52] 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.[53] After defendant initialed and signed the form, Brown asked, "And you want to talk to them freely?"[54] Defendant responded, "Yeah, I want to talk to them."[55]

After defendant re-initiated contact, was advised of his rights by Brown, and informed Brown he was now waiving his right to counsel

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

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and wanted to talk, Beasley and Williams returned to interview defendant.[56] Defendant then admitted that he killed the decedent.[57]

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.[58]

Defendant's second statement was voluntary.

Case law clearly shows that the trial court erred in finding defendant's statements involuntary. 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.

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.'"[59] This Court 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

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[56] 1/5, 43, 45, 52.
[57] 8/3, 05:05:07 – 05:05:18:32.
[58] See People Appendix A.
[59] *People v Kowalski*, 230 Mich App 464, 478 (1998).

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'interrogation' within the meaning of *Edwards*.[60] Further, this Court noted that it had held in *People v McCuaig*[61] 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."[62] This Court later noted in *People v White*[63] 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."[64]

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 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, 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

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[60] *Kowalski, supra,* 230 Mich App at 479.
[61] *People v McCuaig*, 126 Mich App 754, 759-760 (1983).
[62] *Kowalski, supra*, 230 Mich App at 482-483 (quoting *McCuaig, supra*, 126 Mich App at 759-760).
[63] *People v White*, 294 Mich App 622 (2011).
[64] *White, supra*, 294 Mich App at 630.

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attorney, so the story you gave is the story we have to go with."[65] 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."[66] After this explanation of what is happening next in defendant's case and why Beasley can no longer talk to defendant, defendant then asked to talk without an attorney.[67] Beasley cautioned defendant that defendant should not feel compelled to talk and should not feel forced to do so, and defendant again stated that he would like to talk.[68] Further, after this re-initiation of contact by defendant, Brown came in to again inform defendant of his Fifth Amendment rights, and defendant again initialed and signed the form, repeating that he wanted to talk with Beasley.[69]

It is clear that the police immediately honored defendant's assertion of his Fifth Amendment right to counsel. It is also 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.

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[65] 8/3, 04:50:56.
[66] 8/3, 04:51:13 – 04:51:54.
[67] 8/3, 04:52:14.
[68] 8/3, 04:52:18 – 04:53:02.
[69] 1/5, 45-46; 8/3, 04:55:57 – 04:56:11

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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 acknowledged his rights for the third time, involuntary. The facts here are very similar to those in *People v Manning*,[70] in which this 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.[71]

Here, defendant also initiated the discussion that resulted in him giving the inculpatory statement. Defendant also received (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

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[70] *People v Manning,* 243 Mich App 615 (2000).
[71] *Manning, supra,* 243 Mich App at 644.

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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.

C. Conclusion

Both case law and factual context show that defendant's second statement was voluntary under the Fifth Amendment; therefore, the trial court erred in suppressing defendant's statements.

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RELIEF

THEREFORE, the People request that this Honorable Court GRANT their application for leave to appeal and REVERSE the trial court's order suppressing defendant's statements.

Respectfully submitted,

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Prosecuting Attorney
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JON P. WOJTALA
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/s/ *Lori Baughman Palmer*

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Dated: September 26, 2023

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 3,911 countable words.

/s/ *Lori Baughman Palmer*

LORI BAUGHMAN PALMER (P63943)
Assistant Prosecuting Attorney

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STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

-vs-

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

DAREN DONELL FENDERSON,
Defendant-Appellee.

_____/

WAYNE COUNTY PROSECUTOR
Assistant Prosecuting Attorney
LORI BAUGHMAN PALMER (P63943)
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DEFENDANT-APPELLEE'S ANSWER TO PLAINTIFF-APPELLANT'S INTERLOCUTORY APPLICATION FOR LEAVE TO APPEAL

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I. ---- 10

The police may not question a defendant after an assertion of the *Miranda* right to counsel unless the defendant re-initiates contact without pressure. Here, after asserting his right to counsel, defendant was informed that he does not get an attorney because none were available and he does not have any money for his own lawyer and that the story the defendant gave is the story the police had to go with, which is the functional equivalent of express questioning. Defendant's second statement was not voluntary (involuntary) under the Fifth Amendment. ---- 10

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COUNTER-STATEMENT OF JURISDICTION

On September 6, 2023, Judge Wanda Evans of the Third Circuit Court for County of Wayne 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. The prosecutor filed an interlocutory application for leave to appeal with this court on September 27, 2023, pursuant to the Court's jurisdiction under MCR 7.203(B)(1). This answer is filed timely under MCR 7.205(C) .

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COUNTER-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 without pressure. Here, after asserting his right to counsel, defendant was informed that he does not get an attorney because none were available and he does not have any money for his own lawyer and that the story the defendant gave is the story the police had to go with, which is the functional equivalent of express questioning. Was defendant's second statement voluntary under the Fifth Amendment?

The trial court answered, "No."

The People would answer, "Yes."

Defendant answers, "No."

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COUNTER-STATEMENT OF FACTS

Procedural Background

Defendant is currently 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 statements after the police re-initiated questioning on August 3, 2022, on the ground that defendant had previously asserted his Fifth Amendment right to counsel.[1] 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.[2] On September 6, 2023, after multiple hearing dates on the motion, Judge Wanda A. Evans granted defendant's motion to suppress and issued a stay of proceedings pending appeal.[3] The People now seek leave to appeal this order while the defendant files this Answer as an objection to the application for leave to appeal.[4]

Factual Background

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[1] See People's Appendix C (Defendant's Motion).
[2] See People's Appendix D (People's Answer).
[3] See People's Appendix A (Order).
[4] 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.

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Early in the morning on August 1, 2022, Officers went to a scene in Detroit (12910 Greiner St.) and began investigating a potential homicide. On August 2, 2022, Defendant Fenderson was arrested and brought to Detroit Public Safety Headquarters where he was read his constitutional rights, which he waived, prior to the Detectives questioning the Defendant, they determined that the Defendant was unable to make a statement on that date.

On August 3, 2022, Defendant was again interrogated. This interrogation was conducted by Detective Beasley and Detective Williams. Defendant was provided his *Miranda* Rights, waived them and gave a statement before requesting an attorney. After Defendant requested his attorney, the Detroit Police Officers attempted to locate an attorney for the Defendant and left him alone for about an hour and forty-five minutes, before checking on the Defendant and re-initiating conversation with the Defendant.

The Detroit Police Department re-initiated any conversations with the Defendant when Detective Beasley and two uniformed officers entered the interrogation room and interacted with the Defendant. It was during this interaction where Defendant asked where his lawyer was located and while he was in the process of being handcuffed by the uniformed officers, Defendant inquired into what the uniformed officers were doing and his custodial relationship after he was not provided an attorney.

After inquiring into his custodial status, Defendant was informed that Detective Beasley could not talk to him without an attorney and that the "story [the

Defendant] gave is the story we are going with." (August 3, 2022 at about 5:14pm). Defendant was incorrectly informed that he does not get a lawyer. (August 3, 2022 at about 5:14pm). These statements constituted the functional equivalent of express questioning and a mischaracterization of Defendant's *Miranda* rights. Again defense counsel is trying to be as accurate as possible, but the best evidence would be the recording of the interrogation.

After the Defendant was told that the story he gave is the story the police were going with, Defendant again asked what was going on and how he did not understand what was going on prior to being told that Defendant "if you want to talk to me, [Detective Beasley], you can say that you want to talk without an attorney." (August 3, 2022, at about 5:14pm). At that time Defendant's will was broken, the interrogation had been re-initiated by the Detroit Police Department, and Defendant said that he just wanted to get it over with.

After Defendant stated that he wanted to get it over with, the Detroit Police Department's Officers then had Detective Paul Brown enter into the interrogation room and provide the *Miranda* Rights to the Defendant again. Defendant waived those rights again and gave an incriminating statement.

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ARGUMENT

I.

The police may not question a defendant after an assertion of the *Miranda* right to counsel unless the defendant re-initiates contact without pressure. Here, after asserting his right to counsel, defendant was informed that he does not get an attorney because none were available and he does not have any money for his own lawyer and that the story the defendant gave is the story the police had to go with, which is the functional equivalent of express questioning. Defendant's second statement was not voluntary (involuntary) under the Fifth Amendment.

Standard of Review

The People have correctly stated the Standard of Review in their Plaintiff-Appellant's Interlocutory Application for Leave to Appeal from September 27, 2023. (Page 9).

Discussion

While the prosecutor's Application focuses primarily on whether the police re-initiated the interrogation after Defendant exercised his *Miranda* rights, the relevant question includes whether, after Defendant was informed that he does not get a lawyer appointed to him and that his previous statement was the statement the police were brining to the prosecution, Defendant's ultimate second waiver of *Miranda* rights was voluntary or involuntary.

The court, through Judge Wanda A. Evans, correctly ruled that Defendant's second statement was involuntary because (1) defendant had previously asserted his Fifth Amendment right to counsel; (2) defendant waited an extended period in the interrogation while police attempted to find counsel; and (3) the police told defendant that because they could not find counsel and Defendant did not have a private attorney he does not get an attorney and the police would be submitting the warrant request to the prosecutor with Defendant's first story.

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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.[5] In order to safeguard that right, a criminal defendant has a constitutional right to counsel during interrogation.[6] 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."[7] 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 police.[8]

The waiver of any Fifth Amendment right must be done voluntarily, knowingly, and intelligently.[9] The prosecution has the burden of proving voluntariness by a preponderance of the evidence.[10] In *People v. Cipriano*,[11] the Michigan Supreme Court gave a non-exhaustive 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*. (emphasis added). No one factor is determinative; the ultimate question is whether the totality of the circumstances surrounding the statements indicates it was made freely and voluntarily.[12]

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[5] US Const, Am V; Const 1963, art 1, § 17.
[6] *Miranda v. Arizona*, 384 US 436, 444-445 (1966).
[7] *Edwards v. Arizona*, 451 US 477, 484-485 (1981) (emphasis added).
[8] *Edwards*, *supra*, 451 US at 482.
[9] *Miranda*, *supra*, 384 US at 444.
[10] *People v. DeLisle*, 183 Mich App 713, 719 (1990).
[11] *People v. Cipriano*, 431 Mich 315, 334 (1988).
[12] *Cipriano*, *supra*, 431 Mich at 334; see also *People v. Gipson*, 287 Mich. App. 261, 265 (2010).

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B. The totality of the circumstances show that Defendant's second statement was not voluntary (involuntary): The police re-initiated contact after Defendant previously asserted his right to counsel, improperly informed Defendant that he does not get a lawyer and spoke with words likely to elicit an incriminating response from the Defendant.

Defendant's Interviews and Statements

On August 2, 2022, Officer Reginald Beasley of the Detroit Police Department met with Defendant and went over his *Miranda* rights. Defendant then waived his *Miranda* rights, however, Officer Beasley determined that Defendant was not in the right state of mind to properly waive his *Miranda* rights. Officer Beasley ended up ending the interrogation without asking anything of note.

