STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs

MUHAMMAD ALTANTAWI,

Defendant-Appellant.
_____/

M.S.Ct. No.

COA No. 346775

Oakland County Circuit Court No. 2017-265355-FJ

DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

BRIEF IN SUPPORT OF DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

NOTICE OF FILING AND CERTIFICATE OF SERVICE

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NOW COMES MUHAMMAD ALTANTAWI, Defendant-Appellant herein, by and through his attorney, CAROLE M. STANYAR, and moves this Honorable Court, pursuant to MCR 7.302, for an order granting his application for leave to appeal from the Court of Appeals' interlocutory (merits) decision in this case, affirming the trial court's denial of two motions to suppress evidence, based upon the following reasons.

1. Defendant was charged in an original information, before Oakland County Circuit Court Judge Martha D. Anderson, with one count of first degree premeditated murder pursuant to MCL 750.316(1)(A), arising out of the death of his mother, Nada Huranieh, on August 21, 2017.[1]

2. In the trial court, the defendant moved to suppress (1) evidence of his alleged

[1] The defendant was 16 years old at the time of his mother's death. He is being held in custody at Children's Village, in Pontiac, Michigan.

statements to police obtained without *Miranda*[2] warnings, and (2) surveillance video evidence from the family home seized and later searched without the defendant's consent and without a warrant.

3. The trial court held an evidentiary hearing on September 21 and October 8, 2018, denied both motions on November 20, 2018, and stayed the proceedings pending the defendant's interlocutory appeal, which was timely filed.

4. The Court of Appeals granted the interlocutory application for leave to appeal, with Judge Colleen O'Brien dissenting, on March 7, 2019.

5. Following the Court's grant of the application, Defendant-Appellant filed timely his brief on appeal, raising the following issues:

> A. THE DEFENDANT'S MOTION TO SUPPRESS THE SEARCH AND SEIZURE OF THE DVR SYSTEM SHOULD BE GRANTED DUE TO LACK OF CONSENT, AND THE TRIAL COURT'S ORDER DENYING IT SHOULD BE OVERTURNED.
>
> B. THE DEFENDANT'S MOTION TO SUPPRESS THE INTERVIEW SHOULD BE GRANTED DUE TO A VIOLATION OF *MIRANDA*, AND THE TRIAL COURT'S ORDER DENYING IT SHOULD BE OVERTURNED.

6. On September 5, 2019, the Court of Appeals issued its decision on the merits in an unpublished opinion, affirming the trial court's denial of the motions to suppress, with a partial concurrence, partial dissent, authored by Judge Deborah Servito. *People v Altantawi,* unpublished per curiam opinion of the Court of Appeals, issued September 5, 2019 (Docket No. 346775).

7. Defendant was represented in the trial court and in the Court of Appeals by Michael P.

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[2] *Miranda v. Arizona*, 38 U.S. 436; 86 S.Ct. 1602; 16 L.Ed.2d 694 (1966).

Schiano, Clarence M. Dass and Mark E. Hart.

8. Based upon the foregoing, and based upon the argument and authorities contained in the attached memorandum of law, Mr. Altantawi contends that the Court should allow his application for leave to appeal the following claims.

> A. THE COURT OF APPEALS CLEARLY ERRED IN AFFIRMING THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S MOTION TO SUPPRESS HIS STATEMENTS, AND THE COURT OF APPEALS CLEARLY ERRED IN AFFIRMING THE TRIAL COURT'S FINDING THAT THIS JUVENILE DEFENDANT HAD NOT BEEN SUBJECTED TO "CUSTODIAL INTERROGATION" AND THAT HIS FREEDOM OF MOVEMENT WAS NOT SUFFICIENTLY CURTAILED SO AS TO REQUIRE THE GIVING OF *MIRANDA* WARNINGS.
>
> B. THE TRIAL COURT AND THE COURT OF APPEALS CLEARLY ERRED IN FINDING THAT EVIDENCE WAS OBTAINED AS A RESULT OF A LAWFUL, AUTHORIZED CONSENT SEIZURE AND SEARCH, AND THE COURT OF APPEALS CLEARLY ERRED IN AFFIRMING THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S MOTION TO SUPPRESS.

9. This application is being filed timely as it is being filed within 56 days of the Court of Appeals' order affirming the decision of the trial court. MCR 7.302(C)(2).

10. This application for leave to appeal satisfies the requirements of MCR 7.302(B)(3) warranting review by this Court because this case involves legal principles of major significance to the State's jurisprudence, namely,

> (a) whether the *Miranda* custodial interrogation analysis and required warnings apply to a juvenile interrogated at home in a "police-dominated atmosphere" by three detectives while isolated from family;
>
> (b) whether the *Miranda* custodial interrogation analysis may consider that the defendant went to a good school;

> (c) whether property law or Fourth Amendment law controls as to the issue of the actual or apparent authority of an out-of-custody father – who does not live with his son, who has a recent domestic violence adjudication and is on probation and is subject to a protective order based upon that adjudication, and who has been permitted only supervised visitation (which he fails to exercise) – to lawfully consent for his son to a search and seizure of property within the home.

11. This application for leave to appeal satisfies the requirements of MCR 7.302(B)(5) warranting review by this Court because the decision of the Court of Appeals is "clearly erroneous and will cause material injustice" as to its analysis of the questions summarized above at paragraphs 10(a), (b) and (c), and for the reasons expressed in the attached brief.

WHEREFORE, based upon all of the foregoing, based upon the argument and authorities set forth in the attached brief, Defendant Muhammad Altantawi prays for an order granting his application for leave to appeal from the Court of Appeals' decision affirming the trial court's order denying his motions to suppress.

Respectfully submitted,

/s/ *Carole M. Stanyar*
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Dated: October 28, 2019

STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

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Defendant-Appellant.
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BRIEF IN SUPPORT OF DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF THE BASIS OF JURISDICTION

Defendant-Appellant Muhammad Altantawi was charged in Oakland County Circuit Court, before the Honorable Martha D. Anderson, with one count of first degree premeditated murder pursuant to MCL 750.316(1)(A), arising out of the death of his mother, Nada Huranieh, on August 21, 2017. Muhammad was sixteen years old at the time of his mother's death. In the trial court, the defendant moved to suppress (1) evidence of his alleged statements to police obtained without *Miranda*[3]warnings, and (2) surveillance video evidence from the family home seized and later searched without the defendant's consent and without a warrant.

The trial court held an evidentiary hearing on September 21 and October 8, 2018, denied both motions on November 20, 2018, and stayed the proceedings "pending appeal", which was timely filed by the defendant. The Court of Appeals granted the interlocutory application in an unpublished opinion, in March and affirmed the trial court's ruling, with a dissenting opinion, on September 5, 2019. *People v Altantawi,* unpublished per curiam opinion of the Court of Appeals, issued September 5, 2019 (Docket No. 346775).

This Court's jurisdiction on the instant appeal is grounded in MCR 7.301(A)(2) which governs applications for leave to appeal from a decision of the Michigan Court of Appeals. This application is being filed timely as it is being filed within 56 days of the Court of Appeals' order affirming the decision of the trial court. MCR 7.302(C)(2).

[3] *Miranda v. Arizona*, 38 U.S. 436; 86 S.Ct. 1602; 16 L.Ed.2d 694 (1966).

STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS CLEARLY ERRED IN AFFIRMING THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S MOTION TO SUPPRESS HIS STATEMENTS AND WHETHER THE COURT OF APPEALS CLEARLY ERRED IN AFFIRMING THE TRIAL COURT'S FINDING THAT THIS JUVENILE DEFENDANT WAS NOT SUBJECTED TO "CUSTODIAL INTERROGATION", AND THAT HIS FREEDOM OF MOVEMENT WAS NOT SUFFICIENTLY CURTAILED SO AS TO REQUIRE THE GIVING OF *MIRANDA* WARNINGS?

Defendant-Appellant answers "Yes".
Plaintiff-Appellee answers "No".

II. WHETHER THE TRIAL COURT AND COURT OF APPEALS CLEARLY ERRED IN FINDING THAT EVIDENCE WAS OBTAINED AS A RESULT OF A LAWFUL, AUTHORIZED CONSENT SEIZURE AND SEARCH, AND WHETHER COURT OF APPEALS CLEARLY ERRED IN AFFIRMING THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE?

Defendant-Appellant answers "Yes".
Plaintiff-Appellee answers "No".

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS[4]

On August 21, 2017, Defendant-Appellant (hereinafter "Muhammad"), then sixteen years old, lived at 36933 Howard Road in Farmington Hills with his mother, Nada Huranieh (the deceased), and two sisters: Aya, aged 14 and Sidra, aged 9. (Jordan, Hrg Tr 9/21/18, p 9; Wehby, Hrg Tr 12/8/17, p 179. Muhammad's parents were in the midst of a contentious divorce. His father, Dr. Bassel Altantawi, had not lived with the family for nearly two years. (Exhibit A, pp 10-11;[5] Dr. Altantawi, Hrg Tr 9/21/18, pp 250-251 and Molloy, Hrg Tr 9/21/18, p 83).

At about 6:30 a.m. that day, Aya advised Muhammad that their mother appeared to have fallen, from a second story window to a concrete patio 29 feet below, while cleaning a window. (Jordan, Hrg Tr 9/21/18, pp 13, 22, 35 and Wehby, pp 181-183, 190). Aya called 911, later handing the phone to Muhammad who followed a dispatcher's directions to perform CPR on their mother. (Jordan, Hrg Tr 9/21/18, pp 46-47, 54 and Molloy, p 113; Exhibit A, p 14). Sidra remained asleep. (Jordan, Hrg Tr 9/21/18, pp. 24-25).

Farmington Hills police responded to the address and Officer Nathan Jordan found Muhammad performing CPR on his mother with one hand, with his other hand holding the phone and talking to the police dispatcher. (*Id*. 46-47). Officer Jordan noted that her body was still warm to the touch, but she had no pulse, and she was pronounced dead a short while later. (*Id*. 20-21 and Molloy, pp 76-77). Jordan talked to Aya and Muhammad immediately, neither of

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[4] Facts summarized herein are taken from transcripts three days of hearings relating to the defendant's motions to suppress, with testimony taken on 9/21/18 and 10/8/18, and the trial court's ruling, from the bench, on November 20, 2018.

[5] A transcript of the defendant's interrogation was admitted at the hearing below as People's Exhibit 15. It is appended to this application as Exhibit A.

whom reported actually seeing their mother fall. (Jordan, Hrg Tr 9/21/18, pp 24-25, 32-33, 52). Both explained that their mother typically cleaned the house, starting at 4:30 or 5:00 a.m., prior to getting them off to school. (Jordan, 32-33; Wehby, p 220).

Police summoned Dr. Altantawi to the scene to assist with the children. The doctor hesitated because he was on probation for a misdemeanor adjudication for domestic violence against the deceased, and a protective order barred him from being near the deceased or the family home. (Jordan, Hrg Tr 9/21/18, pp 37-39, 56 and Wehby, pp 180, 222).[6] After the officers advised that it would be alright for him to come to the house, he arrived and took the three children out to eat while EMS and Farmington Hills police tended to the deceased. (*Id*. 180-181, 185, 187). They were too upset to eat anything. (Dr. Altantawi, Hrg Tr 9/21/18, p 234).

From approximately 7:00 a.m. to noon on August 21st, police investigated the scene. In the second-floor guest room suite, where the deceased typically put on her make up in the morning, detectives made note of a three-step ladder, upright and placed near the open window; a bottle of Tilex sitting on the top step of the ladder; streaks of a fluid ("spray marks") on the outside surface of the open window which appeared to have not been wiped yet; a screen that had been removed from the open window; and a bucket of water. (Wehby, Hrg Tr 9/21/18, pp 181-182, 187-189, and Jordan, pp 34-35).[7] Black hair consistent with that of the deceased was found

[6] Later police confirmed with the tether company that Dr. Altantawi had not been near the family home at the time of the death. (Molloy, Hrg Tr 9/21/18, pp 93-94)

[7] Detectives noted no signs of a struggle in the room, and no signs of forced entry to the home. The family typically entered the home, without keys, through the garage. (Jordan, Hrg Tr 9/21/18, pp 34-35, and Molloy, pp 93, 127; Wehby, Preliminary Exam Tr 12/8/17, p 79).

on a dented, decorative, Stucco ledge that was 4 to 6 feet directly below the open window. (Id. 14, 17, 35-36, and Wehby, Hrg Tr 9/21/18, pp 182 191-192) A rag was found near the deceased's body on the patio. (Jordan, Hrg Tr 9/21/18, p 21). She was laying on her back with her head perpendicular to, and inches away from, the westerly wall of the home, directly beneath the open window. (Id. 11). There was "one inch" of blood under her head on the concrete. (Wehby, Hrg Tr 9/21/18, p 195). She was dressed in pajamas, the bottoms of which appeared to be partially wet. (Id. 195). Besides the head injury, she appeared to have no significant external injuries. A bruise on her lower lip and blood streaking down her cheek may have been related to intubation efforts by EMS, because those were not visible to Officer Jordan, the first responder. (Jordan, Hrg Tr 9/21/18, p 52, and Wehby, p 185).

Detectives noticed what appeared to be surveillance cameras on the exterior of the home, including one which was directed at the patio area. (Id. 187; Jordan, Hrg Tr 9/21/18, p 40). When Dr. Altantawi and the children returned from breakfast on 8/21/17, both Dr. Altantawi and Muhammad told police that the cameras were on the home when it was purchased, and had never been used. (Wehby, Hrg 9/21/18, pp 187, 214-215). In a second floor laundry room, a bath mat with rubber backing was floating in standing water, in a front loader washing machine that was displaying with a flashing error code. A bath mat appeared to be "missing" in the master bathroom. (Id. 193). In the dryer were blue jeans and a pair of boy's underwear. (Id. 193, 219)

After detectives left the home on 8/21, they were given information by the deceased's interior decorator that the home still had a functioning video surveillance system. (Molloy, Hrg Tr 9/21/18, p 96). On August 22, 2017, Detectives Molloy and Hammond returned to the home for the purpose of recovering the DVR (digital video recorder) for the surveillance system, and

they were allowed in by Dr. Altantawi, who said "[o]kay, you can go check that out." (Id. 102-104). According to Detective Molloy, the doctor agreed that the detectives "could conduct an investigation", meaning "[g]oing in the house, take a look around, see any signs of ... anything possibly criminal, take photographs, collect evidence". "He said he didn't have a problem with that." (Id. 84).

