

No. _____

In The
Supreme Court of the United States

BRIAN FAYNE,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Virginia

APPENDIX – Table of Contents

APPENDIX A:	Supreme Court of Virginia Opinion (April 23, 2026).....App. 1
APPENDIX B:	Virginia Court of Appeals Opinion (March 4, 2025).....App. 11
APPENDIX C:	Hearing Transcript of Motion to Suppress, Hampton Circuit Court (April 21, 2023).....App. 29
APPENDIX D:	Order Denying Petition for Rehearing in the Supreme Court of Virginia (May 27, 2026).....App. 103

APPENDIX A
Supreme Court of Virginia Opinion (April 23, 2026)

PRESENT: Powell, C.J., Kelsey, McCullough, Chafin, Russell, and Mann, JJ., and Mims, S.J.

COMMONWEALTH OF VIRGINIA

v. Record No. 250359

BRIAN FAYNE

OPINION BY
JUSTICE TERESA M. CHAFIN
APRIL 23, 2026

FROM THE COURT OF APPEALS OF VIRGINIA

The present case involves statements that Brian Fayne made while he was in police custody. The Court of Appeals concluded that the police impermissibly obtained the statements at issue after Fayne requested counsel. For the following reasons, we reverse the Court of Appeals' judgment.

I. BACKGROUND

On December 18, 2020, police detained Fayne after a shooting that resulted in the death of C.K., who was pregnant. Fayne had previously sold drugs to C.K. and was in a relationship with her. Fayne was taken to the police station and placed in an interview room.

Approximately one hour and twenty minutes later, Detectives Daniel Smith and Henry Hodson entered the room. Smith advised Fayne of his *Miranda*¹ rights, and Fayne stated that he understood them.

Smith and Hodson questioned Fayne for approximately four hours.² During this time, Fayne denied any involvement in the shooting. The detectives allowed Fayne to call his father twice. At one point, Fayne told his father to “call Clancy,” seemingly referring to an attorney.

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

² The interview was recorded on video. At the suppression hearing, the video recording of the interview was admitted into evidence as Commonwealth's Exhibits A-1 and A-2.

After the second call, Fayne stated that he was being advised to “lawyer up.”³ When Fayne expressed concern about potential charges, Smith explained that Fayne was facing a second-degree murder charge. Smith also explained that the charge could be elevated if the killing of a pregnant woman was intentional.

Fayne stated that he “definitely want[ed] to talk” to the detectives but did not want his father “to feel disrespected.” Fayne asked for another opportunity to persuade his father. Smith again contacted Fayne’s father, who again advised Fayne to wait for counsel. Fayne expressed concern about receiving a life sentence. Fayne’s father responded that the detectives could not offer him a deal and that only a prosecutor could do so.

When the call ended, Smith confirmed that only a prosecutor could offer him a plea deal, which Fayne would have to earn through cooperation. Fayne then stated that he had “no reason for a lawyer now,” that hiring a lawyer would be “spend[ing] \$20,000 on nothing,” and that a lawyer could not “help [him].” At the same time, Fayne acknowledged that when he did speak with a lawyer, the lawyer would likely advise him not to talk to the detectives.

Approximately fifteen minutes later, Fayne invoked his right to counsel, stating,

I strongly request [a lawyer] here . . . I could easily slip up . . . and I ain’t trying to do that. But I’m telling you now while you’re here in front of me that that is what I want. I’m not ducking it, but at the same time, I have to protect what I’m saying.

The Commonwealth concedes that this was an unequivocal request for counsel.

³ See, e.g., *Townsend v. Morrison*, 2025 U.S. Dist. LEXIS 8461, at *31 (W.D. Mich. Jan. 16, 2025) (indicating via colloquy between the trial court and a defendant that to “lawyer up” means that the defendant asks to consult with an attorney in response to questioning by law enforcement); *England v. Hart*, 970 F.3d 698, 708 (6th Cir. 2020) (noting that “the detectives reminded [the appellant] that he had the right to ‘lawyer up,’” and observing that the appellant “nevertheless responded that he would talk and tell what he knew”).

Despite Fayne's invocation of his right to counsel, the detectives nonetheless continued questioning Fayne for approximately one hour and fifteen minutes after his invocation. The Commonwealth concedes that this conduct violated *Edwards v. Arizona*, 451 U.S. 477 (1981).

During this period, Detective Steven Carpenter entered the room. Carpenter had watched portions of the interview but was unaware that Fayne had invoked his right to counsel. He questioned Fayne about illegal drug activity, and Fayne acknowledged that he sold cocaine.

At one point, Fayne requested to speak to Carpenter alone. After Detective Smith left the room, Fayne told Carpenter that he wanted to give a statement but did not want to "fuck up" what he said. Carpenter continued to question Fayne about the shooting. Fayne again stated that if he confessed, a plea deal would not be a possibility. Carpenter stated,

If you want me to help you, you need to start explaining something to me, because if not, I'm going to walk out, and there ain't going to be nobody else that comes back in this room.

After additional questioning, Carpenter stated that there was nothing further he could do for Fayne and left the room, closing the door behind him. Carpenter later testified that, at that point, the interview had ended. Fayne remained alone in the room.

Approximately twenty seconds later, Fayne opened the door. He asked an officer to locate Detective Smith, explaining that Carpenter had been "too aggressive" and that he was more comfortable speaking with Smith. When told that Smith might not be available, Fayne reiterated that he wished to speak to him.

Fayne then resumed discussion with Carpenter and a second officer, Sergeant Giles, indicating that he was ready to talk and wanted to resolve the matter. Giles encouraged him to explain what had happened and described the evidence. Fayne stated that he wanted Smith

present before he gave a confession. When Smith returned, Fayne admitted to his role in the shooting and provided details of the offense.

Fayne moved to suppress the statements that he made during the interview, arguing that the officers continued to question him after he invoked his right to counsel in violation of *Edwards*. The circuit court denied Fayne's motion to suppress, finding that while Fayne had invoked his right to counsel, he later reinitiated contact by opening the door and requesting Detective Smith. The circuit court further found that Fayne knowingly and intelligently waived his right to counsel before making additional statements.

The Court of Appeals reversed the trial court's denial of Fayne's motion to suppress. *Fayne v. Commonwealth*, 83 Va. App. 686 (2025). Relying on *Ferguson v. Commonwealth*, 52 Va. App. 324, 340 (2008), *aff'd*, 278 Va. 118 (2009), the Court of Appeals held that Fayne did not reinitiate contact because the interrogation did not cease in a manner sufficient to permit reinitiation. *Fayne*, 83 Va. App. at 700-03. The Court of Appeals further held that even if Fayne had reinitiated the discussion, he did not knowingly and intelligently waive his right to counsel. *Id.* at 703-06. This appeal followed.

II. ANALYSIS

This case turns on sequence. Fayne invoked his right to counsel. The police continued questioning in violation of *Edwards*. The interrogation then ended. Fayne—not the police—resumed communication. The question is whether, under those circumstances, his statements subsequent to resuming communications were admissible under *Edwards*. The Court of Appeals focused on the violation but failed to account for what followed. *Fayne*, 83 Va. App. at 700-03.

We review a circuit court's factual findings in denying a motion to suppress for clear error and its application of the law de novo. *See Spinner v. Commonwealth*, 297 Va. 384, 389

(2019); *Commonwealth v. Quarles*, 283 Va. 214, 220 (2012); *Zektaw v. Commonwealth*, 278 Va. 127, 134 (2009). In doing so, we view the evidence in the light most favorable to the prevailing party and consider all reasonable inferences supported by the record. *See Spinner*, 297 Va. at 389.

The Court gives deference to the trial court's factual findings, including those bearing on who initiated the communication and whether the defendant understood his rights, if supported by the evidence, and determines whether those facts establish a valid waiver under the totality of the circumstances. *See Oregon v. Bradshaw*, 462 U.S. 1039, 1046 (1983); *Hilliard v. Commonwealth*, 270 Va. 42, 49 (2005); *Commonwealth v. Redmond*, 264 Va. 321, 327 (2002).

A. The Interrogation Ended Following Fayne's Invocation of Counsel

Edwards requires that interrogation cease once a suspect invokes the right to counsel. *Edwards*, 451 U.S. at 484-85. That rule governs the admissibility of any statements after invocation.

The Court of Appeals treated the earlier *Edwards* violation as dispositive. That interpretation, however, extends the rule beyond its proper scope. *Edwards* requires that interrogation cease; it does not impose a permanent bar on further communication between a suspect and law enforcement. *Id.*; *Bradshaw*, 462 U.S. at 1044-46. If questioning ends and the suspect later chooses to speak, the admissibility of any subsequent statements turns on reinitiation and waiver. *See Maryland v. Shatzer*, 559 U.S. 98, 103 (2010) (recognizing that *Edwards* is not a permanent bar on further interrogation after a sufficient break has occurred).

The record supports the circuit court's finding that the interrogation ended. Detective Carpenter stated that there was nothing further he could do, exited the room, and closed the door.

Fayne was left alone. No officer remained and no questioning continued. This was not a brief pause in an ongoing exchange; it marked the end of the interview.

That officers earlier failed to honor Fayne’s invocation of his right to counsel does not change this analysis. The rule requires that questioning cease. It does not resolve the admissibility of statements made after questioning in fact ends. Once questioning stops, the focus shifts to what follows under *Edwards*.

B. Fayne Reinitiated Communication with Law Enforcement

After a suspect invokes the right to counsel, further interrogation must cease unless the suspect reinitiates communication with law enforcement. *Edwards*, 451 U.S. at 484-85. Reinitiation requires conduct that reflects a willingness to engage in a “generalized discussion” of the investigation. *Bradshaw*, 462 U.S. at 1045.

Within seconds of being left alone, Fayne reopened communication. He opened the door and asked for Detective Smith, explaining that Carpenter had been “too aggressive” and that he was more comfortable speaking with Smith. When told that Smith might not be available, Fayne repeated that he wanted to speak with him. This request was not prompted by further police conduct. It was Fayne’s decision to resume the conversation. *See id.* at 1045-46.

The Court of Appeals relied on *Ferguson v. Commonwealth*, 52 Va. App. 324 (2008), *aff’d*, 278 Va. 118 (2009), which involved a materially different sequence of events. *Fayne*, 83 Va. App. at 700-03. But *Edwards* does not turn on whether a violation occurred in the first instance; it turns on what follows—whether the interrogation ceased, whether the suspect reinitiated communication, and whether a valid waiver ensued. The premise underlying the Court of Appeals’ analysis—that the initial violation continued to control the admissibility of

Fayne’s later statements absent a meaningful cessation of questioning—is inconsistent with that framework.

In *Ferguson*, the interrogation never meaningfully stopped. The encounter remained “one continuous custodial interrogation,” and the suspect’s statements were inseparable from the ongoing questioning. *Commonwealth v. Ferguson*, 278 Va. 118, 126 (2009).

That distinction is significant. When questioning continues in disregard of a request for counsel, any later statement cannot fairly be attributed to the suspect’s independent choice to reopen the dialogue. Without a meaningful break, there is no real opportunity for reinitiation—only a continuation of the same interrogation.

Here, the interrogation ended. The detective left the room, the door closed, and Fayne was left alone. Only then did Fayne choose to speak. That sequence—cessation of the interrogation followed by suspect-initiated communication—is what was contemplated in *Edwards* and *Bradshaw*. The Court of Appeals erred in concluding otherwise.

C. Fayne Knowingly and Intelligently Waived His Right to Counsel

When an impermissible post-invocation interrogation ends and the suspect thereafter initiates a further exchange that produces statements like the ones at issue here, those statements may be admissible if accompanied by a valid waiver, notwithstanding the initial *Edwards* violation. *King v. Commonwealth*, 243 Va. 353, 362 (1992). A waiver need not be express; it may be inferred from the suspect’s words and conduct. *See North Carolina v. Butler*, 441 U.S. 369, 373 (1979); *King*, 243 Va. at 360. The relevant inquiry is whether the suspect understood his right to counsel and chose to relinquish it. *See Quarles*, 283 Va. at 221-22; *see also Moran v. Burbine*, 475 U.S. 412, 421 (1986).

That inquiry is distinct from general voluntariness. The question is not whether the statement was voluntary under general due process principles, but whether the suspect knowingly abandoned the right to counsel. *See Colorado v. Connelly*, 479 U.S. 157, 169-70 (1986) (distinguishing *Miranda* waiver from broader due process voluntariness); *Quarles*, 283 Va. at 221-22 (addressing voluntariness under the totality of the circumstances).

The record supports the circuit court's finding that Fayne waived his right to counsel. Fayne was advised of his *Miranda* rights and stated that he understood them. He demonstrated awareness of his right to counsel by invoking that right. After the interview ended, Fayne chose to reopen communication, requested a different detective, and stated that he was ready to talk. He then provided a detailed account of the offense.

The record does not reflect confusion or continued coercion after the interrogation ended. Fayne's reinitiation of the conversation was a deliberate choice. *Compare Correll v. Commonwealth*, 232 Va. 454, 464 (1987) (finding valid waiver following reinitiation), *with Ferguson*, 278 Va. at 125-26 (finding no waiver where interrogation never meaningfully ceased).

The Court of Appeals effectively treated the earlier *Edwards* violation as permanently tainting everything that followed and blurred the distinction between *Miranda* waiver and general voluntariness. *See Fayne*, 83 Va. App. at 706. That is not the governing framework.

The admissibility of post-invocation statements turns on whether interrogation ceased, whether the accused reinitiated communication, and whether a valid waiver followed. *See Edwards*, 451 U.S. at 484-85; *Bradshaw*, 462 U.S. at 1045; *Butler*, 441 U.S. at 373; *King*, 243 Va. at 360. It does not turn on whether an earlier violation renders all subsequent statements inadmissible. *See Connelly*, 479 U.S. at 169-70; *Quarles*, 283 Va. at 221-22.

III. CONCLUSION

Because the interrogation ceased, Fayne reinitiated communication, and he knowingly and intelligently waived his right to counsel, the circuit court did not err in denying Fayne's motion to suppress. We reverse the judgment of the Court of Appeals and reinstate the judgment of the trial court.

Reversed and final judgment.