The following day, August 3, 2022, Officer Beasley again met with Defendant. Defendant was given his *Miranda* rights and gives a statement. During this first statement, Defendant properly exercised his *Miranda* rights when he informed Officer Beasley that he wanted an attorney. The police then stopped the interview and left the defendant for a little over two-and-a-half hours. The police were unable to locate an attorney for the defendant.

After the police could not locate an attorney, Officer Beasley and two officers walked into the interrogation room. Defendant inquired into his custodial status. After asking about his custodial status Defendant's questioning was re-initiated by Officer Beasley and defendant was informed that an attorney at public expense was not available and since defendant did not have a private attorney, he did not get an attorney. Shortly after being informed that the Defendant was not entitled to an attorney, Officer Beasely said something similar to "the story you gave is the story we have to go with," that statement was the functional equivalent of express questioning and broke the will of the Defendant.

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You can see, based on further conversations between the Defendant and Officer Beasley, that Defendant "just wan[ts to] get this over with."[13] Defendant's will was broken and he stated that he just wanted to get it over with. Officer Paul Brown then went over the *Miranda* rights with Defendant again and seeing as his will was broken, Defendant involuntarily waived his *Miranda* rights.

The Trial Court's Ruling

After a hearing on defendant's motion to suppress, watching the interrogation video and multiple further hearing dates, the trail court held that defendant's statement admitting guilt was involuntary and properly suppressed the statement.

Defendant's second statement was involuntary.

The use of an accused individual's involuntary statements is forbidden by the due process clauses of The Michigan and United States Constitutions. US Const, Ams V, XlV; Michigan Const. 1963, Art l, § 17. *Mincey v Arizona*, 437 US 385,398 (1978); *Brown v Mississippi*, 297 US 278,287 (1936); *People v Conte*, 421 Mich704,722 (1984).

The prosecution's burden is to show by a preponderance of the evidence that the defendant's statements were voluntarily made. *People v Sears*, 124 MA 735,738 (1983). This Honorable Court must make an independent determination of the statement's voluntariness. *People v Inman*, 54 Mich App 5,8 (1974).

The United States Supreme Court has discussed several issues underlying this fundamental restriction against the use of involuntary confessions; including ensuring the trust worthiness of evidence, deterrence of questionable police conduct, and preserving the individual's "freedom of will." *Brady v United States*, 397 US 742 (1970). Yet, the appropriate test of voluntariness is the totality of the circumstances. *Brown v Illinois*, 422 US 590, 603-4 (1975); *People v Cipriano*, 431 Mich 315 (1988). Our Courts have defined this test as follows:

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[13] August 3, 2022, 04:51:47 – 04:52:04.

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> "Whether, considering the totality of all the surrounding circumstances, the confession is the product of an essentially free and unconstrained choice by its maker, or whether the accused's will was overborne and his capacity for self-determination was critically impaired …." The line of demarcation is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps propel the confession." Id. at (333-4).

Decisions have focused on the defendant's state of mind and the effect of surrounding circumstances on the ability to make a rational judgment. *Conte*, 421 Mich at 704. A non-exhaustive list of circumstances courts consider includes length and conditions of detention; the defendant's age and mental and physical state; mentality and prior experience with the criminal justice system; nature of inducements offered; the police officer's conduct; and the adequacy and frequency of the advice of rights. Id. See *People v DeLisle*, 183 Mich App 713; 455 NW 2d 401 (1990). And more than a century ago the Michigan Supreme Court recognized that confessions extracted by psychological coercion of weak-minded defendants are inadmissible. *People v Flaff*, 40 Mich 706, 709 (1879). Modern decisions have treated the defendant's mental condition as a factor to be weighed in the voluntariness analysis. *People v Price*, 112 Mich App 791, 797; 317 NW2d 249 (1982); *People v Smith*, 124 Mich App 723, 725; 335 NW2d 137 (1983).

In *People v DeLisle*, supra, the Court affirmed a finding that a confession extracted through psychological coercion was involuntary. Relying on *Leyra v Denno*, 347 US 556, 559-560; 74 S Ct 716; 98 L Ed 948 (1954), the Court noted that even 90 minutes of psychological coercion from a trained psychiatrist could render a confession involuntary *Delisle*, 183 Mich App 721-722.

Considering the totality of the circumstances – the time duration and conditions of the interrogation; Defendant's mental and physical state; his inability to resist and exercise self-control over the promises of leniency – the statement was involuntary and should not have been admitted. See *People v Price*, 112 Mich App 791; 317 NW 2d 249 (1982); *People v. Smith*, 124 Mich App 723; 335 NW2d 137 (1983).

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The controlling case on the issue of Defendant's voluntarily waiving of his *Miranda* Rights after requesting an attorney is *Edwards v. Arizona*, 451 U.S. 477 (1981). The critical facts of *Edwards* is that "Edwards asserted his right to counsel and his right to remain silent on January 19, but that the police, without furnishing him counsel, returned the next morning to confront him and as a result of the meeting secured incriminating oral admissions." *Id.* at 482.

The United State Supreme Court found that "without making counsel available to Edwards, the police returned to him the next day. This was not at his suggestion or request." *Id.* at 487. The court said that Edward's "statement, made without having had access to counsel, did not amount to a valid waiver and hence was inadmissible." *Id.* "Had Edwards initiated the meeting on January 20, nothing in the Fifth and Fourteenth Amendments would prohibit the police from merely listening to his voluntary, volunteered statement and using them against him at the trial." *Id.* at 486.

Unfortunately, there is more to the analysis than whether or not the Defendant requested an attorney and if the police honored that request. After a person requests an attorney *Edwards* held that a Defendant "is not subject to 'further interrogation' in the absence of counsel, unless the accused himself 'initiated' further communication. Thus the holding in *Edwards*, rests upon the concepts of 'initiation' and 'interrogation.'" *People v. Kowalski*, 584 N.W.2d 613, 619, 230 Mich. App. 464 (1998). "For the purposes of *Miranda*, interrogation refers to express questioning or its 'functional equivalent.' . . . The 'functional equivalent' of interrogation includes '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 from the suspect.'" *Id.* (internal citations omitted). "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." *Edwards*, 451 U.S. at 484.

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In an unpublished case, *People v. Norton*, unpublished, Docket No. 356835 (December 16, 2021) the Court of Appeals explained what it means to initiate further communication. The court, in quoting *Edwards*, stated "an officer may again interrogate a suspect who has asserted the right to remain silent, without first providing the suspect with the requested lawyer, if the suspect 'initiates further communication, exchanges, or conversations with the police." *Id.* (internal citations omitted). The Court of Appeals analyzed the proper application of the *Edwards* rule in *Oregon v. Bradshaw*, 462 U.S. 1039; 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983), "even after a defendant reinitiates a conversation with police – the burden remains on the prosecution to show that the defendant waived his Fifth Amendment rights. *Id.* The Supreme Court, in *Oregon v. Bradshaw*, "explained that the relevant question was whether the defendant validly waived his right to counsel and the right to remain silent under the totality of the circumstances, which included the necessary fact that *the accused, not the police officer, reopened the dialogue*." *Id.* (emphasis added).

The court analyzed the *Edwards* rule and found it required two inquiries. First, did the Defendant invoke his right to counsel and then, fi the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) made a knowing and intelligent waiver of the right he had invoked. *Id.* quoting *Edwards*, 1044-1046.

In *Oregon v. Bradshaw*, 462 U.S. 1039; 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983), the United States Supreme Court analyzed a suspect initiating a conversation with the police after requesting a lawyer. The court held that "after the right to counsel had been asserted by an accused, further interrogation of the accused should not take place "unless the accused himself initiates further communications, exchanges, or conversations with the police. *Id.* citing *Edwards*, 451 U.S. at 485. The court restated that "before a suspect in custody can be subjected to further interrogation after he requests an attorney, there must be a showing that the "suspect himself initiates dialogue with the authorities." *Id.* citing *Wyrick v. Fields*, 459 U.S. 42 (1982) (*per curiam*).

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The court in *Oregon v. Bradshaw*, seemed to analyze a specific quotation:

> There can be no doubt in this case that in asking, "Well, what is going to happen to me now?", respondent "initiated" further conversation in the ordinary dictionary sense of that word. While we doubt that it would be desirable to build a superstructure of legal refinements around the word "initiate" in this context, there are undoubtedly situations where a bare inquiry by either a defendant or by a police officer should not be held to "initiate" any conversation or dialogue. There are some inquiries, such as a request for a drink of water or a request to use a telephone, that are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation. Such inquiries or statements, by either an accused or a police officer, relating to routine incidents of the custodial relationship, will not generally "initiate" a conversation in the sense in which that word was used in *Edwards*. *Id.* at 1045.

The court held that "[a]lthough ambiguous, the respondent's question in this case as to what was going to happen to him evinced a willingness and a desire for a generalized discussion about the investigation; it was not merely a necessary inquiry arising out of the incidents of the custodial relationship." The *Oregon v. Bradshaw* case is different from our present case as the Defendant asked about what was going on as two uniformed officers entered into the interrogation room and were removing the Detective's handcuffs and re-cuffing the Defendant. Defendant, as is seen on the video, was merely inquiring about the custodial relationship after being left alone for an extended period of time.

A case that is persuasive, but not binding, *Martinez v. Cate*, 903 F.3d 982 (2018), helped explain what direct questioning was, restating that "*Innis* defined 'interrogation' as either express questioning or its functional equivalent. [*Innis*], 466 U.S. at 300-301." *Innis* recognizes that words and actions that are normally attendant to arrest and custody should be excluded from the definition of interrogation. *Id.*

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Martinez v. Cate involved a statement of "What am I being booked under?" by a Defendant and then analyzed what happens when a Detective states "[a]ll I wanted was your side of the story. That's it. OK. So, I'm pretty much done with you then. Um, I guess I don't know another option but to go ahead and book you. OK. Because . . ." *Id.* at 994. The court found that the "clearest evidence of the interrogating nature of [the Detective's] statements is their plain language. By stating, "your [sic] going to be booked for murder *because* I only got one side of the story," [the Detective] causally links [Defendant's] assertion of his constitutional right to the detective's decision to book the suspect for murder." *Id.*

The court found that the "obvious implication of that linkage is that if [the Defendant] were to give his side of the story, by waiving his just-invoked right to counsel, he will not be booked, or not be booked for murder. At the very least the detective should know that his statement would be perceived this way and was "reasonably likely to elicit an incriminating response." See *Innis*, 446 U.S. at 302." *Martinez v. Cate*, at 995.

The court could not ignore the implications of the Detective's statement because "the *Innis* test explicitly calls for considering the "perceptions of the suspect, rather than the intent of the police. 446 U.S. at 301 . . ." *Id.* The analyzing court must still consider how a suspect would perceive the statements. The court found that the Defendant's statement of "What am I being booked under" could not be interpreted as a re-initiation of the conversation. *Id.* at 996. The detective's statements linking the Defendant's booking "to his invocation of the right to counsel, and the detective's comments that [the Defendant] would need to call his own attorney from jail are exactly the type of badgering that *Edwards* was crafted to prevent." *Id* at 997.

