VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

COMMONWEALTH OF VIRGINIA,	)	
	)	
VS.	)	C-22213-16 and 22763
	)	
DAVID VASQUEZ,	)	
	)	
Defendant.	)	

MOTION TO SUPPRESS

COMES NOW the Defendant, David Vasquez, by counsel, and moves this Court for an order suppressing all statements he has made both prior to and subsequent to his arrest. In support of this motion, Defendant respectfully represents as follows:

1. On February 6, 1984, the Defendant was picked up at his place of employment by detectives from the Arlington County Police Department and transported to the interrogation room of the Prince William County Police Department. He was then interrogated by these detectives and provided them with a statement. The Defendant was not advised of any of his rights under Miranda V. Arizona, 384 U. S. 436 (1966), at any time prior to or during this interrogation.

2. As a result of this statement, the Defendant was immediately transported to the Arlington County Police Department and interrogated by the same detectives. He was advised of his rights under Miranda, and gave another statement to the detectives.

3. On February 7, 1984, the Defendant was interrogated at the Arlington County Police Department and, after being advised of his Miranda rights, gave another statement.

WHEREFORE, in consideration of the foregoing, Defendant prays that these statements be suppressed on the following grounds:

(a) The statement given by Defendant on February 6, 1984 at the Prince William County Police Department was involuntary and given under duress.

The obtaining of the statement was also unlawful in that the Defendant had not been advised of his rights under Miranda.

(b) The second statement given by the Defendant on February 6, 1984 and the statement given on February 7, 1984 were the direct result of the first statement and are tainted by that unlawful statement.

(c) The second statement given by the Defendant on February 6, 1984 was involuntary and the Defendant did not give a knowing, intelligent and voluntary waiver of his rights under Miranda.

(d) The statement given by the Defendant on February 7, 1984 was involuntary and the Defendant did not give a knowing, intelligent and voluntary waiver of his rights under Miranda.

(e) The statement given by the Defendant on February 7, 1984 was obtained in violation of the Defendant's rights under the Sixth Amendment of the United States Constitution.

(f) All of the statements given by the Defendant were obtained in violation of the Defendant's rights under the Fifth and Fourteenth Amendments of the United States Constitution and sections Eight and Eleven of Article 1 of the Constitution of Virginia.

Respectfully submitted,

DAVID VASQUEZ
BY COUNSEL

RICHARD J. McCUE
945 South George Mason Drive
Arlington, Virginia 22204
(703) 892-9540

MATTHEW P. BANGS
2054 North 14th Street, Suite 200
Arlington, Virginia 22201

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was hand-delivered to Henry E. Hudson, Commonwealth's Attorney for Arlington County this 7th day of ~~August~~ September, 1984.

Richard J. McCue

RICHARD J. McCUE

V I R G I N I A :

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

COMMONWEALTH OF VIRGINIA	:	
v.	:	C-22,213 throughC-22,216
DAVID VASQUEZ	:	C-22763
Defendant	:	

MOTION TO SUPPRESS

COMES NOW the Defendant, DAVID VASQUEZ, by counsel and moves this Honorable Court for the entry of an Order in the above styled cases suppressing any and all items seized by the Commonwealth and/or its agents as the result of the illegal search of various locations and as grounds therefor alleges the following:

1. That on February 6, 1984, the Commonwealth and/or its agents conducted a search of the Defendant's home in Prince William County, Virginia, pursuant to an illegal, unconstitutional and improperly obtained search warrant in violation of the Defendant's constitutional rights; that said warrant was issued without probable cause; that the affidavit in support of said warrant was constitutionally and statutorily defective; and that said search, seizure and return were improperly performed. Section 19.2-52, et seq., Code of Virginia, 1950, as amended.

2. That as a result of said search based on said unconstitutional search warrant certain items were seized, none of which were listed in said warrant.

3. That the Commonwealth and/or its agents, without a warrant, searched premises located at 2419 Culpeper Street, Arlington, Virginia and seized certain items.

4. That said search was unconstitutional in that it was without the consent of David Vasquez, that said premises were in the exclusive use of David Vasquez, and that there were not exigent circumstances permitting such a warrantless search and seizure.

5. That the Commonwealth and/or its agents conducted a search, without a warrant, of a McDonald's locker in Manassas, Virginia without the knowing and intelligent consent of David Vasquez; that David Vasquez had exclusive use of said locker and that there were no exigent circumstances permitting such a warrantless search.

LAW OFFICES
MATTHEW P. BANGS
ARLINGTON, VIRGINIA

6. That certain items were seized as the result of said search.

7. That the seizures of said items were the direct result of a violation of the Defendant's constitutional rights and of statute. Fourth Amendment, Constitution of the United States, Section 19.2 -52, et seq., Code of Virginia, 1950, as amended; Rules of the Supreme Court of Virginia.

8. That all items taken as the result of said unconstitutional searches and seizures may have led to the discovery of other evidence by the Commonwealth, all of which would not have been discovered otherwise, all of which should be suppressed as the "fruits of the poisonous tree". Wong Sun v. U.S. 371 U.S. 471 (1963).

WHEREFORE the premises considered the Defendant, by counsel, hereby moves this Honorable Court for the entry of an Order suppressing any and all items seized as the result of said searches by the Commonwealth and/or its agents and any other evidence later obtained by the Commonwealth as the result of said searche and seizures.

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DAVID VASQUEZ
By Counsel

LAW OFFICES:

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Co-Counsel for Defendant

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FILED
SEP 7 1984
DAVID A. BELL
Circuit Court, Arlington
By

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	)	
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WHEREFORE, in consideration of the foregoing, Defendant prays that these statements be suppressed on the following grounds:

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Respectfully submitted,

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RICHARD J. McCUE

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V I R G I N I A:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

COMMONWEALTH OF VIRGINIA

vs.

C-22,213 through
C-22,216 and
C-22,763

DAVID VASQUEZ

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS STATEMENTS

COMES NOW the Commonwealth of Virginia, by her Attorney, and offer the following in response to the Defendant's Motion to Suppress:

FACTUAL PREDICATE

On January 25, 1984, the body of [redacted] was discovered in the basement of her Arlington residence by a close friend and business associate. Miss [redacted] hands were tied behind her and a noose around her neck was suspended from an overhead pipe. The medical examiner determined that she had died sometime during the evening hours of January 23, 1984. The cause of death was declared to be hanging. Vaginal swabs prepared during the autopsy disclosed the presence of sperm.