While his name was on the title to the home, Dr. Altantawi had not lived in the home for over a year and a half, he was barred by a protective order from being there, he had not been in the house physically for over a year, and he was unsure of what would happen with the house in the divorce litigation. (Dr. Altantawi, Hrg Tr 9/21/18, pp 250-251, and Molloy, p 83). In that lengthy time period, Muhammad had only seen his father "occasionally". (Exhibit A, p.10). There is no indication that Muhammad was present when his father allowed police into the home, no indication that *Muhammad* allowed police entry into the home, no indication that *Muhammad* consented to any search or seizure of items in his home. Significantly, when Detective Molloy asked Muhammad about the surveillance cameras "he told me he didn't want to talk to me – he didn't want to talk right now." (Molloy, Hrg Tr 9/21/18, p 92). The detectives were in plain clothes, with their guns holstered on their hips. (Id. 98). They moved to various locations throughout the home, on every floor, looking for the surveillance equipment. After calls to an interior decorator and the camera installation company, detectives located the surveillance DVR behind a furnace on the second floor. (Id. 106; Wehby, Hrg Tr 9/21/18, p 218; Dr. Altantawi, Hrg Tr 9/21/18, pp 238-242).

There were disputes at the hearing below (1) as to whether the surveillance video was the subject of a consent seizure and search, (2) as to whether Dr. Altantawi objected to the removal

of the surveillance DVR from the home, (3) as to whether Dr. Altantawi insisted on seeing a written consent form prior to giving consent, (4) as to when and where the conversation regarding consent occurred, (5) as to whether or not the DVR was seized by the officers prior to Dr. Altantawi's assertion of consent, and (6) as to whether the detectives discussed amongst themselves the necessity of a written consent form. Both sides appear to agree that there was some discussion about a written consent form, but none was offered to Dr. Altantawi or the children. Dr. Altantawi contends that detectives unplugged the DVR, confiscated it, transported it to the main floor and were about to exit to the home when the subject of consent was first raised on the recording – i.e., that the detectives effectively seized the DVR before asking for consent. (Dr. Altantawi, Hrg Tr 9/21/18, 244-245). When asked if police can take the DVR, Dr. Altantawi is heard saying on tape, "So, I don't know ..." and then, "I mean, I guess I don't have an issue with that." Exhibit B, p 4, appended.[8] Dr. Altantawi explained at the hearing that he felt pressured by the officers: they suggested to him that he was suspect in the murder based upon information coming from friends of the deceased. (Dr. Altantawi, Hrg Tr 9/21/18, pp 246-248). In contrast, the detectives claimed that the consent conversation occurred earlier, near the furnace, when they were taking possession of the DVR, and that they asked the doctor if they could take the DVR and review the tape, and he said "Fine". (Molloy, Hrg Tr 9/21/18, p 107). The recording demonstrated, and Detective Molloy agreed, that Detective Hammond asked Molloy if he wanted a consent form. (Id. 166). Detective Wehby agreed that the department had the standard forms, however, he explained that if consent is given by a not-in-custody, non-

[8] The transcript of the recording of the DVR consent conversation was admitted by the trial court as Exhibit 10. It is appended to this application as Exhibit B.

suspect, the forms are not routinely used. (Wehby, Hrg Tr 9/21/18, pp 204-205, 209).[9] Instead, the detectives used a cell phone to tape record Dr. Altantawi's equivocal assertion of consent. (Id. 205).[10]

Regardless, at no time were any of the Altantawi children ever asked if *their* home could be searched, or if *their* property, including the surveillance DVR, could be taken from the home or searched. The record is fairly clear (and the prosecution has never disputed) that Muhammad was not present, within earshot, when consent for the DVR was discussed. The detectives had not secured a warrant before taking the DVR.

After the DVR was seized, Detective Molloy asked the doctor if he could "check[] in on Muhammad ... to see how he was doing", and the doctor said "it was okay". (Molloy, Hrg Tr 9/21/18, p 111). Despite the fact that Muhammad had told the detective the previous day that he did not want to talk, the detective engaged him in questioning, asked how he was doing and then quickly revisited the issue of the security system. In response to this questioning, Muhammad said "... he knew how to use it ... how it worked", he thought it wasn't working, that "several phones ago" his mom "would access it via her phone", but that he didn't think that information would still be on her current phone. (Id. 92, 111-112). Muhammad then asked Molloy where the cameras were, and whether there were any inside the house, and the detective responded that he didn't know. (Id. 112).

Molloy then redirected the questioning to what Muhammad remembered about the time

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[9] The written consent forms advises the subject of his or her constitutional right not to consent to the seizure of evidence. (Id. 210).

[10] A copy of this recording was admitted as Exhibit 9 at the 9/21/18 evidentiary hearing.

line of 8/21. Muhammad repeated what he had told the detectives the day before, however, this time, he remembered waking up at 6:00 a.m. and showering in the bathroom attached to his bedroom before being notified by Aya that their mother had fallen. (Id. 113). Muhammad agreed that his parents' divorce was "contentious", that he and his mother argued a lot, but that their relationship had gotten better recently, and that in general he got along with his father better. (Id. 114). Muhammad said he was not surprised that his mother fell out the window because she had had "several car accidents in one week several months" prior. (Id. 115-116).

After returning to the station, the detectives eventually were able to access a video excerpt, from 5:55 a.m. on 8/21, of the lower portion of the deceased's fall to the patio, as well as "moving shadows" cast on the ground below, generated by the guest room light, which Detective Molloy claimed reflected a second person in the guest bedroom, possibly male, flipping the body out the window, followed by the appearance of a shadow of a ladder. (Id. 116-121).

At 3:00 p.m. on 8/22, after viewing the surveillance video, the detectives returned to question Muhammad again, this time, as a potential suspect in his mother's death. (Wehby, Hrg Tr 9/21/18, p 122, and Molloy, pp 298-300, 336; Molloy Hrg Tr 10/8/18, pp 8, 21). Detectives asked Dr. Atlantawi if they could take the children to the police station for questioning, and the doctor said he did not want them subjected to that. The doctor asked "Should I have an attorney here?" That request was batted away by the detectives, who implied falsely that there would be no need for an attorney, that this process was "just standard procedure", and that they were just "trying to get the time line down." (Opinion, Hrg Tr 11/20/18, pp 10-11). With these assurances, Dr. Altantawi did all allow the detectives to speak with Muhammad at the home. (Molloy, Hrg Tr 9/21/18, 302-303). Detectives went upstairs and collected Muhammad: "You're

gonna come downstairs with us." (Id. 347; Appendix Exhibit A, p 2). At that moment, "[i]t doesn't appear that [the doctor]" was upstairs with Muhammad. (Molloy, Hrg Tr 9/21/18, 302-303). Muhammad was alone with the detective when the detective ordered Muhammad to come downstairs, and detectives alone escorted him down the stairs.

At that point, Dr. Atlantawi told the detectives that he had to pick Aya up at the library bus stop, which was a mere three miles from the home. (Id. 342; Molloy, Hrg Tr 10/8/18, p 18, and Wehby, p 73). Before leaving to pick up Aya, the doctor and Muhammad asked if they could pray privately in a basement, dedicated prayer room, however, detectives would only allow them to do so, in the upstairs family room, within earshot of the detectives. (Molloy, Hrg Tr 9/21/18, pp 303-305; Dr. Altantawi, Hrg Tr 10/8/18, pp 213-214).[11] The detectives gave the doctor misleading information that in questioning Muhammad, they "just want[ed] to check a time line". (Id. 337-338). They did not tell the doctor they had seen the video and that they now believed that the death was not an accident because of the second figure seen in the shadows, and they did not tell the doctor that his son was a potential suspect in the murder of his mother. (Id. 336-338).

