

**SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO**

CASE NO: CR 17-01237

STATE OF NEW MEXICO,

Plaintiff,

vs.

AMEER MUHAMMAD,

Defendant.

MOTION TO SUPPRESS STATEMENTS

Defendant by and through counsel respectfully moves this Honorable Court to enter an Order suppressing and precluding from use at trial or other proceeding, all statements made by the defendant to government officers at the Bernalillo County Metropolitan Detention Center (MDC) in connection with this case on the grounds that such statements were obtained in violation of the Defendant's Constitutional rights under Article 2, Sections 15 and 18 of the New Mexico State Constitution, as well as the 5th, 6th, and 14th Amendments to the United States Constitution. This motion is made pursuant to Rule 5-212, NMRA 1986, the records and files of the instant case, and such further evidence and argument as may be adduced at a hearing on this Motion.

STATEMENT OF FACTS

1. On March 19, 2017, Defendant Ameer Muhammad was taken into custody by the Albuquerque Police Department.
2. As noted in the police report, Mr. Muhammad had asked for an attorney to be present for any questioning regarding the alleged incident.
3. After being arrested at the scene and receiving subsequent medical treatment, he

was taken to MDC.

4. On March 21, 2017, he was represented by the Public Defender Office at the Felony First Appearance at the Metropolitan Court.

5. His case was transferred to the District Court for a preventive detention hearing, and the Public Defender Office represented him at the hearing held on March 24, 2017.

6. Detective Hsu stated at his pretrial interview that he had gone out to MDC on or about March 24, 2017 to see the Defendant during the process of obtaining fingerprint and DNA standards from Mr. Muhammad. However, the detective stated that Mr. Muhammad was at court, so the detective decided to come back to MDC when Mr. Muhammad was returned to MDC.

7. Detective Hsu knew or should have known that Mr. Muhammad was represented by the Public Defender Office, yet he proceeded to have contact with Mr. Muhammad outside of the presence of his Attorney.

8. Detective Hsu had no exigent circumstances to justify his contact with Mr. Muhammad.

9. The Defendant did not knowingly, intelligently, and voluntarily waive his Constitutional rights prior to the beginning of any questioning by police officer.

Therefore, any oral or written statements from the Defendant in these circumstances were in violation of his Constitutional rights under the 5th, 6th, and 14th Amendments of the United States Constitution; and Article 2, Sections 14, 15, and 18 of the New Mexico State Constitution, which provides more protection based on the structural differences. Defendant accordingly requests that any such statements be suppressed along with any evidence tainted by the illegal contact and questioning.

APPLICABLE LAW & ARGUMENT

It is well settled in New Mexico and Federal law that before statements stemming from custodial interrogation may be offered against a criminal defendant at trial, the State must first establish that:

1. The defendant was properly advised of the Miranda rights, *State v. Verdugo*, 2007-NMCA-006; *State v. Salazar*, 123 N.M. 778 (1997); *Miranda v. Arizona*, 384 U.S. 436 (1966), and
2. The defendant made a knowing, intelligent, and voluntary waiver of his or her right to remain silent, *Id.* and
3. The defendant made a knowing, intelligent, and voluntary waiver of his or her right to consult with an attorney, *Id.* and
4. The defendant's statement was voluntary pursuant to the due process clauses of Article 2, Section 18 of the New Mexico Constitution and the 5th and 14th Amendments to U.S. Constitution, *Aguilar v. State*, 106 N.M. 798 (1988).

Absent a showing of all of the above, the defendant's statement is inadmissible as a matter of law.

Miranda rights must include informing individuals that they have the right to remain silent, that anything they say can and will be used against them, that they have the right to have an attorney present, and that if they cannot afford counsel, one will be appointed for them prior to any interrogation. *State v. Verdugo* (citing: *Miranda v. Arizona*, 384 U.S. 436 (1966)).

Furthermore, the prosecution must demonstrate that after being advised of the Miranda rights, the defendant voluntarily, knowingly, and intelligently chose to waive them. This burden has been described as a heavy one. *State v. Spriggs-Gore*, 2003-NMCA-046. *State v. Fekete*, 120 N.M. 290. Courts must indulge every reasonable presumption against waiver of such rights. *State v. Boeglin*, 100 N.M. 127, 131, 666 P.2d 1274, 1278 (Ct.App.1983).

In the post-Miranda era the pivotal question involving a voluntary confession is whether the Fifth Amendment “waiver is made voluntarily, knowingly and intelligently.” *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Defense Counsel submits that when a defendant is sleep-deprived for four to five days, any confession cannot be made knowingly and intelligently.