An inspection of Miss [redacted] residence by the Arlington County Police revealed that the contents of her purse had been scattered on the upstairs landing. All currency appeared to have been removed from her wallet. A small compact camera was later discovered to be missing from the dining room table.

Subsequent scientific examination indicated that the bindings used to secure Miss [redacted] hands had been cut from the venetian blinds in the sunroom. The noose employed for her execution had been cut from a length of rope wrapped around a carpet in her

basement.

A canvass of Miss [redacted] neighborhood by Arlington Officers disclosed that the defendant had been observed walking in front of the victim's house shortly after 8:00 P.M. on the evening of the homicide. This was within the general time frame in which the victim's death occurred. The defendant had formerly resided in that neighborhood and was known by many of [redacted] neighbors. Several people described the defendant as having an abnormal personality. Consequently, Detective W.C. Shelton, the primary investigator in the case, elected to interview the defendant concerning his presence in the neighborhood that evening.

In the late morning of February 6, 1984, Detective Shelton, accompanied by his partner Detective R. H. Carrig, met the defendant at his place of employment, the McDonald's on Sudley Road in Manassas.

When Detective Shelton approached the defendant his status was no more than that of a witness. There was nothing to link the defendant to the homicide other than his presence in the neighborhood. Detective Shelton would have been remiss in his duties if he had not thoroughly interviewed the defendant. Shelton prefaced his contact by explaining the nature of his inquiry. The Detective asked the defendant, in the presence of other officers, if he would accompany them to the Prince William County Police Department for an interview. The defendant agreed without hesitation. He was then transported to the Prince William County Police Department since there were no interview facilities at the McDonald's.

Detective Shelton conversed with the defendant for approximately one hour and a half in Prince William County. At no time was the defendant's freedom of movement restrained in any way.

He was unequivocally advised that he was not under arrest. The defendant was not given his Miranda warning prior to the interview.

The defendant initially denied having visited Arlington County since November, 1983. Shelton realized that this statement was false. To impress upon the defendant that he knew that the defendant had been in Arlington County on the evening of January 23, 1984, Shelton told him that his fingerprints had been recovered from the [redacted] residence. After some additional conversation, the defendant admitted being present at [redacted]'s residence on January 23, 1984. However, it was the defendant's contention that he had been invited inside by Miss [redacted]. Moreover, later in the interview, the defendant informed Shelton that he had been seduced by the victim. As the conversation evolved, the defendant's ability to communicate became progressively worse. At times his statements were virtually incomprehensible. Eventually, the defendant admitted in a rather oblique fashion that he participated in the hanging of Miss [redacted]. However, according to the defendant, she was executed at her request.

At this point, Shelton requested that the defendant accompany him to Arlington County. The defendant reluctantly agreed. Although suspicion was mounting, Detective Shelton reiterated to the defendant that he was not under arrest. The defendant was transported to the Arlington County Police Department in the rear of an unmarked vehicle. He was neither handcuffed nor restrained in any fashion. He was not physically escorted in his movements.

When the defendant and Detectives Shelton and Carrig arrived in Arlington, the defendant was provided with lunch. He was taken to an interview room in the Investigation Division of the Police Department. There Shelton advised the defendant of his

Miranda rights and inquired if he understood them. The defendant acknowledged affirmatively and signed a written version of the Miranda warnings. The defendant further stated that he was sober and had not been threatened or offered any promise for his co-operation.

During the ensuing hour, the Detectives discussed with the defendant his involvement in the murder of Carolyn Jean Hamm and the burglary of her home. Although the defendant still presented a rather disjointed rendition of the incident, there was little doubt of his involvement. Soon after the second statement was taken, the defendant was placed under arrest for capital murder. Bond was set and the defendant remanded to jail.

The following morning, because some confusion still existed with respect to certain aspects of the case, Detective Shelton removed the defendant from the jail and reviewed some points from his previous statements. The defendant was again advised of his pertinent constitutional rights both orally and in writing. The defendant acknowledged his rights and executed a written waiver in the Detective's presence.

LEGAL ARGUMENT

The defendant challanges the admissibility of his statements to Detective Shelton on a variety of Constitutional grounds. Firstly, he contends that his client was not advised of the warnings prescribed by Miranda v. Arizona, 86 S. Ct. 1602 (1966), prior to the initial interview in Prince William County. He maintains collaterally that the first statement was involuntarily given under duress. Lastly, he argues that the two statements which followed were the product of the initial unlawful confession. The defendant consequently urges the Court to exclude all three

confessions as constitutionally infirm. His position is without factual or legal basis.

The Initial Statement in Prince William County

In Miranda v. Arizona, 86 S. Ct. 1602 (1966), the United States Supreme Court announced a mandatory procedure which must be followed by police officers conducting "custodial interrogation." The Court in Miranda defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 86 S. Ct. at 1612. The mere fact that the questioning occurs at the police station or that the person being questioned is a suspect does not trigger the requirement of warnings. A noncustodial situation is not converted into one governed by Miranda merely because the questioning took place in a "coercive environment." Oregon v. Mathiason, 97 S. Ct. 711, 714 (1977). As the Court pointed out in Oregon v. Mathiason, "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime."

More recently the Court noted in California v. Beheler, 103 S. Ct. 3517 (1983), that in determining whether a suspect is "in custody" for purposes of receiving Miranda protection, the ultimate inquiry is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. Ante at 3520. In order for a police contact to become custodial there "must be at least some objective manifestation that the defendant was deprived of his freedom of action in a significant way." Pulaski v. Buttermost, 677 F.2d 8, 9

(1st Cir. 1982).

The United States Court of Appeals for the Eleventh Circuit suggested a four factor judicial analysis in determining whether an interrogatory setting is custodial. In United States v. Lueck, 678 F.2d 895, 900 (1982), that Court enumerated the following considerations:

(1) Whether probable cause existed for the defendant's arrest.

(2) Whether the interrogating officer considered the defendant free to leave.

(3) Whether the defendant subjectively believed that he was free to leave.

(4) Whether the defendant had become the focus of the investigation.

