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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

-vs-

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

DAREN DONELL FENDERSON,
Defendant-Appellant.

_____/

Criminal Defense Attorneys of Michigan's Amicus Brief in Support of Mr. Fenderson's Application for Leave to Appeal

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Statement of Interest of Amicus Curiae

CDAM is a 501(c)(3) non-profit organization with a purpose of promoting expertise in criminal law, constitutional law, and procedure. CDAM sponsors seminars, training conferences, and advocates for the criminal defense bar's views before state and legislative bodies. For more than forty years, CDAM has filed amicus briefs in the Michigan Supreme Court, the Michigan Court of Appeals, and the United States Supreme Court.

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Introduction and Summary of Argument

The Criminal Defense Attorneys of Michigan ("CDAM") respectfully urges this Court to hold that Mr. Fenderson's statement was obtained without a knowing and voluntary waiver of his constitutional rights. CDAM concurs in the arguments presented by Mr. Fenderson and by amicus curiae the American Civil Liberties Union. Mr. Fenderson's interrogators impermissibly reinitiated questioning of him after he invoked his right to counsel, misled him regarding that right, and the interrogator's conduct violated both the Michigan and United States Constitutions.

CDAM writes separately to address two discrete points. First, Michigan has a long independent tradition of robustly protecting the right against self-incrimination that should guide this Court's interpretation of Const 1963, art 1, § 17. That history includes a disdain for police conduct that is coercive and engenders mental distress. The scare tactics interrogators used to manipulate Mr. Fenderson are precisely the type of unfair treatment this Court has historically condemned.

Second, this Court should follow its sister states by incorporating sociological factors into its voluntariness analysis when interpreting our state constitution. Without consideration of race, education, reading comprehension, socio-economic status, disability, age, and first-language, this Court cannot craft rules that secure fair and just treatment for all consistent with Michigan's constitutional mandate. Mr. Fenderson is a young Black man who did not graduate high school and was inexperienced in dealing with police. After he was subjected to coercive and manipulative police conduct, Mr. Fenderson became confused about his constitutional rights. Rather than clarify his rights, his interrogators told him that because he lacked money, he did not get a lawyer. Accounting for prevailing social science research, this Court should hold that when police mislead a suspect about their rights, as happened here, any subsequent waiver of those rights or statements is involuntary under Const 1963, art 1, § 17.

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Argument

I. Michigan has a long and independent history guarding the right against self-incrimination.

Michigan's constitutional history underscores our longstanding commitment to preventing coerced and involuntary statements from being used in criminal proceedings. Although Michigan's first Constitution in 1835 did not contain a self-incrimination clause, the Constitutions of 1850 and 1908 both contained protections similar to those contained in the Fifth Amendment of the United States Constitution. In 1963, before the United States Supreme Court incorporated the Fifth Amendment's right against self-incrimination to the states, *Malloy v Hogan*, 378 US 1, 6 (1964), Michigan independently affirmed and expanded its own constitutional protection against self-incrimination. The drafters of Michigan's Constitution included the same self-incrimination language from the Constitutions of 1850 and 1908, but also adopted a separate right to "fair and just treatment" in government investigations. Const 1963, art 1, § 17. The table below traces the evolution of this protection from 1850 to present.

Michigan Constitutions – Right Against Self-Incrimination

Constitution	Text
1835 Constitution	None
1850 Constitution	"No person shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law." (Art. VI, § 32)
1908 Constitution	"No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law." (Art. II, § 16)
1963 Constitution	"No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed." (Art. 1, § 17)

This Court has long relied on common law and the Michigan Constitution to thoroughly protect the right against self-incrimination. Starting in 1879, this Court recognized that only statements obtained under "principles of fairness and justice" that were "free and voluntarily made" were admissible against the accused. *Flagg v People*, 40 Mich 706, 708-709 (1879).

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In 1917, this Court went further, stating, "a confession is never admissible unless it is voluntarily made, and by the word 'voluntary' is meant that the confession must be of the free will and accord of the defendant, without coercion whether from fear of any threat of harm, promise or inducement by hope of reward, or method known as 'sweating.'[1]" *People v Brockett*, 195 Mich 169, 179 (1917). This Court then held that:

> the means used…in the instant case must have so agitated the mind of the defendant as to arouse his fear, and to have a coercive effect. Therefore the confession was not voluntary. We do not mean to hold that a voluntary confession may not be made by one charged with crime and under arrest, … but they should come from the defendant under such circumstances as show them to be made of his free will, and with full and perfect knowledge of their nature and consequences, free from the dictation and coercion of others. *Id*.

