SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

CR No. 2017-001237

STATE OF NEW MEXICO

Plaintiff,

vs.

AMEER MUHAMMAD,

Defendant.

STATE'S RESPONSE IN OPPOSITION TO SUPPRESS THE DEFENDANT'S STATEMENTS

COMES NOW, the State of New Mexico, by and through its Assistant Attorneys General, MARK PROBASCO and NICHOLAS GILBERT, and hereby files its Response in Opposition to Defendant's Motion to Suppress the Defendant's Statements. All of the facts are based on the recorded statements between the detectives and the Defendant in this case which is attached to this motion so the Court can hear the statement in its entirety.

STATEMENT OF PERTINANT FACTS

1. Defendant asserted a right to counsel after having been arrested and Mirandized on March 20, 2017.

2. During a subsequent contact with the Defendant on March 27, 2017 to execute a body standards warrant (for buccal swabs, major case prints, and photographs), the Defendant initiated a statement to law enforcement.
3. After documenting an injury on the Defendant's hand, the Defendant – without any question being posed-- volunteers "Like, uh, never mind. I was going to say, like, I know I did it but that- is that what y'all want to know? Like I did it but I feel like I wasn't in my right mind at the time though. Like, I feel like everybody in Albuquerque, New Mexico was trying to kill me and shit."
4. Law enforcement stops the Defendant from speaking further on the issue of his guilt and state of mind by reiterating that he needs to be read his rights again before they discuss what Defendant wants to discuss; Det. Hsu: "Well, Ameer, let- let's do this because I-I- it sounds like you want to talk a little bit. I want to go over your rights again before we get into that."
5. The Defendant abides temporarily the Officer's admonition to wait until speaking further. Other than direction for the execution of the warrant, the Defendandant discusses: his desire for granola bars (Nature Valley granola bars specifically: Ameer Muhammad: "Y'all ain't got no more of those- uh granola bars?"); to the Defendant engaging in "cutting" behavior (discussed while arms and fingerprint and complaining about the lack of good razors to perform this act on himself "I couldn't find any good razors and shit when I was cutting." The Defendant then affirmatively asks why the standards are being taken by stating: "What's the point if you guys already know I did it and

shit?" and "Like, you already saw me. I had a bloody knife on me the day." It is explained to the Defendant the purpose of police collecting this evidence for scientific analysis and that it is a standard process for a fair investigation to rely on something other than statements.

6. The Defendant then further discusses – again while the standards are being collected – issues concerning his phone in jail, issues with collecting standards from his hands because of a scar on a finger and the dimensions of his hand, "wet-wipes" to clean his hands (presumably from the dye used for the taking of impressions), the Defendant requesting paper for his poetry before finally the police complete the taking of standards, and with Defendant's full attention states:

> Detective Hsu: "Okay. Well before we go much further, Ameer, let me remind you of your rights. And again if you want to continue talking with us about what happened, or if you have questions or concerns that we can help answer, we'll go from there okay?"
> Defendant: "Okay"
> Detective Hsu: "So, you have the right to remain silent. Do you understand that right Ameer?"
> Defendant: "Mm hmm"
> Detective Hsu: "Can you tell me what that means to you?"
> Defendant: "I don't have to talk to you guys"
> Detective Hsu: "Right. Uh, anything you say can be used against you in court. Do you understand that right?
> Defendant: "Yeah"
> Detective Hsu: "Can you tell me what that means to you?"
> Defendant: "That you guys will use whatever I say to try and get me locked up and shit."
> Detective Hsu: "Okay. Um, you have the right to talk to an attorney for advice before you answer any questions. Do you understand that right, Ameer?
> Defendant: "Yeah"
> Detective Hsu: "Can you tell me what that means?"