In *Maryland v. Shatzer*, 559 U.S. 98, 130 S.Ct. 1213 (2010), the court analyzed *Edwards* finding that "*Edwards* created a presumption that once a suspect invokes the *Miranda* right to the presence of counsel, any waiver of

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the right in response to a subsequent police attempt at custodial interrogation is involuntary. *Edwards*' fundamental purpose is to '[p]reserve[e] the integrity of an accused's choice to communicate with the police only through counsel,' *Patterson v. Illinois*, 487 U.S. 285, 291; 108 S.Ct. 2389; 101 L.Ed.2d 261 (1988), by 'prevent[ing] police from badgering [him] into waiving his previously asserted *Miranda* rights." *Michigan v. Harvey*, 494 U.s. 344, 350; 110 S.Ct. 1176, 108 L.Ed 293. (1990)" *Id.* "It is easy to believe that a suspect's later waiver was coerced or badgered when he has been held in uninterrupted *Miranda* custody since his first refusal to waive. He remains cut off from his normal life and isolated in a "police-dominated atmosphere," *Miranda v. Arizona*, 384 U.S. 436, 456; 86 S.Ct. 1602, 16 L.Ed.2d 694, where his captors "appear to control [his] fate," *Illinois v. Perkins*, 496 U.S. 292, 297; 110 S.Ct. 2394, 110 L.Ed.2d 243 (1992).

Argument

This is clearly a case that requires an *Edwards* analysis followed by an *Oregon v. Bradshaw* analysis. It is acknowledged by the officers, as they are interrogating the Defendant, that the Defendant requested a lawyer. After the Defendant requested a lawyer, the Detroit Police Officers then left the interrogation room and left the Defendant alone in the same room for an extended period of time. After an extended period of time, Detective Beasley and two uniformed officers entered the room. At this time, any interaction was initiated by the police who had Defendant in custody. Defendant did not knock on the door and request to speak to anyone or do anything else until the officers entered the interrogation room.

While the Defendant was interacting with the uniformed officers, he merely asked what was going on and where was his lawyer. That did not re-initiate the interrogation or express a want to re-initiate the conversation. The fact that the Detective told the Defendant that there was no attorney available and that the "story you gave is the story we are going to go with" is similar to *Martinez v. Cate*, where the federal court suppressed that

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defendant's statement when the Detective said that he "only got one side of the story."

In this present case, there was no break in custody, or location, between Defendant's request for an attorney and when the police re-entered the room to transport the Defendant. It was at this time, when Defendant actually inquired into his right to have an attorney present when Detective Beasley stated that the Defendant does not get a lawyer. This was after Defendant was left alone for an extended period and had requested an attorney. After being told that the Defendant does not get a lawyer, he asks what is going on with his current status as he was at the Detroit Public Safety Headquarters and had spent the previous night at the Detroit Detention Center.

This is clearly a violation of the *Edwards* analysis and the *Oregon v. Bradshaw* analysis. After a Defendant requests an attorney, the only further communication with the Defendant should be booking questions and the Defendant should never have been told that he does not get an attorney, despite the Defendant validly exercising his *Miranda* Rights.

Defendant, after requesting an attorney, was not released from custody and his waiver of that right in response to a subsequent police attempt at custodial interrogation is involuntary. The Defendant's right to speak to the police only through counsel was infringed when the police went back into the interrogation room and said that the Defendant does not get an attorney. Without a break in custody and being left in the interrogation room, the Defendant was coerced or badgered into waiving his previously asserted *Miranda* rights. The Defendant was cut off from his normal life and isolated in a police-dominated atmosphere, first being arrested and transported to the Detroit Detention Center, then being transported to the Detroit Public Safety Headquarters, then back to the Detroit Detention Center for less than 24 hours, and finally back to the Detroit Public Safety Headquarters where the second and third *Miranda* Rights were given.

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The mere fact that the Defendant believed that he could make a statement that would prevent him from going back to the Detroit Detention Center, shows how the pressures coerced him into making a statement. When the Detective informed the Defendant that the "story you gave is the story we are going to go with," the Detective should have known that telling someone that the story they gave is the story the police are going to use to maintain his custody would elicit a response.

Detective Beasley did the functional equivalent of express questioning. The definition of interrogation "focuses primarily upon the perceptions of the suspect, rather than the intent of the police," but is an objective standard such that the police "cannot be held accountable for the unforeseeable results of their words or actions." *Rhode Island v. Innis*, 446 U.S. 291, 300-301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). It was foreseeable that after being told that the Defendant does not get an attorney and that the police are going with that story that the Defendant would respond to Detective Beasley's statements.

C. Conclusion

Based on both case law and the factual context of the interrogation, re-initiation by the police, informing Defendant that he was not entitled to an attorney and *People v. Cipriano*'s analysis of the nature of the advice to the defendant and the totality of the circumstances show that Defendant's second statement was not voluntary (involuntary) under the Fifth Amendment and the court was correct in suppressing the Defendant's statement.

D. Request For the Court of Appeals to reconsider whether pretrial release is appropriate

The prosecution filed an Application for Interlocutory Appeal on September 27, 2023. The main issue of the appeal is whether the second statement by defendant should be suppressed, the statement where defendant implicates himself. Defendant now moves this Honorable Court to reconsider whether pretrial release is appropriate under MCR 6.126.

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Defendant was arraigned on August 5, 2022 in the 36th District Court for the City of Detroit in the County of Wayne. At that time, Defendant was given a remand bond, or bond was denied. On August 19, 2022, Defendant was referred to pre-trial services for a bond review. On September 8, 2022, Defendant's bond was continued as a remand by Judge Kenneth King of the 36th District Court. A bond re-determination hearing was scheduled for September 27, 2022, but was then adjourned until about November 28, 2023 and addressed on November 29, 2022, where the Motion to Reduce bond was denied. The preliminary examination was held on January 5, 2023 and continued on January 26, 2023. At the conclusion of the preliminary examination, Judge Kenneth King ordered the case bound over to the Third Circuit Court and ordered Defendant's bond to remain at remand, or no bond.

On February 9, 2023, Defendant made his first appearance in the Third Circuit Court for the County of Wayne and bond has been continued at remand since. Since Defendant's arraignment on August 5, 2022, he has been held in custody and as of October 17, 2023, Defendant has been held in custody for about 438 days without a bond (or about one year, two months and 12 days). Pursuant to MCR 6.126, Defendant requests that this Honorable Court reconsider whether pretrial release is appropriate.

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RELIEF

THEREFORE, the Defendant, through his appointed counsel Patrick E. Nyenhuis, requests that this Honorable Court DENY the State of Michigan's application for leave to appeal and affirm the trial court's order suppressing defendant's statement.

Respectfully submitted,

/s/ Patrick E. Nyenhuis
PATRICK E. NYENHUIS (P76343)
1446 Kensington Avenue
Grosse Pointe Park, Michigan 48230
(313) 244-3500
PNyenhuis@gmail.com

DATED: October 17, 2023

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 4,631, or less, countable words.

/s/ Patrick E. Nyenhuis
Patrick E. Nyenhuis (P76343)
Attorney for Defendant-Appellee

CERTIFICATE OF SERVICE

I certify that Defendant-Appellee's Answer to Plaintiff-Appellee's Answer to Plaintiff-Appellant's Interlocutory Application for Leave to Appeal was efiled through MiFile on October 17, 2023, serving all appropriate parties.

/s/ Patrick E. Nyenhuis
Patrick E. Nyenhuis

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Court of Appeals, State of Michigan

ORDER

People of MI v Daren Donell Fenderson

Docket No. 367926

LC No. 23-000412-01-FC

Anica Letica
Presiding Judge

Michael J. Riordan

Kristina Robinson Garrett
Judges

The application for leave to appeal is GRANTED. The time for taking further steps in this appeal runs from the date of the Clerk's certification of this order. MCR 7.205(E)(3). This appeal is limited to the issues raised in the application and supporting brief. MCR 7.205(E)(4).

Anica Letica
Presiding Judge

November 15, 2023

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STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v **No. 367926**

DAREN DONELL FENDERSON,
Defendant-Appellee.

Third Circuit Court No. 23-000412-01-FC

PLAINTIFF-APPELLANT'S BRIEF ON LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

Filed under AO 2019-6

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[1] This video appendix was previously provided via first-class U.S. mail.

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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.[2] This suppression order is a non-final order that is appealable by leave.[3] This Court granted leave to appeal in an order dated November 15, 2023.

[2] See People's Appendix A (order).
[3] See MCR 7.202(6)(b) (defining final orders); MCR 7.203(B)(1).

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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 People answer, "Yes."

Defendant would answer, "No."

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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.[4] 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.[5] 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.[6] The People sought leave to appeal this order, which was granted in an order dated November 15, 2023.[7]

[4] See People's Appendix C (Defendant's Motion).
[5] See People's Appendix D (People's Answer).
[6] See People's Appendix A (Order).
[7] 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.

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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, this Court must apply two distinct standards of review. First, this Court "review[s] for clear error a trial court's findings of fact in a suppression hearing[.]"[8] "A ruling is clearly erroneous if the reviewing court is left with a definite and firm conviction that the trial court made a mistake."[9] Although this Court must give "regard…to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it[,]"[10] the critical piece of evidence at issue at the suppression hearing was video of defendant's statements.[11] 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."[12]

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

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Second, the trial court's "ultimate decision on a motion to suppress" is reviewed de novo.[13] This Court also "reviews de novo whether the Fifth Amendment was violated and whether an exclusionary rule applies."[14] Accordingly, this Court gives no deference to the lower court's legal analysis.[15]

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.[16] In accordance with *Yee v City of Escondido, Cal.*,[17] the People have provided expanded argument and case citation in support of their preserved positions.

Discussion

The People are appealing the trial court's September 6, 2023 order suppressing defendant's statements. In so ruling, the 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

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[13] *Hyde*, *supra*, 285 Mich App at 436.
[14] *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.").
[15] See *People v Barrera*, 451 Mich 261, 268 (1996).
[16] 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).
[17] *Yee v City of Escondido, Cal.*, 503 US 519, 534 (1992).

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given, placing extra pressure on defendant.[18] 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. As set forth below, the trial court erred in finding defendant's second statement involuntary under the Fifth Amendment and suppressing defendant's statements.

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.[19] In order to safeguard that right, a criminal defendant has a constitutional right to counsel during interrogation.[20] 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."[21] 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.[22]

The waiver of any Fifth Amendment right must be done voluntarily, knowingly, and intelligently.[23] The prosecution has the burden of proving voluntariness by a preponderance of the evidence.[24]

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[18] 9/1, 122-123; 9/6, 6-7.
[19] US Const, Am V; Const 1963, art 1, § 17.
[20] *Miranda v Arizona*, 384 US 436, 444-445 (1966).
[21] *Edwards v Arizona*, 451 US 477, 484-485 (1981) (emphasis added).
[22] *Edwards*, *supra,* 451 US at 482.
[23] *Miranda, supra,* 384 US at 444.
[24] *People v DeLisle,* 183 Mich App 713, 719 (1990).