Applying *Brockett*, this Court could find that Mr. Fenderson's statement is inadmissible as it was a product of coercion, agitation of mind, and was given without full and perfect knowledge of his constitutional rights.

In 1929, this Court considered a case like Mr. Fenderson's. Mr. Cavanaugh, a young man, alleged that he asked to see a lawyer, and officers responded, "A lawyer would not do you any damn good." *People v Cavanaugh*, 246 Mich 680, 686 (1929). It was undisputed that a lawyer hired by the young man's father was present at the police station and both the father and the lawyer were prohibited from speaking with Mr. Cavanaugh. *Id.* 685, 688. This Court explained that:

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[1] "Sweating" was a term used in the 1900s to reference common interrogation techniques deployed by the police. In the 1930s the Kentucky Legislature defined it as "…plying…with questions or by threats or other wrongful means, extorting from [the suspect] information to be used against him as testimony upon his trial for such alleged crime." Note, *Crimes--The Third Degree--Carroll's Kentucky Statutes (1930)*, 21 Ky L J 350 (1933), available at <https://uknowledge.uky.edu/klj/vol21/iss3/10> (accessed November 19, 2025). The modern form of "sweating" is the Reid technique, commonly used by interrogators, to leverage psychological coercion and manipulation, to extract a confession. Note, *The Cutting Edge of Confession Evidence: Redefining Coercion and Reforming Police Interrogation Techniques in the American Criminal Justice System*, 97 Tex L Rev 1031-1060 (2018), <available at https://texaslawreview.org/the-cutting-edge-of-confession-evidence-redefining-coercion-and-reforming-police-interrogation-techniques-in-the-american-criminal-justice-system/> (accessed November 19, 2025).

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> A confession, extorted by mental disquietude, induced by unlawfully holding an accused incommunicable, is condemned by every principle of fairness…is forbidden by the constitutional guaranty of due process of law, and inhibited by the right of an accused to have the assistance of counsel….Holding an accused incommunicable to parents and counsel is a subtle and insidious method of intimidating and cowing, tends to render a prisoner plastic to police assertiveness and demands, and is a trial of mental endurance under unlawful pressure.
> *Id*. 686.

Mr. Fenderson asked his interrogator, "can I have a lawyer first?" and then he was held incommunicable for nearly three hours. Mr. Fenderson's Appendix A at 2:29 and 5:15. When the interrogator first left Mr. Fenderson, he told him that he would try and find him an attorney. Mr. Fenderson's Appendix C, p 48-49. When the interrogator finally returned, Mr. Fenderson asked, "Where's my lawyer?" The interrogator answered, "You don't get one." Mr. Fenderson's Appendix A at 5:15. This game of mental disquietude rendered Mr. Fenderson plastic to his interrogator's demand that Mr. Fenderson tell him, "what I want to hear." Mr. Fenderson's Appendix A at 2:29. The means used to exact Mr. Fenderson's waiver of rights and subsequent statement violate every principle of fairness, were pressured, were coercive, and inhibited his right to counsel.

Even after incorporation of the Fifth Amendment, this Court continued to rely on the Michigan Constitution to secure the rights of the accused against unfair police tactics. In *People v Conte*, 421 Mich 704 (1984), this Court announced, "We would hold that under Const 1963, art 1, § 17, a statement induced by a law enforcement official's promise of leniency is involuntary and inadmissible, if there was a promise of leniency and that promise caused the defendant to confess." *Id*. at 712. That same year, this Court interpreted the due process guarantee of Const 1963, art 1, § 17 as a more expansive right than is secured by the federal constitution. *People v Mallory*, 421 Mich 229, 256 (1984) (BOYLE, J., dissenting) ("this Court is certainly free to interpret the Michigan Constitution to require a higher standard for the protection of our citizens than that which the United States Constitution grants to citizens by virtue of its commands…").

