No. 24-

IN THE

Supreme Court of the United States

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs.

MARK DAVID WOOLLEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

The Fifth Amendment protects citizens against compulsory self-incrimination in criminal cases. *Miranda* creates an irrebuttable presumption—which is simply a rule of law—that any statement given after a defective *Miranda* warning or the unequivocal assertion of a *Miranda* "right" is involuntary when that is demonstrably untrue; indeed, currently a voluntary though *Miranda*-defective statement is admissible for impeachment purposes.

The question presented is:

Because the Fifth Amendment concerns voluntariness, whether *Miranda* should at the least be modified to an adjudicatory device rather than a rule of law so that a failure of some sort with regard to *Miranda* creates a *rebuttable* presumption of involuntariness, allowing admission of the statement if it is demonstrated to be voluntary; that is, not taken in violation of the actual Fifth Amendment.

II.

Respondent while in custody and after *Miranda* warnings and agreeing to take a polygraph, asked a detective to call his wife and said, "I'd also like to contact my attorney, so he can arrange for whatever, kind of thing." The detective asked "Do you want your attorney, then, before you take a polygraph?" and Respondent replied "I want to ask him, like, you know, look, I'm being

honest, I'm being upfront, you know, you know, and now—I will take a polygraph test, that's not going to change my mind." Respondent expressed concern with how the polygraph test would read given his level of anxiety, and the detective briefly explained the polygraph procedure before concluding the interview. The following morning, after Respondent talked to an attorney, the detective asked Respondent if he wanted to take the polygraph and Respondent said he did. He was again given *Miranda* warnings before and after the polygraph. The State court held that Respondent had unequivocally asserted his *Miranda* right to counsel.

The question presented is:

Whether a reference to counsel after *Miranda* warnings for reasons unrelated to cutting off questions is an "invocation" of the *Miranda* right to counsel, and whether clarifying police questions concerning the taking of a polygraph to which a reasonable person would not expect an incriminating response constitute further interrogation.

PARTIES TO THE PROCEEDING

Petitioner is the State of Michigan. Respondent is Mark David Woolley. No party is a corporation.

RELATED CASES

- *People v. Mark Woolley*, No.376901, judgment entered April 14, 2024.

- *People v. Mark Woolley*, No. 167214, order denying leave to appeal entered December 13, 2024.

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PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

The State of Michigan, by KYM L. WORTHY, Prosecuting Attorney for the County of Wayne, JON P. WOJTALA, Chief, Research, Training, and Appeals, TIMOTHY A. BAUGHMAN, Special Assistant Prosecuting Attorney, and LORI BAUGHMAN PALMER, assistant prosecuting attorney, prays that a Writ of Certiorari issue to review the judgment of the Michigan Court of Appeals entered in this cause on April 18, 2024, leave to appeal denied by the Michigan Supreme Court on December 13, 2024.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is unreported, may be found at 2024 WL 1692953, and appears as appendix A. The order of the Michigan Supreme Court denying leave to appeal may be found at 2024 WL 5104203. and appears as Appendix B. The order of the Michigan Circuit Court suppressing Respondent's statements appears as Appendix C.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was rendered April 18, 2024. This Court's jurisdiction is invoked under 28 USC §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person . . . shall be compelled in any criminal case to be a witness against himself.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent's Interviews and Statements

Before Respondent's initial interrogation on November 17, 2022, Respondent read a form advising him of his *Miranda* rights, said he had no questions regarding his rights, and initialed and signed the form.[1] Immediately after signing the form, Respondent said, "I'm not sure how much I want an attorney here, because after this escalated to a certain point and it got like really weird I shut off all communications with my daughter."[2] Respondent then immediately continued to talk, not giving Detective Emilee Wilson a chance to speak. Over an hour later, Respondent said, "I think I should call my attorney," and then continued talking, unprompted, for nearly two minutes.[3] Respondent then asked Wilson to call his wife

1. 11/17, 0:09:57 – 0:10:47.

2. 11/17, 0:10:57 – 0:11:17.

3. 11/17, 1:26:30 – 1:28:12.

and said, "I'd also like to contact my attorney, so he can arrange for whatever, kind of thing."[4] Wilson responded by clarifying, "Do you want your attorney, then, before you take a polygraph?"[5] Respondent responded, "I want to ask him, like, you know, look, I'm being honest, I'm being upfront, you know, you know, and now—I will take a polygraph test, that's not going to change my mind."[6] Respondent expressed concern with how the polygraph test would read given his level of anxiety, and Wilson then briefly explained the polygraph procedure to Respondent before concluding the interview.[7]

The following morning, on November 18, 2022, Respondent's corporate attorney, Phillip Matthews, met with Respondent for about 35 minutes.[8] After speaking with Respondent, Matthews briefly spoke with Wilson, who asked if Respondent would take a polygraph.[9] Matthews did not answer that question but told Wilson that he generally practiced civil law and had contacted a criminal attorney.[10] Wilson then asked Respondent directly if he still wanted to take the polygraph he had requested, and Respondent said he did.[11]

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4. 11/17, 1:30:21 – 1:30:27.

5. 11/17, 1:30:29 – 1:30:31.

6. 11/17, 1:30:31 – 1:30:48.

7. 11/17, 1:30:47 – 1:31:06.

8. 9/1, 104-105.

9. 9/1, 105-107.

10. 9/1, 21, 106.

11. 9/1, 21.

Before conducting the polygraph, Detective Corporal Michael McNamara again read Respondent a form explaining Respondent's *Miranda* rights, and Respondent initialed each right and signed the form.[12] After administering the polygraph and reading the results, McNamara explained that the results showed deception and asked Respondent why that might be.[13] Respondent did not ask for or mention an attorney, but did offer explanations.[14] Respondent then made incriminating statements to McNamara and asked, unprompted, to speak to Wilson, saying he "wanted to be truthful and get what he told [McNamara] off his chest."[15]

McNamara then brought Respondent to meet with Wilson in an interview room.[16] Before asking Respondent any questions, Wilson and McNamara had Respondent read aloud a third form detailing his *Miranda* rights, which he initialed and signed before stating that he had no questions regarding his rights.[17] Respondent told Wilson and McNamara that he had spoken to Phillip Matthews, saying, "He's my corporate attorney, I felt like I needed some things to be addressed."[18] Respondent then made

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12. 9/1, 74-76.

13. 9/1, 97.

14. 9/1, 79-80, 97.

15. 9/1, 21, 80, 98.

16. 9/1, 20-21.

17. 9/1, 23, 25; 11/18, 0:01:43 – 0:03:19.

18. 9/1, 31; 11/18, 0:03:26 – 0:03:35.

incriminating statements for approximately 17 minutes, never mentioning anything regarding an attorney.[19]

After Respondent confessed, Wilson asked Respondent what she might find on Respondent's phone, saying, "You know I have your phone," and stating that Respondent was "pretty protective" of his phone.[20] Respondent responded that he was startled when Wilson took his phone from him when he was arrested: "I was going to call my attorney, and it was, like, this whole dismissiveness of my rights, that's kind of how I felt."[21] Respondent then expressed that he had been frustrated earlier because he did not know what was going on and was "just sitting here [in the jail]."[22] Wilson explained that she had taken his phone quickly because she thought that he might be deleting things, and Respondent responded, "Oh, I see."[23] Respondent then continued answering questions without mentioning an attorney.[24]

At the conclusion of the interview, Respondent asked "Where do we go from here?"[25] Wilson and McNamara briefly explained what would happen up to arraignment.[26]

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19. 11/18, 0:05:10 – 0:22:41.

20. 11/18, 0:22:32 – 0:22:37.

21. 11/18, 0:22-47 – 0:23:23.

22. 11/18, 0:23:10 – 0:23:17.

23. 11/18, 0:23:43 – 0:24:14.

24. 11/18, 0:24:14 – 0:36:00.

25. 11/18, 0:36:00

26. 11/18, 0:37:48 – 0:38:28.