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In *People v Cipriano*,[25] 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 surrounding the statement indicates it was made freely and voluntarily.[26]

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.[27] 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.[28] Defendant then read the rest of the document to himself before initialing each right and signing his name.[29] During this interaction, however, Beasley realized defendant was lethargic and possibly under the influence of

[25] *People v Cipriano*, 431 Mich 315, 334 (1988).
[26] *Cipriano*, *supra*, 431 Mich at 334.
[27] 1/5, 18.
[28] 1/5, 18-19.
[29] 1/5, 19.

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some drug or alcohol.[30] Beasley then decided not to ask defendant any questions and had defendant transferred to the Detroit Detention Center.[31]

The next day, on August 3, 2022, Beasley had defendant brought to Detroit Police Department headquarters to conduct an interview. [32] With Detective Douglas Williams joining the interview, Beasley again advised defendant of his constitutional rights by reading the rights to defendant, who again initialed and signed the document.[33] Around an hour and half into the interview, defendant asserted his Fifth Amendment right to counsel.[34] Immediately after defendant asserted his right to counsel, Beasley and Williams left the interview room and attempted, unsuccessfully, to find an attorney for defendant.[35] Defendant remained in the interview room for a little over 2.5 hours while police searched for an attorney.[36] During this time, defendant asked for and received a Coke, and went to the bathroom twice.[37]

After the police could not locate an attorney, Beasley walked into the interview room with a uniformed officer.[38] Beasley informed defendant that he could not find an attorney.[39] After defendant asked, "What's going on?" Beasley replied, "You said you wanted an attorney, I

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[30] 1/5, 18, 20-21.
[31] 1/5, 21.
[32] 1/5, 23.
[33] 1/5, 23, 28.
[34] 1/5, 27, 29.
[35] 1/5, 30.
[36] 1/5, 40, 47; 8/3, 02:05:42 – 04:49:58.
[37] See 8/3, 02:11:57 – 02:13:30, 02:48:53, 04:24:46.
[38] 8/3, 04:49:58.
[39] 8/3, 04:50:27.

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can't talk to you without an attorney, so the story you gave is the story we have to go with."[40] As the uniformed officer was patting defendant down and Beasley was cleaning up the interview room, defendant said, "So confusing."[41] 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."[42] 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?"[43] 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."[44]

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."[45] 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."[46] Beasley and defendant then have the following exchange:

---

[40] 8/3, 04:49:58 – 04:50:56.
[41] 8/3, 04:51:08.
[42] 8/3, 04:51:10 – 04:51:13.
[43] 8/3, 04:51:21.
[44] 8/3, 04:51:25 – 04:51:54.
[45] 8/3, 04:51:47 – 04:52:04.
[46] 8/3, 04:52:05 – 04:52:14.

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> 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.
>
> 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.[47]

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."[48] 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.[49] After defendant initialed and signed the form, Brown asked, "And you want to talk to them freely?"[50] Defendant responded, "Yeah, I want to talk to them."[51]

After defendant re-initiated contact, was advised of his rights by Brown, and informed Brown he was now waiving his right to counsel

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

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and wanted to talk, Beasley and Williams returned to interview defendant.[52] Defendant then admitted that he killed the decedent.[53]

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.[54] 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.[55] 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."[56]

Defendant's second statement was voluntary.

Case law clearly shows that the trial court erred in finding defendant's statements involuntary. 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

[52] 1/5, 43, 45, 52.
[53] 8/3, 05:05:07 – 05:05:18:32.
[54] See People Appendix A.
[55] 9/6, 4.
[56] 9/6, 5-6.

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talk to defendant and so would seek charges on the information they had, in no way violates the Fifth Amendment right to counsel.

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.'"[57] This Court 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*."[58] Further, this Court noted that it had held in *People v McCuaig*[59] 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."[60] This Court later noted in *People v White*[61] 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."[62]

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

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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 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, 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."[63] 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."[64] After this explanation of what is happening next in defendant's case and why Beasley can no longer talk to defendant, defendant then asked to talk without an attorney.[65] Beasley cautioned defendant that defendant should not feel compelled to talk and should not feel forced to do so, and defendant again stated that he would like to talk.[66] Further, after this re-initiation of contact by defendant, Brown came in to again inform

[63] 8/3, 04:50:56.
[64] 8/3, 04:51:13 – 04:51:54.
[65] 8/3, 04:52:14.
[66] 8/3, 04:52:18 – 04:53:02.

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defendant of his Fifth Amendment rights, and defendant again initialed and signed the form, repeating that he wanted to talk with Beasley.[67]

It is clear that the police immediately honored defendant's assertion of his Fifth Amendment right to counsel. It is also 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 acknowledged his rights for the third time, involuntary. The facts here are very similar to those in *People v Manning*,[68] in which this 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.[69]

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[67] 1/5, 45-46; 8/3, 04:55:57 – 04:56:11
[68] *People v Manning,* 243 Mich App 615 (2000).
[69] *Manning, supra,* 243 Mich App at 644.

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Here, defendant also initiated the discussion that resulted in him giving the inculpatory statement. Defendant also received (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.

C. Conclusion

Both case law and factual context show that defendant's second statement was voluntary under the Fifth Amendment; therefore, the trial court erred in suppressing defendant's statements.

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RELIEF

THEREFORE, the People request that this Honorable Court REVERSE the trial court's order suppressing defendant's statements.

Respectfully submitted,

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Prosecuting Attorney
County of Wayne

JON P. WOJTALA
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/s/ *Lori Baughman Palmer*

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Dated: December 12, 2023

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 3,891 countable words.

/s/ *Lori Baughman Palmer*

LORI BAUGHMAN PALMER (P63943)
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STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

-vs-

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

DAREN DONELL FENDERSON,
Defendant-Appellee.

_____/

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DEFENDANT-APPELLEE'S ANSWER TO PLAINTIFF-APPELLANT'S BRIEF ON LEAVE TO APPEAL

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I. 10

The police may not question a defendant after an assertion of the *Miranda* right to counsel unless the defendant re-initiates contact without pressure. Here, after asserting his right to counsel, defendant was informed that he does not get an attorney because none were available and he does not have any money for his own lawyer and that the story the defendant gave is the story the police had to go with, which is the functional equivalent of express questioning. Defendant's second statement was not voluntary (involuntary) under the Fifth Amendment. 10

A. ..... *Waivers of Fifth Amendment Rights* 11

B. ..... *The totality of the circumstances show that Defendant's second statement was not voluntary (involuntary): The police re-initiated contact after Defendant previously asserted his right to counsel, improperly informed Defendant that he does not get a lawyer and spoke with words likely to elicit an incriminating response from the Defendant.* 12

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COUNTER-STATEMENT OF JURISDICTION

On September 6, 2023, Judge Wanda Evans of the Third Circuit Court for County of Wayne 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. This Court granted leave to appeal in an order dated November 15, 2023.

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COUNTER-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 without pressure. Here, after asserting his right to counsel, defendant was informed that he does not get an attorney because none were available and he does not have any money for his own lawyer and that the story the defendant gave is the story the police had to go with, which is the functional equivalent of express questioning. Was defendant's second statement voluntary under the Fifth Amendment?

The trial court answered, "No."

The People would answer, "Yes."

Defendant answers, "No."

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COUNTER-STATEMENT OF FACTS

Procedural Background

Defendant is currently 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 statements after the police re-initiated questioning on August 3, 2022, on the ground that defendant had previously asserted his Fifth Amendment right to counsel.[1] 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.[2] On September 6, 2023, after multiple hearing dates on the motion, Judge Wanda A. Evans granted defendant's motion to suppress and issued a stay of proceedings pending appeal.[3] The People sought leave to appeal this order while the defendant filed his Answer as an objection to the application for leave to appeal.[4] This Court granted leave to appeal in an order dated November 15, 2023.

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[1] See People's Appendix C (Defendant's Motion).
[2] See People's Appendix D (People's Answer).
[3] See People's Appendix A (Order).
[4] 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.

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Factual Background

Early in the morning on August 1, 2022, Officers went to a scene in Detroit (12910 Greiner St.) and began investigating a potential homicide. On August 2, 2022, Defendant Fenderson was arrested and brought to Detroit Public Safety Headquarters where he was read his constitutional rights, which he waived, prior to the Detectives questioning the Defendant, they determined that the Defendant was unable to make a statement on that date.

On August 3, 2022, Defendant was again interrogated. This interrogation was conducted by Detective Beasley and Detective Williams. Defendant was provided his *Miranda* Rights, waived them and gave a statement before requesting an attorney. After Defendant requested his attorney, the Detroit Police Officers attempted to locate an attorney for the Defendant and left him alone for about an hour and forty-five minutes, before checking on the Defendant and re-initiating conversation with the Defendant.

The Detroit Police Department re-initiated any conversations with the Defendant when Detective Beasley and two uniformed officers entered the interrogation room and interacted with the Defendant. It was during this interaction where Defendant asked where his lawyer was located and while he was in the process of being handcuffed by the uniformed officers, Defendant inquired into what the uniformed officers were doing and his custodial relationship after he was not provided an attorney.

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After inquiring into his custodial status, Defendant was informed that Detective Beasley could not talk to him without an attorney and that the "story [the Defendant] gave is the story we are going with." (August 3, 2022 at about 5:14pm). Defendant was incorrectly informed that he does not get a lawyer. (August 3, 2022 at about 5:14pm). These statements constituted the functional equivalent of express questioning and a mischaracterization of Defendant's *Miranda* rights. Again defense counsel is trying to be as accurate as possible, but the best evidence would be the recording of the interrogation.

After the Defendant was told that the story he gave is the story the police were going with, Defendant again asked what was going on and how he did not understand what was going on prior to being told that Defendant "if you want to talk to me, [Detective Beasley], you can say that you want to talk without an attorney." (August 3, 2022, at about 5:14pm). At that time Defendant's will was broken, the interrogation had been re-initiated by the Detroit Police Department, and Defendant said that he just wanted to get it over with.

After Defendant stated that he wanted to get it over with, the Detroit Police Department's Officers then had Detective Paul Brown enter into the interrogation room and provide the *Miranda* Rights to the Defendant again. Defendant waived those rights again and gave an incriminating statement.

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ARGUMENT

I.

The police may not question a defendant after an assertion of the *Miranda* right to counsel unless the defendant re-initiates contact without pressure. Here, after asserting his right to counsel, defendant was informed that he does not get an attorney because none were available and he does not have any money for his own lawyer and that the story the defendant gave is the story the police had to go with, which is the functional equivalent of express questioning. Defendant's second statement was not voluntary (involuntary) under the Fifth Amendment.

Standard of Review

The People have correctly stated the Standard of Review in their Plaintiff-Appellant's Brief on Leave to Appeal from December 12, 2023. (Page 8).

Discussion

While the prosecutor's Brief focuses primarily on whether the police re-initiated the interrogation after Defendant exercised his *Miranda* rights, the relevant question includes whether, after Defendant was informed that he does not get a lawyer appointed to him and that his previous statement was the statement the police were brining to the prosecution, Defendant's ultimate second waiver of *Miranda* rights was voluntary or involuntary.