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In *Mallory* the majority concluded that Const 1963, art 1, § 17 "requires an arrestee's prompt arraignment." *Mallory*, 421 Mich at 239.[2]

Later in *People v Bender*, 452 Mich 594 (1996), this Court again held that Const 1963, art 1, § 17 secured greater protections than the Fifth Amendment. The *Bender* Court held that Michigan's Constitution requires police inform a suspect when the suspect's counsel is present at the police station. *Id*. at 614. But, in *People v Tanner*, 496 Mich 199, 245 (2014), a later iteration of this Court overruled *Bender*, holding that the text of art 1, § 17 did not support the rule, and should be understood only to protect against statements obtained using "coercion, violence, force, or pressure." The *Tanner* Court adopted the rule set forth in *Moran v Burbine*, 475 US 412 (1986). *Id*. at 247. Amici contends that *Tanner* was wrongly decided, but this Court need not reconsider or overrule *Tanner* to find the police conduct here violated Mr. Fenderson's constitutional rights. Michigan's history compels this Court to hold that Mr. Fenderson's second waiver of rights and subsequent statement were involuntary because they were obtained using coercion, pressure, and methods that do not comport with principles of fairness and justice.

Given Michigan's history of recognizing an expansive right against self-incrimination and its practice of interpreting its own constitution as more protective than the federal constitution,[3] this Court should rule that Const 1963, art 1, § 17's language establishing a right against self-incrimination and guarantee of fair and just treatment together render a *Miranda* waiver and subsequent statement involuntary when the record demonstrates that the accused either lacked a full understanding or was misled about their right to remain silent or their right to an attorney. Here, Mr. Fenderson did not understand his right to an attorney because his interrogators misled him about that right. His repeated questions about his right and statements expressing confusion about his right to counsel were dismissed. Mr. Fenderson's Appendix A at

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[2] A similar rule has since been recognized by the United States Supreme Court but is grounded in the federal rules of criminal procedure and not the constitutional right to due process. *Corley v United States*, 556 US 303, 308 (2009).

[3] For other times when this Court has recognized that the Michigan Constitution is either more protective or may be more protective than the federal constitution *See People v Parks*, 510 Mich 225 (2022); *People v Stovall*, 510 Mich 301 (2022); *Rafaeli, LLC v Oakland Cnty*, 505 Mich 429 (2020); *AFT Michigan v State of Michigan*, 497 Mich 197, 245 (2015) ("Const 1963, art 1, § 17 may, in particular circumstances, afford protections greater than or distinct from those offered by US Const, Am XIV, § 1."); *Sitz v Dept of State Police*, 443 Mich 744 (1993).

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5:15, 5:17-23. His subsequent waiver and statements were therefore involuntary under Const 1963, art 1, § 17 and must be excluded from trial.

II. Social science research has compelled other states to extend greater protections during interrogation than have been recognized by the United States Supreme Court.

Other states have concluded that modern social science undermines the assumptions underlying the United States Supreme Court's interrogation jurisprudence. Consequently, they have held that greater protections necessarily exist under their state constitutions. Recently, Maine and Connecticut have considered how vulnerable groups are particularly susceptible to making involuntarily statements. *State v McLain*, __ ME __ (2025) (Docket No. PEN-21-256), available at 2025 WL 2490589; *State v Purcell*, 331 Conn 318 (2019). Drawing on social science, these courts held that their state constitutions require additional protections, especially for young adults, people with limited education or language skills, and those who experience custodial interrogation as intimidating and disorienting.

Mr. Purcell, like Mr. Fenderson, expressed confusion about his right to counsel during a police interrogation. *Purcell*, 331 Conn at 326. The Connecticut Supreme Court recognized that people do not fully understand their rights and that understanding the traditional *Miranda* warnings requires a greater educational background than most suspects have. *Id*. 354-55. The Court observed that those who are young, disabled, or for whom English is not their first

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language are more likely to have difficulty understanding their rights. *Id*. 354-55.[4] Ultimately, the court concluded, "the Connecticut constitution does not condone a rule that could disadvantage the most vulnerable of our citizens." *Id.* at 321. The Court determined that the state's constitution requires that when a suspect makes an equivocal invocation police must cease interrogation, and may only ask limited questions to clarify or inform the suspect that they understand their statement to mean they do not wish to speak without counsel present. *Id*. at 362.

The Maine Supreme Judicial Court followed a similar path in *State v McLain*, __ ME __ (2025) (Docket No. PEN-21-256), available at 2025 WL 2490589. Maine recognized that people of lower socioeconomic status, juveniles, people of color, immigrants, and women are more likely to use ambiguous language with interrogators. *Slip op* at 9. Like the Connecticut Supreme Court, Maine relied on social science to reach its decision. And like Connecticut, Maine held that when a person in custody makes an ambiguous or equivocal statement suggesting they may wish to remain silent or request counsel, police cannot continue questioning. *Slip op* at *6 Instead, officers must either stop the interrogation or clarify whether the individual intends to invoke their rights. *Id*.