APPENDIX B
Court of Appeals of Virginia Opinion (March 4, 2025)

COURT OF APPEALS OF VIRGINIA

Present: Judges Ortiz, Raphael and White
Argued at Virginia Beach, Virginia

BRIAN FAYNE, S/K/A
BRIAN LATRELL FAYNE

v. Record No. 1675-23-1

COMMONWEALTH OF VIRGINIA

OPINION BY
JUDGE STUART A. RAPHAEL
MARCH 4, 2025

FROM THE CIRCUIT COURT OF THE CITY OF HAMPTON
Bonnie L. Jones, Judge

James O. Broccoletti (S. Mario Lorello; Zoby & Broccoletti, P.C.,
on brief), for appellant.

Tanner M. Russo, Assistant Attorney General (Jason S. Miyares,
Attorney General; Jessica M. Bradley, Assistant Attorney General,
on brief), for appellee.

Brian Latrell Fayne appeals the trial court’s denial of his motion to suppress. He argues that the court erred in finding that he initiated further conversations with detectives who continued to interrogate him in spite of his request for counsel under *Miranda v. Arizona*, 384 U.S. 436 (1966). Fayne also argues that the detectives’ misconduct tainted the confession that resulted because he did not voluntarily, knowingly, and intelligently waive his *Miranda* right to counsel. Because we agree that Fayne’s inculpatory statements were tainted by the improper interrogation, we reverse the trial court’s ruling and remand for further proceedings.

BACKGROUND

We recite the facts in the light most favorable to the Commonwealth, the prevailing party below. *Camann v. Commonwealth*, 79 Va. App. 427, 431 (2024) (en banc). “Doing so requires that we ‘discard’ the defendant’s evidence when it conflicts with the Commonwealth’s evidence,

‘regard as true all the credible evidence favorable to the Commonwealth,’ and read ‘all fair inferences’ in the Commonwealth’s favor.” *Id.* (quoting *Commonwealth v. Cady*, 300 Va. 325, 329 (2021)).

Late in the evening of December 18, 2020, Fayne and C.K. agreed to meet at a Sunoco gas station in Hampton.¹ Fayne and C.K. had previously been in a romantic relationship. C.K. arrived with two others in a white Dodge pickup truck. Fayne was driving a Toyota sport utility vehicle. C.K. got into Fayne’s SUV, where she stayed for about two minutes. As she got out and started walking back to the pickup truck, Fayne and C.K. were “arguing loudly.” After C.K. got back in the truck, Fayne allegedly fired eight rounds at the vehicle. A bullet struck C.K. in the torso, killing her and the unborn child she was expecting with Fayne. The gunfire shattered a backseat window, cutting another passenger’s face. That passenger also suffered a gunshot wound to his left hand.

A. The interrogation

A few days later, Fayne was detained and interrogated by detectives at the Hampton Police Department. Fayne waited alone in an interrogation room for about an hour and 20 minutes before detectives Daniel Smith and Henry Hodson came to speak with him. Detective Smith read Fayne his *Miranda* rights from a pre-printed card. Fayne confirmed that he understood his rights. Throughout the interrogation, the detectives provided Fayne with water and snacks, and they permitted him to smoke cigarettes. The detectives also allowed Fayne to call his daughter, fiancée, and father.

For more than four hours, Fayne denied responsibility for C.K.’s murder. Fayne asked the detectives if he could call his father a second time. They agreed on the condition that Fayne

¹ We omit the victim’s identity to protect the family’s privacy.

put the call on speaker. Fayne's father advised him not to say anything more until Fayne could consult a lawyer.

After that call, Fayne asked if he and an attorney could discuss the allegations with the detectives and a Commonwealth's attorney, all present at the same time. Detective Smith said that was not likely to happen.

Forty minutes later, Fayne unequivocally requested an attorney:

I feel like this is a waste of your time, my time or my money towards a lawyer. And that's why I strongly request him here. I hate to do this in front, but before I give a statement I'm going to give, even before talking to him, I just want him.

Detective Smith did not stop the interrogation.

Smith acknowledged that it was Fayne's right to request an attorney, but Smith warned that once counsel was involved it would be difficult for Fayne to make a statement. Smith said that "it [would] be good for [Fayne's] mental health" to make a statement, but if Fayne hired an attorney, this could be "the last time" he and Fayne could have "a face-to-face like this."

When Fayne said that he had seen detectives talk to people in jail, Smith pressed him further:

You've said it a couple times. "I want to make a statement but I don't want to say the wrong thing" I'm thinking the statement you want to make is about the why. Is that fair to say? Your side. What happened. Why did this happen. That's what you want to tell me, but you don't want to make a mistake. And I get that and I respect that.

Fayne responded, "I don't want to really say nothing."

Then Detective Hodson urged Fayne to talk:

Well you've already said that . . . you feel like you can better elaborate things than me, so say it straight to me, man. Then, as you're saying it, I'll interpret it and if I'm confused about something, I'll ask. Just like I said, start at the beginning, we're asking for two minutes. When [C.K.] got into that car, what was said between the two of you?

After a few minutes of silence, Detective Smith left the room and Detective Hodson asked Fayne if he wanted to say anything to C.K.'s family. Fayne replied, "let them know that everything is figured out."

Detective Smith returned a few minutes later and told Fayne that new evidence made it even more important for Fayne to tell them what happened:

I want to show you a few more things. This just came in . . . hot off the presses. . . . I don't want you to feel like the walls are closing in, but I want you to see how important it is that we get your side of the story. Because your Instagram search warrants just came back in. Does that pants and jacket and shirt look familiar? And does that silver Toyota SUV look familiar? If I show all of this to a courtroom, with no explanation, it not only looks bad, but it straight up looks nuclear bad. You see what I'm saying? That's why we need to know the why. Because we already know the when, and the who, and the where. And I can do a whole lot more with my Commonwealth['s Attorney] with an honest, apologetic person, than I can with somebody who clams up and doesn't want to face the facts.

Detective Smith allowed Fayne to make another call to his father. Again, Fayne's father told him to stay quiet until he could speak with a lawyer. Smith said that he and Fayne had more things to talk about, and Smith told Fayne to hang up.

Moving on from "the why," Smith asked Fayne about the gun used to shoot C.K. When Fayne did not respond directly, Smith moved on to other potential crimes, asking him whether white powder found in C.K.'s house contained narcotics belonging to Fayne.

By that point, about 30 minutes had passed since Fayne had requested counsel. A third detective, Steven Carpenter, now entered the interrogation room, replacing Detective Hodson. Carpenter had been intermittently watching Fayne's interrogation from the hallway. Smith left about ten minutes after Carpenter arrived.

Carpenter interrogated Fayne for another 40 minutes. Fayne maintained, "I want to give a statement, but I don't want to f*** up my statement." Fayne admitted to Carpenter that he had

sold cocaine to C.K. in the past, but Fayne did not reveal any more details about the shooting. Voicing frustration, Carpenter said he could not do anything else for Fayne and left the interrogation room.

Less than a minute later, Fayne opened the interrogation-room door and asked for Detective Smith.² When Detective Smith returned, he spent another 35 minutes steadily coaxing a confession from Fayne. Fayne said he felt “set up” when he met C.K. at the Sunoco, since the gas station itself was closed but multiple cars were in the parking lot. Fayne eventually provided details to Smith about the gun he used and approximately how many shots he had fired at the car.

On October 4, 2021, a grand jury indicted Fayne for C.K.’s murder, aggravated malicious wounding, and other gun-related charges.

B. Fayne’s motion to suppress

Fayne’s attorney moved to suppress all statements that Fayne made to the detectives after he invoked his right to counsel. The Commonwealth’s Attorney for the City of Hampton filed a “Disclosure” advising that the police department in a previous case had “determined that Detective Smith, in spite of training and experience, failed to recognize a suspect’s invocation of Constitutional Rights. As a result, Detective Smith did not honor the suspect’s invocation.” In addition, the disclosure suggested that Detective Smith had been untruthful in that case: “when later asked by the Hampton Commonwealth’s Attorney if the suspect invoked his rights, Detective Smith answered in the negative.”

At the suppression hearing that followed, the Commonwealth conceded that Fayne had sufficiently invoked his right to counsel. Despite the Commonwealth’s concession, Detective

² Detective Carpenter initially told Fayne that Detective Smith was no longer at the station to talk. A fourth detective joined in the interrogation. The detectives then repeatedly asked Fayne if he “meant to kill” C.K. Detective Smith returned about 15 minutes after Fayne asked to speak with him.

Smith maintained that Fayne had not “definitively” said that he wanted an attorney. When asked why he continued the interrogation after Fayne requested counsel, Smith claimed that Fayne’s request was equivocal and that Fayne “continued to talk to [him] just as [they] had been.” Smith said that, after leaving the interrogation room, he did not “do anything to go back and initiate contact” with Fayne.

Smith agreed on cross-examination that he had “continued to speak to [Fayne]” after Fayne asked for a lawyer. In light of the prosecution’s disclosure, Smith conceded that he had previously “failed to recognize a suspect’s invocation of his constitutional rights.” Still, Smith maintained that he did not ask Fayne to waive his right to a lawyer because he did not think that Fayne “had asked for a lawyer” in the first place. Smith acknowledged that Detective Carpenter continued to interrogate Fayne for about an “hour and 20 minutes” after Fayne invoked his right to counsel.

Detective Carpenter testified that, despite having watched portions of Fayne’s interrogation by detectives Smith and Hodson, he did not know that Fayne had asked for counsel. He said if he had known about Fayne’s invocation, he never would have entered the interrogation room. Carpenter said that his interrogation of Fayne ended when he told Fayne he couldn’t do anything else for him and left the room.

Carpenter admitted on cross-examination that he had not asked the other detectives whether Fayne had been Mirandized or invoked his *Miranda* rights. Carpenter agreed that he did not re-Mirandize Fayne or ask if he wanted to waive his right to counsel when Fayne opened the door to ask for Detective Smith.

The trial court denied the motion to suppress, finding that Fayne “reinitiated further contact with police after the invocation.” The court reasoned that after Carpenter left the room,

Fayne took it upon himself to open the door and ask for Detective Smith to return. The court found that Fayne knowingly and intelligently waived his previously invoked right to counsel.

Fayne entered a conditional guilty plea that preserved his right to appeal the denial of his suppression motion. The trial court accepted Fayne's plea, finding him guilty of:

(1) second-degree murder, (2) shooting into an occupied vehicle, (3) shooting in public, (4) use of a firearm (two counts), (5) aggravated malicious wounding, and (6) possession of a firearm as a convicted felon. Fayne was sentenced to 88 years in prison with 53 years suspended. Fayne noted a timely appeal.

ANALYSIS

The party appealing the denial of a motion to suppress bears the burden "to show that the trial court's decision constituted reversible error." *Quinn v. Commonwealth*, 25 Va. App. 702, 712 (1997). We review "the trial court's findings of historical fact only for clear error." *Ferguson v. Commonwealth*, 52 Va. App. 324, 334 (2008) (en banc), *aff'd*, 278 Va. 118 (2009). But "we review *de novo* the trial court's application of defined legal standards to the particular facts of a case." *Id.*

The Fifth Amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The Due Process Clause of the Fourteenth Amendment also protects the privilege against self-incrimination from "abridgment by the States." *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court held "that when an individual is taken into custody . . . and is subjected to questioning, the privilege against self-incrimination is jeopardized." *Id.* at 478. To protect the privilege, *Miranda* announced several prophylactic warnings that must be provided "to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored." *Id.* at 479.

[The suspect] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires After such warnings have been given, . . . the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

Id.

This case centers on the *Miranda* warning that the accused has the right to the presence of an attorney, a right that *Miranda* said was “indispensable to the protection of the Fifth Amendment privilege.” *Id.* at 469. *Miranda* derived that requirement in part from *Escobedo v. Illinois*, 378 U.S. 478 (1964), where the police during a custodial interrogation had refused the suspect’s request for a lawyer. *See Miranda*, 384 U.S. at 465-66. “The denial of the defendant’s request for his attorney . . . undermined his ability to exercise the privilege—to remain silent if he chose or to speak without any intimidation, blatant or subtle.” *Id.* at 466. *Miranda* reasoned that “[t]he presence of counsel . . . would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion.” *Id.*

Miranda made clear that “[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present.” *Id.* at 474. “If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.” *Id.* at 475.

In *Edwards v. Arizona*, 451 U.S. 477 (1981), the Court concluded that the “traditional standard for waiver was not sufficient to protect a suspect’s right to have counsel present at a subsequent interrogation if he had previously requested counsel; ‘additional safeguards’ were necessary.” *Maryland v. Shatzer*, 559 U.S. 98, 104 (2010) (quoting *Edwards*, 451 U.S. at 484). *Edwards* thus “superimposed a ‘second layer of prophylaxis’” if a suspect in a custodial interrogation invokes his right to counsel. *Id.* (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 176 (1991)). *Edwards* held that:

[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. . . . [He] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

451 U.S. at 484-85.

The requirements for a valid waiver differ for waiving one’s *Miranda* rights generally compared to waiving the specific *Miranda* right to have counsel present once that right has been invoked. “Under this rule, a voluntary *Miranda* waiver is sufficient at the time of an initial attempted interrogation to protect a suspect’s right to have counsel present, but it is not sufficient at the time of subsequent attempts if the suspect initially requested the presence of counsel.” *Shatzer*, 559 U.S. at 105.

The rationale of *Edwards* is that once a suspect indicates that “he is not capable of undergoing [custodial] questioning without advice of counsel,” “any subsequent waiver that has come at the authorities’ behest, and not at the suspect’s own instigation, is itself the product of the ‘inherently compelling pressures’ and not the purely voluntary choice of the suspect.”

Id. (alteration in original) (quoting *Arizona v. Roberson*, 486 U.S. 675, 681 (1988)). In other words, *Edwards* established a “presumption of involuntariness” of a waiver of the right to

counsel that “ensures that police will not take advantage of the mounting coercive pressures of ‘prolonged police custody,’ by repeatedly attempting to question a suspect who previously requested counsel until the suspect is ‘badgered into submission.’” *Id.* (first quoting *Roberson*, 486 U.S. at 686; and then quoting *Roberson*, *id.* at 690 (Kennedy, J., dissenting)).