As Wilson, McNamara, and Respondent are walking out of the interview room, Respondent mentioned that his defense attorney "would be here at some point," saying that Matthews had hired "some woman from Novi."[27]

The Trial Court's Ruling

After hearing testimony from Wilson, McNamara, and Matthews and watching the interrogation video, the trial court held that Respondent's first statement regarding an attorney on November 17, 2022, when Respondent said, "I'm not sure how much I want an attorney," was not unequivocal.[28] The court then held that Respondent's statement made during that same interview at 01:26:30 that "I think I should call an attorney" was "an affirmative unwavering statement that must be characterized as [an] unambiguous and unequivocal" assertion of Respondent's right to counsel.[29] The court held that the police should have immediately terminated the interview after that statement and held that any statements made after Respondent said, "I think I should call an attorney," were suppressed.[30]

The court then discussed when Wilson asked Respondent if he wished to take a polygraph: "I want an attorney to make sure the polygraph is on par and for him

27. 11/18, 0:39:21 – 0:39:42.

28. 9/1, 121-122.

29. 9/1, 122.

30. 9/1, 122-123.

to sit with me in the polygraph to make sure it is standard, no funny stuff."[31] The court concluded:

> So if there is any question on November 18th whether or not Mr. Woolley had already invoked his right to counsel based on his statements the previous day, his statement that starts with, 'I want an attorney[,'] I don't think it can be anymore [sic] unambiguous or unequivocal.
>
> I think he's stating that he wants an attorney and at that point the questioning needed to cease, the interrogation needed to stop, but instead the Detective mentions—she talks about the size of the room that cannot accommodate an attorney. None of that matters.
>
> Frankly, those statements don't need to be made. He requested an attorney, it needs to stop. It didn't and anything after that point also needs to be suppressed.
>
> So, in conclusion, any statements made by Mark Woolley following his statement on November 17th, 'I think I should call an attorney[,'] must be suppressed in this matter.[32]

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31. 9/1, 124. The Court of Appeals correctly noted the trial court erred: this statement was made on November 17, 2022, not on November 18, 2022. *People v. Woolley*, No. 367901, 2024 WL 1692953, at 2 (Mich. Ct. App. Apr. 18, 2024), appeal denied, No. 167214, 2024 WL 5104203 (Mich. Dec. 13, 2024).

32. 9/1, 124-125.

The Court of Appeals Decision

The Court of Appeals held that Respondent's November 17, 2022, statement, "I think I should call my attorney," was not an unambiguous or unequivocal request for counsel.[33] The Court held that Respondent's statement was similar to the Respondent's statement in *Davis v. United States* that "[m]aybe I should talk to a lawyer," as well as the Respondent's statements in *People v. Tierney* that "[m]aybe I should talk to an attorney," and "I might want to talk to an attorney."[34]

The Court held, however, that Respondent's statement at the end of his November 17, 2022, interrogation while discussing his desire to take a polygraph that, "I'd also like to contact my attorney so he can arrange for whatever, you know, kind of thing," was an unequivocal request for counsel.[35] The Court further held that any ambiguity "was clarified by Respondent when Detective Wilson asked if Respondent wanted to speak with his attorney before the polygraph examination and Respondent responded he would take the polygraph examination, but he wanted to ask his attorney unspecified questions," and that Respondent's statements were not merely inquiries into the way the process worked.[36] The statements made during the second interview were thus suppressed.

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33. *Woolley, supra.*

34. *Woolley, supra*, citing *Davis, supra*, 512 U.S. at 459, *People v. Tierney*, 266 Mich. App. 687, 711 (2005).

35. Id.

36. Id., at 4.

On December 13, 2024, the Michigan Supreme Court denied Petitioner's application for leave to appeal the decision of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I.

Because the Fifth Amendment concerns voluntariness, the Court should grant certiorari to determine whether *Miranda* should at the least be modified to an adjudicatory device rather than a rule of law so that a failure of some sort with regard to *Miranda* creates a *rebuttable* presumption of involuntariness, allowing admission of the statement if it is demonstrated to be voluntary; that is, not taken in violation of the actual Fifth Amendment.

> *No person shall be compelled in any criminal case to be a witness against himself.*
>
> Fifth Amendment to the United States Constitution
>
> *The Fifth Amendment actually means what it says.*
>
> Professor Joseph Grano.[37]

In pertinent part, the Fifth Amendment to the United States Constitution provides that "No person

37. Joseph D. Grano, *Confessions, Truth, and the Law* (University of Michigan Press: 1993), p.143.

. . . shall be compelled in any criminal case to be a witness against himself." The purpose of the *Miranda* caution is prophylactic; that is, to assist in avoiding coerced statements by dispelling the inherently coercive atmosphere of custodial interrogation, but "a violation of *Miranda* does not necessarily constitute a violation of the Constitution and therefore such a violation does not constitute the deprivation of a right secured by the Constitution."[38] There is not even a claim—let alone a finding—that the Respondent's statements were involuntary. Given that the actual right protected by the Constitution was *not* violated by the State, it is more than passing strange that any statement made by the Respondent is excluded from evidence. It is something of a mystery that a nonconstitutional violation can, as a matter of constitutional requirement, require the suppression of evidence. It is simply a constitutional oxymoron to speak of a "voluntary inadmissible" statement of an accused. Only by treating a *Miranda* violation as creating an irrebuttable presumption of involuntariness—which in the context of impeachment the Court has recognized is not, as a matter of epistemology, true—can this result be reached, and, as irrebuttable presumptions are simply rules of law, *Miranda* effectively amends the Constitution.

A. The Fifth Amendment in History

> "*Our forefathers, when they wrote this provision into the Fifth Amendment, had in mind a lot of history which has been largely forgotten today.*"[39]

38. *Vega v. Tekoh*, 597 U.S. 134, 150 (2022) (cleaned up).

39. *Maffie v. United States*, 209 F.2d 225, 237 (1954).

The protection of the Fifth Amendment against compelled self-incrimination in criminal cases seems an odd protection to have been included in our Bill of Rights when one takes account of history. At the time of the Founding, and of the ratification of the Bill of Rights, no State even permitted, much less compelled, an accused in a criminal case to testify. It was not until 1864 that Maine became the first state to permit defendants to testify, and Congress followed suit in 1878.[40] Why, then, the inclusion of the Fifth Amendment protection against compelled self-incrimination in criminal cases?

Some scholars, Leonard Levy principal among them, take the view that the Founders, and the members of state constitutional conventions that enacted similar protections on which the Fifth Amendment was based, "failed to say what they meant," for if they meant what they said, then the common-law prohibition on testimony from the accused in criminal cases rendered the Fifth Amendment superfluous.[41] Instead, concluded Levy, what those individuals drafting State Bill of Rights and the Fifth Amendment actually meant to do was adopt the common-law right of *nemo tenetur seipsum acusare* (no one is bound to accuse himself), which protected not only against courts in criminal cases but against all of government, in all kinds of actions, protecting witnesses as well as the accused, and protecting against "threats

40. See Ralph Rossum, "'Self-Incrimination': The Original Intent," in Hickok, ed., *The Bill of Rights: Original Meaning and Current Understanding* (University of Virginia Press: 1991), p.276.

41. See Levy, *The Origins of the Fifth Amendment (2d Ed)* (MacMillan: 1986).

of criminal liability, civil exposure, and public obloquy."[42] This redrafting of the Fifth Amendment is not tenable.

Professor Rossum nicely notes that Levy and his followers fail to take account of the very real probability—given the express language of the Fifth Amendment—that the drafters were not writing to "end some current abuse but simply to provide a floor of constitutional protection above which the common law was free to operate but below which it could not go."[43] Though it seems quaint now, during the 17th century the giving of an oath was itself held to be a coercive act. The ecclesiastical Court of High Commission engaged in the practice of summoning those with nonconformist opinions and requiring them to take an oath and answer questions; refusing the oath resulted in contempt and Star Chamber proceedings; lying under oath was perjury, and telling the truth under oath could subject one to prosecution for political and religious crimes. The celebrated trial of John Lilburne, a Puritan agitator who refused to take the oath, led to the prohibition of the administration of any oath obliging a person "to confess or accuse himself or herself of any crime."[44] Professor Albert Alschuler concludes that the history of the Fifth Amendment is "almost entirely a story of when and for what purposes people would be required to speak under oath."[45]

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42. See Rossum, at 276.

43. Rossum, at 277.

44. See John Henry Wigmore, "The Privilege Against Self-Incrimination: Its History," 15 Harv. L. Rev. 610, 621-24 (1902).

