RECEIVED by MSC 6/5/2025 12:21:52 PM

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Swartzle, P.J., and Servitto and Garrett, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court No. 167391
Court of Appeals No. 367926

v

DAREN DONELL FENDERSON,

Defendant-Appellant.

EXHIBITS TO AMICI CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN AND THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION

Philip Mayor (P81691)
Bonsitu Kitaba-Gaviglio (P78822)
American Civil Liberties Union Fund of Michigan
2966 Woodward Avenue
Detroit, MI 48201
(313) 578-6803
pmayor@aclumich.org
bkitaba@aclumich.org

Terry Ding
Jackson Springer
American Civil Liberties Union Foundation
125 Broad Street
18th Floor
New York, NY 10004
(929) 969-4365
ttding@aclu.org
jspringer@aclu.org

Matthew Segal
American Civil Liberties Union Foundation
One Center Plaza, Suite 850
Boston, MA 02108
(617) 299-6664
msegal@aclu.org

Attorneys for Amici Curiae

RECEIVED by MSC 6/5/2025 12:21:52 PM

INDEX OF EXHIBITS

Exhibit A	*United States v Smith*, unpublished opinion of the United States District Court for the Western District of Missouri, issued August 4, 2021 (Docket No. 19-00035-01), 2021 WL 3892675
Exhibit B	*United States v Lewis*, unpublished opinion of the United States District Court for the Southern District of Florida, issued December 17, 2012 (Docket No. 11-20745-CR), 2012 WL 6569373
Exhibit C	*People v Sikorski*, unpublished per curiam opinion of the Michigan Court of Appeals, issued October 20, 2015 (Docket No. 327393), 2015 WL 6167674

RECEIVED by MSC 6/5/2025 12:21:52 PM

Exhibit A

United States v Smith, unpublished opinion of the United States District Court for the Western District of Missouri, issued August 4, 2021 (Docket No. 19-00035-01), 2021 WL 3892675

RECEIVED by MSC 6/5/2025 12:21:52 PM

2021 WL 3892675
Only the Westlaw citation is currently available.
United States District Court,
W.D. Missouri, Western Division.

UNITED STATES of America, Plaintiff,

v.

Corey L. SMITH, Defendant.

Case No. 19-00035-01-CR-W-HFS
|
Signed 08/04/2021

Attorneys and Law Firms

Catherine A. Connelly, United States Attorney's Office, Kansas City, MO, for Plaintiff.

FPD, Robert Glen Kuchar, Federal Public Defender's Office, Kansas City, MO, for Defendant.

REPORT AND RECOMMENDATION

W. BRIAN GADDY, UNITED STATES MAGISTRATE JUDGE

***1** This matter is currently before the Court on Defendant Corey Smith's Motion to Suppress. Doc. 24. For the reasons set forth below, the undersigned recommends Defendant's Motion to Suppress be GRANTED.

I. BACKGROUND

On February 14, 2020, the grand jury returned a twelve-count superseding indictment charging Defendants Corey Lavelle Smith, Dameon Devor Williams, Kenyashae Monae Roach, and Demetrius Armon Cornelius. Doc. 31. Defendant Smith, whose motion to suppress is the subject of this Report and Recommendation, was charged with one count of conspiracy to engage in sex trafficking in violation of 18 U.S.C. §§ 1591(a), 1591(b), and 1594(c) (Count One); two counts of sex trafficking in violation of 18 U.S.C. §§ 1591(a), 1591(b)(1), 1591(c), and 1594(a) (Counts Two and Three); two counts of sex trafficking in violation of 18 U.S.C. §§ 1591(a), 1591(b)(1), and 1594(a) (Counts Four and Five); two counts of transportation of a minor for prostitution in violation of 18 U.S.C. §§ 2423(a) and 2423(e) (Counts Eight and Nine); and one count of interstate transportation for prostitution in violation of 18 U.S.C. § 2421 (Count Ten). *Id.* at 1-7.

Defendant Smith moves to suppress his statements to law enforcement during a custodial interrogation on January 10, 2019. Doc. 24. On April 7, 2021, the undersigned held an evidentiary hearing on the motion to suppress. Doc. 88. Defendant was present and represented by counsel, Martin Warhurst. The Government was represented by Assistant United States Attorney Catherine Connelly. At the evidentiary hearing, one witness, Special Agent Timothy Kixmiller, testified. Additionally, three exhibits were admitted into evidence:

Government Exhibit 1 – Audio Recording of January 10, 2019 Interview

Government Exhibit 3 – Video Recording of January 10, 2019 Interview

Government Exhibit 4 – ICE Form 73-025: Statement of Rights and Waiver

II. FINDINGS OF FACT

Based on the evidence adduced at the evidentiary hearing, the undersigned submits the following findings of fact:

1. At approximately 11:13 p.m. on January 9, 2019, Defendant Corey Smith was detained after a vehicle stop. Tr. at 6-7.[1]

[1] "Tr." refers to the Transcript of Hearing on Motion to Suppress. Doc. 90.

2. Homeland Security Investigations ("HSI") Special Agent Timothy Kixmiller arrived shortly thereafter and arrested Defendant. Tr. at 7-8.

3. At the time of the arrest, Agent Kixmiller smelled marijuana and asked Defendant if he had marijuana on his person. Defendant stated he did not have marijuana on him. Tr. at 8.

4. Shortly thereafter, Defendant was transported to the HSI Field Office located in Kansas City, Missouri. Tr. at 9.

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

RECEIVED by MSC 6/5/2025 12:21:52 PM

5. According to Agent Kixmiller, Defendant appeared "relaxed," not intoxicated, and was aware of his surroundings and the circumstances of his arrest. Tr. at 8-9.

6. At approximately 12:30 a.m. on January 10, 2019, Defendant was placed alone in a holding cell at the HSI Field Office, and the agent noticed Defendant "was in and out of sleep and just relaxing" "most of the time" he was in the holding cell. Tr. at 9-10.

***2** 7. At approximately 2:00 a.m., Agent Kixmiller stopped by Defendant's holding cell and saw him sleeping. Tr. at 11.

8. At another time between 12:30 a.m. and 4:45 a.m., Agent Kixmiller, via closed circuit video, observed Defendant lying on the bench in his holding cell. Tr. at 11-12.

9. At about 4:45 a.m., Defendant was taken to a room to be interviewed. Tr. at 9-10, 14.

10. According to Agent Kixmiller, the entire interview was audio recorded. The audio recording, which was admitted as Government Exhibit 1 at the hearing, is two hours, two minutes, and twenty seconds in length. Tr. at 3, 13-14; Ex. 1.[2]

[2] Exhibit 1 consists of three audio files labeled IMG_0272, IMG_273, and IMG_274. The timestamps in the audio files begin anew with each file. To avoid confusion, the Court refers to IMG_0272 as "Audio File 1," IMG_273 as "Audio File 2," and IMG_274 as "Audio File 3" when identifying particularly portions of the interview. Audio File 1 is forty-eight minutes and forty seconds in length, Audio File 2 is one hour and one minute in length, and Audio File 3 is twelve minutes and forty seconds in length.

11. Due to what Agent Kixmiller described as technical issues, only the first thirty-seven minutes and twenty-six seconds of the interview were video recorded. Tr. at 13-14; Ex. 3.

12. The video recording was admitted as Government Exhibit 3 during the hearing. Tr. at 3, 13-14, 20; Ex. 3.[3]

[3] Both parties stipulated to the authenticity of Government Exhibit 1 and Government Exhibit 3. Tr. 2-3.

13. During the interview, Defendant was seated in a chair at a table and was not physically restrained. Tr. at 21-22; Ex. 3.

14. Defendant was provided a copy of ICE Form 73-025: Statement of Rights, a consent form for HSI to search his phones, and a consent form for HSI to search his residence. Tr. at 14-16, 19-20; Ex. 1, Audio File 1, at 04:23 – 04:44; Ex. 4.

15. Agent Kixmiller began the interview by reading the Statement of Rights, which was admitted as Government Exhibit 4 during the hearing. Specifically, he stated the following:

> So, I am going to read this and just look as, look as we go across. Before we ask any questions, it is my duty to advise you of your rights. You have the right to remain silent. Anything you say can be used against you in a court of law or other proceedings. You have the right to consult with an attorney before making any statements or answering any questions. Alright? You have the right to have an attorney present with you during questioning. If you cannot afford an attorney, one will be appointed for you before any questioning, if you wish. If you decide to answer questions now, you still have the right to stop the questioning at any time or to stop the questioning for the purpose of consulting an attorney. So, you understand that?

Ex. 1, Audio File 1, at 01:57 – 02:39; Ex. 3 at 00:47 – 01:30; Ex. 4; Tr. 4-5, 14-16.[4]

[4] Neither party provided certified transcripts of the recordings. Instead, the parties' briefs included counsel's impressions as to what was said during the interview. *See* Doc. 24 at 2-10, 14, 19; Doc. 28 at 3-14, 16-17, 19, 21, 23-24. In its Findings of Fact, the Court's recitation of what was said during the interview is based on its careful and repetitive review of the actual video and audio recordings admitted as exhibits at the suppression hearing.

***3** 16. As he read the Statement of Rights, Agent Kixmiller believed Defendant was reading and following along. Tr. at 16.

17. After Agent Kixmiller asked if Defendant understood, the following exchange occurred:

> **Defendant:** Mmm hmm.
>
> **Kixmiller:** So basically, it says.
>
> **Defendant:** No, I was, I was looking at the last part.
>
> **Kixmiller:** Sure. Well, we're not, we're not there yet. But basically, it says – and you know how to read and

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

RECEIVED by MSC 6/5/2025 12:21:52 PM

write – that I am going to ask you some questions, you don't have to answer them. Uh, if you want an attorney, we can stop so you can talk to an attorney or one will be appointed. And normally, when it says one will be appointed, that, that happens if you are officially charged, or you understand what I am saying?

Defendant: Mmm hmm.

Kixmiller: We are not going to give you an attorney just to talk to us. Uh, but if you are officially charged, then the Court will appoint an attorney for you.

Ex. 1, Audio File 1, at 02:40 – 03:11; Ex. 3 at 01:31 – 02:02; Tr. at 16-17.

18. Agent Kixmiller testified that although he typically reads the *Miranda* form verbatim, he deviated from the form to further explain the right to counsel because, in his experience, "people ask about...if they need an attorney or when they're going to get an attorney when it deals with appointment." Tr. at 18.

19. Approximately 90 seconds later, the following exchange occurred:

Kixmiller: So, having that in mind, and having these rights in mind, I have read or have or someone has read to me this statement of my rights and I understand what my rights are. At this time, I'm willing to answer questions without a lawyer present. You understand that?

Defendant: Mmm hmm.

Kixmiller: So, basically, what it says is I want to talk to you. You hopefully want to talk to me. I'm going to ask you questions. If you're uncomfortable with a question, you don't have to answer that question. Alright. But this is my time to talk to you so we can find out about that young girl in the backseat.

Defendant: Mmm hmm.

Kixmiller: Okay? You cool with that?

Defendant: Man. Ah.

Ex. 1, Audio File 1, at 04:40 – 05:15; Ex. 3 at 03:30 – 04:05.

20. Defendant's response prompted HSI Special Agent Joseph Stewart, who was also present during the interview, to ask if Defendant was still high and Agent Kixmiller to inquire when Defendant last smoked marijuana. Ex. 1, Audio File 1, at 05:15 – 05:23; Ex. 3 at 04:06 – 04:14; Tr. at 24.

21. Defendant said he was not high and last smoked marijuana at 6:00 or 7:00 p.m. Ex. 1, Audio File 1, at 05:20 – 05:39; Ex. 3 at 04:10 – 04:29; Tr. at 24.

22. When asked if he was on any medications or was drunk, Defendant answered in the negative and said he was "just tired." Ex. 1, Audio File 1, at 05:40 – 05:46; Ex. 3 at 04:30 – 04:36.

23. When Agent Stewart asked Defendant if he had "all his mental faculties" and was "clear headed," Defendant said, "Mmm hmm." Ex. 1, Audio File 1, at 05:47 – 06:00; Ex. 3 at 04:37 – 04:50.

24. Agent Kixmiller proceeded to tell Defendant that the forms in front of him were "three different things." He continued with the following:

The first thing is this is for us to talk to you, so you understand what your rights are.... This is a consent form for us to look at your phones. And then this would be a consent form to, uh, go through your apartment, check your apartment. All these are independent of themselves, so you would have to sign each and every one of these documents to allow us to do the phones, or to do the apartment, or to talk to you.

***4** Ex. 1, Audio File 1, at 06:01 – 06:07, 06:13 – 06:30; Ex. 3 at 04:51 – 04:58, 05:03 – 05:21.

25. Less than fifteen seconds later, Defendant, while looking down, said, "Yeah, I'm just thinking about my possibilities, that's all." Ex. 1, Audio File 1, at 06:44 – 06:47; Ex. 3 at 05:35 – 05:38.

26. The agents responded as follows:

Stewart: You want a couple minutes to think about it?

Kixmiller: We can give you a couple minutes to think about it. Or, we can start it, you can sign it, and you start it. If you don't like the, if you don't like the question, you don't have to answer it. Or, if you want to stop when we get started, you can stop.

Ex. 1, Audio File 1, at 06:51 – 07:04; Ex. 3 at 05:42 – 05:55.

27. Agent Kixmiller, referring to the forms,[5] then told Defendant, "we don't even have to worry about those right

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

RECEIVED by MSC 6/5/2025 12:21:52 PM

now," and the agents proceeded to talk with Defendant about where he lived in the apartment building. Ex. 1, Audio File 1, at 07:07 – 07:40; Ex. 3 at 05:58 – 06:33.

5 It is unclear if Agent Kixmiller was referring to all three forms.

28. Shortly thereafter, Agent Kixmiller asked Defendant, "So, what's causing you pause, my man?" Ex. 1, Audio File 1, at 08:15 – 08:17; Ex. 3 at 07:06 – 07:08.