This Court has repeatedly applied *Edwards* to invalidate confessions obtained during custodial interrogations by police officers who failed to stop questioning suspects who invoked their right to counsel. *Ferguson*, 52 Va. App. at 324; *Quinn*, 25 Va. App. at 702; *Hines v. Commonwealth*, 19 Va. App. 218 (1994).

When the accused in custody requested counsel in *Hines*, the detective responded by saying, “All I wanted to know is whether you’re going to be a witness or a defendant in the matter.” 19 Va. App. at 220. When Hines asked what he meant, the detective continued the discussion and Hines ultimately made incriminating statements. *Id.* We held that the trial court erred in finding that Hines had “initiated the further discussion.” *Id.* “By asking Hines ‘whether [he was] going to be a witness or a defendant in the matter,’ the officer continued the conversation that he was bound to cease.” *Id.* at 221 (alteration in original). In other words, the inquiry by the detective was the “reinitiation of the dialogue that Hines sought to terminate.” *Id.* “When the officer continued the dialogue without first giving Hines access to his lawyer, the statements that he elicited did not follow upon a valid waiver of Hines’s Fifth Amendment rights.” *Id.* at 222.

In *Quinn*, we said that “[w]hether the *Edwards* rule renders a statement inadmissible is determined by a three-part inquiry.” 25 Va. App. at 712.

- “First, the trial court ‘must determine whether the accused actually invoked his right to counsel’ and whether the defendant remained in continuous custody from the time he or she invoked this right to the time of the statement.” *Id.* (quoting *Smith v. Illinois*, 469 U.S. 91, 95 (1984)).

- “Second, if the accused has invoked his . . . right to counsel and has remained in continuous custody, the statement is inadmissible unless the trial court finds that the statement was made at a meeting with the police that was initiated by the defendant or attended by his lawyer.” *Id.*
- “Third, if the first two parts of the inquiry are met, the trial court may admit the statement if it determines that the defendant thereafter [voluntarily,] ‘knowingly and intelligently waived the right he had invoked.’” *Id.* (quoting *Smith*, 469 U.S. at 95).³

Applying that three-part inquiry in *Quinn*, we held that the trial court erred by failing to suppress two separate incriminating statements elicited from a defendant in custody who had clearly invoked his *Miranda* right to counsel. *Id.* at 713-18. In one instance, several days after Quinn had requested his lawyer to be present for any interview, the investigator read Quinn his *Miranda* rights again. The investigator told Quinn (incorrectly) that his prior request for counsel applied only to the crime for which Quinn had been charged; if Quinn wanted to request counsel in connection with a different criminal investigation, he would have to “‘re-invoke’ his *Miranda* right to counsel.” *Id.* at 707-08. *But see Roberson*, 486 U.S. at 682 (declining to create exception to *Edwards* for custodial interrogation about a different crime). When Quinn did not ask for a lawyer, the investigator spoke with him at length, eliciting incriminating statements about the uncharged offense. *Quinn*, 25 Va. App. at 708. We held that no break in custody had occurred, that the investigator had initiated the conversation, and that Quinn’s failure to invoke his right to counsel after hearing his *Miranda* rights again was insufficient to show that he waived his right to counsel. *Id.* at 714.

We also held that the trial court should have suppressed a second statement elicited from Quinn by a different officer who was unaware that Quinn had previously invoked his right to

³ *Quinn* made clear that voluntariness must also be shown in the third part of the three-part inquiry. *See Quinn*, 25 Va. App. at 710 (“If the interrogation continues without the presence of an attorney, the defendant’s statement is inadmissible unless the Commonwealth proves by a preponderance of the evidence that the defendant voluntarily, knowingly, and intelligently waived his right to retained or appointed counsel.” (citing *Edwards*, 451 U.S. at 482)).

counsel. *Id.* at 716-19. We recognized the Supreme Court’s holding in *Roberson* that “an officer who initiates the reinterrogation of a defendant without knowing of the defendant’s prior request for counsel is not relieved of complying with the *Edwards* rule.” *Id.* at 716. We said that *Roberson* imposed on “law enforcement authorities . . . a duty to inform each other of prior invocations of the *Miranda* right to counsel by suspects in their custody and that the *Edwards* rule requires officers to ascertain prior to interrogation whether a suspect has previously requested counsel.” *Id.*

We applied the three-part inquiry again in our en banc decision in *Ferguson*, 52 Va. App. at 335-36, a case with important parallels to this one. After the police arrested Ferguson on suspicion of burglary and read him his *Miranda* rights, Ferguson asked for a lawyer. *Id.* at 331. Instead of stopping the interrogation, the investigator said, “Okay, well, you don’t have to talk to me. Let me talk to you now.” *Id.* The investigator proceeded for several minutes to detail the evidence against Ferguson and to urge him “to come clean.” *Id.* When Ferguson did not cooperate, the investigator announced that the interview was over and that Ferguson would remain in the interrogation room “for a few minutes” with the police chief, a friend of Ferguson’s family. *Id.* at 332. After 20 minutes of silence, Ferguson blurted out, “either ‘I messed up’ or ‘This is messed up.’” *Id.* He and the police chief then began to talk about Ferguson’s family, and the police chief encouraged Ferguson to help himself by cooperating. *Id.* at 332-33. The investigator returned and, after being read his *Miranda* rights again, Ferguson gave a recorded statement admitting his involvement. *Id.* at 333. The confession occurred 45 minutes after Ferguson was first brought into the interrogation room. *Id.*

We said that the police violated *Edwards* by failing to stop their questioning after Ferguson had unequivocally requested counsel. *Id.* at 338-44. In particular, we held that it was not Ferguson who reinitiated the conversation with police, but the police who reinitiated their

interrogation of Ferguson after violating their obligation to stop questioning him once he invoked his right to counsel. “Any consideration of whether a defendant ‘re-initiated’ the dialogue with police necessarily presumes that police officers have stopped the interrogation upon a defendant’s request for counsel. Indeed, the analysis under *Edwards* presupposes that police will cease all interrogation after a suspect invokes his right to counsel.” *Id.* at 340. We held that “[w]hen police do not cease interrogation, *their* statements constitute an ‘initiation’ of further discussions with a suspect, and any incriminating statements gained during that discussion are deemed inadmissible.” *Id.* (emphasis added). Finding the facts “markedly similar to those in *Hines*,” *id.* at 338, we said that, “as in *Hines*, despite appellant’s invocation of his right to counsel, the interview never ceased. [The i]nvestigator . . . and [Police] Chief continued questioning appellant as if his request for counsel had never been made.” *Id.* at 340. Thus, the question was not whether Ferguson’s statement that broke the silence “‘reinitiated’ a dialogue with police; [the] [i]nvestigator . . . and [Police] Chief[’]s continued interrogation of appellant after he invoked his right to counsel initiated the dialogue.” *Id.* at 347.

The Supreme Court affirmed our decision in *Ferguson*. 278 Va. at 126. The Court said that the officers’ “failure to honor Ferguson’s request for counsel had its intended effect.” *Id.* at 125. The Court held that the “encounter was one continuous custodial interrogation conducted in such a manner as to deliberately disregard a clear, unambiguous and unequivocal invocation of the right to counsel and coerce Ferguson to incriminate himself.” *Id.* at 126.

Ferguson controls the outcome here. Like the officers there, the officers here disregarded Fayne’s clear invocation of his *Miranda* right to counsel. Where Ferguson’s interrogation took only 45 minutes to result in a confession after the police disregarded his request for a lawyer, the officers here interrogated Fayne for more than an hour after he invoked his right to counsel. And when Fayne said he “strongly” requested an attorney, Detective Smith immediately tried to

dissuade him. Smith warned that Fayne would lose his “direct line” to Smith once an attorney got involved. Smith urged that Fayne’s mental health would benefit from making a statement; he warned ominously that he had no idea what would happen once he left the interrogation room. Detective Hodson chimed in, assuring Fayne that the detectives would help him tell his side of the story. Detective Smith then produced incriminating photographs from Fayne’s social media account, telling him that the evidence would look “nuclear bad” without an explanation from Fayne about what happened. When that did not work, Detective Carpenter tried his luck to elicit a confession. And although Carpenter said he would not have interrogated Fayne had he known of his request for counsel, *Roberson* and *Quinn* make clear that Carpenter is deemed to have been on notice that Fayne had invoked his *Miranda* right to counsel.

As in *Ferguson*, the trial court here erred in concluding that it was the accused who reinitiated discussions with the police. To be sure, less than a minute after Detective Carpenter left the interrogation room, Fayne asked to speak with Detective Smith, whom Fayne felt had been kinder to him than Carpenter. But just as Ferguson’s outburst to the police chief after 20 minutes of silence was not a reinitiation by the accused, nor was Fayne’s asking to speak with Smith less than a minute after Carpenter left the room. Any such reinitiation “presupposes” that the police first stopped their interrogation, as *Edwards* and *Miranda* required them to do. *Ferguson*, 52 Va. App. at 340. Here, as in *Ferguson*, the police continued their interrogation in disregard of an explicit request for counsel. To repeat, “[w]hen police do not cease interrogation, their statements constitute an ‘initiation’ of further discussions with a suspect, and any incriminating statements gained during that discussion are deemed inadmissible.” *Id.*

Even assuming for argument’s sake that Fayne reinitiated the discussion, suppression was also required under the third consideration in the three-step inquiry—whether the accused made a voluntary, knowing, and intelligent waiver of his previously invoked right to counsel. “When

considering whether an accused knowingly and intelligently waived his or her previously invoked right to counsel, we look to ‘the totality of the circumstances, including his background and experience and the conduct of the police.’” *Overbey v. Commonwealth*, 65 Va. App. 636, 650 (2015) (quoting *Giles v. Commonwealth*, 28 Va. App. 527, 536 (1998)).

Even though Ferguson ultimately confessed after being reread his *Miranda* rights, we said that his confession “did not follow upon a valid waiver of [his] Fifth Amendment rights.” *Ferguson*, 52 Va. App. at 348 (quoting *Hines*, 19 Va. App. at 222). Here, as in *Ferguson*, the prior invocation of the right to counsel “raise[s] the presumption that [the accused] is unable to proceed without a lawyer’s advice.” *Roberson*, 486 U.S. at 683. Indeed, “to a suspect who has indicated his inability to cope with the pressures of custodial interrogation by requesting counsel, any further interrogation without counsel having been provided will surely exacerbate whatever compulsion to speak the suspect may be feeling.” *Id.* at 686. If the presumption that the defendant needed counsel to voluntarily, knowingly, and intelligently exercise his rights was not overcome in *Ferguson*, where the accused was reread his *Miranda* rights, it was certainly not overcome here when no such renewed warnings were given.

The need for the *Edwards* presumption is clear: “It is easy to believe that a suspect may be coerced or badgered into abandoning his earlier refusal to be questioned without counsel in the paradigm *Edwards* case.” *Shatzer*, 559 U.S. at 106. When the police continue to question an accused in spite of his request for a lawyer, the accused is denied the chance to “regain[] a sense of control or normalcy after . . . [being] initially taken into custody for the crime under investigation.” *Id.* at 107.

The short break in time when Fayne was alone before asking to speak with Smith was not a break in custody, let alone a break in custody long enough “for the suspect to get reacquainted to his normal life, to consult with friends and counsel, and to shake off any residual coercive

effects of his prior custody.” *Id.* at 110. As in *Ferguson*, therefore, there was no valid waiver here of Fayne’s *Miranda* right to counsel.

We are not persuaded by the Commonwealth’s claim that *Correll v. Commonwealth*, 232 Va. 454 (1987), supports affirming the trial court’s ruling. True, the police there had interrogated Correll for two days after he invoked his *Miranda* right to counsel, failing to provide him a lawyer. *Id.* at 460. The Commonwealth did not seek to introduce into evidence his statements from those two days. *Id.* On the third day, after Correll was taken for a polygraph examination, Correll told an officer who was unaware of Correll’s request for counsel that he wanted to speak with him. *Id.* Correll then confessed after being read his *Miranda* rights. *Id.* at 460-61. The Court affirmed the trial court’s finding that Correll had initiated the conversation on the third day. *Id.* at 463.

But we distinguished *Correll* in *Ferguson*, noting that Correll had “never alleged that his request for counsel on the first day of interrogation was linked to any subsequent violations of his Fifth Amendment rights.” *Ferguson*, 52 Va. App. at 346. Correll argued only “that his conversation with the . . . officer on the third day was ‘an extension of the interrogation that began that morning . . . [with] a polygraph test.’” *Id.* (alterations in original). *Correll* is further distinguishable because the Commonwealth there relied on the argument that the officer was “unaware” that Correll had previously invoked his *Miranda* right to counsel. 232 Va. at 460. But the United States Supreme Court in *Roberson* held in 1988, the year after *Correll* was decided, that an *Edwards* violation cannot be excused by an officer’s failure to discover that the accused had previously invoked his right to counsel. *See Roberson*, 486 U.S. at 687-88. In short, *Correll* does not support the Commonwealth’s position here.

We do not foreclose the possibility that the presumption of involuntariness of the waiver of the right to counsel could be overcome by facts sufficient to show a voluntary, knowing, and

intelligent waiver. But our cases in which the presumption of involuntariness of the waiver was overcome generally involved police officers who abided by *Miranda* and *Edwards* by immediately stopping their questioning when the accused asked for a lawyer. *See, e.g., Overbey*, 65 Va. App. at 647-48; *Rashad v. Commonwealth*, 50 Va. App. 528, 536 (2007); *Potts v. Commonwealth*, 35 Va. App. 485, 494, *aff'd en banc*, 37 Va. App. 64 (2001); *Giles*, 28 Va. App. at 533. When, as here, the police have violated their obligation to stop the interrogation, the Commonwealth properly bears “a heavy burden,” *Miranda*, 384 U.S. at 680, to show a voluntary, knowing, and intelligent waiver of the *Miranda* right to counsel.

CONCLUSION

The detectives’ violation of Fayne’s rights under *Edwards* and *Miranda* “tainted any subsequent confession made by appellant while he remained in the[ir] continuous custody.” *Ferguson*, 52 Va. App. at 348. The trial court therefore erred in denying Fayne’s suppression motion. Because Fayne has prevailed in this appeal, he is entitled to withdraw his conditional guilty plea. *See* Code § 19.2-254. Fayne “must be given the opportunity to reassess the admissible evidence that may be used against him and, if the Commonwealth wishes to continue its prosecution, demand a trial if he so desires.” *Hasan v. Commonwealth*, 276 Va. 674, 681 (2008).