Defendant: "Um, I have the right – I mean, it's pretty self-explanatory. What else can it mean?"
Detective Hsu: Yeah I know. It's just we have to- we have to make sure that we're- that you understand your rights and that's-
Defendant interjecting: "I understand it."
Detective Hsu: "Okay"
Defendant: "Yeah"
Detective Hsu: "If you can't afford a lawyer and want one, uh, a lawyer can be provided to you at no costs. Do understand that right?"
Defendant: "Yeah"
Detective Hsu: "Okay. Do you feel like explaining that to me?"
Defendant: "Um. I get, like, a attorney for free or"
Detective Hsu: "Yes. Yes. Um, and if you want to answer questions now without a lawyer present you still have the right to stop answering at any time. You also have the right to stop answering questions until you talk to your attorney."
Defendant: "Okay"
Detective Hsu: "Does that one- does that one make sense to you?"
Defendant: "Yeah"
Detective Hsu: "Do you want to tell me what that means?"
Defendant: "Um, could you repeat the question?"
Detective Hsu: "Sure. If you want to answer questions now without a lawyer present, you'll still have the right to stop answering at any time."
Defendant: "Yeah. So, I can just answer questions and whenever I feel like not answering I can- I don't have to."
Detective Hsu: "Exactly. Um, you also have the right to stop answering questions until you can talk to your attorney."
Defendant: "Um, I have the right to answer- stop answering questions until I talk to my attorney?"
Detective Hsu: "Right, so the first part is you got it right, you can talk to us and then if you don't want to talk to us you can stop at any time."
Defendant: "Mm hmm"
Detective Hsu: "This next part is, you can stop answering and then talk to your attorney before-
Defendant: "-Answering."
Detective Hsu: "you resume our conv-"
Defendant: "-questions, okay. Yeah."
Detective Hsu: Okay. Make sense?
Defendant: Yeah.
Detective Hsu: Okay. Um, so, again 1-1- 1-1 really wanted to find out what was going on today, or excuse me, a couple of Sundays ago, um, and it seemed like -
Defendant: Are you recording this?
Detective Hsu: I am.

Defendant: Okay.
Detective Hsu: I am. Uh, I just want to understand that if you want to talk to me, you want to do it without an attorney present. Is that right?
Defendant: No, uh, I don't mind. I don't mind- telling you what happened.

7. Law enforcement, as indicated above, did not allow this subsequent statement to the Defendant until, again, being Mirandized and specifically advised of his right to counsel. Law enforcement even went above and beyond the prophylactic *Miranda* advice of rights by expressly not proceeding until it had been read and ensuring the Defendant understood and appeared to understand each and every right waived.

LEGAL ARGUMENT

Defendant's Motion to Suppress Should Be Denied Where He Initiates His Statement and Waived His Previous Assertion of Counsel

The law allows the admission of statements after the Defendant's invocation of the right to counsel where the Defendant: (1) initiates the subsequent statement and (2) waives his rights before taking the subsequent statement. *Oregon v. Bradshaw*, 462 U.S. 1039, 1045–46, 103 S. Ct. 2830, 2835 (1983) (where the Supreme Court reversed the Oregon State Supreme Court for wrongfully suppressing a Defendant's statement in a homicide case when the Defendant initiated his subsequent statement by stating "Well, what is going to happen to me now?" and the trial court had found a valid waiver).

Waiver, after invoking the right to counsel, "depends upon the totality of the circumstances and the particular facts, including consideration of the mental and

physical condition, background, experience, and conduct of the accused." *State v. Boeglin*, 100 N.M. at 132, 666 P.2d at 1279. The State has the burden of establishing that a defendant waived his constitutional rights and every reasonable presumption against waiver is indulged. *State v. Young*, 117 N.M. 688, 694, 875 P.2d 1119, 1125 (Ct.App.1994). However, after a suspect invokes his right to counsel, he may be interrogated if he himself "initiates further communication, exchanges, or conversations with the police." *Id.* (*quoting Edwards v. Arizona*, 451 U.S. 477, 484, 101 S.Ct. 1880, 1884 (1981)). This is what happened in this case.