45. Albert Alschuler, "A Peculiar Privilege in Historical Perspective: The Right to Remain Silent," 94 Mich. L. Rev. 2625, 2638 (1994).

Requiring an oath of the criminally accused was coercive—and banned for that reason—as being equivalent to torture and the rack. Manuals that instructed justices of the peace on the conduct of their office warned, from the late 16th century through the mid-19th century, that "The law of England is a Law of Mercy, and does not use the Rack or Torture to compel criminals to accuse themselves. . . . I take it to be for the Same Reason, that it does not call upon the Criminal to answer upon Oath. For, this might serve instead of the Rack, to the Consciences of Some Men, although they have been guilty of offenses. . . . The Law has therefore wisely and mercifully laid down this Maxim, *Nemo tenetur seipsum prodere*."[46] To put the matter finely, then, the purpose of the Fifth Amendment, when understood in its historical context, was "to outlaw torture and improper methods of interrogation," including the compelling of testimony under oath.[47]

B. The nonconstitutional basis of the *Miranda* rules

This Court has recently made clear that the *Miranda* warnings are not a part of the Constitution, and so their violation does not, standing alone, violate a Constitutional right.[48] There is no Fifth Amendment right to remain silent that is subject to a waiver analysis, nor any Fifth Amendment right to counsel during questioning. These propositions follow most readily from a simple reading of the language of the Fifth Amendment; moreover, they follow from *Miranda* and its progeny themselves.

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46. See Alschuler, at 2648.

47. Alschuler, at 2631.

48. *Vega v. Tekoh*, supra.

1. The right not to be compelled is not a "right to silence"

The Fifth Amendment does not state that "Every person has a right to remain silent." Instead, it proclaims that "No person *shall be compelled* in any criminal case to be a witness against himself." Does the right not to be compelled or coerced translate into a right to remain silent? Are the two phrases simply two sides of the same coin, being merely different ways of expressing the same principle? The constitutional language itself simply will not bear such a construction.

The *sine qua non* for involvement of the Fifth Amendment is *coercive governmental conduct,*[49] and "few sane adults would waive a right to be free of compulsion."[50] In the absence of coercive conduct by a governmental official, that an individual speaks or does not, whether to some other 'ordinary citizen' or to a governmental official, has nothing to do with the Constitution. When one speaks voluntarily, that person is not waiving his or her Fifth Amendment right not to be *compelled* to speak, the only right protected by the Fifth Amendment; rather, the speech is voluntary. If coerced by a governmental agent, the Fifth Amendment applies, but plainly no one, in speaking with a governmental agent, is saying, in effect:

> Yes, I understand that I have a right not to be compelled to speak, but I choose to *waive* that right and wish to be compelled to speak, so you may now proceed to beat or torture me or

49. *Colorado v. Connelly*, 479 U.S. 157 (1986).

50. Alschuler, at 2627.

> engage in some other coercive activity in order to gain my verbal cooperation.

Indeed, Justice Marshall, dissenting in *Schneckloth*, said, referring to confessions, that "no sane man would knowingly relinquish a right to be free of compulsion. Thus the questions of compulsion and of violation of the right itself are inextricably intertwined."[51] If the consent to speak is not voluntary, then the individual has been compelled, and his or her statements are barred from admission at trial by the Fifth Amendment, for no person may be compelled to be a witness against himself. But it is logically impossible to waive the right not to be *compelled* to speak, and this is what the Constitution protects, not any free floating "right to silence" *without regard* to coercive governmental conduct. There is no right to silence that must be waived knowingly and intelligently, there is an unwaivable right not to be coerced.[52] As Professor Grano has aptly pointed out, if there indeed exists an independent constitutional right to remain silent (rather than a courtcreated requirement of a warning regarding silence that serves as one portion of a prophylaxis designed to protect a constitutional right—the right not to be compelled), there is no principled basis on which the right and the waiver analysis can be limited to custodial interrogation.[53]

The appropriate constitutional question regarding the admission into evidence of a statement given by a

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51. *Schneckloth v. Bustamonte*, 412 U.S. 218, 280281 (1973).

52. See Alschuler, at 2660-2667.

53. See Grano, *Confessions, Truth, and the Law*, p.142143.

criminally accused thus is, was the statement voluntarily given or was it compelled? On what basis, under what rightful authority, can a court declare a voluntary statement inadmissible, the Constitution being satisfied?[54]

2. The nature of the *Miranda* requirements

The "rights" regarding which a defendant under arrest must be advised prior to questioning *have no significance independent from the question of voluntariness*; they are not free-standing rights on their own, they are *not constitutional* rights of the accused at all, as this Court recently made clear in *Vega*. Instead, they are warnings the sole purpose and design of which is to serve to insure that any resulting statement is free from governmental coercion

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54. As Professor Grano has pointed out, "No reasonable person who accepts the basic legitimacy of society and its laws can endorse the view that a guilty suspect, like a fox during a hunt, must be given a sporting chance to escape conviction and punishment. Eschewing sporting theory terminology, many courts and commentators nevertheless express dismay that the suspect is on an 'unequal footing with his interrogators.' . . . To advocate such equality is to express indifference, if not actual hostility, to the likelihood of police success in the interrogation process. . . . Equality between contestants makes for good sports, but in a criminal investigation we should be seeking truth rather than entertainment. . . . A system committed to ascertainment of truth would not value for its own sake the goal of giving guilty defendants some chance to escape conviction. . . . Nowhere, except in the rhetoric of confessions law, does the law reflect anxiety that the investigation may be too successful and thus deny the defendant a chance for acquittal at trial." Joseph D. Grano, "Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law," 84 Mich. L. Rev. 662, 677-678 (1986)

That the "rights" litany required by *Miranda*[55] is not composed of advice of constitutional rights of the accused is made clear by *Miranda* itself, as well as its progeny, such as *Vega*. The Court stated specifically and directly in *Michigan v. Tucker*[56] that these warnings are "*not themselves rights protected by the Constitution*" but instead have a prophylactic purpose, that being to help insure that the *actual* constitutional right involved—the right not to be coerced—is itself protected. Were it otherwise, were the *Miranda* warnings themselves composed of independent constitutional rights of the accused, then a violation of *Miranda* would itself be a violation of the Constitution, and impeachment use of such unconstitutionally gained statements would be as impermissible as substantive use. But it is well established that impeachment use of voluntary—that is, constitutionally gained—statements that are *Miranda*defective is permissible.[57] *Harris* only recognizes the obvious—that it is quite possible for a statement obtained in violation of the prophylactic rules of *Miranda* to nonetheless be voluntary. Put another way, noncompliance with *Miranda* is not a violation of the Constitution on its face, as the *Miranda* "rights" are not themselves constitutional, nor does their violation necessarily cause a violation of the actual Constitution, as a voluntary statement is still quite possible.[58]

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55. *Miranda v. Arizona*, 384 U.S. 436 (1966).

56. *Michigan v. Tucker*, 417 U.S. 433, 444 (1974).

57. See *Harris v. New York*, 401 U.S. 222 (1971).

58. *Tucker* and *Harris* are not the only authority for the proposition that the *Miranda* rights are not themselves constitutional rights; the point is now quite well settled. See e.g. *Vega*, supra; *New Jersey v. Portash*, 440 U.S. 450 (1979); *New York*

When, then, courts speak of the Fifth Amendment right to counsel, or the Fifth Amendment *Miranda* rules, they misspeak, as this Court itself has expressly disavowed the notion that the *Miranda* rights are themselves constitutional rights of the accused. There is no Fifth Amendment right to counsel; there is a "*Miranda* right" to counsel, the violation of which does not necessarily lead to a violation of the Fifth Amendment in that the result may well be a voluntary statement, as it was in the instant case. Nor is there a right to remain silent; rather, there is a right not to be coerced. The actual Constitution was not violated in this case.

3. Suppression of voluntary statements and *Miranda*: The impossibility of irrebuttable presumptions

If the right protected by the Fifth Amendment is the right not to be compelled or coerced to give a statement—and it is—and if the *Miranda* rights are not themselves independent constitutional rights—and they are not—and if a voluntary statement may be given after *Miranda*defective warnings or waivers—and one plainly may—then from what source comes the authority to insist that a trial court suppress as substantive evidence of guilt a statement gained in violation of no constitutional right of the accused, limiting its use for impeachment purposes?