The court, through Judge Wanda A. Evans, correctly ruled that Defendant's second statement was involuntary because (1) defendant had previously asserted his Fifth Amendment right to counsel; (2) defendant waited an extended period in the interrogation while police attempted to find counsel; and (3) the police told defendant that because they could not find counsel and Defendant did not have a private attorney he does not get an attorney and the police would be submitting the warrant request to the prosecutor with Defendant's first story.

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On September 6, 2023, Judge Wanda Evans of the Third Circuit Court correctly ruled that Mr. Fenderson did not voluntarily waive his *Miranda* Rights. Judge Wanda Evans stated:

> Well they had read his Miranda rights and part of the *Miranda* rights says that you can have a lawyer and if you cannot afford a lawyer one would be appointed for you. Nothing about – oh, you don't have one. This is what they said, "You don't have the money to pay for one. You don't have one. We don't have any available, so you don't get a lawyer."[5]

Judge Wanda Evans correctly held and had the correct thought process that because the police misstated *Miranda* by saying "we don't have any [lawyers], you don't get one and have a conversation about . . . if you can't afford to pay for one, that implies you might not get a lawyer."[6]

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.[7] In order to safeguard that right, a criminal defendant has a constitutional right to counsel during interrogation.[8] 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."[9] 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 police.[10]

The waiver of any Fifth Amendment right must be done voluntarily, knowingly, and intelligently.[11] The prosecution has the burden of proving

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[5] 9/6 4-5
[6] 9/6 5
[7] US Const, Am V; Const 1963, art 1, § 17.
[8] *Miranda v. Arizona*, 384 US 436, 444-445 (1966).
[9] *Edwards v. Arizona*, 451 US 477, 484-485 (1981) (emphasis added).
[10] *Edwards*, *supra*, 451 US at 482.
[11] *Miranda*, *supra*, 384 US at 444.

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voluntariness by a preponderance of the evidence.[12] In *People v. Cipriano*,[13] the Michigan Supreme Court gave a non-exhaustive 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*. (emphasis added). No one factor is determinative; the ultimate question is whether the totality of the circumstances surrounding the statements indicates it was made freely and voluntarily.[14]

B. *The totality of the circumstances show that Defendant's second statement was not voluntary (involuntary): The police re-initiated contact after Defendant previously asserted his right to counsel, improperly informed Defendant that he does not get a lawyer and spoke with words likely to elicit an incriminating response from the Defendant.*

Defendant's Interviews and Statements

On August 2, 2022, Officer Reginald Beasley of the Detroit Police Department met with Defendant and went over his *Miranda* rights. Defendant then waived his *Miranda* rights, however, Officer Beasley determined that Defendant was not in the right state of mind to properly waive his *Miranda* rights. Officer Beasley ended up ending the interrogation without asking anything of note.

The following day, August 3, 2022, Officer Beasley again met with Defendant. Defendant was given his *Miranda* rights and gives a statement. During this first statement, Defendant properly exercised his *Miranda* rights when he informed Officer Beasley that he wanted an attorney. The police then stopped the interview and left the defendant for a little over two-and-a-half hours. The police were unable to locate an attorney for the defendant.

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[12] *People v. DeLisle*, 183 Mich App 713, 719 (1990).
[13] *People v. Cipriano*, 431 Mich 315, 334 (1988).
[14] *Cipriano*, *supra*, 431 Mich at 334; see also *People v. Gipson*, 287 Mich. App. 261, 265 (2010).

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After the police could not locate an attorney, Officer Beasley and two officers walked into the interrogation room. Defendant inquired into his custodial status. After asking about his custodial status Defendant's questioning was re-initiated by Officer Beasley and defendant was informed that an attorney at public expense was not available and since defendant did not have a private attorney, he did not get an attorney. Shortly after being informed that the Defendant was not entitled to an attorney, Officer Beasely said something similar to "the story you gave is the story we have to go with," that statement was the functional equivalent of express questioning and broke the will of the Defendant.

You can see, based on further conversations between the Defendant and Officer Beasley, that Defendant "just wan[ts to] get this over with."[15] Defendant's will was broken and he stated that he just wanted to get it over with. Officer Paul Brown then went over the *Miranda* rights with Defendant again and seeing as his will was broken, Defendant involuntarily waived his *Miranda* rights.

The Trial Court's Ruling

After a hearing on defendant's motion to suppress, watching the interrogation video and multiple further hearing dates, the trail court held that defendant's statement admitting guilt was involuntary and properly suppressed the statement.

Defendant's second statement was involuntary.

The use of an accused individual's involuntary statements is forbidden by the due process clauses of The Michigan and United States Constitutions. US Const, Ams V, XlV; Michigan Const. 1963, Art l, § 17. *Mincey v Arizona*, 437 US 385,398 (1978); *Brown v Mississippi*, 297 US 278,287 (1936); *People v Conte*, 421 Mich704,722 (1984).

The prosecution's burden is to show by a preponderance of the evidence that the defendant's statements were voluntarily made. *People v Sears*, 124 MA 735,738

[15] August 3, 2022, 04:51:47 – 04:52:04.

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(1983). This Honorable Court must make an independent determination of the statement's voluntariness. *People v Inman*, 54 Mich App 5,8 (1974).

The United States Supreme Court has discussed several issues underlying this fundamental restriction against the use of involuntary confessions; including ensuring the trust worthiness of evidence, deterrence of questionable police conduct, and preserving the individual's "freedom of will." *Brady v United States*, 397 US 742 (1970). Yet, the appropriate test of voluntariness is the totality of the circumstances. *Brown v Illinois*, 422 US 590, 603-4 (1975); *People v Cipriano*, 431 Mich 315 (1988). Our Courts have defined this test as follows:

> "Whether, considering the totality of all the surrounding circumstances, the confession is the product of an essentially free and unconstrained choice by its maker, or whether the accused's will was overborne and his capacity for self-determination was critically impaired …." The line of demarcation is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps propel the confession." Id. at (333-4).

Decisions have focused on the defendant's state of mind and the effect of surrounding circumstances on the ability to make a rational judgment. *Conte*, 421 Mich at 704. A non-exhaustive list of circumstances courts consider includes length and conditions of detention; the defendant's age and mental and physical state; mentality and prior experience with the criminal justice system; nature of inducements offered; the police officer's conduct; and the adequacy and frequency of the advice of rights. Id. See *People v DeLisle*, 183 Mich App 713; 455 NW 2d 401 (1990). And more than a century ago the Michigan Supreme Court recognized that confessions extracted by psychological coercion of weak-minded defendants are inadmissible. *People v Flaff*, 40 Mich 706, 709 (1879). Modern decisions have treated the defendant's mental condition as a factor to be weighed in the voluntariness analysis. *People v Price*, 112 Mich App 791, 797; 317 NW2d 249 (1982); *People v Smith*, 124 Mich App 723, 725; 335 NW2d 137 (1983).

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In *People v DeLisle*, supra, the Court affirmed a finding that a confession extracted through psychological coercion was involuntary. Relying on *Leyra v Denno*, 347 US 556, 559-560; 74 S Ct 716; 98 L Ed 948 (1954), the Court noted that even 90 minutes of psychological coercion from a trained psychiatrist could render a confession involuntary *Delisle*, 183 Mich App 721-722.

Considering the totality of the circumstances – the time duration and conditions of the interrogation; Defendant's mental and physical state; his inability to resist and exercise self-control over the promises of leniency – the statement was involuntary and should not have been admitted. See *People v Price*, 112 Mich App 791; 317 NW 2d 249 (1982); *People v. Smith*, 124 Mich App 723; 335 NW2d 137 (1983).

The controlling case on the issue of Defendant's voluntarily waiving of his *Miranda* Rights after requesting an attorney is *Edwards v. Arizona*, 451 U.S. 477 (1981). The critical facts of *Edwards* is that "Edwards asserted his right to counsel and his right to remain silent on January 19, but that the police, without furnishing him counsel, returned the next morning to confront him and as a result of the meeting secured incriminating oral admissions." *Id.* at 482.

The United State Supreme Court found that "without making counsel available to Edwards, the police returned to him the next day. This was not at his suggestion or request." *Id.* at 487. The court said that Edward's "statement, made without having had access to counsel, did not amount to a valid waiver and hence was inadmissible." *Id.* "Had Edwards initiated the meeting on January 20, nothing in the Fifth and Fourteenth Amendments would prohibit the police from merely listening to his voluntary, volunteered statement and using them against him at the trial." *Id.* at 486.

Unfortunately, there is more to the analysis than whether or not the Defendant requested an attorney and if the police honored that request. After a person requests an attorney *Edwards* held that a Defendant "is not subject to 'further interrogation' in the absence of counsel, unless the accused himself 'initiated' further communication. Thus the holding in *Edwards*, rests upon the concepts of 'initiation' and 'interrogation.'" *People v. Kowalski*, 584 N.W.2d 613, 619, 230 Mich. App. 464

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(1998). "For the purposes of *Miranda*, interrogation refers to express questioning or its 'functional equivalent.' . . . The 'functional equivalent' of interrogation includes '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 from the suspect.'" *Id.* (internal citations omitted). "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." *Edwards*, 451 U.S. at 484.

In an unpublished case, *People v. Norton*, unpublished, Docket No. 356835 (December 16, 2021) the Court of Appeals explained what it means to initiate further communication. The court, in quoting *Edwards*, stated "an officer may again interrogate a suspect who has asserted the right to remain silent, without first providing the suspect with the requested lawyer, if the suspect 'initiates further communication, exchanges, or conversations with the police." *Id.* (internal citations omitted). The Court of Appeals analyzed the proper application of the *Edwards* rule in *Oregon v. Bradshaw*, 462 U.S. 1039; 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983), "even after a defendant reinitiates a conversation with police – the burden remains on the prosecution to show that the defendant waived his Fifth Amendment rights. *Id.* The Supreme Court, in *Oregon v. Bradshaw*, "explained that the relevant question was whether the defendant validly waived his right to counsel and the right to remain silent under the totality of the circumstances, which included the necessary fact that *the accused, not the police officer, reopened the dialogue*." *Id.* (emphasis added).

The court analyzed the *Edwards* rule and found it required two inquiries. First, did the Defendant invoke his right to counsel and then, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) made a knowing and intelligent waiver of the right he had invoked. *Id.* quoting *Edwards*, 1044-1046.

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In *Oregon v. Bradshaw*, 462 U.S. 1039; 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983), the United States Supreme Court analyzed a suspect initiating a conversation with the police after requesting a lawyer. The court held that "after the right to counsel had been asserted by an accused, further interrogation of the accused should not take place "unless the accused himself initiates further communications, exchanges, or conversations with the police. *Id.* citing *Edwards*, 451 U.S. at 485. The court restated that "before a suspect in custody can be subjected to further interrogation after he requests an attorney, there must be a showing that the "suspect himself initiates dialogue with the authorities." *Id.* citing *Wyrick v. Fields*, 459 U.S. 42 (1982) (*per curiam*).