29. Defendant did not respond immediately, so Agent Kixmiller said, "We can deal with these one at a time, or I can answer your questions, or whatever you want to do." Ex. 1, Audio File 1, at 08:19 – 08:23; Ex. 3 at 07:10 – 07:14.

30. Defendant told the agents he "never thought [he] would be in this situation" but saw this "type of stuff on TV all the time." Ex. 1, Audio File 1, at 08:24 – 08:34; Ex. 3 at 07:14 – 07:24.

31. One of the agents said, "We actually read you the rights," to which Defendant responded, "Yeah." Ex. 1, Audio File 1, at 08:34 – 08:37; Ex. 3 at 07:25 – 07:28.

32. During the first ten minutes of the interview, the agents told Defendant he did not have to answer questions, he could refuse to answer questions, or he could stop the questioning. In addition to the statements identified in the foregoing paragraphs, the agents made the following statements:

a. "If you don't want to answer a question, you don't, you can refuse to answer that question. If you have a question that we talk you're not comfortable or you don't understand, you can ask me to repeat it or come at it a different way, so you understand what I'm asking ya." Ex. 1, Audio File 1, at 03:46 – 04:02; Ex. 3 at 02:37 – 02:53.

b. "So, if you want to stop the questioning, we can stop that too." Ex. 1, Audio File 1, at 04:18 – 04:22; Ex. 3 at 03:09 – 03:13.

c. "So that you know, you know that you have the ability to stop answering questions or not answer a question at all." Ex. 1, Audio File 1, at 06:36 – 06:42; Ex. 3 at 05:26 – 05:33.

d. "All we ask is that you tell us the truth. And if there's something there where you think you've got an issue, just don't answer the question." Ex. 1, Audio File 1, at 08:59 – 09:06; Ex. 3 at 07:50 – 07:57.

e. "But if you don't want to give a statement too, that's cool. But this is your chance to explain stuff to us." Ex. 1, Audio File 1, at 09:08 – 09:14; Ex. 3 at 07:59 – 08:15.

***5** f. "This is kinda your chance, umm, to say what you want to say. If you don't want to say anything, that's cool too." Ex. 1, Audio File 1, at 10:17 – 10:23; Ex. 3 at 09:08 – 09:14.

33. Approximately ten minutes after the interview began, Agent Kixmiller informed Defendant of the difference between "state and local" and "federal," stating the following about the "federal" criminal justice system:

> On the federal side, completely different. We actually give you points that we call downward departure. If it comes to a point where you're gonna get charged or if you gonna get charged, we have a scale. So, if you talk to us and you're cooperating, all those points go up, and the offense goes down. You understand what I'm saying? We're not saying you're being charged because we don't know. We don't make that decision. All we know is we got a fourteen-year-old runaway in the backseat of your car, and we want to talk to you to get your side of the story to see if what they're throwing dirt on is true, or if what they're saying is accurate, or if they're just full of bunk.

Ex. 1, Audio File 1, at 10:43 – 11:23; Ex. 3 at 09:34 – 10:13.

34. Agent Stewart told Defendant, "the story is still unclear," the agents' "job is find facts," and they "can only figure out what the facts are by hearing the story." Ex. 1, Audio File 1, at 11:23 – 11:49; Ex. 3 at 10:13 – 10:39.

35. About thirty seconds later, Agent Kixmiller said, "Bottom line is we don't know what Corey knows unless we talk to Corey." Ex. 1, Audio File 1, at 12:26 – 12:29; Ex. 3 at 11:17 – 11:20.

36. Defendant responded, "Yeah, Corey ain't got nothin' goin' on. It's just, I don't know. I ain't never been in a situation like this before." Ex. 1, Audio File 1, at 12:29 – 12:38; Ex. 3 at 11:20 – 11:29.

37. Approximately twenty seconds later, Agent Stewart said, "But you did read, you did read and understand all your rights?" Ex. 1, Audio File 1, at 13:00 – 13:03; Ex. 3 at 11:51 – 11:53.

RECEIVED by MSC 6/5/2025 12:21:52 PM

38. Defendant responded with "mmm hmm," while smiling and nodding his head, and then stated, "I see what ya'll saying." Ex. 1, Audio File 1, at 13:03 – 13:05; Ex. 3 at 11:54 – 11:56.

39. A few seconds later, Defendant said, "I think I let you all know what's going on. 'Cause I just. I'm debating on (unintelligible). I've been sitting in there. I don't know what was goin' on. You all was (unintelligible). I was asleep." Ex. 1, Audio File 1, at 13:08 – 13:21; Ex. 3 at 11:58 – 12:11.

40. Agent Stewart told Defendant they wanted to know about his relationship with the girl who was in his vehicle, when and how he met her, and what he knew about her. Ex. 1, Audio File 1, at 13:40 – 14:00; Ex. 3 at 12:31 – 12:51.

41. Defendant proceeded to answer the agents' questions. Ex. 1, Audio File 1, at 14:01 – 32:38; Ex. 3 at 12:52 – 31:28.

42. Approximately thirty minutes into the interview, Agents Kixmiller and Stewart made the following statements to Defendant:

a. "I know you are feeling pressure right now. But, um, the best thing you can do is tell the truth on all this, okay?" Ex. 1, Audio File 1, at 32:40 – 32:53; Ex. 3 at 31:30 – 31:43.

b. "So, like, you know what I'm sayin', man? Like, like, it's going to be easier for you to get to the heart of this. 'Cause I'm trying to figure out if you were, if you were mistold, like they lied to you, or if you actually did it knowingly." Ex. 1, Audio File 1, at 33:34 – 33:53; Ex. 3 at 32:25 – 32:43.

***6** c. "It's a lot easier to tell the truth." Ex. 1, Audio File 1, at 33:57 – 33:59; Ex. 3 at 32:47 – 32:49.

d. "But, like, playin' the hard road on this is really not gonna help you, dude, 'cause there's stuff you're not gonna to be able to beat on this story. And lyin' and lyin' and lyin' and lyin' is just gonna make you look worse." Ex. 1, Audio File 1, at 34:38 – 34:48; Ex. 3 at 33:29 – 33:38.

43. The agents then told Defendant what they thought would be a more believable story than what he was telling them, but they would not know what actually occurred unless Defendant told them the truth. Ex. 1, Audio File 1, at 34:58 – 35:40; Ex. 3 at 36:55 – 37:37.

44. Agent Kixmiller stated, "We're giving you the chance to come and tell us what we already know, brother. We're tryin' to get you to clean up what we already know." Ex. 1, Audio File 1, at 38:04 – 38:12.

45. A few minutes later, Agent Stewart said, "If you carry this on your shoulders and just try to stoneface through this, man, 'cause, you know you're going to be left floundering, you know you're going to be left floundering." Ex. 1, Audio File 1, at 41:36 – 41:48.

46. After Defendant asked to take a cigarette break to calm down, the following conservation occurred between Agent Stewart and Defendant:

Stewart: I know you're scared to death, man. I know you're scared to death. I know you don't want to be that story. I know you don't. Okay? Listen to me, listen to me. If you don't, we need to know what really happened, or people are gonna assume the worst. Okay? And ain't nobody gonna believe the story that you only knew her a couple times and this and that and this and that. Because, like I said, man, we're gonna keep digging because we're not that smart but we are relentless. So, like, you know, give us consent to go to your apartment. We get in that way. You don't give us consent, we write a search warrant. We make an application for a search warrant. Maybe we get in that way, right?

Defendant: Mmm hmm.

Stewart: And then let's say we go in there, and we see a lock on the wrong side of the door. Right?

Defendant: Mmm hmm.

Stewart: That looks like you would put it there to keep someone in. That could be construed the wrong way, right?

Defendant: Mmm hmm.

Stewart: So, there's questions about stuff like that that you may wanna get out of the way first.

Ex. 1, Audio File 1, at 41:58 – 42:18, 42:38 – 42:53, 42:57 – 44:01.

47. After Agent Stewart and Defendant briefly discussed what one of his neighbors allegedly saw during the prior week, Agent Stewart stated, "So, like, it's like stuff like, bro. Like, you gotta explain it to us. Otherwise, I am going to assume the otherwise." Ex. 1, Audio File 1, at 44:14 – 45:16.

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

RECEIVED by MSC 6/5/2025 12:21:52 PM

48. After taking a cigarette break, Agent Kixmiller said, "And, you know, it's our time to hear from Corey." Ex. 1, Audio File 2, at 00:00 – 00:05.

49. Defendant continued to answer the agents' questions. Ex. 1, Audio File 2, at 02:46 – 05:59.

50. After a few minutes, Defendant told the agents he did "not know the exact laws" and did not "feel comfortable" answering certain questions. Ex. 1, Audio File 2, at 06:18 – 06:44.

***7** 51. Agent Kixmiller repeated the difference between the state and federal criminal justice systems, telling Defendant if he took responsibility for his actions and "owned up" to his conduct, he would "get credit" from the Government, a downward departure, and a lower guideline or a lower "sentencing." Ex. 1, Audio File 2, at 06:54 – 07:30. The agents clarified they did not personally make that decision. Ex. 1, Audio File 2, at 7:30 – 7:34.

52. Roughly fifteen seconds later, Agent Kixmiller said the following:

> We're tryin' to give you an opportunity to tell us, to help us, to help you, so when we write our reports, we can say he was honest with us, he was telling us the truth, he was cooperative, he realized that he had made a mistake and he wanted to own up to it and fix it and move on. But we can't do that. We can't be your cheerleader unless you talk to us. And that's what we're tryin' to do. We are tryin' to be your cheerleader down the road.

Ex. 1, Audio File 2, at 08:09 – 08:37.

53. Defendant continued to answer the agents' questions. Ex. 1, Audio File 2, at 10:11 – 1:01:00.

54. When discussing potentially illegal conduct, Agent Kixmiller stated, "You're not being charged right now, man. We're just trying to find out what the truth is." Ex. 1, Audio File 2, at 14:14 – 14:53.

55. Over thirty minutes later, Agent Stewart again told Defendant that he had not been charged, and the agents "don't make charging decisions. The AUSA will have to decide if there are any federal charges there or not." Ex. 1, Audio File 2, at 48:35 – 48:42.

56. At the close of the interview, which lasted about two hours, Defendant executed the form consenting to HSI's search of his phones. Ex. 1, Audio File 3, at 01:34 – 02:36.

57. After Defendant signed the form, Agent Kixmiller asked Defendant if he read the form. Defendant did not audibly respond. Agent Kixmiller then read the form aloud. Ex. 1, Audio File 3, at 02:51 – 04:39.

58. Agent Kixmiller proceeded to read aloud the form allowing HSI to search Defendant's residence. Ex. 1, Audio File 3, at 04:40 – 07:23.

59. Defendant signed the form, consenting to a search of his residence. Ex. 1, Audio File 3, at 07:23 – 07:53.

60. Defendant did not sign the waiver on the Statement of Rights before he answered any of the agents' questions. Tr. at 32; *see* Ex. 1 and Ex. 3.

61. According to the Government, Defendant did not execute the waiver on the Statement of Rights until "later in the interview," but it was "signed in the audio" recording. Tr. at 32-33.

62. During the audio recording, there is no mention of Defendant signing the waiver on the Statement of Rights. *See* Ex. 1, Audio Files 1 – 3.

63. Apart from the first few minutes of the interview, the Statement of Rights was not mentioned again during the interview until the final four minutes of the audio recording when Agent Stewart asked, "Can you grab the, like three of the *Miranda* form [unintelligible] so we can get that one too?"[6] Ex. 1, Audio File 3, at 08:03 – 08:05.

6 Based on its review of the audio recording, the Court believes Agent Stewart's question was directed at someone other than Defendant or Agent Kixmiller.

64. Roughly thirty seconds later, Agent Kixmiller asked where the *Miranda* form was. Ex. 1, Audio File 3, at 08:35 – 08:37.

65. While Agent Stewart talked with Defendant about what he wanted to eat, Agent Kixmiller made the following statement: "And then we'll get, uh, the *Miranda* form wherever that's at."[7] Ex. 1, Audio File 3, at 08:44 – 08:48.

RECEIVED by MSC 6/5/2025 12:21:52 PM

7 Because Agent Stewart and Defendant were conversing with one another at the time this statement was made, Agent Kixmiller's statement appears to have been directed to someone other than Defendant or Agent Stewart.

***8** 66. According to Agent Kixmiller, the Statement of Rights was on the table in front of Defendant during the first twenty-five or thirty minutes of the interview after which the form was "shuffled...under [Agent Kixmiller's] notebook" because he "was taking notes" and did not want to "misplace or lose it." Tr. at 20.

67. At some unknown time not reflected on the video or audio recordings, the Statement of Rights form was signed by Defendant, Agent Kixmiller, and Agent Stewart. Tr. at 14-15; Ex. 4.

68. Agent Kixmiller described Defendant's demeanor during the interview as "calm," "responsive to questions," and "cordial." Tr. at 22.

69. In Agent Kixmiller's opinion, Defendant did not have difficulty comprehending what the agents were saying. Tr. at 24-25.

70. According to Agent Kixmiller, Defendant did not indicate he wanted to talk to a lawyer during the interview, did not bring up the subject of legal counsel, and did not express confusion about his rights. Tr. at 14, 25.

71. In his twenty-five years of law enforcement experience, Agent Kixmiller never witnessed the appointment of counsel for a suspect during the questioning phase. Tr. at 27-30.

III. DISCUSSION

A. *Miranda* Rights

The United States Constitution protects individuals from self-incrimination. U.S. Const. amend. V. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the United States Supreme Court "adopted a set of prophylactic measures designed to safeguard th[is] constitutional guarantee...." *J.D.B. v. North Carolina*, 564 U.S. 261, 269 (2011). Before a suspect in custody is questioned, law enforcement must warn him that "he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda*, 384 U.S. at 444. These warnings are "an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere." *Id.* at 468, 471. While the warnings need not be given verbatim, law enforcement must reasonably convey the *Miranda* rights to the accused. *Duckworth v. Eagan*, 492 U.S. 195, 202-03 (1989); *California v. Prysock*, 453 U.S. 355, 359-60 (1981); *Miranda*, 384 U.S. at 476.