The Court in Lueck, further observed that in applying the foregoing criteria, no single element is dispositive. In determining custodial status, the Court must look to the "totality of the circumstances."

When Detective Shelton approached the defendant at his place of employment, the evidence against him warranted no more than suspicion. In fact, at the conclusion of the initial interview, it is doubtful that probable cause existed for his arrest. The defendant admitted being in [redacted] home the evening of her death, but he steadfastly contended that everything which occurred was consentual. If this was sufficient to constitute probable cause, it developed at the very end of the interview.

Detective Shelton repeatedly advised the defendant that he was not under arrest. The defendant, during the initial interview, was not handcuffed and his freedom of movement was not restrained in any fashion. Obviously, the investigating detective did not consider the defendant to be under arrest. There was no objective

basis for the defendant to draw an opposite conclusion.

Although the defendant may have been a suspect, he certainly had not become the focal point of the investigation.

As demonstrated by the above cited cases, the transportation of the defendant to a police station to facilitate an interview did not convert the situation to a custodial one.

Therefore, under no logical interpretation was the defendant under arrest during the initial interview in Price William County. Detective Shelton had no obligation to advise the defendant of his Miranda warnings.

The Statement Given by the Defendant in Prince William County was Voluntary and Free of Duress.

As a condition precedent to the admissibility of a confession, the Commonwealth must demonstrate by a preponderance of the evidence that the statement was voluntarily given. Witt v. Commonwealth, 215 Va. 670, 673 (1975). The time-honored test of voluntariness is "whether the behavior of the States' law enforcement officials was such as to overbear the [defendants'] will to resist and bring about a confession not freely self-determined." Rogers v. Richmond, 81 S. Ct. 734, 741 (1961). The Court in Witt also restated the recognized principle that government coercion must be judged by an objective standard. The alleged coercion must be one a reasonable man would draw from the government's conduct. 215 Va. at 675. In developing an objective standard, courts have considered a variety of factors, including the defendant's age; sobreity; mentality; prior experience with the criminal justice system; length of questioning; promise or threats and denial of physical needs. See Penn v. Commonwealth, 210 Va. 213 (1969) and Akers v. Commonwealth, 216 Va. 40 (1975).

The defendant in this case is 37 years old and while his mental capacity is below average, it is still in the normal range. There is no evidence that he had consumed any intoxicating beverage or drugs on the date of the interview. The interview itself was far from protracted, lasting only about one and a half hours. The defendant's experience with the criminal justice system was minimal, having only one prior arrest for trespassing. There was no promise offered to the defendant in exchange for his cooperation, nor was any threat made. In sum, none of the traditional indices of coercion were present in this case.

The fact that Detective Shelton misrepresented certain information to the defendant did not change the voluntary nature of his statement. Shelton informed the defendant that his fingerprint had been recovered at the homicide scene. This was not a true statement. However, courts have frequently held that deception alone will not render a confession involuntary, absent other aggravating circumstances. United States v. Castaneda - Castaneda, 729 F.2d 1360, 1363 (11th Cir. 1984) and United States Ex. Rel. Hall v. Director, 559 F.2d 93 (7th Cir. 1978).

In Smith v. Commonwealth, 219 Va. 455 (1978), the defendant was a suspect in a homicide. He was interviewed at his family farm by a police investigator. During the course of the interview, the detective, without any foundation in fact, informed the defendant that his fingerprints and footprints had been found at the homicide scene. After some deliberation, the defendant admitted his involvement and directed the investigator to the location of the murder weapon. The Court held in Smith that while the false statement was a relevant factor in determining voluntariness, it alone did not invalidate the confession. Other courts confronted

with a similar factual situation have ruled identically. See Frazier v. Cupp, 89 S. Ct. 1420 (1969); United States v. Castaneda - Castaneda, supra; United States Ex. Rel. Riley v. Frazier, 653 F.2d 1153 (7th Cir. 1983); and United States Ex. Rel. Hall v. Director, 559 F.2d 93 (7th Cir. 1978).

Employing an objective standard, there was no legally recognizable coercive element attending the statement given by the defendant in Prince William County on February 6, 1984.

The Second Statement by the Defendant was without Constitutional Defect.

Following the initial interview of the defendant in Prince William County, Detective Shelton asked the defendant to accompany him to Arlington County. Again, Shelton informed the defendant that he was not under arrest. The defendant, albeit reluctantly, agreed to travel to Arlington for a more thorough interview. En route to Arlington, the defendant was neither handcuffed nor physically escorted. Immediately upon arrival in Arlington, the defendant was apprised of his rights under Miranda v. Arizona. He acknowledged his understanding of these rights both orally and in writing.

The defendant seeks to bar the admissibility of his statements on two grounds. Firstly, he contends that the statement was involuntarily given. Secondly, he maintains that the second confession was the tainted product of the initial unlawful statement. Neither position has merit.

As mentioned above, the defendant was thoroughly advised of his rights prior to the second interview. He agreed in writing to discuss the Hamm murder with Detective Shelton. The detective made no threats or promises to the defendant. The second interview

was of approximately an hour duration. The defendant was served lunch during the interview. Again, the record is totally devoid of any coercive tactics that would overbear the will of a "reasonable man."

The defendant also seeks exclusion of the second statement as an unlawful fruit derived from the initial interview. Since the first statement is without constitutional blemish, the defendant fails to prove any factual predicate for this issue. However, assuming arguendo that the Court believes this issue to be properly framed, the Commonwealth's evidence would demonstrate adequate attenuation.

As the Supreme Court of Virginia pointed out in Warlick v. Commonwealth, 215 Va. 263, 265 (1974), the exclusionary rule operates to exclude information or evidence acquired directly or derivatively from an unlawful confession. A recognized exception to this so called "fruit of the poisonous tree doctrine" becomes operative when the taint has been purged. When the connection between the illegal statement and evidence derived becomes so attenuated as to dissipate the taint, courts will not invoke the exclusionary rule. 215 Va. at 266.

Assuming that the defendant's statement in Prince William County was contaminated by some currently unidentified coercive influence, the second statement was sufficiently removed in time to relieve such influence. The defendant voluntarily accompanied the Detective to Arlington. They engaged in casual conversation en route. The defendant was advised of his rights and served lunch prior to the second interview. This relaxed interval clearly relieved any pressure which evolved from the first conversation. Furthermore, to conclude that the second and more incriminating

interview would never have occurred but for the initial conversation in Prince William County would require the Court to engage in pure speculation.