The court in *Oregon v. Bradshaw*, seemed to analyze a specific quotation:

> There can be no doubt in this case that in asking, "Well, what is going to happen to me now?", respondent "initiated" further conversation in the ordinary dictionary sense of that word. While we doubt that it would be desirable to build a superstructure of legal refinements around the word "initiate" in this context, there are undoubtedly situations where a bare inquiry by either a defendant or by a police officer should not be held to "initiate" any conversation or dialogue. There are some inquiries, such as a request for a drink of water or a request to use a telephone, that are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation. Such inquiries or statements, by either an accused or a police officer, relating to routine incidents of the custodial relationship, will not generally "initiate" a conversation in the sense in which that word was used in *Edwards*. *Id.* at 1045.

The court held that "[a]lthough ambiguous, the respondent's question in this case as to what was going to happen to him evinced a willingness and a desire for a generalized discussion about the investigation; it was not merely a necessary inquiry arising out of the incidents of the custodial relationship." The *Oregon v. Bradshaw* case is different from our present case as the Defendant asked about what was going on as two uniformed officers entered into the interrogation room and were removing the

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Detective's handcuffs and re-cuffing the Defendant. Defendant, as is seen on the video, was merely inquiring about the custodial relationship after being left alone for an extended period of time.

A case that is persuasive, but not binding, *Martinez v. Cate*, 903 F.3d 982 (2018), helped explain what direct questioning was, restating that "*Innis* defined 'interrogation' as either express questioning or its functional equivalent. [*Innis*], 466 U.S. at 300-301." *Innis* recognizes that words and actions that are normally attendant to arrest and custody should be excluded from the definition of interrogation. *Id.*

Martinez v. Cate involved a statement of "What am I being booked under?" by a Defendant and then analyzed what happens when a Detective states "[a]ll I wanted was your side of the story. That's it. OK. So, I'm pretty much done with you then. Um, I guess I don't know another option but to go ahead and book you. OK. Because . . ." *Id.* at 994. The court found that the "clearest evidence of the interrogating nature of [the Detective's] statements is their plain language. By stating, "your [sic] going to be booked for murder *because* I only got one side of the story," [the Detective] causally links [Defendant's] assertion of his constitutional right to the detective's decision to book the suspect for murder." *Id.*

The court found that the "obvious implication of that linkage is that if [the Defendant] were to give his side of the story, by waiving his just-invoked right to counsel, he will not be booked, or not be booked for murder. At the very least the detective should know that his statement would be perceived this way and was "reasonably likely to elicit an incriminating response." See *Innis*, 446 U.S. at 302." *Martinez v. Cate*, at 995.

The court could not ignore the implications of the Detective's statement because "the *Innis* test explicitly calls for considering the "perceptions of the suspect, rather than the intent of the police. 446 U.S. at 301 . . ." *Id.* The analyzing court must still consider how a suspect would perceive the statements. The court found that the Defendant's statement of

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"What am I being booked under" could not be interpreted as a re-initiation of the conversation. *Id.* at 996. The detective's statements linking the Defendant's booking "to his invocation of the right to counsel, and the detective's comments that [the Defendant] would need to call his own attorney from jail are exactly the type of badgering that *Edwards* was crafted to prevent." *Id* at 997.

In *Maryland v. Shatzer*, 559 U.S. 98, 130 S.Ct. 1213 (2010), the court analyzed *Edwards* finding that "*Edwards* created a presumption that once a suspect invokes the *Miranda* right to the presence of counsel, any waiver of the right in response to a subsequent police attempt at custodial interrogation is involuntary. *Edwards*' fundamental purpose is to '[p]reserve[e] the integrity of an accused's choice to communicate with the police only through counsel,' *Patterson v. Illinois*, 487 U.S. 285, 291; 108 S.Ct. 2389; 101 L.Ed.2d 261 (1988), by 'prevent[ing] police from badgering [him] into waiving his previously asserted *Miranda* rights." *Michigan v. Harvey*, 494 U.S. 344, 350; 110 S.Ct. 1176, 108 L.Ed 293. (1990)" *Id.* "It is easy to believe that a suspect's later waiver was coerced or badgered when he has been held in uninterrupted *Miranda* custody since his first refusal to waive. He remains cut off from his normal life and isolated in a "police-dominated atmosphere," *Miranda v. Arizona*, 384 U.S. 436, 456; 86 S.Ct. 1602, 16 L.Ed.2d 694, where his captors "appear to control [his] fate," *Illinois v. Perkins*, 496 U.S. 292, 297; 110 S.Ct. 2394, 110 L.Ed.2d 243 (1992).

Argument

This is clearly a case that requires an *Edwards* analysis followed by an *Oregon v. Bradshaw* analysis. It is acknowledged by the officers, as they are interrogating the Defendant, that the Defendant requested a lawyer. After the Defendant requested a lawyer, the Detroit Police Officers then left the interrogation room and left the Defendant alone in the same room for an extended period of time. After an extended period of time, Detective Beasley and two uniformed officers entered the room. At this time, any interaction

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was initiated by the police who had Defendant in custody. Defendant did not knock on the door and request to speak to anyone or do anything else until the officers entered the interrogation room.

While the Defendant was interacting with the uniformed officers, he merely asked what was going on and where was his lawyer. That did not re-initiate the interrogation or express a want to re-initiate the conversation. The fact that the Detective told the Defendant that there was no attorney available and that the "story you gave is the story we are going to go with" is similar to *Martinez v. Cate*, where the federal court suppressed that defendant's statement when the Detective said that he "only got one side of the story." By Detective Beasley stating that the story the Defendant gave is the one that the police are going with, the Detective causally links Defendant's assertion of his constitutional right to the Detective's decision to submit a warrant request for the Defendant.

In this present case, there was no break in custody, or location, between Defendant's request for an attorney and when the police re-entered the room to transport the Defendant. It was at this time, when Defendant actually inquired into his right to have an attorney present when Detective Beasley stated that the Defendant does not get a lawyer. This was after Defendant was left alone for an extended period and had requested an attorney. After being told that the Defendant does not get a lawyer, he asks what is going on with his current status as he was at the Detroit Public Safety Headquarters and had spent the previous night at the Detroit Detention Center.

This is clearly a violation of the *Edwards* analysis and the *Oregon v. Bradshaw* analysis. After a Defendant requests an attorney, the only further communication with the Defendant should be booking questions and the Defendant should never have been told that he does not get an attorney, despite the Defendant validly exercising his *Miranda* Rights.

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Defendant, after requesting an attorney, was not released from custody and his waiver of that right in response to a subsequent police attempt at custodial interrogation is involuntary. The Defendant's right to speak to the police only through counsel was infringed when the police went back into the interrogation room and said that the Defendant does not get an attorney. Without a break in custody and being left in the interrogation room, the Defendant was coerced or badgered into waiving his previously asserted *Miranda* rights. The Defendant was cut off from his normal life and isolated in a police-dominated atmosphere, first being arrested and transported to the Detroit Detention Center, then being transported to the Detroit Public Safety Headquarters, then back to the Detroit Detention Center for less than 24 hours, and finally back to the Detroit Public Safety Headquarters where the second and third *Miranda* Rights were given.

The mere fact that the Defendant believed that he could make a statement that would prevent him from going back to the Detroit Detention Center, shows how the pressures coerced him into making a statement. When the Detective informed the Defendant that the "story you gave is the story we are going to go with," the Detective should have known that telling someone that the story they gave is the story the police are going to use to maintain his custody would elicit a response.

Detective Beasley did the functional equivalent of express questioning. The definition of interrogation "focuses primarily upon the perceptions of the suspect, rather than the intent of the police," but is an objective standard such that the police "cannot be held accountable for the unforeseeable results of their words or actions." *Rhode Island v. Innis*, 446 U.S. 291, 300-301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). It was foreseeable that after being told that the Defendant does not get an attorney and that the police are going with that story that the Defendant would respond to Detective Beasley's statements.

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Defendant strongly objects to any inference that *People v. Manning*, 243 Mich. App. 615 (2000) has very similar facts to the current matter. In the Plaintiff-Appellant's Brief on Leave to Appeal (page 18), the State of Michigan says "[t]he facts here are very similar to those in *People v. Manning*, in which this Court found the defendant's statement voluntarily made." When reviewing the *Manning* there was a longer break between the interrogations, an express written request to re-initiate an interrogation and a mistake with the warrant package. *Id.*

C. Conclusion

Based on both case law and the factual context of the interrogation, re-initiation by the police, informing Defendant that he was not entitled to an attorney and *People v. Cipriano*'s analysis of the nature of the advice to the defendant and the totality of the circumstances show that Defendant's second statement was not voluntary (involuntary) under the Fifth Amendment and the court was correct in suppressing the Defendant's statement.

D. Request For the Court of Appeals to reconsider whether pretrial release is appropriate

The prosecution filed an Application for Interlocutory Appeal on September 27, 2023. The main issue of the appeal is whether the second statement by defendant should be suppressed, the statement where defendant implicates himself. Defendant now moves this Honorable Court to reconsider whether pretrial release is appropriate under MCR 6.126.

Defendant was arraigned on August 5, 2022 in the 36th District Court for the City of Detroit in the County of Wayne. At that time, Defendant was given a remand bond, or bond was denied. On August 19, 2022, Defendant was referred to pre-trial services for a bond review. On September 8, 2022, Defendant's bond was continued as a remand by Judge Kenneth King of the 36th District Court. A bond re-determination hearing was scheduled for September 27, 2022, but was then adjourned until about November 28, 2023 and addressed on November 29, 2022, where the Motion to Reduce bond was denied. The preliminary examination was held on January 5, 2023 and continued on January 26, 2023. At the conclusion of

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the preliminary examination, Judge Kenneth King ordered the case bound over to the Third Circuit Court and ordered Defendant's bond to remain at remand, or no bond.

On February 9, 2023, Defendant made his first appearance in the Third Circuit Court for the County of Wayne and bond has been continued at remand since. Since Defendant's arraignment on August 5, 2022, he has been held in custody and as of December 21, Defendant has been held in custody for about 503 days without a bond (or about one year, four months and 16 days). Pursuant to MCR 6.126, Defendant requests that this Honorable Court reconsider whether pretrial release is appropriate.

RELIEF

THEREFORE, the Defendant, through his appointed counsel Patrick E. Nyenhuis, requests that this Honorable Court DENY the State of Michigan's application for leave to appeal and affirm the trial court's order suppressing defendant's statement.

Respectfully submitted,

/s/ Patrick E. Nyenhuis
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DATED: December 22, 2023

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 5,317, or less, countable words.

/s/ Patrick E. Nyenhuis
Patrick E. Nyenhuis (P76343)
Attorney for Defendant-Appellee

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CERTIFICATE OF SERVICE

I certify that Defendant-Appellee's Answer to Plaintiff-Appellee's Answer to Plaintiff-Appellant's Interlocutory Application for Leave to Appeal was efiled through MiFile on December 22, 2023, serving all appropriate parties.

/s/ Patrick E. Nyenhuis
Patrick E. Nyenhuis (P76343)

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DAREN DONELL FENDERSON,

Defendant-Appellee.