Dr. Altantawi left the home to pick up Aya at the bus stop, and the detectives immediately began interrogating Muhammad at the dining room table. (Molloy, Hrg Tr 9/21/18, pp 306-308). The detectives were seated next to and across from Muhammad. (Id. 309 -310, 340-341; Molloy, Hrg Tr 10/8/18, p 43, and Wehby, pp 75, 78). Eventually, three detectives and at least three uniformed police officers arrived at Muhammad's home, with three detectives

[11] For Muslims like Muhammad, the five daily prayer times, called Salat, are among the most important obligations of the faith. See Exhibit A, p 6.

participating in the interrogation: Wehby, Molloy and Hammond. (Molloy, Hrg Tr 10/8/18, p 9, and Wehby, pp 58-62, and Bretz, p 166).[12]

Detective Wehby did most of the questioning seated at the head of the table, in a position of authority, in a "big 'ol hooded chair ... that looks like a space ship." (Molloy, Hrg Tr 9/21/18, pp 340-341). Muhammad was not given *Miranda* warnings, he was not told he was free to go, and he was not told that he could refuse to answer. (Molloy, Hrg Tr 9/21/18, pp 312-313, 317, 338-339; Molloy, Hrg Tr 10/8/18, pp 22-23, 30). Muhammad indicated at various points that "he didn't want to talk about it anymore, he just didn't want to talk about it", (Opinion, Hrg Tr 11/20/18, p 17), and yet the detectives pressed on. Under pressure from the detectives to keep talking, Muhammad began by reiterating the account he had given to the detectives the day before. (Molloy, Hrg Tr 9/21/18, p 319; Exhibit A, pp 13-14, 17-18). Muhammad said repeatedly that "I didn't see anything until after everything happened." (Id. 18). The detectives rejected this account, telling Muhammad that they had recovered video showing a second person

[12] The trial court found that only the three detectives would be visible to persons inside the home. (Opinion, Hrg Tr 11/20/18, p 14). However, the record in this case demonstrates that while the uniformed officers outside were directed to hide until after Dr. Altantawi left to pick up Aya at the bus stop, once he left, they would clearly be visible in the driveway. (Bretz, Hrg Tr 12/8/18, pp 166-167). Moreover, the recording demonstrates that the doctor left at the very beginning of Muhammad's interrogation. In addition, both officers' testimony and the recording of the interrogation make clear that in Muhammad's presence, the inside detectives were communicating with the officers stationed outside, telling the officers if and when the doctor will be allowed to approach the home. (Bretz, Hrg Tr 12/8/18, pp 167-168; Exhibit A, p 10). Officers Bretz and Swanderski testified to being in the driveway, blocking it (Bretz, Hrg Tr 12/8/18, pp 166-168, and Swanderski, pp 184-185, 197), and Detective Wehby is heard saying on the recording "Smith's out there too", and "Okay. They're coming in". (Exhibit A, pp 10, 16). Consequently Muhammad knew that significantly more than three detectives were present, he knew that the police were controlling ingress and egress to the home and the driveway, he knew that for some reason his father had been delayed or blocked, and ultimately, he knew that he was surrounded by police and isolated from family.

in the room with his mother. They become more accusatory, saying that they thought Muhammad knew more than he was telling them. (Molloy, Hrg Tr 9/21/18, p 319; Exhibit A, pp 16-17). During the 40 minute tape-recorded interrogation, Detective Wehby is heard suggesting the word "accident" "a number of times". (Molloy, Hrg Tr 9/21/18, p 341). "That's was the story [the detectives] were feeding [Muhammad], suggesting [it was] an accident." (Id. 342). They suggested to Muhammad that his mother's death was the result of an accident, but that Muhammad must have been present. "Tell us it's an accident." (Id. 342). "If it was an accident, you need to tell us." (Id. 342). "We're trying to find out if it was something done by accident, which ... accidents happen all the time ..." Exhibit A, p 18. The detectives then proceeded to add detail to the suggested accident scenario, assuring Muhammad all the while that if he just tells them that this is what happened, the situation can be resolved. "We want to get a resolution to this." (Exhibit A, p 17). The detective suggested the following scenario.

> DETECTIVE 2: "Yeah, I was helping my mom clean out the windows, and she was having trouble with the screen, "or something like that. "And I was trying to hold the ladder and she slipped and fell. And I panicked". That's something you need to tell us now.
>
> ... "Shit I didn't hold the ladder good enough." Or something like that. "I turned around to look at my phone, and I was supposed to be holding the ladder. And she fell."

(Id. 19-20). At no time did they tell him that their suggestions about what may have happened are leading him into admissions that will result in murder charges and a possible life sentence for this juvenile. When the detectives suggested these things, Muhammad repeatedly countered that he doesn't remember it happening the way they are suggesting, and that he doesn't know. (Id. 21-22). "That's not really how it happened." (Id.).

The detective then resorted to more deception, and suggested that time is of the essence,

because they will be shipping the video out to the Michigan State Police lab, they will "blow it up", "... it's gonna show who was there." "[T]hat's what MSP's doing right now." (Id. 20).

Ultimately, all of the information eventually supplied by Muhammad in his alleged "confession" to Farmington Hills police on 8/22 could also have derived either from the information disclosed by Aya at 6:30 a.m. on 8/21, or from information encompassed in the detectives' numerous suggestions of how Muhammad may have been present and/or played a role in his mother's accidental fall. Eventually, a frustrated, emotional and exhausted Muhammad tells the detectives, simply, that "I'm gonna agree with what you say." (Id. 25). Encouraged and reassured by the detectives to articulate a scenario, and given the road map, Muhammad tells them that he woke up earlier than he has told them previously. His mother was cleaning windows, and at her request, he retrieved what he thought was the right spray bottle cleaner. He held the ladder while she cleaned the window . "She stood on it. She leaned over. I came over. She fell. I looked over, and ... that's it ..." Muhammad thinks that she had one foot on the "step stool" and the other on the railing of the window. He "assume[s]" that "something with her pants got caught", possibly on the window's "turning handle", and she fell out the window. He went back to his room because "I thought I was dreaming or whatever ... I wanted something else to happen." (Id. 21-28). "And I just wanted to forget about it because I just saw my mom fall, man." (Id. 25). "My mom just died. I thought I was dreaming." (Id. 29). "I don't want to think about it .... I'm not gonna think anymore about what specifically happened." (Id. 26). The detectives explained that he was emotional and he cried when they asked if he did anything to help. At one point, Muhammad asks to go upstairs to "show" the detectives, and they

reject that suggestion, directing him to keep talking. (Id. 28).[13]

The interrogation of the defendant took approximately forty minutes. This entire time, Muhammad was alone with the detectives. From Muhammad's perspective, a three mile routine trip to the library bus stop would not have taken his father that long. Per his tether data, Dr. Altantawi had some difficulty finding Aya at the bus stop. "It took longer" than the doctor expected. (Opinion, Hrg Tr 11/20/18, p 16). Per the officers, there was some delay in allowing him back into the house after the trip to the bus stop. The trial court found that during the interrogation of Muhammad, Dr. Altantawi was stopped at the driveway by officers, and he was prohibited from going into the home, for approximately 15 minutes. (Opinion, Hrg Tr 11/20/18, p 15). The doctor was stopped at the driveway, and then he was stopped again by Detective Wehby at the entrance to the home. Once the doctor was allowed to reenter the home, the doctor told the detectives that he wanted them to stop talking to his son, that he wanted an attorney, and that the attorney said to do that. (Id. 16.).