Specific to the right to counsel, "an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation..." *Miranda*, 384 U.S. at 471. The Court described the right to counsel warning as "an absolute prerequisite to interrogation." *Id.* It also held "the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel **prior** to questioning, but also to have counsel present **during** any questioning if the defendant so desires." *Id.* at 469-70 (emphasis added).

In addition, "it is necessary to warn [the individual] that if he is indigent a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one." *Id.* at 473. The Court further observed, "[t]he warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent – the person most often subjected to interrogation – the knowledge that he too has a right to have counsel present." *Id.* Thus, "only by effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it." *Id.*

B. Waiver of *Miranda* Rights

***9** An "accused's statement during a custodial interrogation is inadmissible at trial unless the prosecution can establish that the accused 'in fact knowingly and voluntarily waived [*Miranda*] rights' when making the statement." *Berghuis v. Thompkins*, 560 U.S. 370, 382 (2010) (quoting *North Carolina v. Butler*, 441 U.S. 369, 373 (1979)); *Miranda*, 384 U.S. at 444. Courts apply a two-part inquiry to determine whether the accused waived effectuation of his or her *Miranda* rights. *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (citations omitted). "First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Id.* "Second, the waiver must have been made with a full awareness of both the nature of the

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

RECEIVED by MSC 6/5/2025 12:21:52 PM

right being abandoned and the consequences of the decision to abandon it." *Id.* (often referred to as a "knowing and intelligent" waiver).

When determining whether the accused's waiver was valid, courts examine the "totality of the circumstances" surrounding the interrogation. *Id.* (quoting *Fare v. Michael C.*, 442 U.S. 707, 725 (1979)). Courts have recognized a variety factors in assessing the voluntariness of waiver, including the accused's age, intelligence, and education; whether the accused consented after receiving *Miranda* rights; whether the accused suffered from mental impairments; the length of time the accused was detained and questioned; whether the accused was without counsel when questioned; whether law enforcement made promises or misrepresentations; and whether the accused, due to prior arrests, was aware of the rights and protections afforded by the legal system. *See, e.g., United States v. Vinton*, 631 F.3d 476, 481-83 (8th Cir. 2011) (citation omitted); *United States v. Kime*, 99 F.3d 870, 880 (8th Cir. 1996); *United States v. Larry*, 126 F.3d 1077, 1079 (8th Cir. 1997).

A waiver of *Miranda* rights may be explicit or implicit. *Berghuis*, 560 U.S. at 383-85 (citations omitted); *United States v. Zamarripa*, 544 F.2d 978, 980-81 (8th Cir. 1976) (citations omitted) ("A voluntary waiver need not assume any particular form; it may be made in writing...or it may be made orally by replying to questions...."). The law presumes "an individual who, with a full understanding of his or her [*Miranda*] rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford." *Berghuis*, 560 U.S. at 385 (citations omitted). Regardless of whether the waiver is explicit or implicit, the Government must prove by a preponderance of the evidence that the waiver was both voluntary and knowing and intelligent. *Id.* at 382-83; *Colorado v. Connelly*, 479 U.S. 157, 168-69 (1986) (citations omitted); *United States v. Figueroa-Serrano*, 971 F.3d 806, 814 (8th Cir. 2020) (citations omitted).

(1) Was the Waiver Voluntary?

A waiver of Fifth Amendment privilege is considered voluntary unless there is evidence the individual's will was overborne and his or her "capacity for self-determination" was critically impaired due to the actions of law enforcement. *Colorado v. Spring*, 479 U.S. 564, 574 (1987) (quoting *Connelly*, 479 U.S. at 163-64); *see also Moran*, 475 U.S. at 421 (holding a statement must be "the product of a free and deliberate choice rather than intimidation, coercion, or deception."). Defendant does not argue the agents threatened or coerced him and does not allege his capacity to make his own decisions was critically impaired due to the agents' actions. *See* Doc. 24. Accordingly, the undersigned recommends the Court find Defendant's waiver was voluntary.

Defendant alternatively suggests his fatigue may have prevented him from voluntarily waiving his rights. In his motion, he contends he "had not been to sleep" before the interrogation began at 4:45 a.m. and told the agents he was very tired. Doc. 24 at 2-3. This averment contradicts evidence adduced at the suppression hearing that Defendant slept for significant periods while in the holding cell before his interrogation. Further, after carefully reviewing the audio and video recordings, the undersigned recommends a finding that any fatigue or lack of sleep did not rise to a level that would suggest the statement was not voluntarily given. The Eighth Circuit has found when an individual's mental defect "somewhat diminish[es] capacity to resist coercion," a *Miranda* waiver will not be found involuntary on the basis of diminished capacity "if there is no evidence of police coercion." *Vinton*, 631 F.3d at 483 (citation omitted). Here, there is no evidence of police coercion; thus, Defendant's fatigue did not render his waiver involuntary.[8]

8 The recordings demonstrate Defendant's fatigue did not cause his will to be overborne by the agents. *See United States v. Annis*, 446 F.3d 852, 856 (8th Cir. 2006) (finding the defendant failed to establish "his pain and meth withdrawal caused his will to be overborne," and he was able to answer questions, read and review statements, and sign a report); *see also United States v. Casal*, 915 F.2d 1225, 1229 (8th Cir. 1990) ("Intoxication and fatigue do not automatically render a confession involuntary; rather, the test is whether these mental impairments caused the defendant's will to be overborne.") (citations omitted). Although Defendant was fatigued, he was still able to answer questions and openly converse with the agents. Regardless, his fatigue may be considered below as to whether he was fully aware of his right to counsel and understood the consequences of waiving that right.

(2) Was the Waiver Knowingly and Intelligently Made?

***10** In addition to being voluntary, a waiver of *Miranda* rights must be knowing and intelligent. *Fare*, 442 U.S. at 724-25. The *Miranda* warnings ensure a waiver is knowing and intelligent by requiring the suspect to be fully advised of the constitutional privilege against self-incrimination. *Spring*, 479 U.S. at 574. A knowing and intelligent waiver is "made

RECEIVED by MSC 6/5/2025 12:21:52 PM

with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *United States v. Castro-Higuero*, 473 F.3d 880, 885-86 (8th Cir. 2007) (citation omitted).

(a) The Right to Counsel as Communicated to Defendant

At the beginning of Defendant's interview, the Statement of Rights form was read by Agent Kixmiller. Relevant to the pending motion is what Defendant was told about his right to counsel:

> You have the right to consult with an attorney before making any statements or answering any questions. Alright? You have the right to have an attorney present with you during questioning. If you cannot afford an attorney, one will be appointed for you before any questioning, if you wish. If you decide to answer questions now, you still have the right to stop the questioning at any time or to stop the questioning for the purpose of consulting an attorney.

Ex. 1, Audio File 1, at 02:11 – 2:37; Ex. 4. Agent Kixmiller then asked Defendant if he understood, to which Defendant responded with "mmm hmm." Ex. 1, Audio File 1, at 02:37 – 02:40. Neither party suggests Agent Kixmiller's reading of the Statement of Rights was inaccurate, inadequate, or misrepresented Defendant's rights. Rather, the conversation that immediately followed where Agent Kixmiller deviates from the written statement of rights form and attempts to clarify the *Miranda* right to counsel is the focus of the pending motion:

> **Kixmiller:** So basically, it says.
>
> **Defendant:** No, I was, I was looking at the last part.
>
> **Kixmiller:** Sure. Well, we're not, we're not there yet. But basically, it says – and you know how to read and write – that I am going to ask you some questions, you don't have to answer them. Uh, if you want an attorney, we can stop so you can talk to an attorney or one will be appointed. ***And normally, when it says one will be appointed, that, that happens if you are officially charged, or you understand what I am saying?***
>
> **Defendant:** Mmm hmm.
>
> ***Kixmiller: We are not going to give you an attorney just to talk to us. Uh, but if you are officially charged, then the Court will appoint an attorney for you.***

Ex. 1, Audio File 1, at 02:40 – 03:11 (emphasis added). A matter of seconds – twenty-one seconds, to be exact – passed between when Agent Kixmiller finished reading the Statement of Rights and when he began to tell Defendant what, according to the agent, "normally" happened. Then, approximately 90 seconds later, Agent Kixmiller stated the following:

> **Kixmiller:** So, having that in mind, and having these rights in mind, I have read or...someone has read to me this statement of my rights and I understand what my rights are. At this time, I'm willing to answer questions without a lawyer present. You understand that?
>
> **Defendant:** Mmm hmm.
>
> **Kixmiller:** So, basically, what it says is I want to talk to you. You hopefully want to talk to me. I'm going to ask you questions. If you're uncomfortable with a question, you don't have to answer that question. Alright. But this is my time to talk to you so we can find out about that young girl in the backseat.
>
> ***11 **Defendant:** Mmm hmm.
>
> **Kixmiller:** Okay? You cool with that?
>
> **Defendant:** Man. Ah.

Ex. 1, Audio File 1, at 04:40 – 05:15; Ex. 3 at 03:30 – 04:05.

Almost immediately after Defendant was accurately informed of his right to counsel, Agent Kixmiller told Defendant what "normally" happened with regard to the appointment of counsel. That is, Defendant was advised an attorney would not be appointed for him unless he was "officially charged." To further clarify, Agent Kixmiller notified Defendant, "We are not going to give you an attorney just to talk to us." This statement was followed by a reminder that he would not be appointed counsel unless he was "officially charged." Less than two minutes after telling Defendant, in three separate statements, that he would not be given or appointed counsel for the interview, Agent Kixmiller explained to Defendant that, by signing the waiver on the Statement of Rights, he agreed to "answer questions without a lawyer present." *Id.* Defendant's interview continued and lasted approximately two hours. Except for the above-mentioned statements, the right to counsel was never discussed again at any point during the interview.

As set forth *supra*, section III(A), Agent Kixmiller's statements (i.e., Defendant would not be given or appointed

RECEIVED by MSC 6/5/2025 12:21:52 PM

counsel just to speak with the agents and would not be appointed counsel until a future time) do not accurately depict Defendant's right to counsel under *Miranda*. 384 U.S. at 444, 479. The question before the Court is whether these inaccurate statements, which closely followed the accurate reading of the form explaining the right to counsel under *Miranda*, vitiate the accurate warning and render Defendant's waiver invalid and not knowingly and intelligently made. To determine this issue, the Court must examine the totality of the circumstances surrounding the interrogation.

(b) Discussion After the Statement of Rights Was Read

Before the interview began, Defendant was given three forms: the Statement of Rights, a form consenting to a search of his phones, and a form consenting to a search of his residence. After reading the Statement of Rights form, Agent Kixmiller asked Defendant if he understood. Defendant did not respond with "yes." Instead, as best the Court can discern, he said, "mmm hmm." Immediately thereafter, Agent Kixmiller began to tell Defendant what the form "basically...says." Defendant, however, interrupted Agent Kixmiller, saying he was "looking at the last part." It is unclear from the recordings as to which of the three forms Defendant was referring.[9]

[9] If Defendant was looking at the bottom portion of the Statement of Rights, he was viewing the waiver. *See* Ex. 4. While Agent Kixmiller believed Defendant was following along as he read the Statement of Rights, Defendant's statement suggests he was not following along or was looking at another form. When Defendant said he was "looking at the last part," Agent Kixmiller responded, "Well, we're not, we're not there yet." Given that Agent Kixmiller had finished reading the top portion of the Statement of Rights and, ostensibly, would have read the waiver next, it is peculiar that he told Defendant they were not yet to the waiver portion if Defendant was looking at the waiver.

***12** Regardless of which form Defendant was viewing, Agent Kixmiller's next statements to Defendant were clear. That is, the agent told Defendant he would not be appointed an attorney unless he was officially charged. When asked if he understood, Defendant replied with "mmm hmm." Agent Kixmiller then continued by telling Defendant he would not be given "an attorney just to talk to" the agents. And again, the agent told Defendant he would only be appointed an attorney if he was officially charged. Roughly 90 seconds later and without further discussion about the right to counsel, Agent Kixmiller asked Defendant if he understood his rights and was "willing to answer questions without a lawyer present." Defendant responded with "mmm hmm."

After this response, discussions ensued about the three forms. At one point, Agent Kixmiller said each form was separate, and Defendant would "have to sign each and every" document for the agents to "do the phones, or do the apartment, or to talk to you." Less than fifteen seconds later, Defendant told the agents he was thinking about his "possibilities." Although one agent offered to give Defendant a couple minutes to think about it, the agents continued talking, not allowing him to respond to the inquiry about whether he wanted a couple minutes.

Agent Kixmiller then told Defendant they did not have to worry about the forms right then. But it is unclear from the recordings if he was referring to all three forms or the two consent-to-search forms. Defendant was then asked what was "giving [him] pause." He did not respond immediately. Defendant eventually said he had never been in a situation like he was, he never thought he would be in this situation, and he saw this type of situation on television all the time.

(c) The Inquiry into Whether Defendant Understood His Rights

Nearly ten minutes after the Statement of Rights was read and Agent Kixmiller deviated from the form by further discussing the right to counsel, Agent Stewart asked Defendant if he read and understood his rights. Notably, the last statements made to Defendant about his right to counsel were (1) "[W]hen it says [a lawyer] will be appointed, that, that happens if you are officially charged"; (2) "We are not going to give you an attorney just to talk to us;" and (3) "Uh, but if you are officially charged, then the Court will appoint an attorney for you." During the ten minutes that elapsed between these statements and the agents asking if he read and understood his rights, Defendant was told, among other things, it was the agents' time to talk with him, he had to execute a form for the agents to talk with him, he would get a lesser offense if he talked with the agents and cooperated, and it was not known whether he would be charged.