UNPUBLISHED
June 6, 2024

No. 367926
Wayne Circuit Court
LC No. 23-000412-01-FC

Before: SWARTZLE, P.J., and SERVITTO and GARRETT, JJ.

PER CURIAM.

The victim died during a "hit-and-run," and defendant voluntarily confessed to the crime after several interviews with the police. The district court admitted defendant's video confession over his motion to exclude, concluding that defendant had validly waived his right to remain silent and had made a voluntary statement. Viewing the same video, however, the circuit court suppressed the confession, finding instead that police had coerced defendant into make the confession. Our review of the record confirms that the circuit court erred, and we reverse and remand for further proceedings consistent with this opinion.

Defendant was 24-years-old at the time of his arrest, and he had completed three years of high-school education. The police attempted to conduct a custodial interrogation after arresting defendant, but could not proceed because defendant appeared to be intoxicated. The next day, the officers read defendant his constitutional rights concerning the interrogation, and defendant signed a document that explained these rights. During this initial interrogation, defendant told the officers that his truck was carjacked on the night of the victim's death, and that the carjacker was driving defendant's vehicle when the victim was killed. The officers interrupted defendant, however, and told defendant that they had surveillance-video footage that showed defendant driving the vehicle. Defendant attempted to change his story, and he agreed to tell the officers "what they wanted to hear" once he had an attorney. Interpreting this as a request for an attorney, the officers left defendant and tried to find him one.

After making several inquiries over a couple of hours, the officers were unsuccessful in finding defendant an attorney. They returned to the interrogation room, and one of the uniformed

officers handcuffed defendant for transport to a detention center. Defendant expressed confusion on being removed from the room, stating, "hold on, wait . . . wait, huh?" One of the officers explained to defendant that they could not find defendant an attorney, and he did not have funds to hire his own attorney, so they were going to return him to the detention center. Defendant questioned why he was leaving, and the officer explained that they could not talk to him because he asked for an attorney and that they would use the statement that defendant had given them earlier. The officer further explained that defendant would be returned to the detention center, and the police and prosecutor would seek an arrest warrant. The officer reiterated that he could not talk to defendant about the case because defendant had asked for an attorney. Defendant then responded, "Uhm, I just want to get this over," and he repeated this sentiment several more times.

In response, the officer explained to defendant that he did not want defendant to feel "compelled" to speak to them. Defendant asserted that he wanted to speak with the officers. Interpreting this as a request to reinitiate their conversation, the investigating officer left the room, and an officer separate from the investigation instructed defendant again about his constitutional rights. Defendant signed another form indicating that he understood his rights, and he then confessed to hitting the victim with his truck. Defendant was in the interrogation room for over five hours, but only spoke to the officers for two of those hours. When he was not speaking with the officers, defendant received food, drink, and bathroom breaks, and he was free to stand and walk around the room.

Defendant was subsequently arraigned on the charge of first-degree murder, among other charges, and bound over to the circuit court for trial with a bond that would "remain at remand, or no bond." Defendant moved to suppress his confession and argued that the officers violated his constitutional rights because he was coerced into waiving his right to counsel. The circuit court found that the officers used their inability to locate an attorney for defendant as a scare tactic to coerce defendant into continuing the interrogation. Thus, the circuit court held that defendant's confession was not voluntary, and it suppressed the statement.

The prosecutor now presents this interlocutory appeal on leave granted. *People v Fenderson*, unpublished order of the Court of Appeals, entered November 15, 2023 (Docket No. 367926).

"This Court reviews for clear error a trial court's factual findings in a ruling on a motion to suppress evidence. A trial court's factual findings are clearly erroneous when this Court is left with a definite and firm conviction that the trial court made a mistake." *People v Clark*, 330 Mich App 392, 415; 948 NW2d 604 (2019) (citations omitted). "To the extent that a trial court's ruling on a motion to suppress involves an interpretation of the law or the application of a constitutional standard to uncontested facts, our review is de novo." *Id*. (citation omitted).

The United States Supreme Court has "established procedures designed to safeguard" a defendant's Fifth Amendment rights. *Id*. (citing *Miranda v Arizona*, 384 US 436, 467; 86 S Ct 1602; 16 L Ed 2d 694 (1966)). "[W]hen an officer interrogates a person who is in custody, that person must be informed in clear and unequivocal terms that he has the right to remain silent and that anything that he says can be used against him in court." *Id*. (quotation marks and citation omitted). Further, "the right to have counsel present during the interrogation is indispensable to the protection of the Fifth-Amendment right" and, "if [the accused] cannot afford a lawyer, one

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will be appointed for him." *Id*. at 415-416 (citation omitted). Thus, if the defendant has requested counsel in his dealing with the police, he is not subject to further interrogation (1) until counsel has been made available to him, or (2) unless and until he reinitiates a discussion with police and waives the right to counsel. *Id*. at 416, 419. Any evidence obtained during an interrogation may not be used against the accused "[u]nless the person in custody has been given the required warnings and still waives his rights." *Id*. at 416 (quotation marks and citation omitted). See also *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981) (explaining that once a defendant has asserted his or her right to counsel, no further interrogation may occur "unless the accused himself initiates further communication, exchanges, or conversations with the police").

In this case, defendant signed multiple forms that indicated that he understood his constitutional right to counsel. The circuit court found that the officers used their inability to locate an attorney for defendant as a scare tactic that coerced defendant into providing his confession. The prosecutor argues that the circuit court erred because defendant's confession was voluntary.

All "words or actions on the part of the police" are relevant in determining whether coercive police practices have caused an accused to "elicit an incriminating response." *People v White*, 294 Mich App 622, 629; 823 NW2d 118 (2011). "[W]hen a suspect has been afforded *Miranda* warnings and affirmatively waives his *Miranda* rights, subsequent incriminating statements may be used against him" if the waiver was "voluntarily, knowingly, and intelligently" made. *People v Tanner*, 496 Mich 199, 209; 853 NW2d 653 (2014) (citations omitted).

A voluntary decision is one that is born from "free and deliberate choice, rather than intimidation, coercion or deception." *Id*. (citation omitted). "The test of voluntariness should be whether, considering the totality of all the surrounding circumstances, the confession is the product of an essentially free and unconstrained choice by its maker, or whether the accused's will has been overborne and his capacity for self-determination critically impaired." *People v Ryan*, 295 Mich App 388, 396; 819 NW2d 55 (2012) (citation omitted).

> In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Id*. 396-397 (citation omitted).]

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

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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.

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 *id*. at 479, 482. 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." *Clark*, 330 Mich App at 418 (cleaned up). Considering the totality of the circumstances, we conclude that the officers did not

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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.

On a separate note, defendant argues on appeal that the district court's pretrial release order was in error. This Court granted leave for the prosecutor to appeal the issues raised in its application for leave to appeal, and MCR 6.126 states that, in relevant part, "[i]f the application for leave to appeal is filed by the prosecutor and the defendant is incarcerated, the defendant may request that the court reconsider whether pretrial release is appropriate." See also MCR 6.106(H)(1).

With that said, defendant has not provided this Court with any argument that the district court abused its discretion. Generally speaking, "a criminal defendant in Michigan is entitled as a matter of constitutional right to have reasonable bail established for pretrial release." *People v Davis*, 337 Mich App 67, 74; 972 NW2d 304 (2021). When a defendant is charged with murder, however, the district court has the discretion to either set bond or deny bond when "the proof of defendant's guilt is evident or the presumption of the defendant's guilt is great." *Id*. at 77. Defendant was charged with first-degree murder, and the proof of defendant's guilt is evident, given his admissible confession. Thus, the district court did not err in providing no bond.

Reversed and remanded for proceedings consistent with this opinion.

/s/ Brock A. Swartzle
/s/ Deborah A. Servitto

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DAREN DONELL FENDERSON,

Defendant-Appellee.

UNPUBLISHED
June 6, 2024

No. 367926
Wayne Circuit Court
LC No. 23-000412-01-FC

Before: SWARTZLE, P.J., and SERVITTO and GARRETT, JJ.

GARRETT, J. (*dissenting*).

In the setting of a custodial interrogation, the United States Supreme Court has long held that a suspect who invokes his right to have counsel present "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." *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981). In this case, I would conclude that the investigating officer impermissibly interrogated defendant, Daren Fenderson, after he invoked his right to have counsel present, such that Fenderson's subsequent confession was obtained in violation of *Edwards*. I would therefore affirm the trial court's order granting Fenderson's motion to suppress and must respectfully dissent from the majority opinion to the contrary.

I. RELEVANT FACTS

On August 2, 2022, Detroit Police Sergeant Reginald Beasley attempted to question Fenderson in connection with an alleged hit-and-run incident resulting in death, but discontinued the interrogation after determining Fenderson was under the influence of alcohol or an intoxicating narcotic. The following day, Fenderson appeared sober and alert and initially waived his rights under *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Fenderson told the interrogating officers that he was carjacked on the night in question and the carjacker must have struck and killed the victim. The officers told Fenderson that video surveillance footage put him behind the wheel at the time of the collision. Fenderson responded: "Imma tell y'all what y'all want to hear but can I have a lawyer first?" Sergeant Beasley inquired: "Do you have a lawyer?" Fenderson replied: "No, but y'all gonna appoint one right?" Sergeant Beasley left the interrogation

Appellant Fenderson's Appendix O, p. 219

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room, indicating he needed to make some calls. Fenderson was left alone in the room for two-and-a-half hours.

When Sergeant Beasley finally returned, he brought a uniformed officer who cuffed Fenderson's hands behind his back. Sounding desperate and concerned, Fenderson asked: "Where's my lawyer?" Sergeant Beasley responded: "You don't got one so . . .," and Fenderson stated: "Wait, huh?" Sergeant Beasley answered: "You gotta have a lawyer. You have one?" Fenderson incredulously stated: "No, you said that you gonna call one." Sergeant Beasley indicated he "tried to call one, but ain't nobody available, [and] you ain't got no money, so. . . ." Fenderson stated: "Yeah I do, the money that I came in with. You can't use that money?" Sergeant Beasley asserted he could not use that money to hire an attorney. After several confused exclamations from Fenderson, Sergeant Beasley continued: "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 I'll go with."

Fenderson expressed confusion and Sergeant Beasley explained that Fenderson would be taken back to the jail while the officers submitted a warrant to the prosecution. Fenderson again expressed confusion. The sergeant replied: "When you request an attorney, I can't talk to you no more about the case. If you wanted to talk to me, you just say that you want to talk without an attorney. But you said you wanted an attorney, and I'm not allowed to talk to you by law." Fenderson asserted he wanted "to get this over with." Sergeant Beasely offered to reread Fenderson his rights to allow him to agree to speak without an attorney despite telling Fenderson that he does not want him "to feel compelled to talk to" him without an attorney just because he did not want to be transported to the jail. Fenderson hesitantly agreed to speak to the officers without an attorney and Sergeant Beasley left the room again.