There is no answer, for there is no source of authority that permits a Court to order the suppression of a voluntary statement. Professor Grano has persuasively

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v. Quarles, 467 U.S. 649 (1984); *Oregon v, Elstad*, 470 U.S. 298 (1985); *Connecticut v. Barrett*, 479 U.S. 523 (1987).

demonstrated the point.[59] To quote the constitutional source of authority of the United States Supreme Court virtually provides the answer with no further explanation: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, (and) the Laws of the United States."[60] There is no escape from the proposition that the Court has no authority to direct a State as to the admission of evidence gained in violation of no federal constitutional right.

In *Miranda* the Court invented a creature that is neither fish nor fowl. The Court has expressly stated that the Miranda rules create an "irrebuttable presumption" that the Fifth Amendment is violated when there is noncompliance with the rules—but that irrebuttable presumption is *not* actually irrebuttable, as it is fully rebuttable when the question is the admission of the *Miranda*defective statement for impeachment purposes, where the court and the parties must then turn to the question of whether the Constitution itself and not only the prophylactic rules designed to protect it has been violated. This "irrebuttably presumed unconstitutional for use in the case in chief but not irrebuttably presumed unconstitutional for impeachment use" is incoherent; further, nothing in the Constitution warrants it.

Not only is it logically and existentially inconsistent to say that when sought to be used for one purpose a

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59. See Joseph D. Grano, "Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy," 80 N.W. U. L. Rev. 100 (1985).

60. Constitution of the United States, Article 3, section 2, in pertinent part.

statement is irrebuttably presumed unconstitutionally gained but when sought to be used for a different purpose it is not irrebuttably presumed unconstitutionally gained, but there is in fact no such thing as an irrebuttable presumption in the first place. Professor McCormick cogently makes this point, as have any number of other evidence scholars as well: "In the case of what is commonly called a conclusive or irrebuttable presumption, when fact – is proven A must be taken as true. . . . the courts are not stating a presumption of law, but simply expressing (a) rule of law."[61] A rebuttable presumption is an aid to adjudication in that it apportions burdens. With a rebuttable (or true) presumption, the law of evidence states that if A is proven – will be presumed to also have been proven; however, if evidence in contradiction of – is presented, the presumption "bursts" and is of no force. But the opponent of the presumption must go forward, then, with some evidence in contradiction to avoid the effect of the presumption.

A conclusive or "irrebuttable" presumption is actually a rule of law that simply states that when A is proven – has been proven, meaning that – actually becomes irrelevant, as does all evidence in contradiction of B, because A now provides the legal standard *in place of* B.[62] A court may create such a rule of law only if A and B are in fact equivalent; that is, if they are just different ways of saying the same thing. For example, if it is proven that the defendant admitted his guilt after being tied to a tree and horsewhipped, it would be quite understandable to say that being tied to a tree and horsewhipped *is* coercion and

61. McCormick, *Evidence* (4th Ed), § 342.

62. See Grano, at 196.

any resulting statement is involuntary. But, as has been seen, this cannot be done with the *Miranda* rules. One cannot say that if A equals a violation of *Miranda*, and B equals involuntariness, that B equals A, for the very plain reason that this is not true, and this Court has repeatedly held that it is not true.

This is scarcely a semantic quibble. When a court substitutes a rule of law (the misnamed irrebuttable presumption) it has created (the *Miranda* rules) for a constitutional provision that is the creature of the People and the Supreme Law of the Land (the protection against compulsory selfincrimination) when the two are not equivalent, the Court has, in so doing, amended the Constitution.

4. *Miranda* violations as establishing a rebuttable presumption of involuntariness

Though *Miranda* remains the law, it does so by an exercise of will rather than authority,[63] for once one accepts that a *Miranda*defective confession may be voluntary, then the conclusion that a rule of law that compels the suppression of these statements sweeps broader than the Constitution and thus amends it is inescapable. But as an evidentiary rule to be applied when voluntariness is at issue, a violation of the rule and its progeny creating a *rebuttable* presumption of involuntariness that may be overcome, just as it is presently for impeachment use of

63. The distinction between power and authority was aptly described by Chesterton: "If a rhinoceros were to enter this room, he would enter with great power; but I would be the first to rise to tell the beast he had no rightful authority in the premises."

such statements, *Miranda* makes perfect sense, and leaves intact the incentive for law enforcement officers to provide warnings when engaging in custodial interrogation. Stare decisis should not preclude this modification of *Miranda*, for a judicial decision outside the realm of permissible interpretation should not prevail over the text of the Constitution, as it constitutes an amendment of that document.[64] Petitioner seeks not an overruling outright of *Miranda* but a modification of its reach, so as to place it within the proper exercise of judicial power.[65]

Miranda as creating an irrebuttable presumption of involuntariness is a rule of law, amending the Constitution[66]; *Miranda* as an adjudicatory device creating a rebuttable presumption of involuntariness is, on the other hand, an appropriate exercise of judicial authority. If after an evidentiary hearing it is determined

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64. *Gamble v. United States*, 587 U.S. 678, 711 (2019) (Thomas, J., concurring).

65. *Dickerson v. United States*, 530 U.S. 428 (2000) would likely need to be overruled, but as Justice Scalia pointed out in dissent there, the Court could not "come out and say quite clearly: 'We reaffirm today that custodial interrogation that is not preceded by *Miranda* warnings or their equivalent violates the Constitution of the United States'" because "a majority of the Court does not believe it." *Dickerson*, at 446, Scalia, J., dissenting. And see *Vega*, supra.

66. See *People v. Winsett*, 606 N.E.2d 1186, 1199 (Ill.,1992) ("The fact that the police continue to question a defendant who invokes his right to counsel does not necessarily mean that the defendant's statements are, in fact, compelled or involuntary, within the meaning of the fifth amendment. Rather, *Miranda* and its progeny create an irrebuttable presumption that the defendant's statement is compelled").

that a defect in *Miranda* warnings, or in the taking of a "waiver" of one of these nonconstitutional rights, did not lead to an involuntary statement, the statement should be admissible. If the waiver is found improper here, see Issue II, then nonetheless the statement should be admissible.

Certiorari should be granted to modify *Miranda* in this fashion.

II.

Certiorari should be granted to determine whether a reference to counsel after *Miranda* warnings for reasons unrelated to cutting off questions is an "invocation" of the *Miranda* right to counsel, and whether clarifying questions concerning the taking of a polygraph to which a reasonable person would not expect an incriminating response constitute further interrogation.

A. Respondent's statements regarding an attorney were ambiguous, equivocal, and not responsive to *Miranda* warnings in order to cut off questioning

Respondent's statements were at best equivocal assertions of the nonconstitutional *Miranda* right to counsel,[67] and were not responses to the warnings for the purpose of cutting off questioning. In *Davis v. United States*[68] the accused stated "Maybe I should talk to a lawyer" *in response to Miranda warnings* during the

67. See *Vega v. Tekoh*, 597 U.S. 134, 149 (2022) ("a *Miranda* violation is not the same as a constitutional violation").

68. *Davis v. United States*, 512 U.S. 452 (1994).

interview after initial waiver of the warnings. This Court held this statement was equivocal and did not require the police to stop the interrogation, reasoning:

> We held in *Miranda* that a suspect is entitled to the assistance of counsel during custodial interrogation even though the Constitution does not provide for such assistance. We held in *Edwards* that if the suspect invokes the right to counsel at any time, the police must immediately cease questioning him until an attorney is present. But we are unwilling to create a third layer of prophylaxis to prevent police questioning when the suspect might want a lawyer. Unless the suspect actually requests an attorney, questioning may continue.[69]

The Fourth Circuit has found "I think I need a lawyer" to be insufficient to constitute an unequivocal request for counsel.[70]

The Michigan Court of Appeals correctly held that Respondent's statement, "I think I should call my attorney" followed by Respondent immediately continuing to talk unprompted for two minutes cannot be considered an unequivocal assertion of his Miranda right to counsel. It is functionally no different than Respondent's earlier statement, "I'm not sure how much I want an attorney" that the trial court found to be ambiguous and equivocal. Both statements at most indicate that Respondent *might* want a lawyer, and *Davis* specifically stated that the police

69. *Davis*, *supra*, 512 U.S. at 462 (emphasis in original).