In response to Agent Stewart asking if he read and understood his rights, Defendant said "mmm hmm," while nodding his head and smiling. Although the waiver remained in front of Defendant for approximately twenty-five minutes, the agents

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

RECEIVED by MSC 6/5/2025 12:21:52 PM

did not ask him to execute the waiver at that time. Defendant's execution of the waiver is not contained on the recordings, and it is unknown if he asked any questions about the Statement of Rights or the waiver immediately before he signed the waiver. It does not appear from this record that Defendant signed the waiver until after the custodial interrogation.

(d) The Agents' Other Statements

Although the right to counsel was not discussed during the remainder of the interview, the agents made several statements related to what Defendant was told about his right to counsel. These statements provide insight into whether Defendant's waiver was knowing and intelligent. For example, Defendant was told at least four times that he was not being charged:

***13**
- "We're not saying you're being charged because we don't know. We don't make that decision."
- "You're not being charged right now, man. We're just trying to figure out what the truth is."
- "[W]e don't make charging decisions. The AUSA will have to decide if there are any federal charges there or not."
- "If it comes to a point where you're gonna get charged or you gonna get charged...."

All four statements were made after Agent Kixmiller told Defendant twice that he would not be appointed an attorney unless or if he was "officially charged."

In addition, the agents repeatedly told Defendant that the interview was their time to talk with him. These statements included, but were not limited to, the following:

- "[T]his is my time to talk to you...."
- "[I]t's our time to hear from Corey."
- "[W]e need to know what really happened, or people are gonna assume the worst."
- "You gotta explain it to us. Otherwise, I am going to assume the otherwise."
- "We're giving you the chance to come and tell us what we already know, brother."
- "Bottom line is we don't know what Corey knows unless we talk to Corey."
- "We're tryin' to get you to clean up what we already know."
- "[T]his is your chance to explain stuff to us."
- "This is kinda your chance, umm, to say what you want to say."

Similar to the agents' comments about Defendant not being charged, these statements about the interview being their time to talk with him were made after Agent Kixmiller told Defendant, "[w]e are not going to give you an attorney just to talk to us."[10]

10 In addition to the agents' comments about the interrogation being their time to talk with Defendant, they told Defendant that talking with them would positively impact any charges or sentence. For example, Agent Kixmiller advised Defendant that if he talked to them and cooperated, he would get points called "downward departure," and the offense would be reduced. Defendant was also informed he would "get credit" from the Government and could get a lower sentence if he took responsibility for his actions. He was instructed that the interview was his "opportunity" to tell the agents what he knew so they could help him and be his "cheerleader" by reporting he was honest, cooperative, and wanted to fix his mistakes. All these statements were made after the agents advised Defendant he would not be given an attorney to talk with them.

Curiously, after the Statement of Rights was read, the agents told Defendant at least seven separate times that he did not have to answer their questions. Defendant seemed to understand that he did not have to answer their questions. Once, he told the agents he did not "feel comfortable" answering certain questions because he did "not know the exact laws." Tellingly, Defendant did not say anything about an attorney at that time.

(e) Defendant's Lack of Experience with Law Enforcement

The Government did not offer evidence that Defendant had experience with federal, state, or local law enforcement officers before January 10, 2019. In fact, during the interview, Defendant told the agents he had never been in a situation like

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

RECEIVED by MSC 6/5/2025 12:21:52 PM

the one in which he found himself. And there is no evidence that Defendant has been the subject of a previous custodial interrogation.

(f) Defendant's Fatigue

***14** Defendant was arrested before midnight, and the interrogation began at 4:45 a.m. Agent Kixmiller observed Defendant was sleeping and lying down in his cell between 12:30 a.m. and 4:45 a.m. During the interview, Defendant told the agents he was tired, and in passing, mentioned he had been sleeping in the cell. Agent Kixmiller observed Defendant did not have difficulty comprehending what the agents were saying and was responsive to questions. Any sleepiness or fatigue did not affect Defendant's ability to knowingly and intelligently waive his rights.

(3) Applicable United States Supreme Court Decisions

By relinquishing the protection against self-incrimination and answering the agents' questions, Defendant waived his *Miranda* rights. For his waiver to be valid, Defendant must have been fully aware of the nature of the right he abandoned and the consequences if the right was abandoned. *See Moran*, 475 U.S. at 421. In their briefing, the parties focused on two United States Supreme Court cases – *California v. Prysock* and *Duckworth v. Eagan.* While each matter provides some guidance, both are distinguishable.

(a) California v. Prysock

In *California v. Prysock*, the United States Supreme Court found law enforcement's representations about a suspect's right to counsel were accurate. 453 U.S. at 361-62. Prysock, a juvenile at the time, was informed he had the right to counsel before he was questioned, he had a right to have counsel present during all questioning, and he had the right to have counsel appointed at no cost. *Id.* at 356-57. Prysock's parent then asked law enforcement if Prysock would still have an attorney later if he gave a statement without counsel at the time of the interrogation. *Id.* at 357. Law enforcement informed the parent that Prysock "would have an attorney when he went to court and that 'he could have one at this time if he wished one.' " *Id.* Prysock's motion to suppress was unsuccessful in the trial court. But the state appellate court determined he had not been adequately advised of his right to counsel before further questioning, and the California Supreme Court denied a petition for hearing. *Id.* at 358-59.

The Supreme Court found the warnings adequate. *Id.* at 361-62. The Court observed *Miranda* did not require a precise formulation or verbatim recital of the warnings to be given. *See id.* 359-60. According to the Court, when law enforcement links the right to counsel "to a future point in time after police interrogation," the individual is "not fully advise[d]... of his right to appointed counsel before such interrogation." *Id.* at 360. The warnings conveyed to Prysock included "his right to have a lawyer appointed if he could not afford one prior to and during interrogation." *Id.* at 361. Further, "nothing in the warnings given [to Prysock] suggested any limitation on the right to the presence of appointed counsel different from the clearly conveyed rights to a lawyer in general." *Id.* at 360-61.

The matter before this Court is unlike *Prysock.* Agent Kixmiller, when explaining the *Miranda* rights to Defendant, tied the right to counsel to a future point in time – to wit, when Defendant was formally charged. And the agent also clearly and unambiguously informed Defendant that he would not be given counsel "just to talk" with the agents. Thus, Agent Kixmiller's statements incorrectly advised Defendant of his right to have counsel present during the interrogation and improperly tied the appointment of counsel to a future event after the interrogation.

This matter is more similar to the two cases discussed by the Supreme Court when differentiating the facts presented in *Prysock.* In both cases cited in *Prysock*, the suspects were misinformed of the right to counsel in that "the reference to appointed counsel was linked to a future point in time after police interrogation." *Id.* at 360 (discussing *United States v. Garcia*, 431 F.2d 134 (9th Cir. 1970), and *People v. Bolinski*, 260 Cal. App. 2d 705 (1968)).

***15** In *Garcia*, "agents gave the suspect several different versions of the Miranda bundle of warnings," and "[o]n no occasion was a warning given fully complying with Miranda." 431 F.2d at 134. Garcia was once told she had a right to counsel "when she answered any questions" and was later informed that an attorney would be appointed to represent her when she first appeared before the United States Commissioner or the Court. *Id.* Declaring "[t]he offer of counsel must be clarion and firm," the Ninth Circuit found the "[t]he warnings failed to adequately inform Garcia of her right to counsel before she said a word." *Id.* (citations omitted).

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

RECEIVED by MSC 6/5/2025 12:21:52 PM

And according to *Prysock, Garcia* was an example where a suspect was not fully advised of their right to appointed counsel. *Prysock*, 453 U.S. at 360.

In *Bolinski*, two sets of *Miranda* warnings were given to the defendant, but both were found inadequate. 260 Cal. App. 2d at 718-24. In the first set, the defendant was advised he would be appointed counsel "if he was charged." *Id.* at 718. In the second set, the defendant, who was being moved from Illinois to California, was informed that an attorney would be appointed for him in California. *Id.* at 723. Because both sets of warnings improperly advised the defendant that appointment of counsel was associated with a future point in time after police interrogation, the California Court of Appeal for the Fourth District found Bolinski "could not have been deemed to have knowingly and intelligently waived his rights." *Id.* at 721, 723. An advisement that counsel would be appointed by the court is not the equivalent of an advisement that counsel would be provided to be present during the interrogation. *Id.* at 723. And again, *Prysock* cited this case as another example where a suspect was not fully advised of their right to appointed counsel. *Pryscock*, 453 U.S. at 360.

The Government argues the matter before this Court is unlike *Garcia* and *Bolinski.* Doc. 28 at 18. Contrary to the Government's argument, Defendant, similar to *Garcia* and *Bolinski*, was given different sets of *Miranda* warnings. But the similarities do not end there. Defendant, like *Garcia* and *Bolinski*, was advised that his right to appointed counsel was linked to a future point in time after the interrogation. What differentiates this matter from *Garcia* and *Bolinski* is only seconds after being accurately informed he had a right to counsel during the interrogation and an attorney would be appointed to represent him, Defendant was then told he would not be given an attorney "just to talk" with the agents, and he did not have the right to counsel until he was charged in court. This was also followed by repeated references during the beginning of the interview by the agents that they were unsure whether charges would even be filed against Defendant. Since Defendant was not properly advised of his right to appointed counsel for purposes of the interrogation, he could not have been deemed to have knowingly and intelligently waived his rights under *Miranda.*

(b) Duckworth v. Eagan

In *Duckworth v. Eagan*, law enforcement read a document informing the defendant that he had the "right to talk with a lawyer for advice before we ask you any questions, and to have him with you during questioning" and the "right to the advice and presence of a lawyer even if you cannot afford to hire one." 492 U.S. at 197-98. The defendant was then told, "We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court." *Id.* at 198. The defendant signed the waiver and provided an exculpatory explanation for his activities of the previous evening. *Id.*

Before the second interview, another document was read to the defendant. *Id.* at 198-99. He was advised he had "the right to consult with an attorney...before saying anything," "an attorney may be present" while he made a statement to or conversed with law enforcement, he could "stop and request an attorney at any time during the course of the taking of any statement or during the course of any such conversation," and if he did not hire an attorney, one would "be provided" for him. *Id.* The defendant signed the second waiver form and confessed to a murder. *Id.* at 199.

***16** The Supreme Court found the additional phrase of "if and when you go to court" given during the first interview "accurately described the procedure for the appointment of counsel in Indiana." *Id.* at 203-04 (noting counsel is appointed at the defendant's initial appearance in Indiana). Unlike *Duckworth*, the agent in this case not only told Defendant that an attorney would be appointed only when he was officially charged, but the agent further stated, "[w]e are not going to give you an attorney just to talk to us ..." Since *Duckworth* did not involve any type of statement that the police "are not going to give you an attorney just to talk to us," it is clearly distinguishable from the instant case. Further, unlike *Duckworth*, the instant case does not involve two different interviews where the advice of rights in the second interview appears valid.

(4) Eighth Circuit Cases

(a) Klingler v. United States

The Government contends Agent Kixmiller's statements that an attorney would not be appointed until charges were filed and Defendant would not be given counsel to talk with the agents did not "vitiate the sufficiency of an otherwise adequate warning." Doc. 28 at 21. In support, the Government cites one Eighth Circuit case. *Id.* (citing *Klingler v. United States*, 409 F.2d 299, 307-08 (8th Cir. 1969)). In *Klingler*, the

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

RECEIVED by MSC 6/5/2025 12:21:52 PM

suspect was told, among other things, he had "the right to consult an attorney before making any statement or answering any question, and you may have him present with you during questioning." *Id.* Klingler was also informed he "may have an attorney appointed by the United States Commissioner or the court to represent you if you cannot afford or otherwise obtain one." *Id.* at 308. He stated he understood his rights. *Id.* The agent told Klingler he had "the right to have an attorney present with you at this time" and also had "the right to have an attorney appointed by the Court for you if you are later charged with a Federal offense." *Id.* He again indicated he understood his rights. *Id.*

In reaching its determination that Klingler voluntarily, knowingly, and intelligently waived his *Miranda* rights, the Eighth Circuit relied on a Fifth Circuit decision. *Id.* (citing *Mayzak v. United States*, 402 F.2d 152 (5th Cir. 1968)). In *Mayzak*, the Fifth Circuit found an FBI agent informed the suspect that the FBI could not furnish a lawyer until federal charges were filed, and the statement did "not vitiate the sufficiency of an otherwise adequate warning." 402 F.2d at 154-55. Notably, neither *Klingler* nor *Mayzak* involved a statement that the agents were not going to give the suspect a lawyer "just to talk to them." This added statement makes the case before this Court distinguishable from *Klingler* and *Mayzak.* Further, both *Klingler* and *Mayzak* were decided several years before the *Prysock* (1981) and *Duckworth* (1989) decisions.

The Eighth Circuit has cited *Klingler* on numerous occasions. But only once has it relied on it when examining *Miranda* warnings given to a defendant. *See Tasby v. United States*, 451 F.2d 394, 398-99 (8th Cir. 1971). In *Tasby*, the Eighth Circuit noted the *Miranda* warnings given to a defendant after his second arrest included a statement that "an attorney would be appointed 'at the proper time.' " *Id.* at 398. The Court, citing *Klingler*, found the statement was a "slight deviation from the *Miranda* prescription" but did "not negate the overall effectiveness of the warning." *Id.* at 398-99. Like *Klingler, Tasby* was decided several years before *Prysock* and *Duckworth.* Since those cases were decided, the Eighth Circuit has not utilized *Klingler* for the proposition suggested by the Government.

(b) United States v. Caldwell

The Eighth Circuit's decision in *United States v. Caldwell*, 954 F.2d 496 (8th Cir. 1992), offers some guidance. When advised of his *Miranda* rights, Caldwell was informed he had a "right for an attorney. If you can't afford one, one will be appointed to you." *Id.* at 498. When asked if he understood his rights, Caldwell shook his head, indicating he understood. *Id.* When asked again if he understood his rights, Caldwell said he did. *Id.* The issue before the Eighth Circuit was "whether a suspect must be explicitly warned that he has the right to have counsel present during interrogation." *Id.* at 501 (emphasis added).