The trial court denied both motions from the bench. As to the motion to suppress the surveillance video, the court found that Dr. Altantawi had consented to the seizure, and that as the remaining titled homeowner, he had legal authority to consent. As to the motion to suppress Muhammad's statement to detectives, the court found that as Muhammad was not in police custody, he was not entitled to *Miranda* warnings: he was in his own home, the interrogation was not overly long or overly coercive, and both Muhammad and his father had agreed that the

[13] "Defendant eventually told the police that he was in the guest bedroom when [his mother] fell out the window. He stated that he held the ladder for [her] while she cleaned a window but she fell." *People v Altantawi,* unpublished per curiam opinion of the Court of Appeals, issued September 5, 2019 (Docket No. 346775), p 9.

detectives could talk to him. (Opinion, Hrg Tr 11/20/18, pp 8, 17-18)

The trial court stayed proceedings pending a determination in the Court of Appeals. The Court of Appeals granted the application for leave to appeal, and then, after full briefing, affirmed both rulings of the trial court. Judge Deborah Servito dissented in part, finding that Muhammad's freedom of movement was sufficiently curtailed to trigger the giving of *Miranda* warnings.

SUMMARY OF ARGUMENT

Muhhamad Altantawi, then 16 years old, was subjected to custodial interrogation without *Miranda* warnings, resulting in a marginally inculpatory statement – albeit not a statement which matched in any way the physical facts developed in the police investigation. The circumstances surrounding this interrogation combined to create an intolerable risk of a false confession. In an oppressive, "police dominated environment", the defendant was interrogated by multiple detectives at home while isolated from family members. The detectives suggested a factual scenario to Muhammad relentlessly, which he ultimately embraced – frustrated, emotional and exhausted – saying simply, "I'm gonna agree with what you say."

Police confiscated a surveillance video that they claim is incriminating to the defendant because it contradicts the statement he gave (above). An assertion of consent by the defendant's father – to seize a DVR and to search the recording – was not valid. He had neither actual authority, nor apparent authority to allow police to seize the DVR, or to search the surveillance recording. The defendant's father no longer lived with the family, and a protective order barred him from even being there. He was not functioning in any meaningful way as the deceased's husband or the children's father. Neither the deceased nor the defendant had delegated to him

the power to consent to search, and the police could not lawfully confer on him that authority. All evidence resulting from this illegal search and seizure should have been suppressed.

The trial court's refusal to suppress the defendant's statements and the surveillance recording from evidence was clear error, as was the Court of Appeals' decision to affirm that ruling. This Court should grant an application for leave to appeal as to both issues.

ARGUMENTS

I.

THE COURT OF APPEALS CLEARLY ERRED IN AFFIRMING THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S MOTION TO SUPPRESS HIS STATEMENTS AND THE COURT OF APPEALS CLEARLY ERRED IN AFFIRMING THE TRIAL COURT'S FINDING THAT THIS JUVENILE DEFENDANT WAS NOT SUBJECTED TO CUSTODIAL INTERROGATION AND THAT HIS FREEDOM OF MOVEMENT WAS NOT SUFFICIENTLY CURTAILED SO AS TO REQUIRE THE GIVING OF *MIRANDA* WARNINGS.

Standard of review: "'The ultimate question whether a person was 'in custody' for purposes of *Miranda* warnings is a mixed question of fact and law, which must be answered independently by the reviewing court after reviewing de novo of the record.'" *People v. Coomer*, 245 Mich. App. 206, 219 (2001) (citations omitted); *Miranda v.Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The Court reviews for clear error the trial court's factual findings concerning the circumstances surrounding statements to police. *Coomer*, 245 Mich. App. at 219. "A finding is clearly erroneous if, after reviewing the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *Id.*

The Supreme Court in *Miranda*, recognized that custodial police interrogation brings with it "inherently compelling pressures". The physical and psychological isolation of custodial interrogation can "undermine the individual's will to resist and ... compel him to speak where he would not otherwise do so freely." *Miranda*, 384 U.S. at 467. The Court has also recognized more recently that there is "mounting empirical evidence" that the pressures attendant to custodial interrogation are so powerful that they "can induce a frighteningly high percentage of people to confess to crimes they never committed." *Corley v. United States*, 556 U.S. 303, 321;

129 S.Ct. 1558; 173 L.Ed.2d 443 (2009), citing Steven A. Drizin & Richard A. Leo, The Problem of False Confessions in the Post-DNA World, 82 N.C.L.Rev. 891, 906-907 (2004); See also *Miranda*, 384 U.S. at 455-457 (incommunicado "police-dominated atmosphere" and the "evils it can bring").

The Court in *Miranda* defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person as been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda,* 384 U.S. at 444. A finding of custodial interrogation under *Miranda* does not require formal arrest, or the confining of a subject at a police station or jail house. Custody can include other "restriction[s] on a person's freedom." *Oregon v. Mathiason*, 429 U.S. 492, 495; 97 S.Ct. 711; 50 L.Ed.2d 714 (1977) (per curiam). An assessment as to whether a suspect has been subjected to custodial interrogation is a two-pronged, objective inquiry:

> ... first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave.

Thompson v. Keohane, 516 U.S. 99, 112; 116 S.Ct. 457; 133 L.Ed.2d 383 (1995); *JDB v. North Carolina*, 564 U.S. 261, 270-271; 131 S.Ct 2394; 180 L.Ed.2d 310 (2011) (the analysis is limited to the objective circumstances of the interrogation, and asking how a reasonable person in the suspect's position would understand his freedom to terminate the questioning and leave).

The former prong of the analysis examines the location and length of the interrogation, statements made by the interrogating officer (i.e., advice that the subject is free to leave or stop the questioning), any restraints, and whether the subject is arrested following the interrogation. *Howes v. Fields*, 565 U.S. 499, 509; 132 S.Ct. 1181; 182 L.Ed.2d 17 (2012). No one

circumstance is controlling. *Id.* at 517, discussed in *People v. Barritt*, 325 Mich. App. 556, 563 (2018). The latter prong of this inquiry focuses on "whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at in issue in *Miranda*." *Fields*, 565 U.S. at 509; *People v. Elliot*, 494 Mich. 292, 311 (2013). The subjective views harbored by either the interrogating officers or the person being questioned are irrelevant. *Barritt*, 325 Mich. App. at 566.

Given the inherently coercive nature of custodial interrogation, the Court in *Miranda* held that prior to questioning, a suspect "must be warned that he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed." *Miranda* , 385 U.S. at 444.

In *JDB*, 564 U.S. at 277, the Court held that a child's age may properly be considered under *Miranda's* objective test for determining whether a defendant has been subjected to "custodial interrogation", so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer.

> [C]hildren cannot be viewed simply as miniature adults.
>
> .... The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them.
>
> ... Time and again, this Court has drawn these common sense conclusions for itself. We have observed that children "generally are less mature and responsible than adults ... that they often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them[.]"
>
> [C]hildren are "most susceptible to influence" ... and "outside pressures ..."

> .... In some circumstances, a child's age "would have affected how a reasonable person" in the suspect's position "would perceive his or her freedom to leave." ... That is, a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go.
>
> .... Addressing the specific context of police interrogation, we have observed that events that "would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens." ... "[N]o matter how sophisticated," a juvenile subject of police interrogation "cannot be compared" to an adult subject.

Id. at 271-275 (citations omitted).

Applying the foregoing principles, the following were objective factors which should have been considered in the *Miranda* custody analysis in light of the Court's decision in *JDB*. First and foremost, the defendant was not only a minor, but an especially vulnerable minor. He had been living separately from his father for almost two years due to his parents' contentious divorce and a domestic violence conviction by his father against his mother. During that time period, he saw his father only occasionally.[13] The defendant's mother had died the day before, with the defendant in direct contact with her body, attempting CPR. The defendant explained to the detectives that prior to her death, his mother would be the person he would go to if he had a problem. His angst at her death was readily apparent from this record.