The final aspect of the defendant's motion addresses a third statement made on February 7, 1984. This statement was made on the morning following his arrest. Detective Shelton brought the defendant from the Arlington County jail to his office. The defendant was advised of his rights pursuant to Miranda and executed a written waiver. The interview was conducted in the same manner as the preceding two. There were no threats, promises or coercive influence. For the reasons heretofore argued, the third statement was equally constitutionally sound.

The Defendant's Low Intelligence Does Not Preclude the Finding of a Valid Waiver.

Assuming a facially valid waiver of rights preceded the second and third interviews, the defendant contends that his low intelligence would preclude a finding of voluntariness. While education and intelligenceare certainly factors to be considered they are not determinative of a conscious and intelligent waiver. Akers v. Commonwealth, 216 Va. 40, 46 (1975).

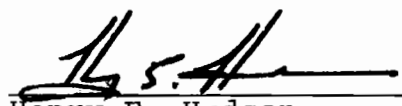
The defendant is undoubtedly an individual of relatively low intelligence. However, Detective Shelton very clearly and explicitly explained the Miranda warnings to him. The defendant acknowledged his understanding of those rights and denied any inability to comprehend their import. In Simpson v. Commonwealth, decided June 14, 1984, the Supreme Court of Virginia experienced no difficulty in upholding a waiver of Miranda rights by an individual with an intelligence quotient of seventy-eight (78). The Court held that based upon the totality of the attendant circum-

cumstances, the waiver and confession which followed were voluntary. Applying that same test to the immediate case, there is no indication that the defendant's intelligence level precluded a conscious decision to cooperate with the interviewing officer.

Conclusion

Wherefore, the Commonwealth urges the Court to deny the Defendant's Motion to Suppress Statements.

Respectfully Submitted



Henry E. Hudson
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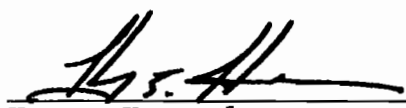

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V I R G I N I A:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

COMMONWEALTH OF VIRGINIA

vs.

C-22,213 through
C-22,216 and
C-22,763

DAVID VASQUEZ

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS STATEMENTS

COMES NOW the Commonwealth of Virginia, by her Attorney, and offer the following in response to the Defendant's Motion to Suppress:

FACTUAL PREDICATE

On January 25, 1984, the body of [redacted] was discovered in the basement of her Arlington residence by a close friend and business associate. Miss [redacted] hands were tied behind her and a noose around her neck was suspended from an overhead pipe. The medical examiner determined that she had died sometime during the evening hours of January 23, 1984. The cause of death was declared to be hanging. Vaginal swabs prepared during the autopsy disclosed the presence of sperm.

An inspection of Miss [redacted] residence by the Arlington County Police revealed that the contents of her purse had been scattered on the upstairs landing. All currency appeared to have been removed from her wallet. A small compact camera was later discovered to be missing from the dining room table.

Subsequent scientific examination indicated that the bindings used to secure Miss [redacted] hands had been cut from the venetian blinds in the sunroom. The noose employed for her execution had been cut from a length of rope wrapped around a carpet in her

basement.

A canvass of Miss [redacted] neighborhood by Arlington Officers disclosed that the defendant had been observed walking in front of the victim's house shortly after 8:00 P.M. on the evening of the homicide. This was within the general time frame in which the victim's death occurred. The defendant had formerly resided in that neighborhood and was known by many of [redacted] neighbors. Several people described the defendant as having an abnormal personality. Consequently, Detective W.C. Shelton, the primary investigator in the case, elected to interview the defendant concerning his presence in the neighborhood that evening.

In the late morning of February 6, 1984, Detective Shelton, accompanied by his partner Detective R. H. Carrig, met the defendant at his place of employment, the McDonald's on Sudley Road in Manassas.

When Detective Shelton approached the defendant his status was no more than that of a witness. There was nothing to link the defendant to the homicide other than his presence in the neighborhood. Detective Shelton would have been remiss in his duties if he had not thoroughly interviewed the defendant. Shelton prefaced his contact by explaining the nature of his inquiry. The Detective asked the defendant, in the presence of other officers, if he would accompany them to the Prince William County Police Department for an interview. The defendant agreed without hesitation. He was then transported to the Prince William County Police Department since there were no interview facilities at the McDonald's.

Detective Shelton conversed with the defendant for approximately one hour and a half in Prince William County. At no time was the defendant's freedom of movement restrained in any way.

He was unequivocally advised that he was not under arrest. The defendant was not given his Miranda warning prior to the interview.

The defendant initially denied having visited Arlington County since November, 1983. Shelton realized that this statement was false. To impress upon the defendant that he knew that the defendant had been in Arlington County on the evening of January 23, 1984, Shelton told him that his fingerprints had been recovered from the Hamm residence. After some additional conversation, the defendant admitted being present at [redacted] residence on January 23, 1984. However, it was the defendant's contention that he had been invited inside by Miss [redacted]. Moreover, later in the interview, the defendant informed Shelton that he had been seduced by the victim. As the conversation evolved, the defendant's ability to communicate became progressively worse. At times his statements were virtually incomprehensible. Eventually, the defendant admitted in a rather oblique fashion that he participated in the hanging of Miss [redacted]. However, according to the defendant, she was executed at her request.

At this point, Shelton requested that the defendant accompany him to Arlington County. The defendant reluctantly agreed. Although suspicion was mounting, Detective Shelton reiterated to the defendant that he was not under arrest. The defendant was transported to the Arlington County Police Department in the rear of an unmarked vehicle. He was neither handcuffed nor restrained in any fashion. He was not physically escorted in his movements.

When the defendant and Detectives Shelton and Carrig arrived in Arlington, the defendant was provided with lunch. He was taken to an interview room in the Investigation Division of the Police Department. There Shelton advised the defendant of his

Miranda rights and inquired if he understood them. The defendant acknowledged affirmatively and signed a written version of the Miranda warnings. The defendant further stated that he was sober and had not been threatened or offered any promise for his co-operation.