***17** The Eighth Circuit determined Caldwell was generally advised he had the right to counsel, and "[i]f there was a deficiency in the warning, it is in the ambiguity of the warning, not that the warning actively misled Caldwell by suggesting a false limitation of his right to counsel." *Id.* at 501-02. The Court concluded the warning "could, and arguably should, have been more explicit in advising Caldwell of his right to an attorney." *Id.* at 503. But the warning did "not rise to the level of plain error" because law enforcement advised Caldwell of his right to counsel, informed him that an attorney would be appointed if he could not afford one, and law enforcement "did not link Caldwell's right to an attorney to a future point in time after police questioning." *Id.* at 503-04. Thus, the Eighth Circuit found the warning did "not suffer from the inadequacy discussed in both *Duckworth* and *Prysock*, namely, linking the right to appointed counsel to a future point in time after interrogation." *Id.* at 502. Unlike *Caldwell*, the warnings given to Defendant in this case were misleading and inaccurate because the agents linked his right to counsel with a future point in time after the interrogation, and the agents specifically and improperly advised Defendant that he would not be given counsel "just to talk" with them.

(5) Other Cases

Because the issue raised in Defendant's motion to suppress requires a fact-intensive inquiry, there are not many cases beyond those cited above that are factually similar. Somewhat similar to this matter is *United States v. Connell*, 869 F.2d 1349 (9th Cir. 1989). Therein, the Ninth Circuit observed Connell was informed he "had the right to talk to an attorney before, during, and after questioning," but "this statement was immediately followed by a strong assertion that such an attorney could not be obtained at the Government's expense." *Id.* at 1353. Connell was told "a lawyer *may* be appointed" to represent him, and he was informed in writing that "arrangements will be made for [him] to obtain a lawyer in *accordance with the law.*" *Id.* (emphasis in original). The Ninth Circuit concluded the "warnings at issue fell below the minimum required standards" because they were "equivocal

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

RECEIVED by MSC 6/5/2025 12:21:52 PM

and open to misinterpretation." *Id.* Because the conflicting statements created confusion and did not clearly inform the defendant of his right to counsel, the Ninth Circuit concluded the defendant's confession should have been suppressed. *Id.*

In addition, other district courts have determined a *Miranda* waiver is unknowing and/or unintelligent when the defendant is inaccurately advised that the right to counsel does not attach until sometime after the interrogation and/or misled to believe counsel will not be provided until sometime in the future. *See, e.g., United States v. Avila*, No. EP-19-CR-3342-PRM, 2020 WL 572874, at *6-7 (W.D. Tex. Feb. 5, 2020); *United States v. Padilla*, No. 19-CR-208 (MDJ/ECW), 2019 WL 7598829, at *5-11 (D. Minn. Nov. 19, 2019), *report and recommendation adopted by* 2020 WL 264320 (D. Minn. Jan. 17, 2020); *United States v. Xi*, No. 16-22-5, 2018 WL 3340884, at *9-14 (E.D. Pa. July 6, 2018); *United States v. Lewis*, No. 11-20745-CR, 2012 WL 6569373, at *2-3, 5-10 (S.D. Fla. Dec. 17, 2012).

(6) Examination of Totality of Circumstances in Light of Applicable Cases

To determine whether Defendant's waiver was knowing and intelligent, the Court must consider the totality of the circumstances. *Moran v. Burbine*, 475 U.S. at 421. In addition to the foregoing discussion, the Court provides the following analysis of the totality of the circumstances.

Defendant was given a copy of the Statement of Rights, which accurately explained his *Miranda* rights. Then, Agent Kixmiller correctly read aloud the contents of the Statement of Rights. But it is unclear if Defendant actually read the Statement of Rights. Moreover, Defendant did not execute the waiver on the Statements of Rights before or during the video portion of the interview. It appears from the record that the form was not signed until the interview was over and after the audio recording stopped. Because the execution of the waiver form was not captured on the audio recording, it is unknown if Defendant asked any questions or sought further explanation about the right to counsel.

***18** Except for the Statement of Rights and Agent Kixmiller's reading of same, the only information about the right to counsel was supplied by Agent Kixmiller. Specifically, Defendant was advised the Statement of Rights "basically" meant the agents were going to ask him questions, and "normally, when it says [an attorney] will be appointed, that, that happens if you are officially charged...." Agent Kixmiller then unequivocally stated, "We are not going to give you an attorney just to talk to us." This statement was followed by the agent reiterating Defendant would not be appointed an attorney unless he was charged. As explained *supra*, section III(A), these statements inaccurately explained Defendant's *Miranda* rights.

At no other time during the remainder of the interrogation was the right to counsel discussed. Thus, Agent Kixmiller's misstatements were never corrected. Because he was provided conflicting information about his right to counsel, Defendant was not "clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation...." *Miranda*, 384 U.S. at 471 (holding "this warning is an absolute prerequisite to interrogation."). Additionally, the agent did not effectively and expressly explain that counsel "will be appointed to represent him." *Id.* Thus, the agent did not "convey to the indigent – the person most often subjected to interrogation – the knowledge that he too has a right to have counsel present." *Id.* at 473. Based on Agent Kixmiller's misleading, inaccurate, and conflicting statements to Defendant, the Court finds Defendant's right to counsel was not reasonably conveyed to him. *See Prysock*, 453 U.S. at 359-60; *Duckworth*, 492 U.S. at 202-03.

While Defendant seemed to indicate at one point during the interview that he understood his rights, his "understanding" does not absolve the agent's misstatements about his *Miranda* rights. Approximately ten minutes after Agent Kixmiller misstated Defendant's right to counsel, the agents asked Defendant if he understood his rights. Defendant seemed to affirmatively respond, saying "mmm hmm" and nodding his head. However, much was said during the ten minutes that elapsed after Defendant was inaccurately informed of his rights. For example, the agents told Defendant it was their time to talk with him, he was not being charged, he had to execute the waiver to talk with them, they wanted to be his cheerleaders and help him out, he would get a lesser offense if he talked with the agents and cooperated, and he may receive a less severe sentence if he talked with them.

Based on the agent's misstatements about his rights and the discussion that ensued before he was asked if he read and understood his rights, Defendant was left with two choices. One, having been advised he would not be given an attorney to talk with the agents, Defendant could talk with the agents without a lawyer present and by answering questions and cooperating, he could receive more "points" for "downward departure," a lesser charged offense, and a lower sentence. Or, two, Defendant could choose not to speak with the agents, wait and see if he was formally charged and potentially face

RECEIVED by MSC 6/5/2025 12:21:52 PM

a more serious charge or higher sentence because he did not answer the agents' questions, and if or when he was charged, he would be appointed an attorney. Neither choice involved the right to counsel during the interrogation to which Defendant was entitled. While Defendant seemed to indicate he understood his rights, his "understanding" was based on the inaccurate and misleading information given to him by Agent Kixmiller.

Given Defendant's apparent lack of experience with federal (or any) law enforcement, he was not familiar with the rights afforded him. *See Vinton*, 631 F.3d at 482 ("A history of interaction with the criminal justice system supports an inference that an interviewee is familiar with his constitutional rights and that his statements to the police are voluntary."). Accordingly, Defendant had to rely exclusively on the contents of the Statement of Rights and what the agents told him as to what his rights were.

***19** While his fatigue is noticeable on the videorecording, Defendant was still able to coherently converse with the agents and answer questions. Thus, his fatigue, by itself, did not render his waiver unknowing and unintelligent. *See United States v. Turner*, 157 F.3d 552, 555-56 (8th Cir. 1998) (finding the defendant's below-average intelligence, intoxication, and mental illness did not render his waiver unknowing and unintelligent because his conduct and behavior demonstrated he understood his rights, agreed to answer questions, and gave accurate information).

The evidence demonstrates that while Defendant was given accurate *Miranda* warnings at the beginning of the interrogation when the form was read verbatim, the significance of those warnings was vitiated and invalidated by Agent Kixmiller's inaccurate statements and "explanation" only seconds later. Defendant was told twice that his right to counsel was linked to a future time after interrogation, and he was informed he would not be given an attorney to talk with the agents. Defendant was provided misleading, inaccurate, and confusing information about his right to counsel during the interrogation and his right to appointed counsel. *See Duckworth*, 492 U.S. at 203-04; *Moran*, 475 U.S. at 421; *Prysock*, 453 U.S. at 360.

These are the types of statements the Eighth Circuit indicated were misleading and inaccurate in *Caldwell*. While the Eighth Circuit found the *Miranda* rights warning given to Caldwell could have been more explicit, the Court found the warning did "not rise to the level of plain error" because he was advised of his right to counsel, was told an attorney would be appointed if he could not afford one, and significant to this matter, and law enforcement "did not link Caldwell's right to an attorney to a future point in time after police questioning." 954 F.2d at 503-04. The record before this Court is distinguishable from *Caldwell*. Here, Defendant's right to counsel, as explained by law enforcement, was not only linked to a future point in time, but law enforcement informed Defendant would not be given counsel to talk with law enforcement.

Based on the foregoing, the undersigned recommends the Court find the Government has not proven by a preponderance of the evidence that Defendant's waiver was knowing and intelligent, and therefore, his waiver was not valid. The undersigned recommends that Defendant's Motion to Suppress be GRANTED.

C. The Parties' Arguments Regarding the Criminal Justice Act

One additional argument the Court must address is the parties' disagreement as to whether Defendant had a right to have counsel appointed under the Criminal Justice Act ("CJA"). Defendant, citing *Miranda* and the CJA, contends he had a Fifth Amendment right to counsel before and during the interrogation and also a right to have counsel appointed under the CJA. Doc. 24 at 1, 11-21. The Government argues "the appointment of an attorney under [the CJA] presupposes that any person seeking an attorney will have to appear before a court on some criminal matter...before an appointment can be made," and thus, Agent Kixmiller's statement that Defendant would not be appointed an attorney until he was charged "was accurate, and adequate under the law." Doc. 28 at 19-20.

Pursuant to the CJA, "A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate judge or the court through appeal, including ancillary matters appropriate to the proceedings." 18 U.S.C. § 3006A(c); *see also* Fed. R. Crim. P. 44(a). The CJA, which "was enacted to provide compensation for attorneys appointed to represent criminal defendants in federal criminal trials," "is a means of implementing what the courts have declared to be a constitutional demand (right of counsel) under the **Sixth Amendment** and its inclusion in the due process clause of the Fourteenth Amendment." *Ferri v. Ackerman*, 444 U.S. 193, 199 (1979) (emphasis added); *Ray v. United States*, 367 F.2d 258, 264-65 (8th Cir. 1966). As articulated by the Eighth Circuit, the CJA "may well embody

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

RECEIVED by MSC 6/5/2025 12:21:52 PM

the congressional judgment as to what representation to afford defendants" but "it is not a statement of what the Constitution requires." *Steele v. United States*, 518 F.3d 986, 988 (8th Cir. 2008).

***20** The Sixth Amendment right to counsel attaches only at the initiation of adversary criminal proceedings. *Davis v. United States*, 512 U.S. 452, 456-57 (1994). However, as explained *supra*, section III(A), the Supreme Court in *Miranda* declared "the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege...." 384 U.S. at 469. Since then, the Supreme Court has reiterated a separate right to counsel as provided for in *Miranda*. *See, e.g., J.D.B.*, 564 U.S. at 269-70; *Berghuis*, 560 U.S. at 380-81; *Florida v. Powell*, 559 U.S. 50, 59-60 (2010); *Missouri v. Seibert*, 542 U.S. 600, 607-11 (2004); *Davis*, 512 U.S. at 456-58; *Edwards v. Arizona*, 451 U.S. 477, 482 (1981). Pursuant to *Miranda*, Defendant had a right to counsel before and during the custodial interrogation.

Irrespective of the CJA, Defendant, who was subject to custodial interrogation, must have been advised before questioning began that he had the right to consult with an attorney and to have counsel present during questioning under *Miranda*. *Davis*, 512 U.S. at 457 (citing *Miranda*, 384 U.S. at 469-73). And he must have been warned that if he could not afford a lawyer, one would be appointed to represent him. *Miranda*, 384 U.S. at 473, 479. Whether a court had statutory authority to appoint counsel under the CJA is irrelevant to the *Miranda* analysis or the undersigned's recommendation to grant Defendant's Motion to Suppress.

IV. CONCLUSION

Based on the foregoing, it is

RECOMMENDED that the Court, after making an independent review of the record and applicable law, enter an order granting Defendant's Motion to Suppress and suppress Defendant's statements to law enforcement on January 10, 2019. Doc. 24.

Counsel are reminded they have fourteen days in which to file any objections to this Report and Recommendation. A failure to file and serve objections by this date shall bar an attack on appeal of the factual findings in this Report and Recommendation except on the grounds of plain error or manifest injustice.

All Citations

Not Reported in Fed. Supp., 2021 WL 3892675

End of Document

© 2025 Thomson Reuters. No claim to original U.S. Government Works.

RECEIVED by MSC 6/5/2025 12:21:52 PM

Exhibit B

United States v Lewis, unpublished opinion of the United States District Court for the Southern District of Florida, issued December 17, 2012
(Docket No. 11-20745-CR), 2012 WL 6569373

RECEIVED by MSC 6/5/2025 12:21:52 PM

2012 WL 6569373
Only the Westlaw citation is currently available.
United States District Court,
S.D. Florida.

UNITED STATES of America

v.

Carlington LEWIS, Defendant.

No. 11–20745–CR.
|
Dec. 17, 2012.

Attorneys and Law Firms

Gera R. Peoples, US Attorney's Office, Miami, FL, for United States of America.

ORDER ON MOTION TO SUPPRESS

URSULA UNGARO, District Judge.

***1** THIS CAUSE is before the Court on Defendant Carlington Lewis's Motion to Suppress Statements. (D.E.87.)

THE COURT has reviewed the motion and the pertinent portions of the record and is otherwise fully advised of the premises.

Lewis moves the Court to suppress post-arrest statements that he made to the police during a custodial interrogation on January 24, 2012. The Government concedes that Lewis made the statements during a custodial interrogation, but argues that the police complied with the warning requirements of *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and that Lewis knowingly and voluntarily waived his *Miranda* rights before making the statements he now seeks to suppress.