While his father succeeded in keeping his children at the house for what he thought was brief questioning about the "time frame", the questioning was by no means brief and by no means was it just about a time frame. Significantly, Muhammad did not pick the time or the location of police interrogation. The prosecution argued that he must have said "yes" when asked if wanted

[13] During the pendency of the divorce action, given the violence in the home, Dr. Altantawi was allowed only supervised visitation with his children, which he chose not to exercise.

to talk, yet no such "yes" is audible on the police recording. Muhammad simply acceded to a directive of the detective. During the interrogation, the only adults in the home were police officers. In the moments preceding the interrogation, his father had left to pick up Muhammad's sister at a bus stop three miles away in what should have been a short trip. However, Dr. Altantawi did not return promptly as expected, leaving the defendant alone with three interrogating detectives who repeatedly ignored his account of what he knew about his mother's death, who ignored his expressed wishes not to talk about the death anymore, and who became increasingly confrontational and accusatory to this minor during a forty minute interrogation. They told Muhammad that based on their review of the video "we know you were in there", implying that once the video gets cleared up by MSP, they will easily be able to see him. Exhibit A, p 26.

Prior to his alleged confession, the defendant was never told he could remain silent, he was never told that he was free to leave, and he was never told that he had the right to consult with an attorney. Not surprisingly, the defendant was never able, successfully, to assert any of these rights.[14] As to this issue, Dr. Altantawi's successful later assertion of Muhammad's right to remain silent – after his son's interrogation was complete – must be contrasted with

[14] The trial court found that Muhammad's repeated statements during the interrogation – that he did not want to talk any more – somehow bear in favor of a finding that the defendant was not subjected to custodial interrogation. The trial court has misapplied this factor. The detective ignores the defendant's verbalized assertion of the right to remain silent, he immediately resumes the questioning, and the defendant capitulates. At another point, the defendant asks to go upstairs to the second floor bedroom to show the detectives something. The detective again overrides him, ordering him to stay where he is and to keep talking. These exchanges, especially in combination, demonstrate that the defendant's will was overborne by the officer and by this police dominated environment even when he attempted to assert his rights to leave and to remain silent.

Muhammad's own experience with police. Muhammad's repeated efforts to remain silent were not honored by police. His father's greater success was no doubt due to the fact that (a) he is an adult, (b) children "are not miniature adults", *JDB*, 564 U.S. at 274, and (c) Dr. Altantawi had his lawyer on the phone when he asserted his son's rights. Moreover, that the doctor asserted his rights while his son did not only underscores the Supreme Court's observations in *JDB*. "It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances will feel free to leave." *Id.* 264-265.

Authorities have recognized that an unfortunate, but predictable byproduct of the "physical and psychological isolation of custodial interrogation" is false confession, a risk that is "is all the more troubling – and recent studies suggest, all the more acute – when the subject of custodial interrogation is a juvenile. See Brief for Center on Wrongful Convictions of Youth et. al. as Amici Curiae 21-22 (collecting empirical studies that 'illustrate the heightened risk of false confessions from youth')." *JDB*, 564 U.S. at 269. That risk was readily apparent in this case. Prior to his alleged "confession" the defendant heard his sister's description of the scene and what she thought had happened, as well as the detective's suggestions as to how an accidental death could have occurred. Virtually every fact included in Muhammad's eventual "confession" was articulated previously by the detective or the defendant's sister. Muhammad was encouraged, repeatedly, to embrace the "it was an accident" scenario even though the detectives knew full well that the facts uncovered during the investigation did not fit the scenario they were pushing at the defendant. The officers lied to him in other significant ways. For example, the detectives told Muhammad that from their review of the video, "we know you were in there", and they implied that once the video was analyzed by MSP, they would easily be able to see him

in the room with his mother at the time of her death (the video only showed shadows). (Exhibit A, p 26). They implored that time was of the essence, that he had to tell them "the whole thing" soon or he would lose the opportunity (Id). The detectives also downplayed the legal significance of his acceptance of the accident scenario, implying to this juvenile that by capitulating, by agreeing it was an accident, there would be a resolution – never telling him that he was hypothesizing and guessing and capitulating his way into first degree murder charges, and a possible life sentence. It is no surprise that an exhausted, exasperated Muhammad tells the detectives that "I'm gonna agree with what you say." (Id. 25)

Also contributing to the psychological pressures on this minor defendant, police had clearly taken complete control of this home prior to the interrogation. Police came to his bedroom, police ordered him down the stairs, police told him and his father where they could (and could not) pray, police roamed through the house, on all three floors, confiscating "evidence", including the family's surveillance system. The latter action would have appeared all the more intimidating because Muhammad was not present when his father allowed detectives to take the DVR. See discussion infra at Argument II. As such, he would have thought that the detectives' powers were limitless. His father's absence from the outset of interrogation, and his failure to return during the interrogation, in turn, would have telegraphed to this young man that police had full control over ingress and egress to this home, and that his father would not be coming back in. Muhammad was all alone with the officers. In light of all the foregoing, any reasonable minor, surrounded by detectives, with other officers acting as back up nearby, would hardly have felt free to leave or free to terminate the interrogation.

The fact that this interrogation occurred in the defendant's own home did not make the

encounter less intimidating, nor does it preclude a finding that the defendant was subjected to "custodial interrogation" under *Miranda* analysis. In *United States v Craighead*, 539 F.3d 1073, 1083 (9th Cir. 2008), the Court articulated the realistic futility of either trying to leave or ending an interrogation when it is taking place in a "police dominated atmosphere" in one's own home.

> If a reasonable person is interrogated inside his own home and is told he is "free to leave," where will he go? The library? The police station? He is already in the most constitutionally protected place on earth. To be "free" to leave is a hollow right if the one place the suspect cannot go is his own home.

Id. at 1083-1084.

Moreover, "... a reasonable person interrogated inside his own home may have a different understanding of whether he is truly free 'to terminate the interrogation' if", as here, "his home is crawling with law enforcement agents" (*id*.), who have no intention of leaving until the search warrant arrives and they can complete yet another search of the defendant's home. Consequently, the Supreme Court has held that questioning within a suspect's home may rise to custodial interrogation in some circumstances. See *Orozco v. Texas*, 394 U.S. 324, 325-326; 89 S.Ct. 1095; 22 L.Ed.2d 311 (1969) (finding that an interrogation was "custodial" where four police officers arrived at the suspect's home, entered his bedroom, and behaved as though the suspect was not free to leave).

The trial court in this case relied on the fact that Muhammad attended International Academy, "a school for extremely bright students," in concluding that he would have known he was free to leave, or free to remain silent. (Court, Hrg Tr 11/20/18, pp 16-17). However, the fact that the defendant attended a good school is no more relevant to the *Miranda* analysis than if he were, for example, a hardened criminal with ample experience in being interrogated by police,

already keenly aware of his rights to refuse. Both of these would be impermissible "subjective" factors. "We do not ask police officers to consider these contingent psychological factors when deciding when suspects should be advised of their *Miranda* warnings." *Yarborough v. Alvarado*, 541 U.S. 652, 668-669; 124 S.Ct 2140; 158 L.Ed2d 938 (2004), citing *Berkemer v. McCarty*, 468 U.S. 420, 431-432; 104 S.Ct. 3138; 82 L.Ed2d 317 (1984) (suspect's history with law enforcement cannot be considered, emphasizing the need for "clarity of [Miranda's] rule.") The Court has made clear that subjective factors such as intelligence, education and experience with law enforcement play no role in the *Miranda* custody analysis. *Yarborough*, 541 U.S. at 667-668. Also noteworthy, a suspect's intelligence and education were not included as permissible factors in either the *Barritt* or *JDB* holdings.