Reversed and remanded.

APPENDIX C
Hearing Transcript of Motion to Suppress,
Hampton Circuit Court (April 21, 2023)

1 VIRGINIA:

2 IN THE CIRCUIT COURT OF THE CITY OF HAMPTON

3 CRIMINAL DIVISION

4
5 COMMONWEALTH OF VIRGINIA)

6) Case No.

7 v.)

CR21000769-00

8 BRIAN FAYNE,)

9 Defendant.)

10
11
12 TRANSCRIPT OF PROCEEDINGS

13 Hampton, Virginia

14 April 21, 2023

15
16
17 BEFORE: THE HONORABLE BONNIE L. JONES, Judge

18
19
20
21 -----
22 SCHNEIDER AND ASSOCIATES, L.C.

23 P.O. Box 22348

24 Newport News, Virginia 23609

25 (757) 868-0800

Appearances:

On behalf of the Commonwealth:

AMY CROSS, ESQUIRE

Office of the Commonwealth's Attorney

236 North King Street

Hampton, Virginia 23669

(757) 747-6442

On behalf of the Defendant:

JAMES BROCCOLETTI, ESQUIRE

Zoby & Broccoletti, P.C.

6663 Stoney Point South

Norfolk, Virginia 23502

(757) 466-0750

I N D E X

WITNESSES	Direct	Cross	Red.	Rec.
Daniel Smith	8	25	33	--
Steven Carpenter	35	50	58	--

EXHIBITS

ON BEHALF OF THE COMMONWEALTH

Number	Description	Page
A	Thumb drive	12

ON BEHALF OF THE DEFENDANT

Number	Description	Page
1	Disclosure	31

1 (The court reporter was sworn.)

2 THE COURT: Is Mr. Fayne here?

3 THE BAILIFF: Yes.

4 THE COURT: Okay.

5 MS. CROSS: Your Honor, so that it's not
6 disruptive when it happens, I have asked one of my
7 staff members to please bring over my power cord in
8 case we need to view videos. I didn't realize how low
9 my battery was on my laptop, and I don't want to have
10 any technical issues during the hearing. I just wanted
11 to let the Court know.

12 THE COURT: Oh, okay. Thank you.

13 MS. CROSS: Thank you, Your Honor.

14 (The defendant entered the courtroom.)

15 THE COURT: You're Mr. Fayne?

16 THE DEFENDANT: Yes, ma'am.

17 THE COURT: Good afternoon.

18 THE DEFENDANT: Good afternoon.

19 THE COURT: You may be seated, sir.

20 THE DEFENDANT: Yes, ma'am.

21 THE COURT: All right. We're here this
22 afternoon for a suppression motion. Before we get
23 started, I just wanted to put on the record that I
24 watched the video last Friday. I left a message for --
25 I called -- had somebody call Mr. Broccoletti first,

1 because I couldn't get it to play. And then we called
2 the Commonwealth, and we got -- Ms. Cross gave me --
3 I'm a dinosaur, so I don't know what it's called, but
4 she gave me something and my law clerk was able to get
5 it open.

6 So I have viewed the entire tape, and
7 Mr. Broccoletti had given me a list of certain parts to
8 focus on, and I did that. So just for the record, I
9 just wanted everybody to know what happened.

10 MS. CROSS: Your Honor, so the record is
11 clear, the Commonwealth had offered the Court at our
12 last hearing date of March 29 a thumb drive that had
13 what had been labeled as Commonwealth's Exhibits 1 and
14 2, along with a series of selected subtitles that could
15 be embedded in, I think some of the parts that counsel
16 will review or ask questions about today. We are
17 asking that that be admitted and made part of the
18 record.

19 I will say for the record that the two parts
20 of the interview constitute the entire interview of
21 Mr. Fayne from the beginning when he got into police
22 custody at headquarters until he left, so that should
23 be the totality of the videos, and we would offer that.

24 THE COURT: And I've got the thumb drive
25 here in this brown envelope, so I'll mark it -- do you

1 want me to mark it Commonwealth's Exhibit 1?

2 MS. CROSS: You can, Your Honor. Just the
3 videos themselves are Commonwealth's 1 and 2
4 respectively, so if they're referred to in pleadings
5 for the Commonwealth, they'll say Commonwealth 1 for
6 the first segment of video and Commonwealth's 2 for the
7 second segment of video.

8 THE COURT: Can I mark Commonwealth's
9 Exhibit 1 as the thumb drive?

10 MS. CROSS: Can we mark it as A? That way,
11 we can distinguish -- the thumb drive itself as A and
12 then we can have 1 and 2 as parts of A?

13 THE COURT: Yes. I'll mark it
14 Commonwealth's A with today's date. Okay. It's right
15 here marked, if anybody decides they need it. Okay.

16 MS. CROSS: All right. And Your Honor has
17 reviewed the pleadings and -- oh, to put a place on the
18 record, I believe we mentioned this, but I'm not sure
19 how much Mr. Fayne was in here. Of the records, your
20 Honor, the Commonwealth is conceding invocation of
21 counsel. We are conceding that invocation occurred at
22 about four hours and 13 minutes into the -- what has
23 been marked as Commonwealth's Exhibit 2, so that would
24 not need to be litigated today.

25 The sole issue I believe that counsel will

1 present evidence on and litigate today would be the
2 re-initiation, which occurs later in the video, I
3 believe around the five-hour -- before -- right before
4 the five-hour mark. And so we will be presenting
5 evidence to that and some of the factors that the Court
6 would look at.

7 THE COURT: Mr. Broccoletti, anything you
8 want to put on the record at this point?

9 MR. BROCCOLETTI: No, ma'am. I think we
10 covered that at the last hearing as a predicate to
11 today. Thank you.

12 THE COURT: All right. Great. Thank you.

13 MR. BROCCOLETTI: I would just have a motion
14 to separate the witnesses.

15 THE COURT: All right.

16 MS. CROSS: Your Honor, the Commonwealth's
17 first witness is going to be Detective Smith.

18 THE COURT: Come on up, sir.

19 The other witnesses will need to go into the
20 hall.

21 (The other witnesses exited the courtroom.)

22 MS. CROSS: Good afternoon.

23 THE WITNESS: Good afternoon, Your Honor.

24 THE COURT: Raise your right hand.

25 (The witness was sworn.)

1 THE COURT: You may be seated, sir.

2 THE WITNESS: Thank you, Your Honor.

3 DANIEL SMITH, called as a witness, having
4 been first duly sworn, was examined and testified as
5 follows:

6 DIRECT EXAMINATION

7 BY MS. CROSS:

8 Q. Detective, could you please state your name
9 and occupation for the Court?

10 A. Master Police Officer Daniel Smith, police
11 officer for the City of Hampton Police Division.

12 Q. And I want to direct your attention back to
13 December 20 of 2020. Were you so employed and had --
14 on that date?

15 A. I was.

16 Q. And what on that date were your duties and
17 responsibilities for the police department?

18 A. I was investigating the homicide of Cierra
19 Kelly.

20 Q. Did you -- in the course of your
21 investigation, did you come in contact with the
22 defendant, Brian Fayne?

23 A. I did.

24 Q. Do you see him in the courtroom today?

25 A. I do, seated to the left of his attorney.

1 MS. CROSS: If the record can reflect he's
2 identified the defendant, Your Honor.

3 THE COURT: He has identified the defendant.
4 BY MS. CROSS:

5 Q. And where did you initially come in contact
6 with Mr. Fayne?

7 A. Initially, I made contact with him in the
8 2100 block of Zinzer Court. I spoke to him very
9 briefly, introduced myself and told him, you know, I
10 was investigating something that I needed to talk to
11 him about. At that point, he was transported over to
12 Hampton Police Division Investigations, Interview Room
13 2.

14 Q. Okay. And --

15 MR. BROCCOLETTI: Could the witness just
16 talk more towards the microphone? I'm having a hard
17 time hearing.

18 THE WITNESS: Oh, I'm sorry. No problem.
19 Is it --

20 MR. BROCCOLETTI: If the microphone works.

21 THE COURT: Yeah. It's on. You can tap it.
22 It's on. You just have to speak right into it.

23 THE WITNESS: No problem, Your Honor. Is
24 that better?

25 MR. BROCCOLETTI: Much better. Thank you.

1 BY MS. CROSS:

2 Q. When you came into contact with Mr. Fayne at
3 police headquarters, do you know approximately what
4 time it was?

5 A. I can tell you the exact time. I don't
6 recall the exact -- 1536 hours. So 3:36 p.m.

7 Q. And could you tell the Court a little bit
8 about the condition the defendant was in when you came
9 in contact with him? For example, was he handcuffed?
10 Those sort of things.

11 A. At the time of contact, he was seated in the
12 interview room. He was provided I believe water at the
13 time and snacks, that he was not handcuffed. The door
14 was open, and there was a marked uniformed officer just
15 monitoring if he needed to go to the bathroom.

16 Q. Who, if anyone, came to that interview room
17 with you?

18 A. Initially, it was Detective Henry Hodson.

19 Q. And in the course of your contact with
20 Mr. Fayne, was there recording equipment that was on
21 and utilized in that interview room?

22 A. Yes. The Hampton Police Division utilizes
23 Security Desk audio and visual recording devices.

24 Q. Was that operational on the day of the
25 interview?

1 A. It was.

2 Q. Did you make sure that was turned on
3 throughout the time period that Mr. Fayne was in
4 Interview Room Number 2?

5 A. I did.

6 Q. And during the course of this investigation
7 and afterwards, were you able to review the video of
8 Mr. Fayne's being in that room in its entirety?

9 A. I did.

10 Q. And have you observed that with what's been
11 now included in Commonwealth's Exhibit A that was
12 provided by the Hampton Police Division to the
13 Commonwealth's Attorney's Office?

14 A. I have.

15 Q. And is it a fair and accurate copy that has
16 not been modified or tampered with in any way since it
17 was recorded on December 20 of 2020?

18 A. That is correct, with the exception of the
19 subtitles. I believe there were subtitles added.

20 MS. CROSS: Your Honor, we would ask that
21 Commonwealth's Exhibit A be admitted, as identified by
22 the officer.

23 THE COURT: Any objection?

24 MR. BROCCOLETTI: No, ma'am.

25 THE COURT: All right. That comes in. The

1 thumb drive comes in as Commonwealth's A.

2 (Commonwealth's Exhibit A was received.)

3 BY MS. CROSS:

4 Q. Now, drawing your attention to that, when
5 you initially came in contact with Mr. Fayne, did you
6 provide him with his Miranda rights?

7 A. I did.

8 Q. How did you do that?

9 A. I read from a preprinted card.

10 Q. And did Mr. Fayne indicate that he
11 understood those rights?

12 A. He did.

13 Q. Okay. And those were recorded as part of
14 the interview around one hour and 21 minutes and 50
15 seconds in the -- what's been labeled Commonwealth's
16 Exhibit 2?

17 A. That's correct.

18 Q. Now, after advising Mr. Fayne of his rights,
19 what did you then do?

20 A. We interviewed him in regards to the
21 homicide regarding Cierra Kelly, specifically showing
22 him video from the incident and getting his side of the
23 story.

24 Q. And was Mr. Fayne -- did Mr. Fayne engage in
25 conversation and answer questions or ask questions of

1 the detectives?

2 A. He did.

3 Q. Did Mr. Fayne ask to contact anyone during
4 your conversations with him?

5 A. He did.

6 Q. Whom did he ask to contact?

7 A. Specifically his father on several
8 occasions.

9 Q. Was he permitted to contact his father?

10 A. He was.

11 Q. How many times?

12 A. I don't know the exact number. At least two
13 to three times.

14 Q. Was he also permitted to call his child and
15 fiancée?

16 A. He was.

17 Q. Now, directing your attention to all this,
18 you spoke with Mr. Fayne for several hours. Is that
19 correct?

20 A. That's correct.

21 Q. Around the -- around three and a half, four
22 hours into the interview, did Mr. Fayne begin speaking
23 about having counsel present when he spoke with you
24 all?

25 A. That's correct.

1 Q. Did you make any observations about his
2 talking about an attorney?

3 A. Yes. He spoke about possibly he had the
4 idea of an attorney. He mentioned multiple times that
5 he knew that he should have one there but he didn't
6 know if he wanted one, that he wanted to make specific
7 statements to me but he only wanted to do so one time
8 and one time only.

9 Q. So when he mentioned that, that he may want
10 an attorney to be present but he only wanted to make
11 his statement one time and one time only, how did you
12 respond?

13 A. I told him that was his right.

14 Q. And did he then tell you he wanted an
15 attorney definitively?

16 A. He did not.

17 Q. During the course of the conversation that
18 led up to these conversations about counsel, did
19 Mr. Fayne ask you what he -- what type of charges he
20 was looking at?

21 A. He did.

22 Q. Were you able to explain to him potentially
23 what he could be charged with?

24 A. Absolutely.

25 Q. What, if you recall, did you tell him he

1 could be charged with if there was sufficient evidence?

2 A. Specifically the second-degree homicide, as
3 well as use of firearm and firearm-related incident
4 charges.

5 Q. Did Mr. Fayne indicate during the
6 conversations an understanding of the court system and
7 who would be involved?

8 A. He did.

9 Q. Did he indicate he understood the importance
10 of any statements that he could make and how they
11 potentially could be used?

12 A. That's correct.

13 Q. On the date of the offense, Officer, and
14 looking back at his pedigree information, do you recall
15 how old Mr. Fayne was at the time of the interviews?

16 A. I'd have to look for the exact date. I
17 apologize.

18 At the time of the interviews, he would have
19 been 25 years old.

20 Q. And to your knowledge, had he had prior
21 contact with law enforcement or the judicial system?

22 A. He did.

23 Q. Now, during your interview, could you
24 describe your demeanor with the defendant and how you
25 approached the interview?

1 A. I would say very calm, very direct in
2 regards to the charges, and respectful, as conversation
3 more so than it was anything else.