This motion was referred to Magistrate Judge Edwin G. Torres, who issued a report recommending that the motion be denied without an evidentiary hearing. (D.E.115.) In making his recommendation, Judge Torres considered the motion, the response, and the following Government exhibits: a transcript of the January 24, 2012 interrogation, a copy of the "Advice of Rights and Waiver" form signed by Lewis, and an audio recording of a police interview of Lewis conducted as part of a separate and unrelated investigation on January 9, 2009. Lewis filed objections to Judge Torres's report requesting the Court reject the recommendation and grant his motion. (D.E.124.) The Court reviews *de novo.* In addition to the materials reviewed by Judge Torres, the Court has reviewed and considered the video recording of the January 24, 2012, interrogation that is the subject of the instant motion.[1]

[1] This video was not made available to Judge Torres. It was noticed as Exhibit D (D.E.126) and hand-delivered to Chambers. It will be filed with the Clerk of Court.

Lewis's objections renew his request for an evidentiary hearing. Although the Court has not heard live testimony on this matter, the Court has received and considered, without objection, evidence consisting of a series of Government exhibits, including a transcript and video recording of Lewis's interrogation. *See United States v. Raddatz,* 447 U.S. 667, 679, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980) ("At a suppression hearing, the court may rely on hearsay and other evidence, even though that evidence would not be admissible at trial ."). Lewis has not objected to the Government exhibits and has not sought to contradict or supplement any of the facts contained therein. Nor has the Government sought to supplement the facts in the record through the presentation of testimony. The parties do not dispute the facts in the record, but rather dispute the legal significance of those facts. Because the only purpose of an evidentiary hearing is to resolve disputed issues over material facts, and because there is no such dispute in this case, the taking of testimony is unnecessary and Defendant's request for further hearing is denied. *See United States v. Villegas,* 388 F.3d 317, 324 (7th Cir.2004) (holding that district court is obliged to hold suppression hearing only to extent that there are disputed issues over material facts); *United States v. Cooper,* 203 F.3d 1279, 1285 (11th Cir.2000) (holding that district court did not abuse its discretion to refuse evidentiary hearing on suppression motion where defendant failed to raise disputed material issue of fact); *United States v. Mejia,* 953 F.2d 461 (9th Cir.1991) (noting that suppression hearing unnecessary where parties dispute legal significance of undisputed facts).

I. The Interrogation

***2** On January 24, 2012, police arrested Lewis pursuant to a federal warrant and criminal complaint charging Lewis with conspiring to kill and attempting to kill a confidential informant to prevent the informant's testimony

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

RECEIVED by MSC 6/5/2025 12:21:52 PM

at trial. Special Agent Ribas from the Bureau of Alcohol, Tobacco, Firearms, and Explosives and Detective Horn from the Miami Gardens Police Department interrogated Lewis regarding these charges. Before they began questioning Lewis concerning the offense, Agent Ribas ("JR") and Detective Horn ("TH") engaged in the following conversation with Lewis ("CL"), regarding his *Miranda* rights.

JR: Okay. Before we can start talking to you, you have certain rights afforded to you, and these are the rights. I'm going to read them to you. You said you can read and write, right?

CL: Yes.

JR: Okay. You can read it out yourself. It's up to you. Pretty much you have your basic rights. You want to read them or you want me read it to you? Okay.

CL: You.

JR: All right. You have the right to remain silent, okay. Anything you say can be used against you in court. You have the right to talk to a lawyer before me asking you any questions (unintelligible). If you cannot afford a lawyer, one will be appointed for you if you wish before any question begins. If you decide to answer any questions now without a lawyer present, you will have the right to stop at any time. Do you understand that?

CL: Yes.

JR: Okay. Just go ahead and initial next to each one of these. Okay? This is very important, okay? This is a waiver. I read the statement of my rights or it has been read to me, as we discussed. I understand these rights and at this time I am willing to answer questions without a lawyer present. No promise or threats have been made to me and no pressures or force of any kind has been used against me. You understand? Are you willing to talk to us?

CL: You said a lawyer will be appointed for me or I have to pay for a lawyer?

JR: The constitution affords you to have an attorney present. It could be now or later or whatever is going on, but I cannot talk to you about your case until you sign this form.

JR: It's up to you whatever you want to talk about.

CL: You got a lawyer present?

JR: No.

TH: No, we don't have a lawyer. You've been arrested before? You know people who've been arrested, right? Basically you either—you talk to us now without a lawyer, or you go to jail and you deal with it on your own. This is your one opportunity.

JR: To talk to us. After that—

TH: It's on you. It's your decision. We're not forcing anything.

JR: We're not forcing you. We just can't talk to you. These are the rights afforded to you.

TH: We can't get you a lawyer present now basically.

CL: I don't even know what's going on, man.

JR: Just print your name right here for me. All right, Carlington. I know you by the name—I know you by the name of Nev, all right? That's why I asked you before if you have any other names. So am I safe to assume that you are Nev or no?

***3** CL: My name is Carlington Nevardo Lewis.
[D.E. 103–2 at 5–6].

In addition to the transcript of this interrogation and the other materials that were considered by Judge Torres, the Government has provided and the Court has considered a video recording of the January 24, 2012, interrogation. The video shows that Lewis signed the waiver at the end of this quoted exchange, after he states, "I don't even know what's going on man." The interrogation then proceeds.

II. The *Miranda* Framework

To protect the Fifth Amendment's privilege against self-incrimination from deteriorating to "but a form of words in the hands of government officials," *Miranda v. Arizona,* 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) (internal quotations omitted), the Supreme Court, in *Miranda,* held that in a criminal trial, the prosecution may not use statements derived from a custodial interrogation of the defendant unless the statements were voluntarily made after the defendant was warned of the following rights:

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

RECEIVED by MSC 6/5/2025 12:21:52 PM

> He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Miranda, 384 U.S. at 479. These are now commonly referred to as the *Miranda* rights.

In *Moran v. Burbine,* 475 U.S. 412, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986), the Supreme Court explained that a court must make two distinct findings in order to conclude that a defendant's statement was made after a knowing and voluntarily waiver of the *Miranda* rights. First, the decision to relinquish the rights and make a statement must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Id.* at 421. Second, the decision must have been made "with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.* In sum, the *Miranda* waiver must be both voluntary and knowing.

When the prosecution seeks to admit a defendant's inculpatory statement at trial, as here, the prosecution must prove by a preponderance of the evidence that in making the statement, the defendant knowingly and voluntarily waived his *Miranda* rights. *Lego v. Twomey,* 404 U.S. 477, 489, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972). "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,* 475 U.S. at 421. This requires the prosecution to show that the *Miranda* warning was given to the defendant, that the defendant understood his *Miranda* rights, and that the defendant then made an uncoerced statement. *Berghuis v. Thompkins,* —— U.S. ——, ——, 130 S.Ct. 2250, 2261, 176 L.Ed.2d 1098 (2010).

The burden the Government must meet to demonstrate that a defendant understood the *Miranda* rights is not high-it is by a preponderance of the evidence. *Lego,* 404 U.S. at 489. The police need not use any particular language, provided they reasonably convey to the suspect his or her rights as required by *Miranda. Duckworth v. Eagan,* 492 U.S. 195, 203, 109 S.Ct. 2875, 106 L.Ed.2d 166 (1989). In the vast majority of cases, courts will infer that the defendant understood his or her rights from the fact that the police read the defendant the *Miranda* rights litany and the defendant signed a *Miranda* waiver. *See Missouri v. Seibert,* 542 U.S. 600, 608–09, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004) ("[G]iving the warnings and getting a waiver has generally produced a virtual ticket of admissibility ...."), *citing Berkemer v. McCarty,* 468 U.S. 420, 433, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984) ("[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare.").

***4** But "mere recitation of the litany" will not suffice in every case. *Seibert,* 542 U.S. at 611; *see also Hart v. Attorney Gen. of the State of Fla.,* 323 F.3d 884, 893 (11th Cir.2003) ("Although a signed *Miranda* wavier form is 'usually strong proof' that a suspect voluntarily waived his rights, it is not conclusive on this issue."). And only by "effective and express explanation" of the *Miranda* rights can there be assurance that the defendant was truly in a position to exercise them. *Miranda,* 384 U.S. at 473.

III. A. Discussion—A Free and Deliberate Choice

The first inquiry under *Moran* is whether Lewis's statement was "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Moran,* 475 U.S. at 421. The Supreme Court made clear in *Colorado v. Connelly,* 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986), that the purpose of the Fifth Amendment privilege against self-incrimination is to protect individuals from official coercion, and therefore the "voluntariness" of a waiver of that privilege depends not on free choice in the abstract, but on the absence of police overreaching. *Id.* at 169–70. For that reason, in *Connelly,* the Supreme Court found a suspect's *Miranda* waiver to be voluntary in spite of evidence that the suspect's confession was not the result of a free choice, but the result of a mental illness that compelled him to confess. *Id.* at 170–71. The Court emphasized that the Fifth Amendment privilege is not concerned with extraneous forces, such as mental illness, that compel a suspect to confess, but only with pressure that emanates from official sources. *Id.*

Judge Torres found, and this Court agrees, that there is no evidence that the police used any intimidation tactics, threats, or physical or psychological pressure in order to compel Lewis to make a statement. The police did not act intentionally to trick or confuse Lewis, and there is nothing in the record to suggest that the police acted intentionally to coerce Lewis to waive his *Miranda* rights. Therefore the

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

RECEIVED by MSC 6/5/2025 12:21:52 PM

Court concurs with Judge Torres that the first prong of *Moran* is satisfied and Lewis's statement was the product of a free and deliberate choice rather than any official coercion.

III. B. Discussion—A Full Awareness

Moran's second inquiry asks whether Lewis waived his Miranda rights with "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Moran, 475 U.S. at 421. Like the first inquiry, the "full awareness" requirement aims to distinguish between statements that are the product of a free choice and those that are compelled by official coercion. This is because the Miranda framework presumes that custodial interrogations are inherently coercive. *Id.* at 455–56 ("[T]he very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals ."). To dispel this inherent pressure, the rights afforded by the Fifth Amendment must be explained to the suspect in an effective and express manner. *Id.* at 473.

***5** Once a suspect understands the rights afforded to him or her, the *Miranda* framework presumes a subsequent waiver to be knowing. For this reason, once understanding is established, it is the suspect's responsibility to clearly invoke any right he or she wishes to assert. *See Berghuis v. Thompkins,* —— U.S. ——, ——, 130 S.Ct. 2250, 2260, 176 L.Ed.2d 1098 (2010) (placing onus on suspect to invoke right to silence by holding that police may continue questioning until suspect unambiguously states he or she wants to remain silent); *Davis v. United States,* 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994) (holding that police have no duty to clarify equivocal requests for counsel and may continue questioning until suspect clearly requests counsel). But first the prosecution must show that the suspect understood his *Miranda* rights. *Berghuis,* 130 S.Ct. at 2261. This is a threshold requirement, the bulwark against the inherently coercive nature of custodial interrogations. In this case, this requirement is not met because the Government has not shown that Lewis understood his right to appointed counsel.

The Government sets out three facts to supports its argument that Lewis understood his *Miranda* rights. First, the police advised Lewis of his *Miranda* rights by reading to him the traditional *Miranda* litany. Second, Lewis signed a rights waiver form, indicating that he understood his rights and waived them. Finally, Lewis was interrogated in 2009 in connection with an unrelated case, and therefore was already familiar with his *Miranda* rights at the time of the 2012 interrogation.

As previously noted, a signed rights waiver form is highly relevant and strong proof that a suspect voluntarily and knowingly waived his rights. *See Seibert,* 542 U.S. at 609 (noting that valid rights waiver is typically a ticket of admissibility). Courts typically infer from such a form that the a suspect actually understood the *Miranda* rights. A signed waiver form is not conclusive, however, and there are instances when the totality of the circumstances surrounding the interrogation indicate that despite signing the form, the suspect did not understand the *Miranda* rights. The Eleventh Circuit's decision in *Hart v. Attorney Gen. Of the State of Fla.,* 323 F.3d 884 (11th Cir.2003) is instructive on this point.

In *Hart,* a detective "went to great lengths to apprise Hart of his rights" by carefully explaining each *Miranda* warning to him. *Id.* at 893. After hearing this explanation, Hart signed a rights waiver form to indicate that he understood each of the rights and that he was willing to speak to the detective without a lawyer. *Id.* Hart then asked to speak with a different detective, Detective Schuster, with whom he was previously familiar. *Id.* at 894. When Schuster arrived, Hart asked her what were the pros and cons of hiring a lawyer. *Id.* The Eleventh Circuit observed: "Although asking for the pros and cons of hiring a lawyer is not an unequivocal request for counsel, it does indicate that Hart did not fully understand his right to counsel and was asking for clarification of that right." *Id.*

***6** The Eleventh Circuit then found problematic two statements that Schuster made in response to Hart's inquiry. First, Schuster told Hart that one of the cons of asking for a lawyer was "I'm going to want to ask you questions and he's going to tell you you can't answer me." *Id.* By doing so, Schuster contradicted the purpose of the *Miranda* warnings, which is to protect a suspect's privilege against self-incrimination. *Id.* Second, Schuster told Hart that "honesty wouldn't hurt him." *Id.* This statement was contrary to the *Miranda* warning that anything Hart said could be used against him in court. *Id.* Given the totality of circumstances surrounding the interrogation, the Eleventh Circuit found that, "[Hart] did not truly understand the nature of his right against self-incrimination or the consequences that would result from waiving it." *Id.* at 495.