The Court of Appeals noted in this case that police did not arrest the defendant until 20 minutes after the end of the interrogation. *People v Altantawi,* unpublished per curiam opinion of the Court of Appeals, issued September 5, 2019 (Docket No. 346775), p 9. As to this factor, the dissenting judge from the Court of Appeals disagreed that Muhammad would have reasonably believed that he was actually free to leave at that point.

> [At the end of the questioning],[t]he officers refused to allow defendant to sit next to his sister, stating that the officers with the search warrant would show up soon. One of the officers stated, "until that happens, ... we're keeping everybody here, okay." Thus, defendant was not released after the interview but instead kept at the home, under the supervision of the police, in a police dominated atmosphere, and away from his sisters.

Id. p 2 (Servito, J., dissenting).

Three seasoned detectives led this juvenile defendant straight into parroting an "accident" scenario which they knew did not fit the known physical facts relating to this death, and which

exposed him to first degree murder charges and a possible life sentence. As such, the very risk identified by the Supreme Court in *Corley*, was intolerably high: that the pressure of custodial is so powerful that it "can induce a frighteningly high percentage of people to confess to crimes they never committed," 556 U.S. at 321, with juveniles especially at risk. *JDB*, 564 U.S. at 269. The defendant's confession should have been suppressed by the trial court, and the Court of Appeals clearly erred in failing to do so. Application for leave to appeal should be granted as to this issue.

II.

THE TRIAL COURT AND THE COURT OF APPEALS CLEARLY ERRED IN FINDING THAT EVIDENCE WAS OBTAINED AS A RESULT OF A LAWFUL, AUTHORIZED CONSENT SEIZURE AND SEARCH, AND THE COURT OF APPEALS CLEARLY ERRED IN AFFIRMING THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S MOTION TO SUPPRESS.

Standard of review: The Court reviews "de novo a trial court's ultimate decision on a motion to suppress on the basis of an alleged constitutional violation." *People v. Mahdi*, 317 Mich. App. 446 (2016), quoting from *People v. Gingrich*, 307 Mich. App. 656, 661 (2014). The Court reviews for clear error any findings of fact made during a suppression hearing. *Id.* The Court reviews de novo the issue of whether the Fourth Amendment was violated and the issue of whether an exclusionary rule applies. *People v. Corr*, 287 Mich. App. 499, 506 (2010). It is the prosecution's burden of proof, by "clear and convincing" evidence, that lawful consent preceded the search or seizure. *People v. Raybon*, 125 Mich. App. 295, 303 (1983).

The defendant maintains in this case that his father had neither actual nor apparent authority to consent to the seizure of a surveillance DVR in the defendant's home, and that he did not have actual or apparent authority to consent to the later search (review) of the surveillance

recording. Moreover, because police used the video surveillance at critical moments in interrogating the defendant, his resultant statement is a "fruit of the poisonous tree". Consequently, both the surveillance recording and the defendant's resultant statements should have been suppressed from evidence.

Both the Michigan and the United States constitutions guarantee the right of people to be free from unreasonable searches and seizures. U.S. Const. amend IV, Const. 1963, Art 1, sec. 11. The prosecution has not disputed in these proceedings that the defendant had standing to contest the search of his home and surveillance recording. Searches and seizures conducted without a warrant are unreasonable per se, subject to several specifically established and well-delineated exceptions. *Schneckloth v. Bustamonte*, 412 U.S. 218; 93 S.Ct. 2041; 36 LEd.2d 854 (1973). Search pursuant to consent is one such exception. *Id.* at 219. That consent must come from the person whose property is being searched or from a third party who possesses common authority over the property. *Illinois v. Rodriguez*, 497 U.S. 177, 181; 110 S.Ct. 2793; 111 L.Ed.2d 148 (1990). The Supreme Court has made clear that "common authority" is not based on the law of property but rather on (1) mutual use of the property by virtue of joint access, or (2) control for most purposes over it. *United States v Matlock*, 415 U.S. 164, 171; 94 S.Ct. 988; 39 L.Ed.2d 242 (1974). See also *United States v. Rith* , 164 F.3d 1323, 1329 (10th Cir. 1999).

> The first of these standards – mutual use by virtue of joint access – is a "fact-intensive inquiry" ... We require the government to show that "the third party entered the premises or room at will, with the consent of the subject of the search."

United States v. Cos, 498 F.3d 1115, 1125, 1127 (10th Cir. 2007), quoting from *Rith*, 164 F.3d at 1330.

A third party without actual authority to consent to search may render a search valid if the

police officer's belief in the authority to consent was objectively reasonable. *Rodriguez*, 497 U.S. at 181; *People v. Brown*, 279 Mich. App. 116, 131-134 (2007). Courts thus differentiate between the "actual" authority and "apparent" authority of a third party consenting to a search. *Cos*, 498 F.3d at 1124, discussing *Matlock*, 415 U.S. at 169-172 (actual authority), and *Rodriguez*, 497 U.S. at 186-189 (apparent authority). This third-party consent analysis is applied not only to searches of homes, but also to objects within a home that are seized or searched by police. See e.g., *Brown*, 279 Mich. App. at 131-134 (emails within a computer in a residence rented by the defendant); *United States v. Andrus*, 483 F.3d 711 (10th Cir. 2007) (defendant's father consents to police use of EnCase software to search the hard drive of a computer in the defendant's bedroom). In *Mahdi*, the police did not have a warrant to search the defendant's apartment, where he lived with his mother, Emma Howard. The officers explained to Mrs. Howard that they were investigating her son for drug trafficking, and asked "if she would mind if we looked around and made sure there was nothing there." *Id.* 317 Mich. App. at 452. The Court of Appeals ruled in that case that Mrs. Howard's consent to the search of their jointly occupied apartment did not justify a later "search" of the data in the defendant's cell phone, including text messages that were displayed to Mr. Mahdi's jurors. "The totality of the circumstances in this case establishes that defendant had a legitimate expectation of privacy in his mother's apartment that society recognizes as reasonable." *Id.* at 459.

In *Andrus*, the Court applied the apparent authority test where the third party consenting was the defendant's father.

> The critical issue in our analysis is whether, under the totality of the circumstances known to [the police], these officers could reasonably have believed [the defendant's father] had authority to consent to a search of the computer. Phrased in the negative, we must ask

> "whether the surrounding circumstances could conceivably be such that a reasonable person would doubt [the defendant's father's authority to consent] and not act upon it without further inquiry."

Andrus, 483 F.3d at 720, cited by the Court in *Brown*, 279 Mich. App. at 133-134. In contrast to the instant case, Mr. Andrus's father was not estranged from the family, he was not barred by court order from the home, he lived with his son, and he had simultaneous "mutual use of or control over the computer" that was searched.[15]

In this case, the actual and apparent authority analyses overlap because by the time they reviewed the surveillance tape on 8/22/17, the detectives knew all of the salient facts. They had ample reason to doubt this defendant's father's authority to consent to search, especially as to the surveillance recordings. The detectives had investigated the case extensively: they had received a great deal of information from the deceased's friends and coworkers, and law enforcement personnel, about the contentious divorce, the domestic violence adjudication, the protective order and the tether. While Dr. Altantawi still enjoyed joint title over the home pending the final outcome of the divorce, he had not lived in the home for nearly two years, and he had not been in it for over a year. The police had information that the deceased was the victim of domestic violence, with Dr. Altantawi adjudicated as the perpetrator. That adjudication, in turn, led to a protective order which banned the doctor from the home. He most certainly could not "enter the premises at will". *Cos*, 498 F.3d at 1125. Moreover, by court order, he was allowed only supervised visitation with his children – *which he failed to exercise*. As a result, he saw the

[15] The question in *Mahdi* was whether Mrs. Howard had consented to the broader search, not whether or not Mrs. Howard had authority to consent to the broader search. In *Andrus*, in contrast, the Court addressed the precise issue involved in this case – the extent of the authority to consent.

children "only occasionally".