4 Q. Officer, were you ever armed during --

5 A. I was not.

6 Q. Okay. Was anyone else in the interview room
7 armed at any time around Mr. Fayne?

8 A. No. Our policy forbids firearms in the
9 interview rooms.

10 Q. At any time did you place your hands on
11 Mr. Fayne?

12 A. I did not.

13 Q. Did you threaten Mr. Fayne?

14 A. I did not.

15 Q. Now, at some point, Detective, did you
16 indicate to Mr. Fayne that this would be his one
17 opportunity to speak with you face-to-face?

18 A. That's correct.

19 Q. Can you tell the Court why you made that
20 statement?

21 A. Based on my training and experience. He
22 mentioned the possibility of trying to arrange a
23 meeting later between myself and any counsel he did
24 seek. I told him that the likelihood of that happening
25 was very low and that in my training and experience,

1 anybody who wants to speak after they're already
2 charged and arraigned and assigned an attorney, that
3 that arrangement never happens.

4 Q. And so you were answering the question could
5 it happen?

6 A. Yes.

7 Q. And in the course of -- how long have you
8 been a police officer?

9 A. At that time, approximately 10 years.

10 Q. And in the time period of being a police
11 officer, how many times had that actually happened?

12 A. Zero times.

13 Q. Now, how many -- during the course of your
14 interview with Mr. Fayne, did he indicate he wanted to
15 talk to you?

16 A. He did.

17 Q. Even when he brought up having counsel
18 present, did he continue to reiterate he wanted to
19 speak with you?

20 A. That's correct.

21 Q. At any time during the interview portions
22 where you were with him, did he tell you he did not
23 wish to speak to you?

24 A. He did not.

25 Q. Did you make any observations about

1 Mr. Fayne and his demeanor throughout the interview
2 process?

3 A. I did.

4 Q. Okay. Could you tell the Court what you
5 observed as the interview unfolded?

6 A. Mr. Fayne was very polite and respectful
7 throughout the entire interview. He was very pensive,
8 focused on the specific charge -- which was the
9 second-degree homicide -- and became very remorseful
10 whenever bringing up the victim, Ms. Kelly.

11 Q. Did Mr. Fayne ever have problems using his
12 words or finding words to indicate what he wanted to
13 say to you or another officer who was present?

14 A. Not to my observation. No.

15 Q. Now, do you recall during Mr. Fayne's
16 conversations with you that he stated that if he got a
17 lawyer, the lawyer would tell him not to speak; in
18 other words, he would tell him to keep his expletive
19 mouth shut and let him do his expletive job?

20 A. That's correct.

21 Q. Did that bother Mr. Fayne -- and I'm not
22 asking -- based on what he was saying, not on you --
23 your suspicions, but based on what Mr. Fayne was
24 saying, would that bother him? Did that bother him?

25 A. It did.

1 Q. Did you remain telling him that it was still
2 his right to have counsel prior to making a statement?

3 A. I did.

4 Q. Now, Officer, at one point Mr. Fayne did
5 state to you that he strongly requested an attorney to
6 be present to make his statement. Is that correct?

7 A. That's correct.

8 Q. Did you ask Mr. Fayne for clarification at
9 that point?

10 A. I did.

11 Q. And did you tell him he still had that
12 right?

13 A. I did.

14 Q. Then why did you continue talking to him?

15 A. He did not make a very -- in my opinion --
16 unequivocal invocation. He did not specifically ask
17 for an attorney, nor did he request to remain silent.
18 After I clarified and asked that clarifying question,
19 he continued to talk to me just as we had been before.

20 Q. Now, during the conversations that you had
21 with Mr. Fayne, did he ask questions?

22 A. He did.

23 Q. What type of questions did Mr. Fayne ask the
24 detectives?

25 A. He asked a lot of questions regarding

1 specifically evidence we had. We went back and forth
2 about possible cell phones that were used related to
3 the crime. He asked me information about the victim.
4 At the time, Ms. Kelly was pregnant during her murder.
5 We talked about that for a very long period of time.

6 Q. And were these questions of what officers
7 had in the course of the investigation throughout even
8 after he had requested having counsel present?

9 A. That is correct.

10 Q. Now, at some point, Officer, you left the
11 interview room. Is that correct?

12 A. That is correct.

13 Q. And where -- what -- why did you leave the
14 interview room?

15 A. During the course of my interview with
16 Mr. Fayne -- it was a pretty lengthy interview -- a lot
17 of evidence had developed. Credit card statements,
18 things that needed my direct attention as the primary
19 investigator, so I was in and out of the interview
20 room. One particular part, I was out for a pretty
21 significant period of time, just clarifying some
22 evidence and approving different directions the
23 investigation would take.

24 Q. Now, was the -- you stated you were
25 investigating a homicide offense?

1 A. That's correct.

2 Q. Were there other charges that Mr. Fayne was
3 also being held on down at headquarters?

4 A. That's correct.

5 Q. And what were those charges?

6 A. Narcotics charges.

7 Q. And do you know who was investigating those
8 charges?

9 A. Detective Carpenter and the Marshals Task
10 Force. So it would have been Detective Carpenter,
11 Detective Rowe, and their supervisor Sergeant Giles.

12 Q. Did there come a time when Detective
13 Carpenter entered the interview room with you?

14 A. Yes.

15 Q. Is that when you left the room and went to
16 conduct other case-essential investigations?

17 A. Yes.

18 Q. Now, reflecting -- you've had an opportunity
19 to review the interview that's been provided to the
20 Court, correct?

21 A. I have.

22 Q. At any time, Detective, did you raise your
23 voice at Mr. Fayne?

24 A. No. I don't think so.

25 Q. Okay. And you would admit, though, you told

1 him this was his one opportunity to talk to you?

2 A. Absolutely.

3 Q. Is that true?

4 A. It is true.

5 Q. Would you admit you also told him that he --
6 you wanted to know why things happened?

7 A. Of course.

8 Q. Okay. Why would you ask that?

9 A. I think intention matters. He expressed a
10 lot of remorse about the incident, specifically about
11 his relationship with the victim, and obviously I think
12 that had a lot to do with the incident itself.

13 Q. Okay. Now, did there come a point,
14 Detective, that you actually came -- after leaving,
15 that you came back into the room with Mr. Fayne?

16 A. I did.

17 Q. And can you describe what was going on when
18 you came back into the room?

19 A. I was speaking to my sergeant, giving him
20 the updates on the case. And as I'm speaking to him --
21 forgive me, I don't know exactly which officer -- an
22 officer told me that Mr. Fayne wanted to speak to me
23 once more.

24 Q. And when you went back into the room, who
25 was there?

1 A. Detective Carpenter.

2 Q. And what happened when you went back into
3 the room?

4 A. I greeted him once more, I sat down, and he
5 told me something -- and forgive me, I don't know the
6 exact -- he was speaking very low. And as I walked
7 back in, I greeted him once more. He told me something
8 to which I replied, Thank you, or, I appreciate that,
9 and then he continued to talk to me.

10 Q. Did you immediately begin asking him
11 questions?

12 A. I didn't.

13 Q. Okay. So how did the next step of that
14 proceed once you came back into the room?

15 A. After he explained a lot of his relationship
16 with the victim, Ms. Kelly, as well as a lot of
17 incriminating information, and I asked some clarifying
18 questions to that information.

19 Q. Was that at his -- was he leading that or
20 were you leading that?

21 A. He was leading that.

22 Q. Now, once you came back into the room, did
23 Mr. Fayne ever ask for an attorney again?

24 A. He did not.

25 Q. Did he show any hesitancy about speaking

1 with you or other officers?

2 A. Not speaking to me, no.

3 Q. And I know we asked this before but, again,
4 no weapons were in the room?

5 A. No.

6 Q. How many -- what was the maximum number of
7 officers that were ever in the room with Mr. Fayne at
8 any one time that you were present?

9 A. Possibly three. As one officer left, I may
10 have been in the room at the split-second that one
11 officer was leaving as I was entering, but no more than
12 two during the conversations.

13 Q. Was Mr. Fayne capable -- or not capable --
14 able to stand up, to stretch, to move about the
15 interview room?

16 A. Yes.

17 Q. Was he encouraged to do so?

18 A. He was.

19 Q. And, Officer, did -- you did not do
20 anything -- upon leaving, you did not do anything to go
21 back and initiate contact with Mr. Fayne, did you?

22 A. I did not.

23 Q. Okay. All right. I think those are all the
24 questions. And, Your Honor, just for the record, the
25 Court has stated it viewed the video, and so I think

1 the Court understands what the Commonwealths is asking
2 without further review of the video.

3 THE COURT: Yes. I viewed the video, as I
4 explained, last Friday, because I think I left
5 messages -- I didn't speak directly to either one of
6 you.

7 MS. CROSS: Correct, Your Honor.

8 THE COURT: But I think both of you got
9 messages from me, because I was concerned because I --
10 I didn't call Mr. Broccoletti back and tell him I
11 looked at it, but I figured you two would communicate
12 and he would know that I viewed the video.

13 MS. CROSS: I notified his office.

14 THE COURT: All right. Thank you.

15 Is that true, Mr. Broccoletti?

16 MR. BROCCOLETTI: Yes, ma'am.

17 THE COURT: You got my message and then
18 found out I was able to look at it?

19 MR. BROCCOLETTI: I did, Your Honor.

20 THE COURT: Okay.

21 MR. BROCCOLETTI: Thank you.

22 THE COURT: Thank you.

23 CROSS-EXAMINATION

24 BY MR. BROCCOLETTI:

25 Q. Detective, at what point during the

1 interview did you advise Mr. Fayne of his Miranda
2 warnings?

3 A. At the very beginning of the interview.

4 Q. Do you have those warnings with you?

5 A. I do. They're in my notebook.

6 MR. BROCCOLETTI: May he retrieve those,
7 Judge?

8 THE COURT: Yes.

9 THE WITNESS: Your Honor, would you like me
10 to give them directly to --

11 THE COURT: I don't know what he wants next,
12 so I'll have to wait and see.

13 THE WITNESS: That's fine.

14 BY MR. BROCCOLETTI:

15 Q. Detective, is that the card that you read
16 from when you orally advised Mr. Fayne of his rights?

17 A. I believe so. Yes.

18 Q. Could you read that to us, please?

19 A. Yes.

20 You have the right to remain silent.
21 Anything you say can be used against you in a court of
22 law.

23 Q. Could you slow down, please?

24 A. Sure.

25 You have the right to remain silent.

1 Anything you say can be used against you in a court of
2 law. You have the right to talk to a lawyer and have
3 him or her present with you while you're being
4 questioned. If you cannot afford to hire a lawyer, one
5 will be appointed to represent you before any
6 questioning. You can decide at any time to exercise
7 these rights and not answer any questions or make any
8 statements. Do you understand each of these rights
9 I've explained to you?

10 Q. And he acknowledged that he understood
11 those?

12 A. Yes.

13 Q. So when the defendant tells you that I
14 strongly request a lawyer, in your mind, that's not an
15 unequivocal invocation of his right to counsel?

16 A. From my recollection, he said, I would
17 strongly want him here.

18 We were speaking about an attorney, but he
19 mentioned numerous times throughout the interview
20 possibly having an attorney. I think he mentioned two
21 by name, Mr. Ron Smith and Mr. Tim Clancy a couple of
22 times. So I did clarify, yes.

23 Q. All right. I'm specifically asking you
24 about a time at -- I believe it is the 4:13 mark, when
25 you're beginning to talk -- where he's beginning to

1 talk and he talks about either strongly requesting a
2 lawyer or wanting a lawyer present, that I need to do
3 this in front of him.

4 Do you recall that?

5 A. I don't recall that verbatim, but it's in
6 line with the conversation. That's correct.

7 Q. And you tell him, That's your choice?

8 A. Correct.

9 Q. And he tells you, I want a lawyer, because I
10 could easily slip up and say something.

11 Do you recall that?

12 A. That sounds correct. Yes.

13 Q. And that he tells you, I'm telling you now
14 while you're in front of me, that's what I'm going to
15 do. I'm not ducking it, but at the same time, I have
16 to protect what I'm saying.

17 Do you recall him saying that?

18 A. That's correct.

19 Q. And at that point, you then tell him, That's
20 your right?

21 A. That's correct.

22 Q. But then you begin to try to talk him out of
23 it, don't you?

24 A. I believe I continued to speak to him. Yes.

25 Q. Right. You begin to dissuade him from

1 having a lawyer present, because if he had a lawyer
2 present, then he would be unable to speak to you?

3 A. I believe I may have clarified some
4 questions. It wasn't my intention to talk him out of
5 any -- using his rights.

6 Q. You told him that the lawyer can do whatever
7 the hell they want. Do you remember that?

8 A. That's correct.

9 Q. And you told him, Money or not, you're not
10 going to have a direct line to me, you're not going to
11 be able to call me?

12 A. That's correct.

13 Q. And that if a lawyer gets involved in the
14 case, the lawyer is not going to let you speak to me?

15 A. That's correct.

16 Q. And you don't consider that to be trying to
17 talk him out of having a lawyer?

18 A. He expressed multiple times that he did want
19 to make a statement to me, and I wanted to ensure that
20 he understood that if that was the path he went down,
21 he wouldn't be able to.

22 Q. Would you agree with me that he wanted to
23 make a statement in the presence of his lawyer and also
24 the Commonwealth's Attorney?

25 A. That's correct.

1 Q. All right. Detective, you have been
2 previously determined to have failed to recognize a
3 suspect's invocation of his constitutional rights.
4 Have you not?

5 A. I have.

6 Q. As a result of that, you did not honor that
7 suspect's invocation?

8 A. That's correct.

9 Q. In fact, when you were asked by the Hampton
10 Commonwealth's Attorney's Office if the suspect had
11 invoked his rights, you said no?

12 A. That's correct.

13 Q. And so this has been -- Judge, may I
14 approach the witness?

15 THE COURT: Yes.

16 BY MR. BROCCOLETTI:

17 Q. So is this disclosure made by the
18 Commonwealth's Attorney's Office with respect to the
19 particular issue that I just discussed with you?

20 A. That's correct.

21 MR. BROCCOLETTI: Judge, I'd move to admit
22 this as Defendant's Exhibit 1.

23 THE COURT: Ms. Cross?

24 MS. CROSS: Judge, I submit it. I don't
25 know that the actual disclosure needs to be submitted

1 in light of the fact that the officer has admitted to
2 everything the Court -- that counsel has just asked
3 him.