70. *Burket v. Angelone*, 208 F.3d 172, 198 (CA 4 2000).

are not prevented from questioning "when the suspect *might* want a lawyer."[71]

Respondent's November 17th statement that "I think I should call my attorney" followed by his request that Wilson call his wife, let her know about their car, and contact Respondent's attorney "so he can arrange for whatever, kind of thing" came at the end of the interview when Wilson discussed next steps and a possible polygraph. Indeed, after Respondent asked Wilson to contact his attorney, Wilson asked if Respondent wanted to talk to his attorney before taking the polygraph, and Respondent responded "I want to ask him, like, you know, look, I'm being honest, I'm being upfront, you know, you know—and, now, I will take a polygraph test, that's not going to change my mind."[72] Not only are both statements highly ambiguous but they also show that Respondent's concerns were with the process of the polygraph and what would occur procedurally next, not to cut off questioning in response to *Miranda* warnings. In fact, once Wilson explained how polygraphs establish a baseline and account for people feeling anxious, Respondent indicated that this answered his question.[73]

This focus on "inquiries into the way the process worked" is further shown by Respondent's statement in response to Wilson's question whether Respondent wanted to take a polygraph. Respondent stated, "I want an attorney to make sure the polygraph is on par and for him

71. *Davis*, *supra*, 512 U.S. at 462 (emphasis in original).

72. 11/17, 01:30:29 – 01:30:48.

73. 11/17, 01:30:47 – 01:31:06.

to sit with me in the polygraph to make sure it is standard, no funny stuff." Wilson testified that Respondent asked for an attorney "for clarification, he wanted an attorney to ask about the polygraph and the standard of the polygraph examination," which again shows a focus on the process involved and is not an unambiguous and unequivocal assertion of the *Miranda* "right" to counsel to cut off questioning.[74] Respondent did speak to his corporate attorney the morning before the polygraph, and so he was aware of his right to speak to an attorney. He chose instead to acknowledge and waive his right to an attorney for a second time before taking the polygraph. Finally, after taking the polygraph, *Respondent* requested to speak again with Wilson, and chose to waive his right to counsel yet again before his requested interview with Wilson began.

Because no assertion of the *Miranda* right was made in order to cut off questioning, the Michigan Court of Appeals erred, and this Court's intervention is required to establish that references to counsel unrelated to the *Miranda* warnings are not an "invocation" of a *Miranda* "right."

B. Application of a Sixth Amendment analysis to determine whether a person reinitiated conversation with the police is mistaken

The Michigan Court of Appeals also erred in believing that because a waiver of the right to counsel under *Miranda* often suffices for a waiver of the right to counsel under the Sixth Amendment, Sixth Amendment

74. 9/1, 64.

caselaw regarding whether a Respondent reinitiated conversation necessarily applies to cases involving the Fifth Amendment. The Fifth and Sixth Amendments serve different purposes and, therefore, require different evaluations and applications. It bears repeating that even though a waiver of the *Miranda* "right" to counsel may also be sufficient to waive the Sixth Amendment right to counsel, that "right" is "distinct and not necessarily coextensive with the right to counsel afforded criminal Respondents under the Sixth Amendment."[75] Unlike the Sixth Amendment's focus on formal charges and the trial process, the *Miranda* "right" to counsel "is designed to counteract the 'inherently compelling pressures' of custodial interrogation."[76] Because the Michigan Court of Appeals relied on caselaw concerning the Sixth Amendment, it failed to make the necessary Fifth Amendment determinations whether the November 18, 2022, police contact with Respondent amounted to the necessary custodial interrogation, and whether, assuming Respondent unequivocally invoked his right to counsel on November 17, 2022, Respondent reinitiated contact on November 18, 2022.[77]

Communication between the police and a Respondent that does not fit the definition of interrogation is permitted and does not violate the right to counsel under the Fifth Amendment.[78] "[T]he admissibility of statements obtained

75. *People v. Williams*, 244 Mich. App. 533, 538 (2001).

76. *People v. Williams*, 470 Mich. 634, 640 (2004); *Arizona v. Roberson*, 486 U.S. 675, 685 (1985).

77. See *Woolley*, *supra*, at 4-5 applying *People v. Anderson*, 446 Mich. 392, 402-404 (1994), and *People v. Harrington*, 258 Mich. App. 703, 706-707 (2003).

78. *People v. Kowalski*, 230 Mich. 464, 478-479 (1998).

after the person in custody has decided to remain silent depends under *Miranda* on whether his right to cut off questioning was scrupulously honored."[79]

Communication that is "attendant to" legitimate police procedure is not considered the functional equivalent of interrogation and is permitted after an invocation of the *Miranda* "right" to counsel.[80] Various other forms of communication between the police and a Respondent after invocation of the *Miranda* "right" to counsel have been held permissible, including (1) inquiring if the Respondent has changed his mind about wanting to speak to an attorney[81]; (2) advising Respondent of the nature of the charge against him and the circumstances that lead the police to believe Respondent was responsible[82]; (3) informing Respondent that a co-Respondent has given a statement[83]; (4) telling a Respondent that "we've got good information on you,"[84]; (5) telling Respondent that the detective hoped the gun was not found by anyone who could get hurt[85]; (6) asking Respondent if he had changed his mind about talking, informing Respondent that they found the murder weapon in his home, and telling Respondent "things did not look good for him," and that he should

79. *Michigan v. Mosley*, 423 U.S. 96, 104 (1975) (internal quotation marks and citations omitted).

80. *Pennsylvania v. Muniz*, 496 U.S. 582, 603 (1990).

81. *Kowalski, supra*, 230 Mich. App. at 479.

82. *People v. McCuaig*, 126 Mich. App 754, 759-760 (1983).

83. *Kowalski, supra*, 230 Mich. App. at 482.

84. *United States v. Hurst*, 228 F.3d 751, 760 (CA 6, 2000).

85. *People v. Raper*, 222 Mich. App. 475, 480-481 (2011).

"do the right thing" and get "with the program,"[86]; (7) commenting to Respondent that "things would be easier for [you] if [you] talked,"[87]; (8) telling the Respondent that he "could possibly face the death penalty" for the crime[88]; (9) saying, "I bet you want to talk now, huh?" after Respondent was given a statement of charges and maximum penalties, about 35 minutes after Respondent requested an attorney[89]; (10) explaining why the suspect was arrested[90]; (11) telling Respondent, "They found a gun at your house,"[91] and (12) saying, "Just think about Harry Payne," (a co-conspirator).[92]

Here, even assuming the Michigan Court of Appeals correctly held that Respondent made an unequivocal request for counsel on November 17, 2022, questioning ceased after Respondent stated he wanted to take a polygraph and mentioned his attorney. The following morning, Respondent met with his counsel.[93] *After* Respondent met with counsel, Detective Wilson asked the

86. *Fleming v. Metrish*, 556 F.3d 520, 522 (CA 6, 2009).

87. *United States v. Murphy*, 107 F.3d 1199, 1205 (CA 6, 1997).

88. *McKinney v. Ludwick*, 649 F.3d 484, 489-490 (CA 6, 2011).

89. *United States v. Blake*, 571 F.3d 331, 336-337 (CA 4, 2009).

90. *United States v. Benton*, 996 F.2d 642 (CA 3, 1993).

91. *United States v. Payne*, 954 F.2d 199, 200-203 (CA 4, 1992).

92. *United States v. Jackson*, 863 F.2d 1168, 1170-1172 (CA 4, 1989).