When a suspect initiates a conversation with police knowingly and intelligently, his statement may be admitted. *Oregon v. Bradshaw*, 462 U.S. 1039, 1046, 103 S.Ct. 2830, 2835, 77 L.Ed.2d 405 (1983). *See accord State v. Salazar*, 1997-NMSC-044, ¶ 62, 123 N.M. 778, 793 (where our own Supreme Court affirmed a trial court determination of a valid waiver under the totality of the circumstance notwithstanding a prior "drug-induced coma" and possibility of incapacitation based partly on facts showing "the Defendant's actions and statements while in the hospital suggest mastery of his faculties and an ability to understand and convey events of the previous forty-eight hours").

Waivers do not even need be express. They may be implied. See e.g. *Berghuis v. Thompkins*, 560 U.S. 370, 371, 130 S. Ct. 2250, 2254, 176 L. Ed. 2d 1098 (2010) citing *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S.Ct. 1755, 60 L.Ed.2d 286. ("Such a waiver may be implied through a defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver.") The waiver

in this case is above and beyond the Constitutional threshold given the repeated advice of rights, the repeated attempts by the Defendant to discuss his criminal conduct, and given his affirmative waiver of rights by indicated that he still wanted to provide a statement to the police in this case.

Any of Defendant's Alternative Arguments as to Defendant's Voluntary Statement Being Suppressed Motion to Suppress Should Be Denied Where the Defendant is Read His Miranda Warning, He Waives his Rights and There is No Evidence of Impermissible Police Coercion or Inability to Understand the Rights Being Waived or Ability to Recall the Subject Matter of the Statement

In New Mexico, coercive police conduct is a necessary predicate to a finding that a confession is not voluntary under the totality of the circumstances approach. *State v. Fekete*, 1995-NMSC-049, quoting *Colorado v. Connelly*, 479 U.S. 157 (1986). The Court determines whether the Defendant's will has been overborne and his capacity for self-determination critically impaired in such a way as to render his confession the product of official coercion. *State v. Munoz*, 1998 NMSC 048, ¶ 20, 126 N.M. 535, 972 P.2d 847 (quoting *Culombe v Connecticut*, 367 U.S. at 602), 81 S.Ct. 1860. The prosecution has the burden of proving the voluntariness of a defendant's statement by a preponderance of the evidence. *Aguilar v. State*, 106 N.M. 798, 800 (1988) (where because of the police taking advantage of defendant's severely diminished cognitive capacity, the Supreme Court found that a police officer improperly influenced the defendant's confession by *offering the defendant leniency*). There is no evidence of impermissible coercive police tactics or particularized threats or even any assertion of force during the questioning of Defendant that would have

overborne his will after the Miranda warnings were read to him. There is absolutely no indication of substandard cognition or education in Defendant.

In *Colorado v. Connelly*, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986), the United States Supreme Court held that coercive police conduct is a necessary predicate to a finding that a confession is not "voluntary" within the meaning of the Due Process Clause of the Fourteenth Amendment. *Id.*, 479 U.S. at 164, 107 S.Ct. at 520. The Court stated that without police misconduct, there is "no basis for concluding that any state actor has deprived a criminal defendant of due process of law." *Id.* "We recognize that under the totality of circumstances test, a confession is not involuntary solely because of a defendant's mental state.[1] Instead, the totality of circumstances