4 THE COURT: All right. I'm going to allow
5 it to come in. I'll mark it as Defendant's Exhibit 1.

6 (Defendant's Exhibit 1 was received.)

7 BY MR. BROCCOLETTI:

8 Q. Now, at some point you said that you had
9 left the interview room, correct?

10 A. That's correct.

11 Q. And you were investigating some other
12 aspects of the case?

13 A. Yes, sir.

14 Q. Detective Carpenter was present with
15 Mr. Fayne during that time?

16 A. I believe so. Yes.

17 Q. Have you been able to review the video which
18 contains Detective Carpenter's interactions with
19 Mr. Fayne?

20 A. Yes, sir.

21 Q. And would it be fair to say that Detective
22 Carpenter -- and he'll be able to speak for himself,
23 but based on your review, that Detective Carpenter
24 continued to interrogate the defendant after you had
25 left?

1 A. I believe the interview took place regarding
2 narcotics that were found inside the home.

3 Q. Did Detective Carpenter have an opportunity
4 to observe the beginning of the interview that you had
5 conducted with Mr. Fayne?

6 A. I don't know the answer to that question,
7 sir.

8 Q. At some point in time, you come back in the
9 room, correct?

10 A. That's correct.

11 Q. And Mr. Fayne begins to speak to you, as
12 counsel indicated?

13 A. That's correct.

14 Q. As you come back into the room, you never
15 Mirandized the defendant again, did you?

16 A. I did not.

17 Q. No officer Mirandized the defendant again at
18 that point?

19 A. No, Your Honor. No, sir. I'm sorry.

20 Q. That's all right.

21 In fact, you never questioned Mr. Fayne
22 whether or not he wanted to waive the presence of a
23 lawyer?

24 A. Not a second time, no.

25 Q. And you never asked him whether he wanted to

1 waive the presence of a lawyer, because you never
2 recognized the fact that he had asked for a lawyer the
3 first time, correct?

4 A. That's correct.

5 Q. And to your knowledge, no officer ever asked
6 Mr. Fayne whether he waived the presence of a lawyer?

7 A. That's correct.

8 Q. Would you agree with me that if we take that
9 4:13 mark when the Commonwealth has conceded the
10 defendant has invoked his right to counsel until
11 there's a discussion with you and Mr. Fayne after you
12 had already left, that there's approximately one hour
13 and 20 minutes of continued interrogation by Detective
14 Carpenter?

15 A. I don't know the exact time, but that
16 sounds -- that interview does seem to be taking place
17 that long. Yes.

18 MR. BROCCOLETTI: Thank you. No other
19 questions.

20 THE COURT: I have no questions.

21 Redirect?

22 MS. CROSS: Very briefly, Your Honor.

23 REDIRECT EXAMINATION

24 BY MS. CROSS:

25 Q. Detective, during the interview, when you

1 stepped out, did you have some concerns about
2 Mr. Fayne's mention of counsel?

3 A. I did.

4 Q. Because of that, did you seek guidance from
5 your chain of command?

6 A. I did.

7 Q. And what specifically did you do to ensure
8 you were trying to honor any requests that Mr. Fayne
9 had?

10 A. The interview was being monitored by Senior
11 Sergeant Crouch. At the time, he was the sergeant in
12 charge of the investigation. I explained to him the
13 nature of the interview, specifically a lot of parts
14 that Sergeant Crouch was able to watch, and he agreed
15 that he did not believe that it was an unequivocal
16 invocation, based on the fact that he wanted to make a
17 statement and continued to go back and forth with
18 whether or not he wanted an attorney present.

19 Q. And I ask you that because based on your
20 interactions with your senior officer, did you go back
21 in and continue questioning without readvising?

22 A. I did.

23 MS. CROSS: Okay. No further questions,
24 Your Honor.

25 THE COURT: Does he need to stay?

1 MS. CROSS: I would ask him to stay, just in
2 case, Your Honor.

3 THE COURT: All right. If you'll wait
4 outside.

5 (The witness stood down and exited the
6 courtroom.)

7 THE COURT: Who is next?

8 MS. CROSS: Detective Carpenter, Your Honor.

9 THE COURT: All right. Detective Carpenter.
10 (The witness entered the courtroom.)

11 THE COURT: Good afternoon.

12 THE WITNESS: Ma'am.

13 THE COURT: Raise your right hand.

14 (The witness was sworn.)

15 THE COURT: You may be seated.

16 STEVEN CARPENTER, called as a witness,
17 having been first duly sworn, was examined and
18 testified as follows:

19 DIRECT EXAMINATION

20 BY MS. CROSS:

21 Q. Detective Carpenter, could you please state
22 your name and occupation for the Court?

23 A. Sergeant Steve Carpenter. Hampton Police
24 Division.

25 Q. And, Detective Carpenter, drawing your

1 attention back to December 20 of 2020, were you so
2 employed?

3 A. Yes. I was with the City of Hampton.

4 Q. And on that -- at that time, were you
5 investigating a matter relating to defendant Brian
6 Fayne?

7 A. Yes. I was assisting Detective Smith.

8 Q. Okay. What in the course of your employment
9 brought you into contact with Mr. Fayne?

10 A. Essentially we were charged or tasked with
11 locating him.

12 Q. Okay. And where did you locate Mr. Fayne?

13 A. Down off of -- Avalon Townhomes. I forgot
14 the name of the street.

15 Q. When you say we, who are you referring to?

16 A. It was myself, and at that time I was part
17 of the Marshal Service Task Force.

18 Q. So as part of that task force, you were able
19 to locate Mr. Fayne?

20 A. Yes, we did.

21 Q. Okay. At the time of his location, did --
22 was Mr. Fayne placed under arrest for any other
23 charges?

24 A. Not at the time. It was just the warrants
25 that were on file.

1 Q. Now, did you come in contact with Mr. Fayne
2 out where the Marshal Service found him?

3 A. Yes. I was on scene when he was arrested.

4 Q. Okay. And did you actually have
5 conversation with Mr. Fayne at that point?

6 A. No. I don't believe I spoke to him on
7 scene. It was later at Investigations.

8 Q. Okay. And you stated later at
9 Investigations. Do you remember when you came into
10 contact with Mr. Fayne?

11 A. I don't know the exact time. I was in and
12 out of the building, because I was doing a search
13 warrant at the residence. I had briefly watched
14 portions of the interview being conducted by Detective
15 Smith, and at one point I entered the interview room.

16 Q. So specifically tell the Court a little bit
17 about there was a search warrant going on. How did
18 that relate to the investigation?

19 A. We were attempting to recover evidence from
20 the crime that we were investigating, and it led into
21 further drugs being located in the residence.

22 Q. Okay. So you ended up actually being part
23 of an investigation on a separate matter in addition to
24 what Mr. Fayne was taken down to headquarters for?

25 A. That's correct.

1 Q. So you knew that Mr. Fayne was at
2 headquarters and that he was being interviewed. Is
3 that correct?

4 A. Yes, ma'am.

5 Q. How much of that interview were you able to
6 observe?

7 A. I can't put a timeframe on it. I know I was
8 in and out. I watched and listened to portions of it
9 and then strategized on how I was going to interview
10 him myself.

11 Q. Okay. So you did not watch the entire
12 interview from beginning until when you entered the
13 actual interview room?

14 A. That's correct.

15 Q. Now, can you tell the Court when you entered
16 the room, what did you do? The interview room. Sorry.

17 A. Trying to get Mr. Fayne to open up and speak
18 about his involvement of what occurred.

19 Q. Could you talk to the Court about
20 Mr. Fayne's demeanor when you entered the room?

21 A. To me, it looked like he was experiencing a
22 range of emotions. At different points, he was
23 covering his face, speaking very low, looked like he
24 was having trouble breathing. At one point, I tried to
25 get him to sit up straight or stand up, take some deep

1 breaths, get some air into his body to make him feel
2 better so hopefully he would be able to speak with us.

3 Q. Now, during the time that you were in with
4 Mr. Fayne, did he mention having an attorney with him?

5 A. He did not.

6 Q. Were you aware -- when you were in and out
7 of the room watching some of the interview portions,
8 were you aware of any -- at any time that Mr. Fayne had
9 asked for counsel?

10 A. I was not.

11 Q. Had you known Mr. Fayne asked for counsel,
12 how would you have responded?

13 A. I wouldn't have even entered the room.

14 Q. Now, from what you observed of the
15 interview, the portions, can you -- did you have a
16 different interview tactic than Detective Smith who was
17 in with the defendant?

18 A. Yes.

19 Q. Okay. And how were those two tactics of
20 interview styles different?

21 A. It seemed like when Detective Smith was in
22 the room, that Mr. Fayne was controlling the interview.

23 Q. Tell the Court what you mean by that.

24 A. Just the way Detective Smith would ask the
25 question, Mr. Fayne -- it seemed like he would deflect

1 from that question and try to talk about something
2 else, and then it would just kind of circle back around
3 where it didn't look like Detective Smith was actually
4 leading the investigation. So my style was more -- I
5 would say authoritative, asking matter-of-fact
6 questions.

7 Q. How did Mr. Fayne respond when you entered
8 the interview room?

9 A. At some points, he would open up. Some
10 points, he didn't like the way I was interviewing and I
11 believe he even made a comment that I was too
12 aggressive for his style.

13 Q. At that point, did he tell you he didn't
14 want to talk to you?

15 A. No.

16 Q. So after going through -- you spoke with
17 Mr. Fayne for an hour or more. Is that correct?

18 A. Approximately. Yes, ma'am.

19 Q. During that time, did he tell you that he
20 wanted to talk to you?

21 A. He said he wanted to explain only one time
22 what occurred, he didn't want to have to keep going
23 over it. But at that point in the interview, I
24 explained to him he hasn't explained anything yet.

25 Q. So do you recall him telling you, I want to

1 give a statement but I don't want to -- pardon me, Your
2 Honor -- fuck up my statement?

3 THE COURT: Say whatever it is you need to
4 say.

5 MS. CROSS: Thank you, Your Honor.

6 THE COURT: If you need my permission, I
7 give you permission.

8 MS. CROSS: Thank you, Your Honor.

9 BY MS. CROSS:

10 Q. Do you recall Mr. Fayne telling you, I want
11 to give a statement, but I don't want to fuck up my
12 statement?

13 A. Along those lines. Yes, ma'am.

14 Q. And do you recall him telling you, I already
15 told him -- Detective Smith -- that I'm willing to talk
16 about anything we need to talk about?

17 A. Yes.

18 Q. Did Mr. Fayne ask you for things in exchange
19 for talking to him?

20 A. No.

21 Q. Did he ask you to call his dad?

22 A. He did ask to speak to his father. I know
23 Detective Smith had already got him on the phone twice.

24 Q. And during this time that you're in there,
25 had -- did Mr. Fayne have the basic provisions? Did he

1 have food, water, smokes, anything that he asked for
2 that was reasonable along those lines?

3 A. Yes, he did.

4 Q. Now, at some point, Detective, did you end
5 up walking out of the interview room?

6 A. Yes, ma'am.

7 Q. Can you explain to the Court what led up to
8 that?

9 A. I felt like we were just going in circles.
10 He would explain up to a certain point what occurred
11 and then he would stop and kind of backtrack, and I
12 explained to him I didn't want to waste his time and I
13 don't want to waste my and I was leaving the interview
14 room.

15 Q. So you said he would explain up to a certain
16 point. What would he explain?

17 A. That the female arrived on scene, got into
18 his car, got out of the car, and then he would pretty
19 much stop there.

20 Q. Okay. And he told you that because -- he
21 would tell you that because it was on video?

22 A. Yes, ma'am.

23 Q. So once you got to an impasse of not getting
24 any further, did you leave the room?

25 A. Yes, I did.

1 Q. Now, I want to take you back to that time
2 period that you were with Mr. Fayne. Did you threaten
3 him?

4 A. I did not.

5 Q. Did you tell him this is his one opportunity
6 to get this off his chest?

7 A. Yes, I did.

8 Q. And why did you say that?

9 A. In my experience, when somebody has gone
10 through an incident like this, it can be hard to talk
11 about it, but once you do talk about it, it can make
12 you feel better.

13 Q. And how many -- now, you say your training
14 and experience. How long have you been a police
15 officer?

16 A. June will be 20 years.

17 Q. And have you interviewed persons that were
18 in similar situations as Mr. Fayne, charged with
19 different types of multiple serious offenses?

20 A. Yes, ma'am.

21 Q. And is it common for them to have difficulty
22 talking about an incident for the first time?

23 A. Yes, ma'am.

24 Q. And in the course of your training and
25 experience, have you used certain techniques in order

1 to assist someone in walking through that and
2 eventually being able to talk about a situation?

3 A. Yes, I have.

4 Q. Okay. If you had to describe -- you
5 mentioned that Mr. Fayne said that your style was a
6 little too aggressive. Was your style different than
7 Detective Smith's?

8 A. Yes, it was.

9 Q. Were you louder than Detective Smith?

10 A. I don't know if I was certainly louder. I
11 was just more assertive.

12 Q. Okay. Now, on the video, were -- have you
13 been able to watch the video that was recorded of the
14 interview of Mr. Fayne with law enforcement?

15 A. Yes, I have.

16 Q. Okay. So could you describe how Mr. Fayne
17 was speaking in the room? There's a lot of noise on
18 the video. I mean, what was -- how -- what was his
19 volume?

20 A. He was speaking very low. Most of the time,
21 he was either leaned over, hunched over next to the
22 table on the wall. At times, it was hard to hear
23 exactly what he was saying.

24 Q. And so -- and you were not leaned over the
25 table or the wall at any point, were you?

1 A. No.

2 Q. So you were speaking very clearly?

3 A. Yes, ma'am.

4 Q. And possibly authoritatively. Yes?

5 A. Yes.

6 Q. But at any time did you -- now, did you
7 place your hands on Mr. Fayne?

8 A. I did.

9 Q. Can you tell the Court what was going on
10 with that?

11 A. While standing next to him, he -- I believe
12 at that point, we were both standing up and he was kind
13 of hunched over the chair. He could have been sitting
14 in the chair. It looked like he was having -- I
15 thought he wanted to talk to me, but he wasn't feeling
16 like he could breathe. It looked to me like he was
17 just struggling, so I was trying to get him to breathe.
18 I placed my hand on his shoulder like, hey, man, I'm
19 here to talk to you, you know, if you talk, it should
20 make you feel better.