93. 9/1, 104-105.

attorney if Respondent still wanted to take a polygraph.[94] When the attorney would not answer that question, Wilson asked Respondent directly if he wanted to take a polygraph.[95] Respondent replied that he did.[96] Asking this yes or no question was not interrogation, as no reasonable person would have expected—and did not receive—an incriminating response. Respondent was then read his rights and signed the form waiving those rights before the polygraph was administered.[97] After the polygraph, Respondent made incriminating statements and asked to speak with Wilson.[98] Before speaking with Wilson, Respondent read aloud another form explaining his *Miranda* "rights," and again signed the waiver.[99]

Under *Mosley* it is clear that Respondent's request for counsel was "scrupulously honored," as questioning ceased. The following day, after Respondent met with counsel, Wilson asked him *only if he still wanted to take a polygraph*. This was a question normally attendant to custody, as it referred to the scheduling of a polygraph and was not reasonably likely to elicit a recriminating response, as the answer would either be "yes," or "no." If asking a Respondent if they still want to talk to an attorney or had changed their mind is permissible after a Respondent invokes his *Miranda* "right" to an attorney,

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94. 9/1, 105-107.

95. 9/1, 21.

96. 9/1, 21.

97. 9/1, 21.

98. 9/1, 21, 80, 98.

99. 9/1, 23, 25; 11/18, 0:01:43 – 0:03:19.

then asking Respondent a yes-or-no question to clarify if a polygraph needed to be scheduled certainly does not constitute a reinitiation of custodial interrogation by the police.

Further, Respondent had just spoken to his attorney, and so he was obviously aware of his right to counsel. Had Respondent said no, he did not want a polygraph, that would have ended the interaction. Once Respondent said he did want a polygraph, however, and then again was informed of his rights and waived them, it was Respondent that reinitiated the interrogation.[100] Respondent then waived his rights yet again before speaking to Wilson. There can be no doubt that Respondent was aware of his rights, and Respondent made no claim that his statements during the polygraph or to Wilson were involuntary, which is the primary inquiry in determining the admissibility of the statements under the Fifth Amendment.[101] Because Wilson's sole question whether Respondent still wanted to take a polygraph test was not custodial interrogation under the Fifth Amendment, and Respondent's decision to take the polygraph and repeatedly waive his rights meant he reinstated a conversation with police, his statements on November 18, 2022, did not violate the Fifth Amendment and are admissible.

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100. *Wyrick v. Fields*, 459 U.S. 42, 47 (1982) (when a defendant requests a polygraph, the defendant initiates an interrogation).

101. See *People v. Ray*, 431 Mich. 260, 268 (1988); *People v. Hicks*, 185 Mich. App. 107, 113-114 (1990). See question 1.

CONCLUSION

The Michigan Court of Appeals erred by failing to determine whether Respondent's November 18, 2022, statements resulted from custodial interrogation and by failing to apply caselaw defining "reinitiation" in the *Miranda* context. Even assuming the Court of Appeals correctly found that Respondent made an unequivocal request for counsel at the end of his November 17, 2022, interrogation, Respondent's request was scrupulously honored as questioning ceased. The next day, Respondent met with counsel as requested. After meeting with counsel, the detective asked Respondent a routine yes-or-no question whether Respondent still wanted to take a polygraph. In no way was that question one that would be reasonably likely to elicit an incriminating response. It was Respondent's choice to answer that he was requesting a polygraph, and it was his decision to waive his *Miranda* rights, take the polygraph, ask to speak to the detective, waive his rights again, and then speak with the detective. The detective's question to Respondent was not custodial interrogation, Respondent's rights under *Miranda* and the Fifth Amendment were not violated, and his statements were voluntary; therefore, his statements are admissible at trial. Certiorari should be granted.

RELIEF

Wherefore, the Petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE COURT OF APPEALS OF MICHIGAN, FILED APRIL 18, 2024

COURT OF APPEALS OF MICHIGAN

No. 367901

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v.

MARK DAVID WOOLLEY,

Defendant-Appellee.

Filed April 18, 2024

Before: Riordan, P.J., and O'Brien and Maldonado, JJ.

OPINION

Per Curiam.

In this interlocutory appeal, the prosecution appeals by leave granted[1] the trial court's order granting defendant's motion to suppress statements he made to law enforcement during two custodial interviews and

1. ***People v Woolley***, unpublished order of the Court of Appeals, entered November 15, 2023 (Docket No. 367901).

a polygraph examination. Defendant was charged with six counts of first-degree criminal sexual conduct, MCL 750.520b(2)(b) (victim less than 13 years old) and two counts of second-degree criminal sexual conduct, MCL 750.520c(2)(b) (victim less than 13 years old). We reverse with respect to the first interview but otherwise affirm.

I. BACKGROUND

Defendant was arrested following disclosures of sexual abuse made by his grandchild. Following his arrest, defendant was interviewed by police, and the next day he submitted to a polygraph examination. Later that day, a second interview was conducted, and during the second interview, defendant confessed to engaging in sexual contact with the complainant on numerous occasions while the complainant was between the ages of 9 and 12. Specifically, defendant described masturbating on the complainant's buttocks, performing fellatio on the complainant, and making the complainant perform fellatio on him. Defendant moved for suppression of these inculpatory statements, asserting that he was questioned in violation of his *Miranda*[2] rights because he asserted his right to an attorney. The trial court agreed with defendant, and his statements were suppressed. This appeal followed.

II. DISCUSSION

The prosecution argues that the trial court erred by finding that defendant unequivocally invoked his right to

2. *Miranda v Arizona*, 384 US 436; 86 S Ct 1602;16 L Ed2d 694 (1966).

counsel. With the exception of defendant's statement early in the first interview, we disagree.

This 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 Gingrich*, 307 Mich App 656, 661; 862 NW2d 432 (2014). This Court reviews for clear error a trial court's findings of fact from a suppression hearing. *Id.* "A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *Id.* 661 (quotation marks and citation omitted). This Court reviews de novo "[a]ny ancillary questions of law relevant to the motion to suppress . . . ." *Id.*

"The right against self-incrimination is guaranteed by both the United States Constitution and the Michigan Constitution." *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005), citing U.S. Const., Am. V; Const. 1963, art. 1, § 17. Thus, "[a] criminal defendant enjoys safeguards against involuntary self-incrimination during custodial interrogations." *People v Henry (After Remand)*, 305 Mich App 127, 145; 854 NW2d 114 (2014). Among these safeguards is the right to have counsel present during a custodial interrogation "because the presence of counsel at custodial interrogation is one way in which to insure that statements made in the government-established atmosphere are not the product of compulsion." *People v Elliott*, 494 Mich 292, 301; 833 NW2d 284 (2013) (quotation marks and citation omitted). Before a person may be subjected to custodial interrogation, "the person must be warned 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 v Arizona*, 384 US 436, 444; 86 S Ct 1602;16 L Ed2d 694 (1966). When a suspect invokes his right to counsel, the police must immediately cease questioning the suspect and cannot resume questioning until counsel is present. *Tierney*, 266 Mich App at 710-711.

"However, the defendant's invocation of his right to counsel must be unequivocal." *Id.* at 711. A suspect's assertion of his or her right to counsel is unequivocal if the assertion is unambiguous. See, e.g., *Henry (After Remand)*, 305 Mich App at 147. Police are not required to immediately cease questioning "if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel . . . ." *Davis v US*, 512 US 452, 459; 114 S Ct 2350; 129 L Ed 2d 362 (1994). A suspect who has properly invoked his right to counsel can later waive his right to counsel without the presence of an attorney. *People v Harris*, 261 Mich App 44, 54; 680 NW2d 17 (2004). When a defendant asserts his right to counsel but later reinitiates a conversation with police, "the proper inquiry is whether the defendant reinitiated a conversation on the subject matter of the investigation and whether, under the totality of the circumstances, the defendant knowingly and intelligently waived his right to counsel . . . ." *People v Clark*, 330 Mich App 392, 418; 948 NW2d 604 (2019).

With respect to what constitutes an unequivocal and unambiguous assertion of the right to counsel, the Supreme Court in *Davis* concluded that the defendant did not unequivocally or unambiguously assert his right to counsel when the defendant stated during a custodial interview, "Maybe I should talk to a lawyer." *Davis*, 512 US at 462. This Court has also previously considered whether a defendant's assertion of his right to counsel during a custodial interrogation was unequivocal and unambiguous. In *Tierney*, this Court held that the defendant's statements that "[m]aybe I should talk to an attorney" and "I might want to talk to an attorney" were not unequivocal assertions of the defendant's right to counsel. *Tierney*, 266 Mich App at 711. This Court has also held that a defendant did not unequivocally assert her right to counsel by asking police, "Shouldn't I have a lawyer?" *McBride*, 273 Mich App at 258-259.