The trial court should look at the totality of the circumstances in determining if statements were freely and voluntarily given. *State v. Sanders*, 129 N.M. 728 (2000) citing *Colorado v. Connelly*, 479 U.S. 157 (1986), which cited *Spano v. New York*, 360 U.S. 315 (1959) “for the proposition that as interrogators have turned to psychological persuasion, ‘courts have found the mental condition of the defendant a more significant factor in the “voluntariness” calculus.’” *Id.* at 734.

In *State v. Fekete*, the Court stated “a defendant’s mental state at the time he or she makes incriminating statements to the police is only one factor for the trial court to consider when determining whether such statements were voluntary.” *Fekete*, 120 N.M. 290, 299 (1995). Although the question of Mr. Muhammad’s being sleep deprived is but one of a number of factors that need to be determine, this Court should conclude that Mr. Muhammad was still experiencing the effects of sleep deprivation and in the middle of active hallucinations. Additionally, Mr. Muhammad was suffering from a four-day loss of sleep.

A. STATEMENTS ELICITED BY POLICE FOLLOWING DEFENDANT’S INVOCATION OF RIGHT TO REMAIN SILENT MUST BE SUPPRESSED

Basic to the privilege against self-incrimination is the right of an individual accused or suspected of a crime not to speak. This is because without the right to cut off police questioning, the inherently compelling pressures of in-custody interrogation overbear free choice, the foundation of the privilege, and statements elicited after the rights’ invocation cannot be anything other than the product of compulsion. *Miranda v. Arizona*, supra at 474, 86 S.Ct. at 1627. Accordingly, if an individual indicates in any manner, at any time prior to or during interrogation

that he wishes to remain silent, the interrogation must cease. *State v. Uganiza*, 68 Haw. 28, 702 P.2d 1352 (1985)(citations omitted) in accord: *State v. Kalani*, 3 Haw.App. 334, 342, 649 P.2d 1188, 1194 (1982); *State v. Kaeka*, 3 Haw.App. 444, 447-448, 653 P.2d 96, 99 (1982).

The invocation of the right to silence must be scrupulously honored by the interrogators. *Uganiza* citing *Michigan v. Mosely*, 423 U.S. 96, 99-100, 96 S.Ct. 321, 324, 46 L.Ed.2d 313 (1975)(emphasis added). In *State v. Uganiza*, the police officer re-approached defendant in custody for burglary offense after declaration by defendant that he did not wish to speak and confronted defendant with written statements of several witnesses that resulted in waiver of rights by defendant. The police officer's action constituted functional equivalent of interrogation after assertion of the right to silence and failure to scrupulously honor invocation of right to silence. Here at initial arrest, Mr. Muhammad did invoke his right to be silent.

B. STATEMENTS ELICITED BY POLICE FOLLOWED DEFENDANT'S UNAMBIGUOUS REFUSAL TO GIVE A STATEMENT WITHOUT AN ATTORNEY, THUS VIOLATED DEFENDANT'S RIGHT TO COUNSEL

The invocation of the right to an attorney is treated far more strictly than the right to silence. The request for counsel may be made at any time during the interrogation. Where a defendant has invoked the right to speak to an attorney, a "bright line" test is employed, and all interrogation must cease until the client has been allowed to consult with counsel. *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); *State v. Mailo*, 69 Haw. 51, 731 P.2d 1264 (1987) (defendant's statement held inadmissible where interrogating detective, during warning phase of questioning, clearly understood defendant's "yeah" to constitute a request for counsel; subsequent questioning regarding request for counsel held violative under *Edwards* "bright line" test); *State v. Nelson*, 69 Haw. 461, 748 P.2d 365 (1987).

The "bright line" test precludes the consideration of a defendant's post-request responses to further police interrogation that cast doubt on the original request for counsel. *Smith v. Illinois*, 469 U.S. 91, 105 S.Ct 490, 83 L.Ed.2d 488 (1984) (defendant's post-request responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request for counsel).

Even when a suspect makes an ambiguous request for counsel during custodial interrogation, the police must either cease all questioning or seek non-substantive clarification of the suspect's request. If, upon clarification, counsel is invoked, questioning must cease. If counsel is properly waived, substantive questioning may continue. *State v. Hoey*, 77 Haw. 17, 881 P.2d 504 (1994) (defendant's statement "I don't have the money to buy one," when asked if he needed an attorney was an ambiguous expression of interest in counsel and was not clarified by police, and thus a voluntary, knowing and intelligent waiver was not demonstrated).