During the ensuing hour, the Detectives discussed with the defendant his involvement in the murder of [redacted] and the burglary of her home. Although the defendant still presented a rather disjointed rendition of the incident, there was little doubt of his involvement. Soon after the second statement was taken, the defendant was placed under arrest for capital murder. Bond was set and the defendant remanded to jail.

The following morning, because some confusion still existed with respect to certain aspects of the case, Detective Shelton removed the defendant from the jail and reviewed some points from his previous statements. The defendant was again advised of his pertinent constitutional rights both orally and in writing. The defendant acknowledged his rights and executed a written waiver in the Detective's presence.

LEGAL ARGUMENT

The defendant challanges the admissibility of his statements to Detective Shelton on a variety of Constitutional grounds. Firstly, he contends that his client was not advised of the warnings prescribed by Miranda v. Arizona, 86 S. Ct. 1602 (1966), prior to the initial interview in Prince William County. He maintains collaterally that the first statement was involuntarily given under duress. Lastly, he argues that the two statements which followed were the product of the initial unlawful confession. The defendant consequently urges the Court to exclude all three

confessions as constitutionally infirm. His position is without factual or legal basis.

The Initial Statement in Prince William County

In Miranda v. Arizona, 86 S. Ct. 1602 (1966), the United States Supreme Court announced a mandatory procedure which must be followed by police officers conducting "custodial interrogation." The Court in Miranda defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 86 S. Ct. at 1612. The mere fact that the questioning occurs at the police station or that the person being questioned is a suspect does not trigger the requirement of warnings. A noncustodial situation is not converted into one governed by Miranda merely because the questioning took place in a "coercive environment." Oregon v. Mathiason, 97 S. Ct. 711, 714 (1977). As the Court pointed out in Oregon v. Mathiason, "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime."

More recently the Court noted in California v. Beheler, 103 S. Ct. 3517 (1983), that in determining whether a suspect is "in custody" for purposes of receiving Miranda protection, the ultimate inquiry is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. Ante at 3520. In order for a police contact to become custodial there "must be at least some objective manifestation that the defendant was deprived of his freedom of action in a significant way." Pulaski v. Buttermost, 677 F.2d 8, 9

(1st Cir. 1982).

The United States Court of Appeals for the Eleventh Circuit suggested a four factor judicial analysis in determining whether an interrogatory setting is custodial. In United States v. Lueck, 678 F.2d 895, 900 (1982), that Court enumerated the following considerations:

(1) Whether probable cause existed for the defendant's arrest.

(2) Whether the interrogating officer considered the defendant free to leave.

(3) Whether the defendant subjectively believed that he was free to leave.

(4) Whether the defendant had become the focus of the investigation.

The Court in Lueck, further observed that in applying the foregoing criteria, no single element is dispositive. In determining custodial status, the Court must look to the "totality of the circumstances."

When Detective Shelton approached the defendant at his place of employment, the evidence against him warranted no more than suspicion. In fact, at the conclusion of the initial interview, it is doubtful that probable cause existed for his arrest. The defendant admitted being in Hamm's home the evening of her death, but he steadfastly contended that everything which occurred was consentual. If this was sufficient to constitute probable cause, it developed at the very end of the interview.

Detective Shelton repeatedly advised the defendant that he was not under arrest. The defendant, during the initial interview, was not handcuffed and his freedom of movement was not restrained in any fashion. Obviously, the investigating detective did not consider the defendant to be under arrest. There was no objective

basis for the defendant to draw an opposite conclusion.

Although the defendant may have been a suspect, he certainly had not become the focal point of the investigation.

As demonstrated by the above cited cases, the transportation of the defendant to a police station to facilitate an interview did not convert the situation to a custodial one.

Therefore, under no logical interpretation was the defendant under arrest during the initial interview in Price William County. Detective Shelton had no obligation to advise the defendant of his Miranda warnings.

The Statement Given by the Defendant in Prince William County was Voluntary and Free of Duress.

As a condition precedent to the admissibility of a confession, the Commonwealth must demonstrate by a preponderance of the evidence that the statement was voluntarily given. Witt v. Commonwealth, 215 Va. 670, 673 (1975). The time-honored test of voluntariness is "whether the behavior of the States' law enforcement officials was such as to overbear the [defendants'] will to resist and bring about a confession not freely self-determined." Rogers v. Richmond, 81 S. Ct. 734, 741 (1961). The Court in Witt also restated the recognized principle that government coercion must be judged by an objective standard. The alleged coercion must be one a reasonable man would draw from the government's conduct. 215 Va. at 675. In developing an objective standard, courts have considered a variety of factors, including the defendant's age; sobreity; mentality; prior experience with the criminal justice system; length of questioning; promise or threats and denial of physical needs. See Penn v. Commonwealth, 210 Va. 213 (1969) and Akers v. Commonwealth, 216 Va. 40 (1975).

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The Second Statement by the Defendant was without Constitutional Defect.

Following the initial interview of the defendant in Prince William County, Detective Shelton asked the defendant to accompany him to Arlington County. Again, Shelton informed the defendant that he was not under arrest. The defendant, albeit reluctantly, agreed to travel to Arlington for a more thorough interview. En route to Arlington, the defendant was neither handcuffed nor physically escorted. Immediately upon arrival in Arlington, the defendant was apprised of his rights under Miranda v. Arizona. He acknowledged his understanding of these rights both orally and in writing.

The defendant seeks to bar the admissibility of his statements on two grounds. Firstly, he contends that the statement was involuntarily given. Secondly, he maintains that the second confession was the tainted product of the initial unlawful statement. Neither position has merit.

As mentioned above, the defendant was thoroughly advised of his rights prior to the second interview. He agreed in writing to discuss the [redacted] murder with Detective Shelton. The detective made no threats or promises to the defendant. The second interview

was of approximately an hour duration. The defendant was served lunch during the interview. Again, the record is totally devoid of any coercive tactics that would overbear the will of a "reasonable man."

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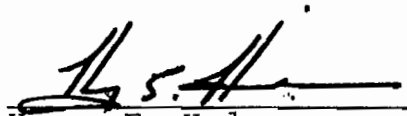

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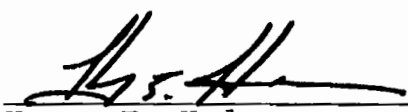

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(4) Whether the defendant had become the focus of the investigation.