A. FIRST INTERVIEW

The trial court erred by finding that defendant unequivocally and unambiguously asserted his right to counsel by stating during the first interview on November 17, 2022, "I think I should call my attorney," because "a reasonable officer in light of the circumstances would have understood only that [defendant] *might* be invoking the right to counsel . . . ." *Davis*, 512 US at 459. Defendant's statement was similar to the equivocal statement of the defendant in *Davis* that "[m]aybe I should talk to a lawyer." *Id.* at 462. It is also similar to the equivocal statements of the defendant in *Tierney* that "[m]aybe I should talk to an attorney" and "I might want to talk to an attorney."

Tierney, 266 Mich App at 711. In both *Davis* and *Tierney*, the defendants' statements expressed an uncertainty as to whether they wanted to speak with an attorney. Here, defendant's use of the phrase "I think" to preface his statement that "I should call my attorney" expresses the same degree of uncertainty as the equivocal statements of the defendants in *Davis* and *Tierney*. Further, suggesting that he *should* call an attorney is not the same as stating that he will or that he wants to.

Moreover, as argued by the prosecution, defendant's statement that "I think I should call my attorney" was not an unequivocal assertion of his right to counsel because defendant continued to speak with police unprompted after making this statement. After stating that "I think I should call my attorney," defendant continued to discuss the subject matter of the investigation as follows:

> And then, also, I think I should call my attorney, right, and at least have—you know, I mean, the fact that [complainant] said something takes it beyond a point where it's just my daughter trying to destroy me, I guess. And that was a thing we kept talking about as a family, is what is her end game here? Does she want money? I don't [inaudible]. Does she want, you know, what is it? You know, and I can't figure this out, you know, because—it just—the ball just kept—everything just kept changing. And then this is where it lands. And it's so preposterous that it's, you know—and then now to say that [complainant] is saying this, these things, when

> I know them not to be true. I'm—I can't say it enough. I cannot say it enough. But I am—I will get information from my doctor, I will get, you know, whatever information you guys need to debunk this, I guess, for lack of a better term because I don't know. Is this his way of wanting to get back home? I don't know.

In light of the uncertain nature of defendant's statement that "I think I should call my attorney" and the fact that defendant continued to discuss the subject matter of the investigation unprompted after making this statement, a reasonable officer would understand only that defendant might want to assert his right to counsel; thus, this statement was not an unequivocal assertion of defendant's right to counsel, and the police were not required to cease questioning defendant after this statement.

B. POLYGRAPH

The prosecution next argues that defendant's statement on November 17, 2022, regarding wanting an attorney before taking the polygraph examination was not an ambiguous and unequivocal assertion of his right to counsel. We disagree.

As an initial matter, the trial court misconstrued Detective Wilson's testimony regarding when defendant made the statement that he wanted an attorney to ensure, as paraphrased by Detective Wilson, that "no funny stuff"

occurred during the polygraph examination. The trial court found that

> the defense attorney, Mr. Matthews, states to Detective Wilson that he is going to call a criminal attorney and despite him saying that[,] Detective Wilson then returns to Mr. Woolley and discusses the polygraph examination and in discussing whether he wishes to take the polygraph[,] Mr. Woolley's first statement is, "I want an attorney to make sure the polygraph is on par and for him to sit with me in the polygraph to make sure it is standard, no funny stuff[.]"

Thus, it appears that the trial court was under the misapprehension that defendant made this statement on November 18, 2022, after meeting with Matthews. However, it appears that Detective Wilson's testimony regarding defendant's comment about "no funny stuff" was a paraphrasing of defendant's statements at the end of the first interview on November 17, 2022, that "I'd also like to contact my attorney so he can arrange for whatever, you know, kind of thing," and that "I want to ask [my attorney], like, you know—look, I'm being honest, I'm being up front ... and now, I will take a polygraph test. That's not going to change my mind because, you know, right now I'm very anxious." Having clarified that the statement regarding "no funny stuff" was made during the first interview on November 17, 2022, and not on November 18, 2022, we will now address whether the trial court erred by finding these statements to be an unequivocal and unambiguous assertion of defendant's right to counsel.

The trial court did not err by finding that defendant's statements regarding speaking with an attorney in advance of the polygraph examination were unambiguous and unequivocal assertions of defendant's right to counsel. Defendant clearly stated during the first interview, "I'd also like to contact my attorney so he can arrange for whatever, you know, kind of thing." This statement by defendant clearly communicated his desire to assert his right to counsel. If Detective Wilson was under any misapprehension that defendant was asserting his right to counsel, that misapprehension was clarified by defendant when Detective Wilson asked if defendant wanted to speak with his attorney before the polygraph examination and defendant responded that he would take the polygraph examination, but he wanted to ask his attorney unspecified questions. The trial court did not clearly err by finding that these statements by defendant communicated that he wanted to speak with an attorney in advance of the polygraph.

The prosecution also argues that defendant's statements on November 17, 2022, regarding wanting an attorney before taking the polygraph examination were merely inquiries into the way the process worked and, therefore, do not constitute unambiguous and unequivocal assertions of the right to counsel. It is true that a defendant does not unequivocally assert the right to counsel merely by inquiring into whether he or she may speak to an attorney during a custodial interrogation. *People v Adams*, 245 Mich App 226, 238; 627 NW2d 623 (2001). In the instant case, however, defendant's statements were not inquiries into whether he was allowed to have an attorney.

Defendant told Detective Wilson that he wanted to contact his attorney "so [his attorney] can arrange for whatever," and indicated that he had questions that he wanted to ask his attorney. Nothing about defendant's statements suggests that he was merely asking Detective Wilson whether he was entitled to have an attorney or how the polygraph examination process worked. As the trial court found, defendant's statements regarding his attorney and the polygraph examination were unequivocal assertions of his right to counsel.

C. SUBSEQUENT QUESTIONING

The prosecution argues that even if defendant unequivocally asserted his right to counsel on November 17, 2022, he waived that right on November 18, 2022, by acknowledging and waiving his *Miranda* rights before undergoing the polygraph examination and again before the second interview with Detective Wilson and Detective McNamara. We disagree.

It is true that a defendant who asserts the right to counsel can later waive the right to counsel. *Harris*, 261 Mich App at 54. However, once a suspect unequivocally asserts the right to counsel, police must immediately cease questioning the suspect until counsel is present, *Tierney*, 266 Mich App at 710-711, or until the defendant reinitiates a conversation with police about the subject matter of the investigation and the defendant knowingly and intelligently waives the previously asserted right to counsel, *Clark*, 330 Mich App at 419. It is undisputed that defendant's counsel was not present for the polygraph

examination or postpolygraph interview with Detective McNamara. It is also undisputed that defendant read and signed a *Miranda* waiver before undergoing the polygraph examination. Thus, to determine whether defendant waived his previously asserted right to counsel with respect to the polygraph examination and postpolygraph interview, the proper inquiry is whether defendant reinitiated a conversation with police about the subject matter of the investigation. *Id.*

Our Supreme Court has previously considered under what circumstances a defendant reinitiates contact with police with respect to a polygraph examination such that the defendant validly waives the right to counsel. See *People v Anderson*, 446 Mich 392, 402-404; 521 NW2d 538 (1994). In *Anderson*, the Supreme Court held that the defendant did not reinitiate contact with police such that he validly waived his Sixth Amendment right to counsel when the defendant requested a polygraph examination before he was arraigned but the examination was not offered or conducted until after he was arraigned.[3] *Id.* at 403-404. The Court held that after the defendant was arraigned and requested appointed counsel, his Sixth Amendment right to counsel was invoked; thus "the general prohibition against further police interrogation was invoked, absent any subsequent initiation *and* waiver

3. Though the issue in *Anderson* involved the defendant's Sixth Amendment right to counsel, our Supreme Court has recognized that "[t]he inquiry regarding waivers of Sixth Amendment rights mirrors the inquiry of whether a defendant has validly waived his Fifth Amendment rights . . . ." *People v Williams*, 470 Mich 634, 640; 683 NW2d 597 (2004).

by defendant." *Id.* at 403 (footnotes omitted). Though the polygraph examination was requested by the defendant before he invoked his right to counsel, the Court held that the defendant did not reinitiate contact with police for the purposes of a waiver of the right to counsel by undergoing the polygraph examination because the polygraph examination was initiated by police contacting the defendant after he had invoked his right to counsel. *Id.* at 404.