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[4] In addition to the social science cited in the *Purcell* and *McLain* opinions, this Court may find the following articles instructive: Rodgers, et al, *An Analysis of Miranda Warnings and Waivers: Comprehension and Coverage*, 31 Law & Hum Behav 177, 179 (2007) (Most suspects have not completed high school, and "their reading levels are much lower than their years of completed education…[suspects] were reading an average of four years below their academic level."); Bronson et al, *Disabilities Among Prison and Jail Inmates, 2011-12*, US Dept of Justice, p 3, tbl 3, published December 2015, available at <https://bjs.ojp.gov/content/pub/pdf/dpji1112.pdf> (accessed November 19, 2025) (suspects are significantly more likely to have a cognitive disability—19.5% for state and federal prisoners—compared with 4.8% of the general population); Rost, et al., *Miranda Rights Comprehension in Young Adults With Specific Language Impairment*, 21 Am J Speech Language Pathology 2, 101-108 (2012), available at <https://pmc.ncbi.nlm.nih.gov/articles/PMC3609432/pdf/nihms369680.pdf> (accessed November 19, 2025) (a majority of prisoners in the United States have a language impairment, people with language impairments are less able to apply *Miranda* rights); Villalobos, et al, *Interrogation and the Minority Suspect: Pathways to True and False Confession*, Advances in Psychology and Law 1 (Springer 2016) (people of color are more likely to waive their *Miranda* rights and are more vulnerable to both true and false confessions); Casey, et al, *Making the Sentencing Case: Psychological and Neuroscientific Evidence for Expanding the Age of Youthful Offenders*, 5 Annu Rev of Criminology 321-43 (2022), available at <https://modlab.yale.edu/sites/default/files/files/annurev-criminol_Casey.pdf> (accessed November 19, 2025) (Adolescents and young adults exhibit immature psychological abilities compared to older adults, and they show little difference from one another in cognitive capacity during emotionally charged situations).

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In this case, there is no dispute that Mr. Fenderson unequivocally invoked his right to counsel. But rather than cease interrogation, interrogators responded to Mr. Fenderson's very clear invocation by first demanding he agree to tell them what they wanted to know if they provided him an attorney, assured him they would try to find an attorney, and then placed him in isolation for nearly three hours. Mr. Fenderson's Appendix A at 2:29-30, 5:15. When his interrogators finally returned, Mr. Fenderson asked about the attorney and the interrogator responded by saying "you don't get one" because "you ain't got no money." Mr. Fenderson's Appendix A at 5:15-5:17. Mr. Fenderson then stated, "I'm confused then" and "what?" to which his interrogator responded that they were submitting a warrant for his arrest and returning him to the jail. Mr. Fenderson's Appendix A at 5:15-21. Seeing Mr. Fenderson's distress, the interrogator instructed Mr. Fenderson about the magic words he could use to avoid going back to jail, "If you wanted to talk to me, you just say you want to talk without an attorney then I can talk to you. You said you wanted an attorney. I'm not allowed to talk to you by law." *Id*. Far from clarifying Mr. Fenderson's rights, the interrogator's statements pressed Mr. Fenderson into waiving the right he had previously invoked. Because of the interrogator's manipulation, Mr. Fenderson was left with the understanding that he did not have the right to an attorney because he was too poor to afford one, and the only way he could avoid being charged with murder was to say, "I want to talk to you without an attorney." These pressured, coercive, and misleading tactics were especially likely to undermine the advice of rights for an individual like Mr. Fenderson, who was young, poor, not a high school graduate, and unfamiliar with the criminal legal system.

This Court should follow other states in accounting for the vulnerabilities of suspects subject to interrogation when evaluating the voluntariness of custodial statements and related waivers of rights. Absent these considerations, fair and just treatment would be reserved only for those less vulnerable to interrogators' sophisticated techniques, which are designed to place suspects in a state of mental disquietude and convince them to act against their interests. Leo, *Police Interrogation and American Justice* (Cambridge: Harvard University Press, 2008), ch 4. Mr. Fenderson was certainly placed in that state by his interrogators, rendering his waiver of rights and subsequent statements involuntary and unknowing under both the state and federal constitutions.

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Summary and Request for Relief

Amicus Curiae Criminal Defense Attorneys of Michigan respectfully requests that this Honorable Court grant Mr. Fenderson's pending application for leave to appeal, or other peremptory relief, and reverse the Court of Appeals opinion below.

Respectfully submitted,

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