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[1] Regarding precedent for medical/mental disorders and the correct approach for determining the : (1) In *Ziang Sung Wan v. United States*, 266 U.S. 1, 10-14, 45 S. Ct. 1, 2-3, 69 L. Ed. 131 (1924) the Court held that a foreign student from China, actively suffering Spanish Influenza with "chronic stomach trouble which led him to eat sparingly and irregularly" and "spastic colitis" while bedridden and was continuously, at 6-10 hour intervals, interrogated for over *8 days* in a secluded room and by law enforcement. On the 9th day, this sick man was forced out of his sick bed to visit the crime scene of that case to review bloody pillowcases and photographs of the victims. Despite being emaciated and suffering from "almost constant pain, excited by any further additions to the contents of the tract at that point, and vomiting and persistent constipation. Witness knows defendant was in bed at least a month after his treatment was prescribed. From witness' observation and medical experience, judging from the defendant's emaciation and history he gave witness, and his condition generally, would say that when witness saw the defendant on February 13th he had been ill for a matter of weeks. He told me he had been talked to all one night and had not received any medical attention, and had been in constant pain all of this time and had been unable to eat for days, and considering all those facts I came to the conclusion that he was so exhausted that he was really he told me also that he had signed a confession." This interrogation lasted in full over 12 days in this condition.

It goes without saying that this interview is distinct under the totality of the circumstances by the reserved questioning of less than an hour that took place in this case as the court concluded by noting the *torture* suffered by this man "Then the witness was further questioned by the court: Question. You thought he was so exhausted mentally that he would not know what he was signing. Would he know what he was signing? Answer. He would know what he was signing, yes. Question. Would he be liable to sign a confession that would lead him to the gallows in that condition? Answer. I think he would, if he wanted to be left alone. Question. With spastic colitis, if he was accused of crime he would simply sign a paper and say, You hang me? This is your opinion as a medical man? Answer. I say, *if he was as*

test includes an element of police overreaching." *Id.* The evidence does not show any misconduct, and therefore, the statement should not be excluded.

This case is factually simple under the totality of the circumstances approach because the Defendant was read each and every one of his rights. His statement would be voluntary under this approach by virtue of the fact that he provided a detailed statement, repeatedly indicated his desire to provide his side of the story, was repeatedly advised of his rights, expressed his individual understanding of each right through affirmation AND by expressing in his own words each right being waived. The fact that, in addition to providing his statement, he expressly affirmed his waiver in response to being asked whether he wanted to provide his side of the story demonstrates that law enforcement violated no aspect of the Defendant's Constitutional rights when the Defendant in fact volunteered his side of the story.

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sick as that, and in as great pain as that, he would do anything to have the torture stopped." *Id.* (Italics added).

Any reliance on *Leyra v. Denno*, 347 U.S. 556, 558-61, 74 S. Ct. 716, 717-19, 98 L. Ed. 948 (1954) would be similarly misplaced as the Defendant in that case was given "medical treatment" by a trained hypnotist who under the auspices of rendering medical psychological aid, coaxed a confession after several days of unrelenting "treatment" with Police and Prosecutors listening intently through secret microphones.

Reck v. Pate, 367 U.S. 433, 441-43, 81 S. Ct. 1541, 1546-48, 6 L. Ed. 2d 948 (1961) also does not help the Defendant's position as that case concerned a four day interrogation of a 19 year old of subnormal intelligence with no prior law enforcement interactions at 6-7 hour intervals of unrelenting questioning where after being shuffled to and from the hospital after vomiting blood and being put on severe painkillers and denied food, denied the company of his family during this medical emergency and denied an attorney after, presumably, an actual assertion of an attorney. The punchline of all this analysis is that there is no single factor of merely being sick or having an injury that invalidates a confession; rather it is the totality of the circumstances which in this case were clearly proscribed as lawful conduct by precedent.

CONCLUSION

Therefore, the State requests that this court deny Defendant's *Motion to Suppress* for the reason that Defendant initiated the subsequent statement after having previously asserted his right to an attorney and then made a knowing, intelligent, and voluntary waiver of his rights after having been advised of his rights and in the absence of any evidence of such impairment to impact his waiver or any evidence of coercive police conduct in this case.

Respectfully submitted,

Mark Probasco
Assistant Attorney General

I hereby certify that a copy of the foregoing was sent to the Defense on the 12th day of April, 2018.