21 Q. Okay. How did he respond?

22 A. He responded to that and began speaking.

23 Q. Now, you finally -- even though he did
24 respond, you still felt you were going in circles and
25 finally left?

1 A. That's correct.

2 Q. And you told Mr. Fayne there's nothing else
3 you can doing for him, and that was it?

4 A. Yes, ma'am.

5 Q. Okay. Now, Detective, was that the end of
6 your interview -- in your mind, when you walked out the
7 door, was that the end of your interview with him?

8 A. Yes, it was.

9 Q. Did you come back into contact with
10 Mr. Fayne?

11 A. I did.

12 Q. Can you tell the Court the circumstances
13 that led to you going back in and speaking with
14 Mr. Fayne again?

15 A. After I had left the room, the door was
16 closed. Probably less than a minute later, Mr. Fayne
17 himself opened the door and actually asked to speak to
18 Detective Smith, but he wasn't present at that moment,
19 and I eventually came back in the room.

20 Q. You came back into the room, and did
21 Mr. Fayne tell you that you were too aggressive for
22 him?

23 A. Yes, he did.

24 Q. And did you apologize to him for that but
25 you were trying not to waste his time and your time?

1 A. That's correct.

2 Q. Okay. And were -- did you then engage in
3 speaking with Mr. Fayne for a few moments -- several
4 minutes before Detective Smith was retrieved?

5 A. Yes, ma'am.

6 Q. Okay. Can you characterize those few
7 minutes that you had with Mr. Fayne?

8 A. After coming back in the room?

9 Q. After coming back into the room.

10 A. I don't know if I would say he seemed more
11 relaxed, but he seemed like he wanted to talk. He just
12 specifically wanted to talk to Detective Smith because
13 he said he had built a rapport with him.

14 Q. Now, at one point after you came back in,
15 did someone else come in with you?

16 A. Yes. Sergeant Giles came in.

17 Q. Did you become upset with Mr. Fayne when you
18 came back in when he answered some of your questions or
19 provided some information? Or at least ...

20 A. I don't know if I would classify that I was
21 upset with him.

22 Q. Was there -- did there come a point in your
23 conversations with Mr. Fayne that you felt like he was
24 misleading or lying to you and the other officer about
25 information he was providing?

1 A. Yes.

2 Q. Did you attempt to redirect Mr. Fayne when
3 you essentially caught him in what you believed was
4 either a misstatement or a lie?

5 A. Yes. I went over what he had previously
6 told me before I left the interview room the first
7 time.

8 Q. During these few minutes before Detective
9 Smith came back in, did Mr. Fayne again state that he
10 only wanted to tell his story one time?

11 A. That's correct.

12 Q. When he asked to tell his story one time,
13 did he ask for a lawyer to be there?

14 A. He did not.

15 Q. Did he tell you he didn't want to tell the
16 story?

17 A. He did not.

18 Q. Now, you have seen the video. Is that
19 correct?

20 A. I have.

21 Q. And would it be fair to say that the
22 interview and the language that was used when you and
23 Sergeant Giles were in the room was much different than
24 when Detective Smith was in the room?

25 A. Yes, ma'am.

1 Q. However, did you honor the defendant's
2 request to have Detective Smith brought back to the
3 interview room to meet with Mr. Fayne?

4 A. I did.

5 Q. Did Detective Smith come back?

6 A. Yes, ma'am.

7 Q. When Detective Smith came back into the
8 room, how did Mr. Fayne respond?

9 A. He began speaking about what occurred.

10 Q. So almost immediately when the detective he
11 requested to be present, he began telling you and
12 the -- and Detective Smith about the victim and what
13 had occurred?

14 A. Yes, ma'am.

15 Q. At any point after that, did Mr. Fayne ask
16 for counsel?

17 A. No, ma'am.

18 Q. Did he ask to stop the interview?

19 A. He did not.

20 Q. Did any other officers come into the room
21 with the two of you and Mr. Fayne?

22 A. No.

23 Q. Did you threaten Mr. Fayne to make a
24 statement?

25 A. I did not.

1 Q. Even when -- even before Detective Smith
2 came in, did you threaten Mr. Fayne that he had to
3 talk?

4 A. I did not.

5 MS. CROSS: If I could have one moment,
6 Judge.

7 THE COURT: Go ahead.

8 BY MS. CROSS:

9 Q. Detective, you re-entered the room at
10 approximately five hours and 31 minutes and 29 seconds.
11 Does that sound about right? About five and a half
12 hours into the video, you came back into the room?

13 A. It sounds about right.

14 Q. Okay. And do you recall the defendant
15 telling you during that time, I'm trying to cooperate,
16 man, it just took time, with me it just took time?

17 A. I do remember that statement.

18 MS. CROSS: Please answer any questions that
19 Mr. Broccoletti may have for you or the Court may have
20 for you.

21 THE COURT: Mr. Broccoletti?

22 MR. BROCCOLETTI: Yes, ma'am.

23 CROSS-EXAMINATION

24 BY MR. BROCCOLETTI:

25 Q. Sir, were you present in the -- is it like a

1 video room where you're watching what's going on inside
2 the interrogation room? I'm not familiar with your
3 setup.

4 A. So you're talking about outside the --
5 outside of the actual room where the interview is being
6 conducted?

7 Q. Correct.

8 A. It's in a hallway.

9 Q. All right. Were you present for that --
10 were you in that hallway during the interview by
11 Detective Smith of the defendant?

12 A. At times, I was.

13 Q. Were you present when the detective
14 Mirandized Mr. Fayne?

15 A. I don't believe I was.

16 Q. Were you present or did you hear the
17 defendant say, I strongly request a lawyer?

18 A. I did not.

19 Q. Did you hear any discussions among Detective
20 Smith and your supervisors about whether or not the
21 defendant had invoked his right to counsel?

22 A. I did not.

23 Q. Prior to the time that you went into the
24 interrogation room to speak to Mr. Fayne, did you
25 confer with any other detectives about whether he was

1 Mirandized, whether he asked for a lawyer, whether he
2 wanted to speak? Did you ask any of those questions?

3 A. I'm certain that he was Mirandized.

4 Q. You didn't hear it, did you?

5 A. I didn't watch it on the video.

6 Q. Okay. So you can't be certain of anything,
7 can you?

8 A. I know the process we've done for 20 years
9 since I've been here.

10 Q. So did you ask anybody was he Mirandized,
11 did he waive, did he agree to speak, did he ask for a
12 lawyer? Did you ask any of that before you went in
13 there?

14 A. Not that I recall.

15 Q. So at the time that you went in there, the
16 parts that you had seen and what you had heard, I think
17 you had talked about Mr. Fayne basically controlling
18 the interview over Detective Smith?

19 A. Yes, sir.

20 Q. And so you came in with a different
21 interrogation -- I think your words were an
22 interrogation strategy?

23 A. Yes, sir.

24 Q. And was it predetermined that Detective
25 Smith was going to leave the interview room and that

1 you were then going to take over?

2 A. No.

3 Q. So it just happened that way?

4 A. Yes.

5 Q. He walked out and you decided to give it a
6 shot?

7 A. Yes, sir.

8 Q. Because you were frustrated that Detective
9 Smith hadn't gotten anywhere?

10 A. I wouldn't say frustrated.

11 Q. Well, you were frustrated that Mr. Fayne was
12 controlling the interview?

13 A. It's not frustration. It's just different
14 levels of experience.

15 Q. So define to me what your interrogation
16 strategy would have been at that point.

17 A. Just to ask him basic questions about what
18 occurred.

19 Q. So when you went in to speak to Mr. Fayne,
20 did you inquire of him about Miranda?

21 A. I did not.

22 Q. Did you inquire with him about counsel?

23 A. I did not.

24 Q. Or making a statement, anything like that?
25 You just -- the answer is no? I'm sorry.

1 A. It's no.

2 Q. So you went in and began -- I think the
3 first part of your questioning with him dealt with some
4 cocaine that was found in the apartment?

5 A. Yes, sir.

6 Q. And then after that is when you went
7 directly into the shooting?

8 A. That's correct.

9 Q. And you were by yourself at that point? It
10 was just you and him?

11 A. It -- I think initially it was. I think
12 Detective Smith might have been in and out.

13 Q. All right. I think counsel asked you this
14 earlier, but do you recall the defendant telling you
15 early on after you had gotten in that I don't want give
16 a statement, man, I don't want to fuck up my statement?

17 A. I remember him saying that he didn't want to
18 mess up his statement. I don't recall about him not
19 wanting to give a statement.

20 Q. All right. Because you recognize that part
21 of the Miranda warnings would be that the defendant can
22 stop the interrogation at any point?

23 A. Yes. He could.

24 Q. And not give a statement and just stop it at
25 that point, right?

1 A. Yes, sir.

2 Q. Did you question him about that, whether he
3 wanted to continue to give you a statement?

4 A. After he made it?

5 Q. Yeah.

6 A. I don't recall the first part of the
7 statement. I know he stated he didn't want to mess up
8 his statement, but I don't think I ever questioned him
9 directly if he wanted to give a statement.

10 Q. Counsel asked you about whether or not you
11 told the defendant that you -- he had to talk to you or
12 something to that effect, correct? Do you remember
13 that?

14 A. Yes, sir.

15 Q. The second person that came into the room
16 was Sergeant -- I'm sorry?

17 A. Giles.

18 Q. Giles. When he came in, a significant part
19 of the interview was already completed?

20 A. I believe so. Yes, sir.

21 Q. And when he came in, he again had a
22 different tactic than Detective Smith, correct?

23 A. I would say so.

24 Q. And do you remember Detective Giles telling
25 him, Well, Brian, you're in a fucked-up situation,

1 because this is what we're here to do is to fucking
2 talk about this. Okay? So have a seat, pull up a
3 chair, and let's fucking talk about it.

4 Do you remember him saying that?

5 A. Something to that effect. I don't know if
6 it was the exact words.

7 Q. Did Detective -- excuse me. Did Sergeant
8 Giles ever -- do you know where he was during the
9 initial part of the interview with Detective Smith?

10 A. I do not.

11 Q. Do you know if he watched any part of it or
12 heard any part of the Mirandizing or invocation of
13 rights or anything?

14 A. I wouldn't know if he did.

15 Q. So after you left the room, you said it was
16 less than a minute before Mr. Fayne knocked on the
17 door?

18 A. He opened the door.

19 Q. And you came back into the room?

20 A. Yes, sir.

21 Q. And when you came back into the room, did
22 you at all consider Mirandizing him again at that
23 point?

24 A. I did not.

25 Q. Did you consider asking him whether or not

1 he waived the presence of counsel at that point?

2 A. I did not ask him that.

3 Q. Did you consider asking him whether or not
4 he wished to go forward and make a statement at that
5 point?

6 A. When he said he wanted to talk to Detective
7 Smith?

8 Q. Would you agree with me it was approximately
9 an hour and 20 minutes that you had interviewed
10 Mr. Fayne after Detective Smith had left the room
11 before you had left the room?

12 A. Repeat your question again, sir.

13 Q. Sure. I'm sorry. It's a bad question.
14 It's late and it's a Friday afternoon. I apologize.

15 Would you agree with me it was approximately
16 an hour and 20 minutes from the time that you had
17 walked into the room to begin questioning Mr. Fayne
18 until the time that you left the room?

19 A. When I left the room the first time before
20 he opened it?

21 Q. Correct.

22 A. I'd say approximately about an hour.

23 MR. BROCCOLETTI: That's all the questions I
24 have.

25 THE COURT: I don't have any questions.

1 Redirect?

2 MS. CROSS: Very briefly, Your Honor.

3 REDIRECT EXAMINATION

4 BY MS. CROSS:

5 Q. Detective, on the screen do you recognize
6 the individuals that are appearing?

7 A. Yes, ma'am. That's myself and Mr. Fayne.

8 Q. And drawing your attention to about five
9 hours and three minutes into -- counsel asked you about
10 the statement, I don't want to fuck up my statement.

11 (Video played.)

12 BY MS. CROSS:

13 Q. So Mr. Fayne said, I want to give a
14 statement, but I don't want to fuck up my statement.

15 Is that correct?

16 A. That's what it sounded like to me.

17 (Video played.)

18 BY MS. CROSS:

19 Q. Now, Officer, why were you asking him about
20 playing the video and denials of evidence? What made
21 you ask him about that? Had Mr. Fayne denied being
22 there?

23 A. At that point, I don't remember if he denied
24 being there or not. Can you repeat your question
25 again?

1 Q. Sure. You're talking to Mr. Fayne about
2 appearing before a jury and the entire interview that
3 we're seeing today that the Court has seen being
4 played?

5 A. Uh-huh.

6 Q. And you mentioned does Mr. Fayne want to
7 see -- have a jury see him denying all of the evidence
8 that essentially the police had. Had Mr. Fayne denied
9 being at the scene?

10 A. Without watching the video a little bit
11 further, I don't think he ever denied being there, but
12 I think he would make the statement that that's what's
13 on video.

14 (Video played.)

15 BY MS. CROSS:

16 Q. So he said, I told him -- Detective Smith --
17 already that I'm willing to talk about anything we need
18 to talk about.

19 Is that what he told you?

20 A. Yes, ma'am.

21 Q. He just wanted to do it all at one time?

22 A. That's correct.

23 Q. Drawing your attention to 5:30 and 28
24 seconds in Commonwealth's 2 ...

25 (Video played.)

1 BY MS. CROSS:

2 Q. At that point, was that the end of your
3 interview?

4 A. It was.

5 (Video played.)

6 MS. CROSS: For the record, I'm continuing
7 to play.

8 (Video played.)

9 BY MS. CROSS:

10 Q. So you didn't go back in the room?

11 A. Not initially.

12 Q. Okay. And was Detective Smith there where
13 you could find him?

14 A. Not outside the room.

15 MS. CROSS: All right. I don't have any
16 further questions based on the cross.

17 THE COURT: Does he need to stay?

18 MS. CROSS: I would ask him to stay briefly,
19 Judge.

20 THE COURT: All right. You can go back out
21 where you were.

22 (The witness stood down and exited the
23 courtroom.)

24 THE COURT: Who is next?

25 MS. CROSS: Judge, for the purposes of the

1 suppression hearing, the Commonwealth would rest.