When asked by the detectives, the doctor knew little, if anything, about the home's surveillance system. He directed police to the wrong DVR. He said the surveillance system was not activated (it was). He said that this *digital* video recorder must have been there for "forty years" (unlikely). He did not know the password to it. (Dr. Altantawi, Hrg Tr 10/8/18, pp 274-275, 279). As to this latter fact, courts analyzing apparent authority have differentiated objects "typically associated with a high expectation of privacy" especially when facts suggest an "intent to exclude the third party from using or exerting control over the object." *Andrus*, 483 F.3d at 717. A password protected object has been compared to "a locked footlocker inside the bedroom." *Id.* quoting from *Trulock v. Free*, 275 F.3d 391, 403 (4th Cir. 2001).

Applying the foregoing test for actual authority, Dr. Altantawi did not in fact possess common authority over the surveillance recording. At the time of the search of the DVR, the doctor had neither "mutual use of the property by virtue of joint access, or (2) control for most purposes over it." *Matlock*, 415 U.S. at 171; *Rith*, 164 F.3d at 1329. Not only could he not enter the premises "at will," *Cos*, 498 F.3d at 1125, he was barred by court order from even entering the premises where the object of the search was located. While some courts have held that parent-child and husband-wife relationships create a presumption of "control for most purposes," *Cos*, 498 F.3d at 1125, *Rith* 164 F.3d at 1330, the presumption is easily rebutted in this case. Sadly, for all of the reasons already expressed, even before this death, this family unit was completely fractured. Dr. Altantawi was clearly no longer the "man of the house", and he was no longer functioning as a husband or a father. The fact that he was still technically related to persons who were actively in possession of the DVR is of little moment. Under *Andrus*, the

deceased's decision not to share the DVR password with her estranged husband demonstrates an "intent to exclude the third party from using or exerting control over the object," an act that belies actual authority to consent. *Andrus*, 483 F.3d at 717.

Applying the alternate test for "apparent" authority, given all of these circumstances, reasonable officers in these detectives' position would *not* have reasonably have believed the defendant's father had authority to consent to a search of the DVR. Phrased conversely, reasonable detectives would have had ample reason *to doubt* his authority to consent to search, especially as to the surveillance recordings. *Andrus*, 483 F.3d at 720; *Brown*, 279 Mich App at 133-134. A reasonable detective, under the circumstances, would have known that Dr. Altantawi did not exert common authority over the surveillance system – *he was probably the reason it was necessary*. In seeking the protective order, in seeking another order allowing for only supervised visitation over the children, a reasonable police officer would have fairly inferred that the deceased was seeking to protect herself and her minor children from Dr. Altantawi. In addition, there is nothing whatever in this record to suggest that the deceased or Muhammad were delegating the authority to consent to a seizure or search over to Dr. Altantawi. The deceased could not (after her death) and would not have (prior to her death), and the defendant was never asked. By all accounts, the doctor was estranged from the family. To allow police officers, hot on the trail of a murder investigation, to bypass the warrant requirement, to bypass legitimate efforts to gain consent, to instead allow them to confer consent authority willy nilly onto a third party who is himself a possible suspect in the homicide, all in the name of expediency rather than necessity, is a bridge too far. Such a practice ignores decades of jurisprudence, and a United States constitutional amendment, requiring that such decisions should be made by a neutral and

detached magistrate. These detectives were neither neutral nor detached.

The trial court in this case clearly erred by applying property law principles to this Fourth Amendment case, finding that since both the deceased and Dr. Altantawi were the titled owners of the home, and since the former was dead at the time of the search, police had no alternative but to seek consent from the doctor. (Opinion, Hrg Tr 11/20/18, p 8). This finding ignores longstanding case law that such issues are not controlled by property law. Rather, the Fourth Amendment, and case law interpreting that amendment, control. *Matlock*, 415 U.S. at 171; *Rith* , 164 F.3d at 1329-131; *United States v. Whitfield*, 939 F.2d 1071, 1074-1075 (D.C. Cir. 1971). Secondly, the trial court's exclusive focus on the home being the property ignores authority which recognizes that in a hybrid search and search – where police action involve the home and property within the home – that Fourth Amendment analysis must be applied at each step, and that the analysis must be applied both to the seizure and to the search of any item. *Id.* at 1074-1075; *Mahdi*, 317 Mich. App. at 452l; *Andrus*, 483 F.3d at 720. Third, the trial court's assumption that the deceased's death left no option but to gain consent from Dr. Altantawi is likewise clearly erroneous. They had options. They could have sought a warrant.

Finally, as the foregoing factual summary demonstrates, the incriminating statements eventually voiced by Muhammad also resulted directly from the detectives' review of the surveillance recording. Consequently, if the Court finds that evidence of the surveillance recordings resulted from an illegal search and seizure, the Court must also find that Muhammad's statements to the detectives must be suppressed as "fruits of the poisonous tree." "[T]he exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, but also evidence later discovered and found to be derivative of an

illegality or 'fruit of the poisonous tree.'" *Segura v. United States*, 468 U.S. 796, 804; 104 S.Ct. 3380; 82 L.Ed.2d 599 (1984), quoting from *Nardone v. Unites States* , 308 U.S. 338, 341; 60 S.Ct. 266; 84 L.Ed. 307 (1939); See also *People v. Frazier*, 478 Mich. 231, 253-254 (2007), and *Wong Sun v. United States*, 371 U.S. 471, 486; 83 S.Ct. 407; 9 L.Ed.2d 441 (1963). Here, the defendant's statements are not "so attenuated as to dissipate the taint" of the illegal seizure and search of the DVR evidence. *Id.* at 486. By the detectives' own account, Muhammad did not embrace their scenario about how the death occurred until after they told him they had seen the video. The illegal seizure and search of the DVR recording, therefore, was "the poisonous tree", and Muhammad's statement was "the fruit". *Id.* at 485-486 . "[V]erbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the 'fruit' of official illegality than the more common tangible fruits of [an] unwarranted intrusion." *Id.* (internal citations omitted).

Based upon all of the foregoing, the trial court should have suppressed evidence of the surveillance recording and the defendant's statement, and the Court of Appeals clearly erred in affirming the trial court's decision on this issue. Application for leave to appeal should be granted as to this issue as well.

RELIEF REQUESTED

Based upon all the foregoing, Defendant-Appellant Muhammad Altantawi respectfully requests that this Court grant his application for leave to appeal from the Court of Appeals' interlocutory (merits) decision in this case, affirming the trial court's denial of both motions to suppress evidence.

Respectfully submitted,

Dated: October 28, 2019

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NOTICE OF FILING AND CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of October, 2019, I electronically filed Defendant-Appellant's Application for Leave to Appeal, Brief, Appendix, and Exhibits in Support, and this Notice of Filing and Certificate of Service with the Clerk of the Court using the Court's e-file and serve system, which will send notification of such filing to Joshua J. Miller, Assistant Oakland County Prosecuting Attorney, an e-filer, at appellatedivision@oakgov.com.

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