The Court in Lueck, further observed that in applying the foregoing criteria, no single element is dispositive. In determining custodial status, the Court must look to the "totality of the circumstances."

When Detective Shelton approached the defendant at his place of employment, the evidence against him warranted no more than suspicion. In fact, at the conclusion of the initial interview, it is doubtful that probable cause existed for his arrest. The defendant admitted being in Hamm's home the evening of her death, but he steadfastly contended that everything which occurred was consentual. If this was sufficient to constitute probable cause, it developed at the very end of the interview.

Detective Shelton repeatedly advised the defendant that he was not under arrest. The defendant, during the initial interview, was not handcuffed and his freedom of movement was not restrained in any fashion. Obviously, the investigating detective did not consider the defendant to be under arrest. There was no objective

basis for the defendant to draw an opposite conclusion.

Although the defendant may have been a suspect, he certainly had not become the focal point of the investigation.

As demonstrated by the above cited cases, the transportation of the defendant to a police station to facilitate an interview did not convert the situation to a custodial one.

Therefore, under no logical interpretation was the defendant under arrest during the initial interview in Price William County. Detective Shelton had no obligation to advise the defendant of his Miranda warnings.

The Statement Given by the Defendant in Prince William County was Voluntary and Free of Duress.

As a condition precedent to the admissibility of a confession, the Commonwealth must demonstrate by a preponderance of the evidence that the statement was voluntarily given. Witt v. Commonwealth, 215 Va. 670, 673 (1975). The time-honored test of voluntariness is "whether the behavior of the States' law enforcement officials was such as to overbear the [defendants'] will to resist and bring about a confession not freely self-determined." Rogers v. Richmond, 81 S. Ct. 734, 741 (1961). The Court in Witt also restated the recognized principle that government coercion must be judged by an objective standard. The alleged coercion must be one a reasonable man would draw from the government's conduct. 215 Va. at 675. In developing an objective standard, courts have considered a variety of factors, including the defendant's age; sobreity; mentality; prior experience with the criminal justice system; length of questioning; promise or threats and denial of physical needs. See Penn v. Commonwealth, 210 Va. 213 (1969) and Akers v. Commonwealth, 216 Va. 40 (1975).

The defendant in this case is 37 years old and while his mental capacity is below average, it is still in the normal range. There is no evidence that he had consumed any intoxicating beverage or drugs on the date of the interview. The interview itself was far from protracted, lasting only about one and a half hours. The defendant's experience with the criminal justice system was minimal, having only one prior arrest for trespassing. There was no promise offered to the defendant in exchange for his cooperation, nor was any threat made. In sum, none of the traditional indicas of coercion were present in this case.

The fact that Detective Shelton misrepresented certain information to the defendant did not change the voluntary nature of his statement. Shelton informed the defendant that his fingerprint had been recovered at the homicide scene. This was not a true statement. However, courts have frequently held that deception alone will not render a confession involuntary, absent other aggravating circumstances. United States v. Castaneda - Castaneda, 729 F.2d 1360, 1363 (11th Cir. 1984) and United States Ex. Rel. Hall v. Director, 559 F.2d 93 (7th Cir. 1978).

In Smith v. Commonwealth, 219 Va. 455 (1978), the defendant was a suspect in a homicide. He was interviewed at his family farm by a police investigator. During the course of the interview, the detective, without any foundation in fact, informed the defendant that his fingerprints and footprints had been found at the homicide scene. After some deliberation, the defendant admitted his involvement and directed the investigator to the location of the murder weapon. The Court held in Smith that while the false statement was a relevant factor in determining voluntariness, it alone did not invalidate the confession. Other courts confronted

with a similar factual situation have ruled identically. See Frazier v. Cupp, 89 S. Ct. 1420 (1969); United States v. Castaneda - Castaneda, supra; United States Ex. Rel. Riley v. Frazier, 653 F.2d 1153 (7th Cir. 1983); and United States Ex. Rel. Hall v. Director, 559 F.2d 93 (7th Cir. 1978).

Employing an objective standard, there was no legally recognizable coercive element attending the statement given by the defendant in Prince William County on February 6, 1984.

The Second Statement by the Defendant was without Constitutional Defect.

Following the initial interview of the defendant in Prince William County, Detective Shelton asked the defendant to accompany him to Arlington County. Again, Shelton informed the defendant that he was not under arrest. The defendant, albeit reluctantly, agreed to travel to Arlington for a more thorough interview. En route to Arlington, the defendant was neither handcuffed nor physically escorted. Immediately upon arrival in Arlington, the defendant was apprised of his rights under Miranda v. Arizona. He acknowledged his understanding of these rights both orally and in writing.

The defendant seeks to bar the admissibility of his statements on two grounds. Firstly, he contends that the statement was involuntarily given. Secondly, he maintains that the second confession was the tainted product of the initial unlawful statement. Neither position has merit.

As mentioned above, the defendant was thoroughly advised of his rights prior to the second interview. He agreed in writing to discuss the Hamm murder with Detective Shelton. The detective made no threats or promises to the defendant. The second interview

was of approximately an hour duration. The defendant was served lunch during the interview. Again, the record is totally devoid of any coercive tactics that would overbear the will of a "reasonable man."

The defendant also seeks exclusion of the second statement as an unlawful fruit derived from the initial interview. Since the first statement is without constitutional blemish, the defendant fails to prove any factual predicate for this issue. However, assuming arguendo that the Court believes this issue to be properly framed, the Commonwealth's evidence would demonstrate adequate attenuation.

As the Supreme Court of Virginia pointed out in Warlick v. Commonwealth, 215 Va. 263, 265 (1974), the exclusionary rule operates to exclude information or evidence acquired directly or derivatively from an unlawful confession. A recognized exception to this so called "fruit of the poisonous tree doctrine" becomes operative when the taint has been purged. When the connection between the illegal statement and evidence derived becomes so attenuated as to dissipate the taint, courts will not invoke the exclusionary rule. 215 Va. at 266.

Assuming that the defendant's statement in Prince William County was contaminated by some currently unidentified coercive influence, the second statement was sufficiently removed in time to relieve such influence. The defendant voluntarily accompanied the Detective to Arlington. They engaged in casual conversation en route. The defendant was advised of his rights and served lunch prior to the second interview. This relaxed interval clearly relieved any pressure which evolved from the first conversation. Furthermore, to conclude that the second and more incriminating

interview would never have occurred but for the initial conversation in Prince William County would require the Court to engage in pure speculation.