2 THE COURT: All right. Commonwealth rests.

3 Mr. Broccoletti?

4 MR. BROCCOLETTI: Judge, we have no
5 evidence. Just argument.

6 THE COURT: Okay. It's your motion, sir.

7 MR. BROCCOLETTI: When we were before the
8 Court last time, I gave the Court some cases. I don't
9 know if the Court had an opportunity to review those.

10 THE COURT: Yes. I have reviewed them.

11 MR. BROCCOLETTI: I cannot imagine a more
12 coercive atmosphere that exists in that interrogation
13 room where a defendant's rights to counsel were just
14 completely ignored. And not just ignored. Once he
15 invoked, as the Commonwealth has conceded, what makes
16 this worse is that they tried to talk him out of it and
17 they tried to influence him by saying, well, if you
18 have a lawyer, we're never going to be able to talk to
19 you and this is our chance. And then when that fails,
20 then the B team comes in and they have a completely
21 different set of tactics that goes on for a hour and 20
22 minutes. Completely in a coercive atmosphere.

23 The Commonwealth says the defendant
24 reinitiated, but reinitiated means that it had to have
25 stopped at some point, and it never stopped and that's

1 the point of the motion and that's the point of the
2 Ferguson case from the Virginia Supreme Court that we
3 gave to the Court to be able to read. In Ferguson, the
4 supreme court -- the trial court found that Ferguson
5 reinitiated the conversation. The supreme court said
6 one cannot imagine a clearer invocation of the right to
7 counsel, but the police did not honor this invocation.
8 Instead, Hagerman alternately threatened and attempted
9 to cajole Ferguson into cooperation.

10 And then it talks about whatever comments
11 Ferguson may have made that broke the silence that were
12 a product of coercive interrogation, an environment
13 created by the police. Surely, the police may not use
14 the product of such techniques as proof of a voluntary
15 reinitiation of communication and subsequent waiver of
16 the right to counsel.

17 In this particular case, when the defendant
18 is then asking for Detective Smith to come back in,
19 nobody bothers to ask him about Miranda, nobody bothers
20 to ask him to ask if he's waived his right to counsel,
21 and the reason is because he never thought that he had
22 invoked counsel to begin with. That's what makes it so
23 egregious. Nobody ever asked him at that point, do you
24 want to make a statement, do you waive right to
25 counsel, do you waive your Miranda rights, because they

1 never thought that he invoked them to begin with, so
2 they just kept on questioning him.

3 It's not as if that hour and 20 minutes
4 dealt with another crime that they were investigating.
5 At the beginning, it dealt with some cocaine, but then
6 it quickly turned right into this offense. And the
7 Court's reviewed that part of the video. Detective
8 Carpenter and then Sergeant Giles comes in and he,
9 again, is very brusque with the defendant and
10 specifically about this offense. Turn around, sit
11 down, we're going to talk about this.

12 And, again, the other cases I've given to
13 the Court, those other cases are distinguishable, and
14 the reason I gave them to the Court is because those
15 are examples of a defendant that has reinitiated, where
16 the police do recognize the invocation, do stop the
17 interrogation, walk out, and the defendant says maybe
18 hold on, and then the police come back and either
19 re-Mirandize him or again tell him, look, you have
20 these rights, are you sure you want to be able to speak
21 to us, all of these circumstances that are present in
22 those cases which are absent in this case. And that's
23 the point of us giving the Court those cases.

24 I think Ferguson is right on point. I'm not
25 going to belabor the issue any further. We'd ask the

1 Court to grant the motion.

2 THE COURT: Ms. Cross?

3 MS. CROSS: Thank you, Your Honor. Your
4 Honor, I can preface with the Commonwealth has reviewed
5 the case extensively, and one of the reasons in our
6 thorough review of the case law was conceding the
7 initial invocation. I would say as a prosecutor for
8 the last 20 years that what is deemed an invocation has
9 changed a lot in the law over the last 10 to 15 years
10 where an actual "I want my lawyer" used to be the
11 standard and now it is not. It has to be -- an officer
12 has to be much more sensitive to even statements which
13 could be a request for counsel.

14 In this case, when Mr. Fayne said, I
15 strongly wish him to be here before I make my
16 statement, the Commonwealth agrees that he was asking
17 for whomever he wanted as counsel to be there. So we
18 have agreed to that. However, the Commonwealth put on
19 the extensive amount of information and provided the
20 entire video because it is -- the Court needs to look
21 at -- and under the Edwards test, the three prongs
22 that -- was there an unequivocal invocation of a right.
23 We have conceded that, so the first prong of that test
24 is met.

25 The second prong is was there a reinitiation

1 by the defendant absent any -- anything law enforcement
2 is doing. Your Honor, we would submit at 5:31 when
3 Officer Carpenter left and Detective Smith was nowhere
4 around and that door was closed, all conversation was
5 ended with Mr. Fayne. They had no intentions -- you
6 heard the officers -- of going back in. They had spent
7 several hours speaking with him. Detective Carpenter
8 felt like they were going around and around. Detective
9 Smith had other investigative leads to follow up on.
10 The police interaction with Mr. Fayne had ended.

11 It was Mr. Fayne who got up, opened the
12 door, asked for Detective Smith, and he was very frank
13 in his discussion. He still wanted to talk, Your
14 Honor, and I don't know that that ever really changed
15 throughout the encounter with the police. He
16 repeatedly said he wanted to make a statement, but he
17 wanted also his protection of having counsel there, at
18 least initially, to say I want him there.

19 But when he came back in, Your Honor -- this
20 is a young man and I think you can look at some of the
21 law that counsel has provided, that what the Court
22 looks at is the totality of the circumstances. They
23 look at the defendant's background. We have a
24 25-year-old man who had experience with the courts, who
25 knew what his rights were and had already waived them.

1 So we do know he waived his rights at the outset of the
2 interview and actually had conversation and
3 communication about the events in the case, the events
4 of that night the evidence the police had. He asked
5 questions of the officers and exchanged information.
6 So he was aware of his rights and that he could invoke
7 them, and we see that because of his invocation.

8 And that -- I point to that, because
9 Commonwealth versus Edwards, which is one of the cases
10 provided by counsel, found that the full awareness of
11 what is going on is a necessary prong of this. So we
12 have the defendant's initiation. I think the only
13 thing counsel possibly can submit is whether or not
14 based on the totality that he waived his rights again
15 to speak with them after reinitiation.

16 And the case law, Your Honor, is clear that
17 a formal waiver of rights is not necessary. They do
18 not have to readvise the defendant if he comes and
19 reinitiates the contact. That is not something they
20 have to do. I think counsel is correct. I would say
21 that the officers at that point do not feel like a
22 clear invocation had been made, so that probably
23 colored their not making another, but that doesn't --
24 that's not the break. The break is that the defendant
25 reinitiated, and it does not have to be a grand

1 gesture. That's what's also clear is when the
2 defendant reinitiates, even after asking for the
3 protections of these rights, then the police are
4 allowed to come talk to him.

5 And, Your Honor, looking at this man, this
6 is a man who knew about the judicial system. He talked
7 about the charges, the charge bargaining, having an
8 attorney, what attorneys he'd had. Clearly he knew
9 that if he spoke to police, that -- that what he said
10 to them could be used against him, and that's really
11 where we're at is did Mr. Fayne -- in knocking on that
12 door and asking for Detective Smith to come back in,
13 did he then waive being able to have counsel there and
14 did he waive his right to being silent, and the
15 Commonwealth would submit that he did.

16 He -- this is not a case like Ferguson. In
17 the case of Ferguson that counsel spoke about, the
18 defendant flat-out asked for a lawyer twice. His first
19 invocation was when they said, We want to talk to you
20 about a burglary, and he said, No, I want a lawyer.

21 That was his invocation. The law
22 enforcement in that case then proceeded to give him his
23 Miranda rights officially, to which in that case
24 Mr. Ferguson said, No, my mom said if I got in trouble
25 again, I should have a lawyer.

1 The officers continued. There were four
2 officers in the interview room with Mr. Ferguson, and
3 the officers in that told the defendant, We're not
4 playing with you. You know you're in trouble, right?

5 They then turned off the recorder in the
6 interview room and threatened that they would bring the
7 wrath of hell on him and that he would be arrested just
8 for entering Pittsylvania County. When the officers
9 then told Mr. Ferguson I will -- you know, we'll give
10 you a few minutes to think about what you want to do,
11 they still left officers in the room with him. They
12 weren't done with their interrogation.

13 That's not what we have here, Your Honor.
14 There was a clean break. That case, I agree with the
15 judge's opinions in that. That was a coercive
16 atmosphere. This is -- this case where two different
17 detectives with two different styles -- the Court may
18 not like how Detective Carpenter spoke, but it doesn't
19 make it unlawful. The defendant reinitiated and then
20 told them throughout, I want to make a statement.

21 As soon as Detective Smith came back in,
22 Your Honor, you've heard that's exactly what he did.
23 He began the story. He talked about his relationship
24 with the victim. He provided information over the next
25 hour about what the contact had been. Because, Your

1 Honor, he reinitiated that, he had the wherewithal, he
2 had the knowledge, he had the maturity, and clearly he
3 knew how to invoke those rights.

4 The Commonwealth would submit that we have
5 met the three-part Edwards rule and that everything
6 after the reinitiation should be admissible. Thank
7 you, Your Honor.

8 THE COURT: Mr. Broccoletti, it's your
9 motion. You get the last word, sir.

10 MR. BROCCOLETTI: Yes, ma'am. Judge, in the
11 words of Ferguson, this was a continuous custodial
12 interrogation. Reinitiation, I suggest to the Court,
13 means the police have honored the right and have
14 stopped the interrogation and the defendant then
15 reinitiates it. In this particular case, the
16 conversation ends not because the detectives honored
17 the defendant's right to counsel. It's because he got
18 frustrated and walked out of the room. So without that
19 honoring of the right, there can't be a reinitiation.

20 THE COURT: In watching this tape, I found
21 that the defendant was highly emotional. There were
22 several times when I actually had to put my head on the
23 table so I could hear what he was saying. But when I
24 did that, I clearly heard him in a conversational tone
25 with the detectives. And the Commonwealth has conceded

1 the defendant did invoke his right to counsel, but the
2 Court's impression is that the defendant continued to
3 want to talk. At some point, he says, I'm willing to
4 talk about anything you need to talk about.

5 He made statements like that several times.
6 The problem is once Detective Carpenter left the room,
7 the defendant got up, opened the door, and asked for
8 Detective Smith and reinitiated. So there is a
9 three-part test. Did he unequivocally invoke his right
10 to counsel, and Commonwealth has conceded that.

11 Whether he reinitiated further contact with
12 police after the invocation, the Court finds that he
13 did. He got up and opened the door and asked
14 specifically for Detective Smith, and then he began
15 telling the whole story. Prior to that, he had not
16 really told the whole story. He had told snippets and
17 he had also discussed his relationship with the alleged
18 victim.

19 And whether after renewed contact with law
20 enforcement, the defendant made a knowing and
21 intelligent waiver of previously invoked right, I find
22 that he did that also. He was very free to talk after
23 that. Throughout the entire situation, he seemed to
24 need time and encouragement and he wanted to ask a lot
25 of questions and he was on the fence about whether or

1 not he wanted to talk. At some point -- maybe I need
2 to talk to my lawyer, my father said don't talk to the
3 police, but he still continued to talk.

4 So based on the defendant's reinitiation,
5 the Court is going to deny the motion to suppress.
6 And, Mr. Broccoletti, I will note your exception to
7 that.

8 MR. BROCCOLETTI: Yes, ma'am.

9 THE COURT: All right. What's the next
10 date?

11 MS. CROSS: Your Honor, this matter has been
12 set for a jury on June 20 to go to June 23.

13 THE COURT: All right. Will we need a
14 pretrial conference? If so, I will need any other
15 motions at least seven days before that. You can let
16 me know. Just the timeframe, I want to be able to set
17 a pretrial conference if we need it. If you all have a
18 dispute about jury instructions or voir dire or any
19 other motions that are being made, I just -- I just
20 need my seven days.

21 MR. BROCCOLETTI: Yes, ma'am.

22 THE COURT: So I can do my own research
23 before we do that. Okay?

24 MR. BROCCOLETTI: Yes, ma'am.

25 THE COURT: And if you find that you don't

1 need it, you can call and let me know, but if there are
2 any problems, witness problems, anything like that --
3 Mr. Broccoletti, you're going to make sure he has
4 clothes, right?

5 MR. BROCCOLETTI: Yes, ma'am.

6 MS. CROSS: I'll make sure we have in-person
7 transportation orders for each of the days.

8 THE COURT: Yes. Yes. But that's a big
9 problem. Clothes can be a big problem.

10 Okay. Thank you very much.

11 MS. CROSS: All right. Thank you, Your
12 Honor.

13 THE COURT: Have a good weekend.
14
15
16
17
18
19
20
21
22
23
24
25

COURT REPORTER'S CERTIFICATE

I, Kimberly A. Heiser, RDR, CCR, certify that I recorded verbatim by stenotype the proceedings in the captioned cause before the HONORABLE BONNIE L. JONES, Judge of said Court, Hampton, Virginia, on April 21, 2023.

I further certify that to the best of my knowledge and belief, the foregoing transcript constitutes a true and correct transcript of the said proceedings.

Given under my hand this 10th day of October 2023, at Hampton, Virginia.

Kimberly A. Heiser

APPENDIX D
Order Denying Petition for Rehearing in the
Supreme Court of Virginia (May 27, 2026)

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday, the 27th day of May, 2026.

COMMONWEALTH OF VIRGINIA,

APPELLANT,

against Record No. 250359
 Court of Appeals No. 1675-23-1

BRIAN FAYNE,

APPELLEE.

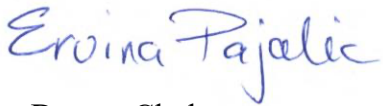
UPON A PETITION FOR REHEARING

On consideration of the petition of the appellee to set aside the judgment rendered herein on April 23, 2026, and grant a rehearing thereof, the prayer of the said petition is denied.

Justice Fulton took no part in the resolution of this petition.

A Copy,

Teste:

By: Muriel-Theresa Pitney, Clerk

Deputy Clerk