The Eleventh Circuit came to a similar conclusion in *United States v. Lall,* 607 F.3d 1277 (11th Cir.2010). In that case,

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

RECEIVED by MSC 6/5/2025 12:21:52 PM

a detective gave defendant Lall the *Miranda* warnings on the front lawn of his house. *Id.* 1283. Then, as the detective and Lall entered the bedroom, the detective told Lall that he was not going to pursue charges against him. *Id.* Lall then made several incriminating statements to the detective, which were subsequently used against him at trial. *Id.* at 1281. Citing *Hart,* the Eleventh Circuit held that "this representation contradicted the *Miranda* warnings previously given," and compelled a conclusion that "Lall 'did not truly understand the nature of his right against self-incrimination or the consequences that would result from waiving it.' " *Id.* (*quoting Hart,* 323 F.3d at 895).

In this case, at the outset of the interrogation, the police recited to Lewis the *Miranda* litany, and Lewis promptly signed a rights-waiver form indicating that he understood and waived his *Miranda* rights. But despite acknowledging that he understood the litany and despite signing the form, Lewis, at the very next opportunity to respond, asked the police, "You said a lawyer will be appointed for me or I have to pay for a lawyer?" This request for clarification, like the one examined in *Hart,* indicates that Lewis did not fully understand the right to counsel, specifically the right to appointed counsel.

Rather than answer Lewis's question, the officers next made a series of irrelevant statements regarding other aspects of the right to counsel. Agent Ribas stated, "The Constitution affords you to have an attorney present. It could be now or later or whatever is going on, but I cannot talk to you about your case until you sign this form." This statement merely reiterated that Lewis had the right to an attorney, but did not communicate to Lewis that he had the right to have appointed counsel present during questioning.

The officers then told Lewis that no lawyer was present at the police station, and that Lewis could choose to talk without a lawyer, or go to jail and "deal with it" on his own. Again, while these statements are not necessarily incorrect, they are irrelevant to Lewis's inquiry regarding appointment of counsel. Lewis easily could have understood the officer's unresponsive answers to mean that no lawyer could be appointed prior to questioning. As was the case in *Hart* and *Lall,* despite the officers' adherence to the relatively orthodox *Miranda* procedure, the totality of the circumstances suggests that Lewis did not actually understand all of the essential *Miranda* rights, in particular the right to appointed counsel. Because Lewis clearly expressed confusion on this point, and because there is no evidence that indicates that he ever came to an understanding of that right, the Court concludes that Lewis did not have a full awareness of the right to counsel when he waived it.

***7** In so concluding, the Court rejects Judge Torres's finding that Lewis waived his *Miranda* rights knowingly, with full awareness of their nature. Judge Torres's recommendation rested on several findings with which this Court disagrees. First, Judge Torres concluded that Lewis's question—"You said a lawyer will be appointed to me or I have to pay for a lawyer?"—evinced not confusion, but awareness of the right to counsel, and noted: "The query concerned the mechanics of hiring and paying for a lawyer, not whether he had a right to a lawyer in the first place." (D.E. 115 at 8.)

A general awareness of the right to counsel does not satisfy *Miranda's* requirements. And the right of an indigent to be appointed counsel cannot be relegated to the category "mechanical." To an indigent defendant, there are no mechanics to be worked out; the indigent defendant understands that either he or she will have access to an appointed a lawyer or go without for lack of resources.

> The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent —the person most often subjected to interrogation—the knowledge that he too has a right to have counsel present. As with the warnings of the right to remain silent and of the general right to counsel, only by *effective and express explanation* to the indigent of this right can there be assurance that he was truly in a position to exercise it.

Miranda, 384 U.S. at 473 (emphasis added). Therefore, a defendant must be warned "that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Id.* at 479.

Lewis's question expressed confusion regarding a core *Miranda* right. This distinguishes the instant case from those cited by Judge Torres, in which the police misled suspects regarding facts that were irrelevant to the Fifth Amendment privilege. These cases distinguish between a suspect's awareness of "constitutionally significant information about the nature of the right being waived, and information that merely affects the wisdom of the decision to waive." *United States v. Farley,* 607 F.3d 1294, 1328 (11th Cir.2010), *quoting Colorado v. Spring,* 479 U.S. 564, 107 S.Ct. 851, 93 L.Ed.2d 954 (1987). In both *Farley* and *Spring,* defendants contended that their statements were involuntary because they were made without full awareness of the nature of the charges against them and the subject matter of the interrogation. In both cases, the courts found the statements

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

RECEIVED by MSC 6/5/2025 12:21:52 PM

were made knowingly because they were made with a full understanding of *Miranda's* protections. The subject matter of an interrogation, although relevant to the decision to waive *Miranda* rights and speak, is not relevant to a suspect's understanding of the *Miranda* rights themselves.

In this case, however, Lewis expressed confusion about whether he would have to pay for an attorney in order for an attorney to be present during the interrogation. This is constitutionally significant information. Because Lewis did not understand whether or not he would have to pay for an attorney to be present during questioning, Lewis was not fully aware of all of his *Miranda* rights.

***8** Judge Torres also points out the there was nothing inherently inaccurate or misleading about any of the statements the police made to Lewis. The accuracy of the officer's statements is relevant to determine whether the warnings, as a whole, reasonably convey to a defendant the *Miranda* rights. *See Duckworth v. Eagan,* 492 U.S. 195, 203, 109 S.Ct. 2875, 106 L.Ed.2d 166 (1989) ("The inquiry is simply whether the warnings reasonably convey to a suspect his rights as required by *Miranda."*) (internal quotations omitted). In *Duckworth,* for example, the Supreme Court considered the accuracy of officers' statements in holding that the following warnings, in their totality, satisfied *Miranda:*

> Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. *You have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning.* You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. *We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.* If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you've talked to a lawyer.

Id. at 198 (emphasis in original).

In *Duckworth,* the defense argued that the "if and when you go to court" language was constitutionally defective because it failed to adequately convey that the suspect had a right to appointed counsel during questioning. *Id.* at 200. The Court examined the warnings as a whole and found that they were not unduly confusing, and that they reasonably conveyed to the suspect that he had a right to appointed counsel during questioning. *Id.* at 205. One factor the Court considered was that the warnings were an accurate statement of the procedure for the appointment of counsel. *Id.*

But importantly, the suspect in *Duckworth* never expressed any actual confusion regarding his rights. *Id.* at 198. In *Duckworth,* the Court had to consider whether the language on its own was misleading, such that the Court could not infer that a suspect, upon hearing that language, would be confused about his or her rights. In this case, Lewis was actually confused about the right to appointed counsel, as evinced by the fact that he asked for clarification from the officers as to that right. Under these circumstances, the relevance of the officers' statements is not whether the statements were accurate, but whether they were responsive to Lewis's inquiry. They are relevant because they show that Lewis never got an answer to his question—would a lawyer be provided or would he have to pay?

Judge Torres also notes that part-way through the interrogation, one of the agents reminded Lewis that a lawyer would be appointed for him. It is true that the officer told Lewis that at some point in the future, he would go before a judge and be appointed a lawyer. The officer stated:

> ***9** Think about this, bro. Think about this. Because this has to get resolved. This is going to go through a process. You're going to go before a judge. The judge is going to read those charges to you again. You're going to get appointed a lawyer. The lawyer is going to see the evidence that we have....

(D.E. 103–2 at 28). This statement, however, does not convey to Lewis that he is entitled to appointed counsel during questioning. The most it does is inform him that he will be appointed a lawyer at arraignment or some other future court date. While this is not inaccurate, it is not an explanation of the right to counsel sufficient to allow the Court to infer that Lewis understood the right to appointment of counsel during questioning.

Finally, the Government relies on the fact that Lewis was interviewed by police in 2009, in connection with an unrelated criminal matter, to show that at the time of the 2012 interrogation, Lewis was already familiar with *Miranda* protections. The Government provided the Court with an audio recording of the 2009 interview, in which a police officer questions Lewis about a domestic disturbance that occurred between Lewis and two other people in November 2008. At the outset of the interview, the officer advised Lewis of his *Miranda* rights and Lewis indicated that he understood those rights and waived them. It is unknown to this Court

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

RECEIVED by MSC 6/5/2025 12:21:52 PM

whether the statements Lewis made during this interview were ever challenged in a subsequent court proceeding, or admitted at a subsequent criminal trial.

Although prior arrests and familiarity with the criminal justice system can support an inference that a suspect understood the *Miranda* warnings, it cannot render the warnings unnecessary, nor dispose of the requirement that the defendant actually understand the warnings at the time that they are waived. *Compare United States v. Vinton,* 631 F.3d 476, 482 (8th Cir.2011) ("A history of interaction with the criminal justice system supports an inference that an interviewee is familiar with his constitutional rights and that his statements to the police are voluntary."), *and United States v. Gaddy,* 894 F.2d 1307, 1312 (11th Cir.1990) (finding *Miranda* waiver knowing and voluntary in part because defendant was previously "convicted, for armed robbery and aggravated assault, and is, therefore, no novice to law enforcement procedures."), *with United States v. Espinosa–Orlando,* 704 F.2d 507, 514 (11th Cir.1983) (holding defendant's previous arrest "insufficient to establish that he was aware of all his [*Miranda*] rights" because "it must under *Miranda* be presumed that he was unaware of his right to appointed counsel."). In *Espinosa–Orlando,* the Eleventh Circuit found that because the police failed to warn the defendant of his right to have appointed counsel during questioning, no amount of circumstantial evidence, such as a prior arrest, could overcome this deficiency to show that the defendant was aware of the right to appointed counsel.

***10** In the instant case, the circumstances of the 2012 interrogation show that Lewis did not understand the nature of the right to appointed counsel. Lewis expressed confusion regarding the right to appointed counsel by asking the officers to clarify whether he could be appointed a lawyer. The officers never clarified this right for Lewis, compelling a conclusion that Lewis did not truly understand the nature of the right. This evidence is not outweighed by the circumstances of the 2009 interrogation, at least insofar as those circumstances are developed in the record in this case. The fact that Lewis apparently chose to waive his *Miranda* rights in 2009, three years prior to making the statements currently at issue, for whatever reason, while being interviewed in connection with a minor charge, says little, if anything, about Lewis's understanding of his *Miranda* rights in 2012. The fact of the earlier waiver is largely outweighed by the fact that Lewis displayed actual confusion regarding the right to appointed counsel during the 2012 interrogation.

IV. Conclusion

Upon *de novo* review and in consideration of the totality of the circumstances, the prosecution fails to demonstrate by a preponderance of the evidence that Lewis was fully aware of the right to appointed counsel at the time he waived his *Miranda* rights. Accordingly, it is

ORDERED AND ADJUDGED that the Report of the Magistrate Judge (D.E .115) is REJECTED and Defendant Carlington Lewis's Motion to Suppress (D.E.87) is GRANTED and the request for hearing is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 13th day of December, 2012.

All Citations

Not Reported in F.Supp.2d, 2012 WL 6569373

End of Document

© 2025 Thomson Reuters. No claim to original U.S. Government Works.

RECEIVED by MSC 6/5/2025 12:21:52 PM

Exhibit C

People v Sikorski, unpublished per curiam opinion of the Michigan Court of Appeals, issued October 20, 2015 (Docket No. 327393), 2015 WL 6167674

RECEIVED by MSC 6/5/2025 12:21:52 PM

2015 WL 6167674
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff–Appellant,

v.

Roksana Gabriela SIKORSKI, Defendant–Appellee.

Docket No. 327393.
|
Oct. 20, 2015.

Wayne Circuit Court; LC No. 15–001059–FJ.

Before: GLEICHER, P.J., and SAWYER and MURPHY, JJ.

Opinion

PER CURIAM.

***1** The prosecutor appeals by leave granted a circuit court order granting the juvenile defendant's motion to suppress her confession. The court found that defendant did not knowingly, voluntarily, and intelligently waive her constitutional rights. We affirm.

The prosecution charged defendant, who was 15 years old, with offenses related to her alleged attempt to kill her family members, including four counts of conspiracy to commit first-degree premeditated murder, MCL 750.157a and MCL 750.316(1)(a), assault with intent to commit murder, MCL 750.83, using a computer to commit a crime, MCL 752.796, and felonious assault, MCL 750.82. Defendant filed a motion to suppress her confession that was made during an interrogation by police after she had been taken into custody. The trial court granted the motion, finding that defendant did not knowingly, voluntarily, and intelligently waive her constitutional rights before making the confession.

I. STANDARD OF REVIEW

Although we engage in a de novo review of the whole record, this Court will not disturb the factual findings of the trial court concerning a knowing and intelligent waiver of *Miranda*[1] rights unless a finding is clearly erroneous. *People v. Daoud,* 462 Mich. 621, 629; 614 NW2d 152 (2000). "[T]he reviewing court is not free to simply substitute its view for that of the trial court, but must be careful to respect the trial court's role in determining factual issues and issues of credibility." *People v. Williams,* 470 Mich. 634, 641; 683 NW2d 597 (2004). "Although we review for clear error the trial court's factual findings regarding a defendant's knowing and intelligent waiver of *Miranda* rights, ... the meaning of 'knowing and intelligent' is a question of law" subject to de novo review. *Daoud,* 462 Mich. at 629–630. " 'We review de novo a trial court's determination that a waiver was knowing, intelligent, and voluntary.' " *People v. Eliason,* 300 Mich.App 293, 304; 833 NW2d 357 (2013), quoting *People v. Gipson,* 287 Mich.App 261, 264; 787 NW2d 126 (2010). " '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.' " *People v.. Tanner,* 496 Mich. 199, 206; 853 NW2d 653 (2014) (citation omitted).

1 *Miranda v. Arizona,* 384 U.S. 436; 86 S.Ct 1602; 16 L.Ed 2d 694 (1966).

We note that the sole evidence submitted to and considered by the trial court in ruling on defendant's motion to suppress was a videotape of defendant's interrogation by police.