Similarly, this Court has held that police obtained inculpatory statements from a defendant in violation of his Sixth Amendment right to counsel when the inculpatory statements were made following a polygraph examination that occurred after the defendant invoked his right to counsel. *People v Harrington*, 258 Mich App 703, 706-707; 672 NW2d 344 (2003). In *Harrington*, police discussed the possibility of taking a polygraph examination with the defendant prior to his arraignment but did not contact the defendant to arrange and conduct the polygraph examination until after the defendant's arraignment when counsel was appointed and defendant's Sixth Amendment right to counsel was invoked. *Id.* at 704-705. Thus, the Court held it was the police—not the defendant—who reinitiated communications about the subject matter of the investigation after the defendant invoked his right to counsel. This Court rejected the argument that the defendant reinitiated communication with police by asking to speak with them after the polygraph examination, thereby waiving his right to counsel, because "[t]he statements allegedly elicited from defendant were obtained during the course of ongoing contact that was originally initiated by the police." *Id.* at 707.

Defendant did not waive his previously asserted right to counsel with respect to the polygraph examination and postpolygraph interview with Detective McNamara. Like the defendants in *Anderson* and *Harrington*, defendant discussed with police the possibility of taking a polygraph examination before he asserted his right to counsel. Further, as in *Anderson* and *Harrington*, after defendant asserted his right to counsel, police reinitiated contact with defendant for the purposes of arranging and administering a polygraph examination. In *Anderson* and *Harrington*, the mere fact that the defendants underwent polygraph examinations did not constitute reinitiating contact with police; rather, the point that contact was reinitiated in both cases was when police contacted the defendants, after they invoked their rights to counsel, to arrange and administer the polygraph examination. *Anderson*, 446 Mich at 403-404; *Harrington*, 258 Mich App at 707. The same is true in the instant case: after defendant unequivocally asserted his right to counsel on November 17, 2022, police reinitiated contact with defendant for the purposes of arranging and administering the polygraph examination. Thus, with respect to the polygraph examination and postpolygraph interview with Detective McNamara, defendant did not validly waive his previously asserted right to counsel because defendant did not reinitiate the contact with police. The trial court, therefore, did not err by suppressing defendant's inculpatory statements made during the postpolygraph interview with Detective McNamara.

The trial court likewise did not err by suppressing defendant's statements during the second interview. Detective McNamara testified that after the polygraph

examination and postpolygraph interview, defendant asked to speak with Detective Wilson because "[h]e wanted to be truthful and get what he told [Detective McNamara] off his chest." Defendant and Detective McNamara thereafter went to a different interview room where they were joined by Detective Wilson. This is similar to *Harrington* because the second interview was part of a "course of ongoing contact that was originally initiated by the police." *Harrington*, 258 Mich App at 707. Indeed, the interview took place the same day as the polygraph examination, and the purpose of the interview was to follow up on the statements made during the examination.

Affirmed in part, reversed in part, and remanded for additional proceedings consistent with this opinion. We do not retain jurisdiction.

APPENDIX B — ORDER OF THE SUPREME COURT OF MICHIGAN, FILED DECEMBER 13, 2024

SUPREME COURT OF MICHIGAN

2024 WL 5104203
SC: 167214
COA: 367901
Wayne CC: 22-007747-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v.

MARK DAVID WOOLLEY,

Defendant-Appellee.

December 13, 2024

Order

On order of the Court, the application for leave to appeal the April 18, 2024 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

APPENDIX C — EXCERPTS OF EVIDENTIARY HEARING IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE, CRIMINAL DIVISION, STATE OF MICHIGAN, DATED SEPTEMBER 1, 2023

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

CRIMINAL DIVISION

File No. 22-007747-01-FC
Evidentiary Hearing

THE PEOPLE OF THE STATE OF MICHIGAN,

vs.

MARK DAVID WOOLLEY,

Defendant.

PROCEEDINGS TAKEN in the above-entitled cause, before the HONORABLE JOHN C. GILLIS, Judge of the 3rd Judicial Circuit Court, City of Detroit, at Frank Murphy Hall of Justice, Courtroom 801, Detroit, Michigan, on September 1, 2023.

* * *

[121]THE COURT: Okay. Thank you. The Court is prepared to rule at this time and I'm going to cite just a little bit of case law to start. I know some of these cases were discussed, but I don't think it hurts to repeat.

So starting with Miranda, because that's kinda where this all starts, the United States Supreme Court has held that an individual that says he wants an attorney -- excuse me. If the individual states that he wants an attorney the interrogation must cease until an attorney is present.

At that time the individual must have an opportunity to confer with the attorney and have him present during any subsequent questioning. That's Miranda V Arizona, 384 U.S. 436, 1966.

Supreme Court has also stated that if a suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him. That's Davis V United States, 512 U.S. 452, 1994.

So in the case before the Court the first statement that the Court needs to analyze was the Defendant's statement regarding an attorney where he states, 'I'm not sure how much I want an attorney', and [122]of course we're going to find that that does not meet the unambiguous or unequivocal standard set in Davis. Mr. Woolley's statement here is similar to the statement, 'I might want to talk to an attorney', used by the Defendant in People v. Tierney. That's 266 Mich. App. 687, 2005, and the Tierney Court found that the statement was not unequivocal in that matter.

The second statement that the Defendant makes is, 'I think I should call an attorney', and from watching the video and I think it is important to watch the video because

I think context and body language make a difference rather than just looking at a quote, and from watching that video footage it's very clear -- and this is the video of -- video footage of the interrogation.

I believe this would be People's Exhibit Four. It's at the eighty-six thirty time mark. It's very clear that the statement made by the Defendant, 'I think I should call an attorney', is an affirmative unwavering statement that must be characterized as unambiguous and unequivocal.

The Court does find that at that point Mr. Woolley did invoke his right to counsel and based on the rulings in Miranda, Davis, and also Edwards V Arizona, which is 415 U.S. 477, 1981, the police must have [123]immediately terminated the interrogation with Mr. Woolley following his unequivocal invocation of his right to counsel.

So that is on November 17th. So anything after he makes the statement on November 17th, 'I think I should call an attorney', until the end of the interrogation on that day must be suppressed. Now, moving to the following day, November 18 --

MS. MOSES: Judge, I'm so sorry. Can you repeat those timestamps again?

THE COURT: The timestamp that I referenced -- so I believe this is People's Exhibit Four. This would be the eighty-six thirty time mark where the Defendant states, 'I think I should call an attorney'. So based -- anything after that time mark on November 17th must be suppressed.

Appendix C

Moving to November 18th, as we had testimony here today, Mr. Woolley did have the opportunity to speak to an attorney on that date. That was Mr. Matthews who testified earlier and Mr. Matthews after speaking to Mr. Woolley, his client, did speak to Detective Wilson and while he may have been aware that there -- that the police may have wanted to conduct a -- let's see here.

So the defense attorney, Mr. Matthews, [124]states to Detective Wilson that he is going to call a criminal attorney and despite him saying that Detective Wilson then returns to Mr. Woolley and discusses the polygraph examination and in discussing whether he wishes to take the polygraph Mr. Woolley's first statement is, 'I want an attorney to make sure the polygraph is on par and for him to sit with me in the polygraph to make sure it is standard, no funny stuff'.

So if there is any question on November 18th whether or not Mr. Woolley had already invoked his right to counsel based on his statements the previous day, his statement that starts with, 'I want an attorney', I don't think it can be anymore unambiguous or unequivocal.

I think he's stating that he wants an attorney and at that point the questioning needed to cease, the interrogation needed to stop, but instead the Detective mentions -- she talks about the size of the room that cannot accommodate an attorney. None of that matters.

Frankly, those statements don't need to be made. He requested an attorney, it needs to stop. It didn't and anything after that point also needs to be suppressed.

Appendix C

So in conclusion, any statements made by [125]Mark Woolley following his statement on November 17th, 'I think I should call an attorney', must be suppressed in this matter.

* * * *