C. STATEMENTS ELICITED BY POLICE WERE NOT VOLUNTARY THUS, VIOLATED DEFENDANT'S DUE PROCESS RIGHTS

Even if a defendant waives his right against self-incrimination and right to counsel, the State must still prove under a "totality of circumstances" that any statements he made were uttered voluntarily under the due process clauses of the New Mexico State Constitution. Also, the 5th and 14th Amendments to the United States Constitution require that any statement be made voluntarily.

The defendant's physical or emotional condition may be such that, even in the absence of coercive police conduct, statements uttered by him are also involuntary. *Ziang Sung Wan v. U.S.*, 266 U.S. 1 (1924) (influenza and a stomach disorder), *Leyra v. Denno*, 347 U.S. 556 (1954) (painful sinus condition), *Reck v. Pate*, 367 U.S. 433 (1961) (severe abdominal pains).

In *State v. Wong*, 50 Haw. 42, 430 P.2d 330 (1967), the Hawaii Supreme Court reversed the trial court's decision to admit the defendant's confession based in part upon the defendant's diminished mental condition, rendering his confession involuntary. In addition to the Wong's lack of capacity, the court also cited the failure of the police to advise the defendant of his constitutional rights and the absence of the defendant's attorney as factors in finding the confession involuntary. It is important to note that *Wong* is a pre-Miranda decision.

In *Wong*, the sole issue decided was whether the confession was freely and voluntarily given. 50 Haw. at 46, 430 P.2d at 333. *Wong* involved the admission of a confession taken by police twenty-two (22) days after the defendant was declared to be suffering from a major mental illness and eight months before a psychiatric commission reported that the defendant was still suffering from mental illness. 50 Haw at 44-45, 430 P.2d at 332. Although the detectives who interviewed Wong indicated that he "was not confused, his statements were clear, [and] he presented himself as a sane and normal person," the appellate court still found it a factor in declaring Wong's statement as involuntary.

Similarly in *People v. Turkenich* 137 A.D.2d 363, 529 N.Y.S.2d 385 (1988), the New York Supreme Court Appellate Division held that if a defendant's mental state is so diminished that he cannot understand the nature of the Miranda warnings, it necessarily follows that the defendant lacks the mental capacity to understand the nature and consequences of his statements to police. Thus, the defendant's statements are involuntary. In *Turkenich*, police interrogated a homicide suspect at a mental hospital and basically acquired a full confession. Initially, the trial court suppressed the defendant's statement finding that, among other things, exclusion of the statements was mandated by the defendant's mental condition. The trial court later reversed its decision based upon a finding that the defendant was not in custody at the time of the

interrogation. 137 A.D.2d 363, 366, 529 N.Y.S.2d 385, 387.

In reversing the trial court, the New York Appellate Court primarily rested its decision upon a finding that the defendant was in custody. However, they also cited an additional reason for the inadmissibility of the defendant's statements:

We conclude for an additional reason that the defendant's statements could not be validly admitted into evidence. If the defendant's mental state was such that he could not understand the nature of the *Miranda* warnings, it would necessarily follow that the defendant lacked the mental capacity to understand the nature and consequences of his statements to the police. Moreover, in his testimony Detective Tennariello stated that the defendant made exculpatory as well as inculpatory statements and some of the defendant's responses were unintelligible. The evidence indicates that the nature of the defendant's mental condition was such as to render his inculpatory statements involuntary (cf., *People v. Schompert*, 19 NY 2d. 300, cert denied 389 U.S. 874.)

137 A.D.2d 363, 366, 529 N.Y.S.2d 385, 387.

In the instant case, Defendant was actively hallucinating during his interrogation by Detective Hsu. In addition, Mr. Muhammad was represented by the Public Defender Office, and the detective failed to have his attorney present during the MDC contact.

CONCLUSION

Given the law and factual circumstances of this case, if a defendant was subject to custodial interrogation and made statements even if *Miranda* warnings were given, but the statements were a not knowing, intelligent, and voluntary waiver, then suppression is the required remedy. Furthermore, the doctrine of the "Fruit of the Poisonous Tree" is applicable to confession. Accordingly, the Defendant respectfully requests that the Motion to Suppress be granted.

Respectfully Submitted,



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This will certify that a copy of the
foregoing was mailed to the New Mexico
Attorney General Office and emailed to
other counsel of record on April 2, 2018



Law Offices of the Public Defender

Assigned Judge: Jacqueline Flores
Time: 60 minutes