The final aspect of the defendant's motion addresses a third statement made on February 7, 1984. This statement was made on the morning following his arrest. Detective Shelton brought the defendant from the Arlington County jail to his office. The defendant was advised of his rights pursuant to Miranda and executed a written waiver. The interview was conducted in the same manner as the preceding two. There were no threats, promises or coercive influence. For the reasons heretofore argued, the third statement was equally constitutionally sound.

The Defendant's Low Intelligence Does Not Preclude the Finding of a Valid Waiver.

Assuming a facially valid waiver of rights preceded the second and third interviews, the defendant contends that his low intelligence would preclude a finding of voluntariness. While education and intelligenceare certainly factors to be considered they are not determinative of a conscious and intelligent waiver. Akers v. Commonwealth, 216 Va. 40, 46 (1975).

The defendant is undoubtedly an individual of relatively low intelligence. However, Detective Shelton very clearly and explicitly explained the Miranda warnings to him. The defendant acknowledged his understanding of those rights and denied any inability to comprehend their import. In Simpson v. Commonwealth, decided June 14, 1984, the Supreme Court of Virginia experienced no difficulty in upholding a waiver of Miranda rights by an individual with an intelligence quotient of seventy-eight (78). The Court held that based upon the totality of the attendant circum-

cumstances, the waiver and confession which followed were voluntary. Applying that same test to the immediate case, there is no indication that the defendant's intelligence level precluded a conscious decision to cooperate with the interviewing officer.

Conclusion

Wherefore, the Commonwealth urges the Court to deny the Defendant's Motion to Suppress Statements.

Respectfully Submitted

Henry E. Hudson
Commonwealth's Attorney

Certificate of Service

I hereby certify that two certified copies of the foregoing Memorandum were hand-delivered to Matthew P. Bangs, Counsel for Defendant, 2054 North 14th Street, # 200, Arlington, Virginia 22201. This _____ day of October, 1984.

Henry E. Hudson

confessions as constitutionally infirm. His position is without factual or legal basis.

The Initial Statement in Prince William County

In Miranda v. Arizona, 86 S. Ct. 1602 (1966), the United States Supreme Court announced a mandatory procedure which must be followed by police officers conducting "custodial interrogation." The Court in Miranda defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 86 S. Ct. at 1612. The mere fact that the questioning occurs at the police station or that the person being questioned is a suspect does not trigger the requirement of warnings. A noncustodial situation is not converted into one governed by Miranda merely because the questioning took place in a "coercive environment." Oregon v. Mathiason, 97 S. Ct. 711, 714 (1977). As the Court pointed out in Oregon v. Mathiason, "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime."

More recently the Court noted in California v. Beheler, 103 S. Ct. 3517 (1983), that in determining whether a suspect is "in custody" for purposes of receiving Miranda protection, the ultimate inquiry is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. Ante at 3520. In order for a police contact to become custodial there "must be at least some objective manifestation that the defendant was deprived of his freedom of action in a significant way." Pulaski v. Buttermost, 677 F.2d 8, 9

V I R G I N I A:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

COMMONWEALTH OF VIRGINIA

vs.

C-22,213 through
C-22,216 and
C-22,763

DAVID VASQUEZ

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS STATEMENTS

COMES NOW the Commonwealth of Virginia, by her Attorney, and offer the following in response to the Defendant's Motion to Suppress:

FACTUAL PREDICATE

On January 25, 1984, the body of [redacted] was discovered in the basement of her Arlington residence by a close friend and business associate. Miss [redacted] hands were tied behind her and a noose around her neck was suspended from an overhead pipe. The medical examiner determined that she had died sometime during the evening hours of January 23, 1984. The cause of death was declared to be hanging. Vaginal swabs prepared during the autopsy disclosed the presence of sperm.

An inspection of Miss [redacted] residence by the Arlington County Police revealed that the contents of her purse had been scattered on the upstairs landing. All currency appeared to have been removed from her wallet. A small compact camera was later discovered to be missing from the dining room table.

Subsequent scientific examination indicated that the bindings used to secure Miss [redacted] hands had been cut from the venetian blinds in the sunroom. The noose employed for her execution had been cut from a length of rope wrapped around a carpet in her

basement.

A canvass of Miss [redacted] neighborhood by Arlington Officers disclosed that the defendant had been observed walking in front of the victim's house shortly after 8:00 P.M. on the evening of the homicide. This was within the general time frame in which the victim's death occurred. The defendant had formerly resided in that neighborhood and was known by many of [redacted] neighbors. Several people described the defendant as having an abnormal personality. Consequently, Detective W.C. Shelton, the primary investigator in the case, elected to interview the defendant concerning his presence in the neighborhood that evening.

In the late morning of February 6, 1984, Detective Shelton, accompanied by his partner Detective R. H. Carrig, met the defendant at his place of employment, the McDonald's on Sudley Road in Manassas.

When Detective Shelton approached the defendant his status was no more than that of a witness. There was nothing to link the defendant to the homicide other than his presence in the neighborhood. Detective Shelton would have been remiss in his duties if he had not thoroughly interviewed the defendant. Shelton prefaced his contact by explaining the nature of his inquiry. The Detective asked the defendant, in the presence of other officers, if he would accompany them to the Prince William County Police Department for an interview. The defendant agreed without hesitation. He was then transported to the Prince William County Police Department since there were no interview facilities at the McDonald's.

Detective Shelton conversed with the defendant for approximately one hour and a half in Prince William County. At no time was the defendant's freedom of movement restrained in any way.

He was unequivocally advised that he was not under arrest. The defendant was not given his Miranda warning prior to the interview.

The defendant initially denied having visited Arlington County since November, 1983. Shelton realized that this statement was false. To impress upon the defendant that he knew that the defendant had been in Arlington County on the evening of January 23, 1984, Shelton told him that his fingerprints had been recovered from the Hamm residence. After some additional conversation, the defendant admitted being present at [redacted] residence on January 23, 1984. However, it was the defendant's contention that he had been invited inside by Miss [redacted]. Moreover, later in the interview, the defendant informed Shelton that he had been seduced by the victim. As the conversation evolved, the defendant's ability to communicate became progressively worse. At times his statements were virtually incomprehensible. Eventually, the defendant admitted in a rather oblique fashion that he participated in the hanging of Miss Hamm. However, according to the defendant, she was executed at her request.