II. REQUIREMENT OF A VOLUNTARY, KNOWING, AND INTELLIGENT WAIVER

A. APPLICABLE LEGAL PRINCIPLES

In *Tanner,* 496 Mich. at 206–209, our Supreme Court explained:

> The Fifth Amendment of the United States Constitution provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." This federal constitutional guarantee was made applicable to the states through the Fourteenth Amendment. Prior to 1966, a suspect's confession was constitutionally admissible if a

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

RECEIVED by MSC 6/5/2025 12:21:52 PM

court determined that it was made "voluntarily." Despite the apparent textual emphasis on the voluntariness of a suspect's confession ("no person shall be compelled"), the United States Supreme Court held in *Miranda v. Arizona,* 384 U.S. at 444–445, 477–479; 86 S.Ct 1602; 16 L.Ed 2d 694 (1966), that the accused must be given a series of warnings before being subjected to "custodial interrogation" in order to protect his constitutional privilege against self-incrimination.

***2** * * *

[W]hen a suspect has been afforded *Miranda* warnings and affirmatively waives his *Miranda* rights, subsequent incriminating statements may be used against him. A suspect's waiver of his *Miranda* rights must be made "voluntarily, knowingly, and intelligently." The United States Supreme Court has articulated a two-part inquiry to determine whether a waiver is valid:

"First, the relinquishment of the right must have been 'voluntary,' in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. 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 ." [Citations omitted.]

As indicated above, the analysis is bifurcated, requiring consideration of (1) whether the waiver was voluntary and (2) whether the waiver was knowing and intelligent. *Eliason,* 300 Mich.App at 304. Again, with respect to voluntariness, a defendant must waive his or her rights absent police coercion or intimidation, and the waiver must be the defendant's own free and deliberate choice. *Id.* Whether a waiver is knowing and intelligent demands inquiry into a defendant's level of understanding, irrespective of police conduct, and a very basic understanding of one's rights is generally all that is necessary. *Id.* "The voluntariness of a *Miranda* waiver is evaluated under a totality of the circumstances test, but also includes additional safeguards for juveniles." *Id.* at 305, citing *In re SLL,* 246 Mich.App 204, 209; 631 NW2d 775 (2001); *People v. Givans,* 227 Mich.App 113, 121; 575 NW2d 84 (1997). In *Givans,* this Court explained:

The factors that must be considered in applying the totality of the circumstances test to determine the admissibility of a juvenile's confession include (1) whether the requirements of *Miranda* ... have been met and the defendant clearly understands and waives those rights, (2) the degree of police compliance with MCL 764.27 ... and the juvenile court rules, (3) the presence of an adult parent, custodian, or guardian, (4) the juvenile defendant's personal background, (5) the accused's age, education, and intelligence level, (6) the extent of the defendant's prior experience with the police, (7) the length of detention before the statement was made, (8) the repeated and prolonged nature of the questioning, and (9) whether the accused was injured, intoxicated, in ill health, physically abused or threatened with abuse, or deprived of food, sleep, or medical attention. [*Givans,* 227 Mich.App at 121.]

The prosecution has the burden of proving the validity of a waiver and that a defendant's statement was voluntary by a preponderance of the evidence. *Daoud,* 462 Mich. at 634; *People v. Etheridge,* 196 Mich.App 43, 57; 492 NW2d 490 (1992).

B. APPLICATION OF FACTORS

1. CLEAR UNDERSTANDING OF WAIVER[2]

2 We note that this particular factor of the voluntariness analysis, as applicable to juveniles, somewhat overlaps with the second component of general waiver analysis, i.e, whether the waiver was knowing and intelligent.

***3** The video recording of defendant's confession leaves no dispute that the 15–year–old defendant read her constitutional rights out loud and completed a waiver of rights form before any interrogation was conducted about the alleged crimes. However, defendant did not appear to clearly understand her rights from the language on the form. After defendant had read the form, the interrogating detective asked defendant if she understood her rights, and defendant responded by asking him whether the *Miranda* and waiver information in the form meant that she should not speak to him. Despite the detective's earlier promises to both defendant and her mother that he would "explain everything" to defendant, he never answered defendant's question or clarified this misunderstanding. Instead, he merely referenced the form again and reminded defendant that her mother had already

RECEIVED by MSC 6/5/2025 12:21:52 PM

given the police permission to speak to her. As reflected in the videotaped interrogation, which captured events before and after direct questioning about the charges occurred, defendant's mother had told defendant to speak to the police about the charges. Only after defendant was reminded of her mother's permission and directive did defendant agree to speak to the detective. Under the circumstances, defendant very easily may have been left with the impression that she had no choice but to speak to the detective. As the prosecutor argues, no overt threats were made against defendant, but the detective's inaction calls into question whether defendant's agreement to speak was the result of a free and deliberate choice, or a misunderstanding of the form combined with the belief that her mother had already made the decision for her. Consequently, this factor weighs heavily against a finding of voluntariness.

The prosecutor argues that defendant's willingness to speak to the detective about the alleged crimes during their more casual conversation before defendant was advised of her constitutional rights indicates her free and deliberate choice. But this argument is unpersuasive because any willingness to speak before she was advised of her rights has no bearing on her understanding of those rights and vulnerability to the influence of others.

The prosecutor argues that, on several occasions, defendant demonstrated that she was capable of asking for clarification, so if she had not understood the waiver of rights, she would have said so. But the record demonstrates that defendant, in fact, expressed confusion about the waiver of rights and the detective did not resolve the confusion and instead alluded to the mother's statements, effectively creating greater confusion.

2. COMPLIANCE WITH MCL 764.27

The prosecutor makes no argument regarding MCL 764.27 and its requirement to take an arrested child immediately to the family division of the circuit court. On de novo review, we nevertheless note that, in this circumstance, compliance with MCL 764.27 was not required because the prosecutor charged defendant as an adult. See *People v. Brooks,* 184 Mich.App 793, 798; 459 NW2d 313 (1990). Therefore, this factor has no bearing on the question of voluntariness.

3. PRESENCE OF AN ADULT

***4** The trial court weighed the presence of defendant's mother against voluntariness, finding that her instruction to defendant to tell the police everything was not "rational" and instead resulted from a conflict of interest involved with being both defendant's mother and an intended victim. The videotaped interrogation clearly indicates defendant's dissatisfaction with her home life, that an argument occurred between defendant and her mother on the night before the alleged crimes, and that defendant and codefendant Michael Rivera had planned to kill defendant's entire family so that defendant could live with Rivera. But the recording did not show the mother's motivations behind instructing defendant to cooperate with the police. In the recording, the mother visited the interview room for about two minutes before defendant was advised of her constitutional rights and interrogated. During the visit, the mother appeared calm and showed no signs of dissatisfaction, she expressed her love for defendant, and they even shared a moment of humor as the mother left the room. The fact that defendant's parents later retained an attorney for defendant also belies any finding that the mother was so conflicted that she was unable to act in defendant's best interests. That said, it was not unreasonable for the trial court to infer the existence of a conflict of interest under the surrounding circumstances. If defendant's mother's motivations were not favorable to defendant's best legal interests, the situation was effectively one in which there was no *acceptable* adult presence to guide defendant, weighing against a finding of voluntariness.

Moreover, assuming that the mother was solely concerned with defendant's best interests, this factor still weighs against a finding of voluntariness. The timeframe when the mother was present and the mother's advice to defendant are relevant to whether defendant understood her constitutional rights and voluntarily waived them. The mother repeatedly urged defendant to tell the police the truth about what had happened. During her short visit, the mother offered to answer any of defendant's questions, but she had already left the room by the time defendant read the *Miranda* warnings and first expressed her confusion. Moreover, the mother had told defendant that the police did not want her in the room for the interrogation. Consequently, defendant may have been reluctant to ask for her mother at the point when she became confused. In light of the mother's instructions to defendant to speak to the police and her absence when defendant was confused about the *Miranda* warnings, this factor weighs

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

RECEIVED by MSC 6/5/2025 12:21:52 PM

against a finding of voluntariness. Cf. *People v. Abraham,* 234 Mich.App 640, 651; 599 NW2d 736 (1999) (mother was present throughout *Miranda*-waiver process and assisted the defendant in answering questions about the waiver); *People v. Irby,* 129 Mich.App 306, 311–312; 342 NW2d 303 (1983), overruled on other grounds *People v. Williams,* 422 Mich. 381; 373 NW2d 567 (1985) (stepfather was present when the *Miranda* rights were read and both the defendant and the stepfather indicated their understanding of those rights). Here, defendant's mother was not present during crucial times relative to the interview.

4. PERSONAL BACKGROUND

***5** Defendant apparently was adopted as a five-year-old after living in an abusive situation in Poland. Defense counsel suggested that she "suffers most likely from ... post-traumatic stress disorder." The prosecutor acknowledged that defendant's early life "may have been difficult." The record demonstrates that defendant was adopted by an affluent and, according to the prosecutor, "stable" family. Defendant alleged that she had been victimized by codefendant Rivera, which led to the filing of criminal sexual conduct charges. This information about defendant's personal background and vulnerability weighs against a finding of voluntariness.

5. AGE, EDUCATION, INTELLIGENCE

"[A] reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go." *J D B v. North Carolina,* —— U.S. ——; 131 S.Ct 2394, 2403; 180 L.Ed 2d 310 (2011). Children often lack the judgment, perspective, and experience to recognize and avoid choices that might be detrimental to them. *Id.* In addition, "a 14–year–old ... cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions." *Gallegos v. Colorado,* 370 U.S. 49, 54; 82 S.Ct 1209; 8 L. Ed 2d 325 (1962).

The trial court erred by referring to defendant as a 14–year–old. It is undisputed that she was 15 years old. The record also demonstrates that she was a freshman in high school and did well in her classes. But regardless of evidence of defendant's intelligence, her lack of composure and exhibition of emotions during the police interrogation, her apparent shyness when discussing certain subjects, such as her relationship with codefendant Rivera, and her interest in the more trivial subjects that she and the detective discussed before the waiver, demonstrate that the trial court did not clearly err in concluding that defendant was immature. While her intelligence could support a finding of voluntariness, defendant's immaturity weighs against such a finding.

6. EXPERIENCE WITH THE POLICE

The trial court found that defendant had no previous experience being questioned by police. The record demonstrates that defendant's only past experience with the police was as a victim. She had not previously been questioned as a suspect of a crime, and therefore would not have previously made a decision regarding her *Miranda* rights. This inexperience weighs against a finding of voluntariness. Any past experience with officers acting on her behalf to solve the earlier crime may have made her more vulnerable during the interview, when the police took a more adversarial role.

7. LENGTH OF DETENTION

Defendant was only in custody for about four hours. The trial court found that the length of detention was not a concern. This factor weighs in favor of a finding of voluntariness.

8. REPEATED AND PROLONGED NATURE OF THE QUESTIONING

The trial court found that the interrogation was "repeated and prolonged," occurring for two hours after the mother consented to it. The prosecutor argues that this finding is clearly erroneous because the questioning about the crimes lasted less than 90 minutes, the questions were open-ended, the interrogating officers were kind, and they did not make overt misrepresentations. We agree in part.

***6** In *Eliason,* two hours of questioning did not constitute "prolonged" questioning to weigh against voluntariness. *Eliason,* 300 Mich.App at 307. Here, the detective gave defendant the advice of rights form at 1:21 p.m., and the interrogation was concluded by 2:45 p.m. Comparing the less than hour and a half of questioning about the charged offenses, alone, to the timeframe in *Eliason,* we conclude that the questioning was not prolonged.

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

RECEIVED by MSC 6/5/2025 12:21:52 PM

However, the trial court did not clearly err by characterizing the questioning as repeated. As the prosecutor argues, the questioning regarding the events surrounding the alleged crimes was initially open-ended and follow-up questions were asked merely for clarification. But the record also demonstrates that the detective and a second officer later repeatedly reviewed material already discussed and even challenged defendant regarding some facts, including characterizing her felonious assault of her brother as a "stabbing," when she repeatedly insisted that she cut him or hurt him, but did not stab him. Regardless of the repetition, however, defendant maintained her story consistently throughout the questioning. Therefore, any repetitiveness appears to have had little effect on voluntariness.

9. HEALTH AND PROVISION OF FOOD, SLEEP, AND MEDICAL ATTENTION

Defendant suffered a minor injury to her hand requiring a single stitch, but she was taken for treatment before arriving at the police station and the injury does not seem to have bothered her during the interrogation. She was able to write with that hand. The trial court's finding that defendant had an injury to her hand that had not been addressed is therefore clearly erroneous. The trial court's finding that defendant was provided with food and beverages is consistent with the record.

Even though defendant was given medical attention and food, the trial court did not clearly err in finding that she appeared to be fatigued during the interrogation. She was questioned on the afternoon following the alleged crimes. The prosecutor's theory of the case was that defendant stayed awake into the early morning hours to execute her plan to kill her family, she escaped from home, and was found sleeping in a field later that morning. Despite her long night, defendant was initially upbeat and responsive during the interrogation. Signs of fatigue, including defendant leaning on the table, periods of silence, and a less-upbeat tone, were most evident after about an hour of the interrogation. At approximately 2:30 p.m ., defendant started making even less eye contact and covered her face with her hands and arms. She was crying by 2:34 p.m., which apparently prevented her from writing an explanation of the events surrounding the crimes. The interrogation did not end for approximately 10 minutes while she continued to cry. But it is unclear whether defendant's fatigue had any effect on voluntariness. Instead, by the time she really exhibited any signs of fatigue, she had already agreed to speak to the police and described her version of the events surrounding the crimes.

C. CONCLUSION

***7** Considering all the factors relevant to whether defendant's waiver was voluntary, particularly her apparent confusion about her constitutional rights, the detective's questionable response to that confusion, her mother's instructions that defendant speak to the police, her mother's motivations and whether she was an acceptable adult presence, her mother's absence, assuming the mother's genuine concern for defendant, when defendant was confused about the waiver of rights form, the risk of vulnerability due to defendant's personal background, her immaturity, her lack of prior experience being questioned as a suspect by the police, and—to a much lesser extent—the repetitive questioning and defendant's fatigue, the trial court did not err by concluding that the waiver was not voluntary and understanding. The prosecution did not meet its burden of establishing voluntariness. Absent voluntariness, the confession was properly suppressed.

Affirmed.

All Citations

Not Reported in N.W.2d, 2015 WL 6167674

End of Document

© 2025 Thomson Reuters. No claim to original U.S. Government Works.