While alone in the interrogation room, Fenderson muttered to himself and began to cry. Sergeant Paul Brown then entered the interrogation room and reread Fenderson his *Miranda* rights. Fenderson expressed concern that matters were "not going right." Sergeant Brown indicated he was only there to secure a waiver of rights and that he had no role in the investigation. When Sergeant Brown asked if anyone forced or coerced him into giving a statement, Fenderson stated: "That's why I don't understand . . .," but he signed the waiver form anyway. Fenderson proceeded to tell the investigating officers that he did hit the victim, but claimed he acted in self-defense.

Before trial, Fenderson moved to suppress his statements to the police, contending he did not knowingly and voluntarily waive his right to counsel. Fenderson relied heavily on Sergeant Beasley's preliminary examination testimony. At the preliminary examination, Sergeant Beasley indicated he stopped questioning Fenderson when he requested an attorney and "left the interview room and I attempted to get a lawyer for him but was unsuccessful." The following colloquy ensued:

> *Q*. Instead of ceasing and desisting the interview, you tried to get him a lawyer immediately?
>
> *A*. He requested an attorney. And I tried to contact our Control Center to get a show cause attorney and I was unsuccessful.

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Defense counsel inquired whether the department had an attorney on call to represent suspects in line-ups. Sergeant Beasley responded he did not determine whether such an attorney was on call and available. Defense counsel appeared shocked, asking the court: "Have you ever heard of that, Judge, that the police is trying to get him a lawyer?" The prosecution subsequently elicited testimony that when Sergeant Beasely left the interrogation room, he made "efforts to try to find a lawyer."

Sergeant Brown testified at the preliminary examination that "[s]everal" officers "worked as a team" to attempt to find an attorney for Fenderson. Sergeant Brown personally contacted the notification and control center "and tried to get a show [up] attorney for him. The show [up] attorney that were on duty that particular day said she only do photo line-ups." Sergeant Brown asserted he continued his efforts, but was not successful in securing an attorney.

Defense counsel ultimately moved to exclude the waiver of rights form and Fenderson's subsequent statements at the preliminary examination. Counsel noted Fenderson requested counsel and this should have stopped the interrogation. Instead, the officers embarked on an "unusual" procedure "of them trying to get him a lawyer." Counsel continued:

> So at some point they recognize, they knew, their advantage, you know. It's a game. You know you're in a trying position. So they, these detectives know that this guy could go back to his cell. Go back to his cell, he's resting and leave this room because he invoked that Fifth Amendment right. Okay.
>
> But they capitalized on something, but he's clearly not clear about it. So I'm going to object.

The prosecutor retorted that Fenderson "popped his head out and he wanted to speak to the officers," after waiting for the officers to find him an attorney.

The district court admitted Fenderson's statements at the preliminary examination, finding "for probable cause purposes" that the statement was voluntarily given after Fenderson waived his rights. Following the bind over, and after considering Fenderson's motion to suppress, the prosecution's answer, and the record, however, the circuit court granted the motion to suppress the evidence from trial, leading to this interlocutory appeal.

II. LEGAL BACKGROUND

In *Edwards*, 451 US 477, United States Supreme Court squarely addressed the requirements before interrogation may be reinitiated following a suspect's request for counsel. In *Maryland v Shatzer*, 559 US 98, 104-105; 130 S Ct 1213; 175 L Ed 2d 1045 (2010), the Court summarized the principles supporting *Edwards*:

> The rationale of *Edwards* is that once a suspect indicates that he is not capable of undergoing custodial questioning without advice of counsel, any subsequent waiver that has come at the authorities' behest, and not at the suspect's own instigation, is itself the product of the inherently compelling pressures and not the purely voluntary choice of the suspect. Under this rule, a voluntary *Miranda* waiver is sufficient at the time of an initial attempted interrogation to protect a suspect's right

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> to have counsel present, but it is not sufficient at the time of subsequent attempts if the suspect initially requested the presence of counsel. The implicit assumption, of course, is that the subsequent requests for interrogation pose a significantly greater risk of coercion. That increased risk results not only from the police's persistence in trying to get the suspect to talk, but also from the continued pressure that begins when the individual is taken into custody as a suspect and sought to be interrogated—pressure likely to increase as custody is prolonged. The *Edwards* presumption of involuntariness ensures that police will not take advantage of the mounting coercive pressures of prolonged police custody by repeatedly attempting to question a suspect who previously requested counsel until the suspect is badgered into submission. [Cleaned up.]

According to *Edwards*, 451 US at 484-485, "when an accused has invoked his right to have counsel present during custodial interrogation," the *accused* must personally "initiate[] further communication, exchanges, or conversations with the police" or the police may not reengage interrogation without the presence of counsel.

III. ANALYSIS

I would affirm the circuit court's determination that Fenderson did not knowingly and voluntarily waive his right to counsel after invoking his right, and that his subsequent statements were inadmissible. Sergeant Beasley misled Fenderson, preventing Fenderson from making an informed decision.

A.

When a suspect invokes his right to counsel during a custodial interrogation, all questioning must stop. *People v Tanner*, 496 Mich 199, 208; 853 NW2d 653 (2014). At oral argument, both the prosecution and the defense agreed the officers' actions to locate appointed counsel to represent Fenderson were highly unusual. Attorneys are on call to represent suspects during identification procedures, like live line-ups and photographic show-ups, but not to advise individuals during interrogation. Defense counsel specifically asserted there is no formal method of securing appointed counsel for an interrogation before arraignment. Further, the process to secure an attorney even for identification procedures is simply to call the Detroit Police Department's central notification and control center to ask them to contact on-call attorneys. The interrogating officers do not contact these attorneys directly. Both sides were unclear about what the officers actually did for more than two hours when the officers should have been well aware that a single phone call to the notification and control center was the only course of action. Indeed, defense counsel stated he had never encountered police officers attempting to find an attorney in this manner to represent a suspect being interrogated.

According to these concessions, a suspect undergoing interrogation is required to retain counsel if he or she wishes to immediately continue the interrogation with the representation of counsel. Both sides agreed that if the suspect requires appointed counsel, the officers must return the suspect to his or her cell and secure an arrest warrant. The matter then proceeds to district court arraignment. An arraignment must be conducted "without necessary delay," MCL 764.26, and a delay of more than 48 hours absent unusual circumstances is presumptively unreasonable,

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Riverside Co v McLaughlin, 500 US 44, 56-57; 111 S Ct 1661; 114 L Ed 2d 49 (1991). Counsel is appointed just before arraignment and within 48 hours. Michigan Indigent Defense Commission, Standard 4, available at <https://michiganidc.gov/standards/#tab-id-4> (accessed May 15, 2024). See also *Oakland Co v State of Michigan*, 325 Mich App 247, 268-269; 926 NW2d 11 (2018) (holding that states are permitted to grant greater protections than required by the Constitution, including expanding the right to counsel to criminal arraignments). Interrogation may continue with appointed counsel after that point. Again, both sides asserted that this is the proper procedure in the face of a request for appointed counsel during a pre-arraignment interrogation.

B.

As noted, once a suspect has invoked his right to counsel, all questioning must stop and may only be reinitiated by the suspect personally. *Edwards*, 451 US at 484-485; *Tanner*, 496 Mich at 208. I believe Fenderson did not personally reinitiate the interrogation. The prosecutor stated at the hearing on Fenderson's motion to suppress that Fenderson "popped his head out" of the interrogation room because he wanted to reinitiate the interrogation. If Fenderson "popped his head out," it was more likely because he was concerned after being left alone in the small interrogation room for two-and-a-half hours with nothing to occupy his time. Further, if Fenderson had "popped his head out" and announced his intent to speak to the officers without the presence of counsel, Sergeant Beasley would not have brought a uniformed officer into the interrogation room to prepare Fenderson for transport.

Rather, Fenderson's decision to speak to the officers without counsel was a direct result of the uniformed officer cuffing his hands behind his back and Sergeant Beasley's confusing and misleading statements that there was no attorney available to represent Fenderson and that Fenderson could not afford to retain an attorney. Contrary to the majority's holding, I do not believe Fenderson reinitiated the interrogation; he was backed into a corner and agreed to continue without counsel as a result of the coercive atmosphere created by Sergeant Beasley.

C.

I disagree with the majority's conclusion that Fenderson "made multiple unequivocal requests to speak to the officers without an attorney present," fully understood his rights, and knowingly and voluntarily waived his right to counsel. In my view, the record demonstrates Sergeant Beasley's incomplete and contradictory statements misled Fenderson into believing he would not be appointed counsel. Fenderson's confusion was clear from the video recording and the rereading of his *Miranda* rights did not provide clarification.

I believe the record shows that Sergeant Beasley manipulated Fenderson's desire to "get this over with." Sergeant Beasley correctly informed Fenderson that he would be returned to his cell because the invocation of the right to counsel meant the end of the interrogation. Fenderson clearly expressed his confusion about the course of events. Sergeant Beasley made no attempt to clarify that Fenderson would return to his cell pending arraignment, at which time counsel would be appointed. Instead, Sergeant Beasley told Fenderson that he did not have an attorney and could not afford one. A reasonable person in Fenderson's situation could interpret Sergeant Beasley's

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statements as meaning he or she could not have counsel at the interrogation, a legally incorrect proposition. Fenderson had no idea that counsel would be appointed in short order and likely feared he would be left to languish in jail awaiting the next step in the criminal process. Sergeant Beasley effectively sealed the deal by telling Fenderson that the investigating officers would rely on the version of events he had given during the first part of the interrogation, a story contradicted by video evidence.

Rereading the *Miranda* rights to Fenderson did not cure this error. Rereading a suspect these rights should clarify any confusion, not increase the level of misunderstanding. When Sergeant Brown read Fenderson his rights the second time, Fenderson suggested he was forced or coerced into waiving his right to counsel; after being asked whether he was forced or coerced into giving a statement, Fenderson replied: "That's why I don't understand. . . ." However, no one questioned Fenderson to ascertain whether his confusion or lack of understanding had resolved.

This Court's opinion in *People v Clark*, 330 Mich App 392; 948 NW2d 604 (2019), exemplifies what should be done when a suspect expresses confusion about his rights. In *Clark*, "[o]nly a few minutes passed between the initial reading of defendant's *Miranda* rights, his invocation of his right to counsel, and his subsequent decision to submit a signed statement." *Id*. at 400. Before beginning their second discussion, an officer summarized the *Miranda* rights and "reminded defendant that he had invoked his right to counsel and asked him if he had changed his mind and wanted to talk to them. Defendant told them that he had changed his mind, he wanted to speak with them, and he immediately informed the officers" that he wanted to follow the statement given by another suspect. *Id*. at 401.

No such clarifying information or questions were posed to Fenderson. Instead, after just being told there were no attorneys available and he could not afford counsel, Sergeant Brown merely reread the *Miranda* rights verbatim to Fenderson. No one clarified his rights when Fenderson stated: "That's why I don't understand. . . ." Fenderson was never given accurate information or advice to knowingly and voluntarily choose to give a statement to the officers.

The record of Fenderson's encounter with Sergeants Beasly and Brown demonstrates the officers misled Fenderson into involuntarily waiving his right to counsel during the interrogation and speaking to the officers without representation. I believe the circuit court correctly suppressed the resulting statements and would affirm.

/s/ Kristina Robinson Garrett