At this point, Shelton requested that the defendant accompany him to Arlington County. The defendant reluctantly agreed. Although suspicion was mounting, Detective Shelton reiterated to the defendant that he was not under arrest. The defendant was transported to the Arlington County Police Department in the rear of an unmarked vehicle. He was neither handcuffed nor restrained in any fashion. He was not physically escorted in his movements.

When the defendant and Detectives Shelton and Carrig arrived in Arlington, the defendant was provided with lunch. He was taken to an interview room in the Investigation Division of the Police Department. There Shelton advised the defendant of his

Miranda rights and inquired if he understood them. The defendant acknowledged affirmatively and signed a written version of the Miranda warnings. The defendant further stated that he was sober and had not been threatened or offered any promise for his co-operation.

During the ensuing hour, the Detectives discussed with the defendant his involvement in the murder of [redacted] and the burglary of her home. Although the defendant still presented a rather disjointed rendition of the incident, there was little doubt of his involvement. Soon after the second statement was taken, the defendant was placed under arrest for capital murder. Bond was set and the defendant remanded to jail.

The following morning, because some confusion still existed with respect to certain aspects of the case, Detective Shelton removed the defendant from the jail and reviewed some points from his previous statements. The defendant was again advised of his pertinent constitutional rights both orally and in writing. The defendant acknowledged his rights and executed a written waiver in the Detective's presence.

LEGAL ARGUMENT

The defendant challanges the admissibility of his statements to Detective Shelton on a variety of Constitutional grounds. Firstly, he contends that his client was not advised of the warnings prescribed by Miranda v. Arizona, 86 S. Ct. 1602 (1966), prior to the initial interview in Prince William County. He maintains collaterally that the first statement was involuntarily given under duress. Lastly, he argues that the two statements which followed were the product of the initial unlawful confession. The defendant consequently urges the Court to exclude all three

confessions as constitutionally infirm. His position is without factual or legal basis.

The Initial Statement in Prince William County

In Miranda v. Arizona, 86 S. Ct. 1602 (1966), the United States Supreme Court announced a mandatory procedure which must be followed by police officers conducting "custodial interrogation." The Court in Miranda defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 86 S. Ct. at 1612. The mere fact that the questioning occurs at the police station or that the person being questioned is a suspect does not trigger the requirement of warnings. A noncustodial situation is not converted into one governed by Miranda merely because the questioning took place in a "coercive environment." Oregon v. Mathiason, 97 S. Ct. 711, 714 (1977). As the Court pointed out in Oregon v. Mathiason, "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime."

More recently the Court noted in California v. Beheler, 103 S. Ct. 3517 (1983), that in determining whether a suspect is "in custody" for purposes of receiving Miranda protection, the ultimate inquiry is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. Ante at 3520. In order for a police contact to become custodial there "must be at least some objective manifestation that the defendant was deprived of his freedom of action in a significant way." Pulaski v. Buttermost, 677 F.2d 8, 9

(1st Cir. 1982).

The United States Court of Appeals for the Eleventh Circuit suggested a four factor judicial analysis in determining whether an interrogatory setting is custodial. In United States v. Lueck, 678 F.2d 895, 900 (1982), that Court enumerated the following considerations:

(1) Whether probable cause existed for the defendant's arrest.

(2) Whether the interrogating officer considered the defendant free to leave.

(3) Whether the defendant subjectively believed that he was free to leave.

(4) Whether the defendant had become the focus of the investigation.

The Court in Lueck, further observed that in applying the foregoing criteria, no single element is dispositive. In determining custodial status, the Court must look to the "totality of the circumstances."

When Detective Shelton approached the defendant at his place of employment, the evidence against him warranted no more than suspicion. In fact, at the conclusion of the initial interview, it is doubtful that probable cause existed for his arrest. The defendant admitted being in [redacted] home the evening of her death, but he steadfastly contended that everything which occurred was consentual. If this was sufficient to constitute probable cause, it developed at the very end of the interview.

Detective Shelton repeatedly advised the defendant that he was not under arrest. The defendant, during the initial interview, was not handcuffed and his freedom of movement was not restrained in any fashion. Obviously, the investigating detective did not consider the defendant to be under arrest. There was no objective

basis for the defendant to draw an opposite conclusion.

Although the defendant may have been a suspect, he certainly had not become the focal point of the investigation.

As demonstrated by the above cited cases, the transportation of the defendant to a police station to facilitate an interview did not convert the situation to a custodial one.

Therefore, under no logical interpretation was the defendant under arrest during the initial interview in Price William County. Detective Shelton had no obligation to advise the defendant of his Miranda warnings.

The Statement Given by the Defendant in Prince William County was Voluntary and Free of Duress.

As a condition precedent to the admissibility of a confession, the Commonwealth must demonstrate by a preponderance of the evidence that the statement was voluntarily given. Witt v. Commonwealth, 215 Va. 670, 673 (1975). The time-honored test of voluntariness is "whether the behavior of the States' law enforcement officials was such as to overbear the [defendants'] will to resist and bring about a confession not freely self-determined." Rogers v. Richmond, 81 S. Ct. 734, 741 (1961). The Court in Witt also restated the recognized principle that government coercion must be judged by an objective standard. The alleged coercion must be one a reasonable man would draw from the government's conduct. 215 Va. at 675. In developing an objective standard, courts have considered a variety of factors, including the defendant's age; sobreity; mentality; prior experience with the criminal justice system; length of questioning; promise or threats and denial of physical needs. See Penn v. Commonwealth, 210 Va. 213 (1969) and Akers v. Commonwealth, 216 Va. 40 (1975).

The defendant in this case is 37 years old and while his mental capacity is below average, it is still in the normal range. There is no evidence that he had consumed any intoxicating beverage or drugs on the date of the interview. The interview itself was far from protracted, lasting only about one and a half hours. The defendant's experience with the criminal justice system was minimal, having only one prior arrest for trespassing. There was no promise offered to the defendant in exchange for his cooperation, nor was any threat made. In sum, none of the traditional indices of coercion were present in this case.

The fact that Detective Shelton misrepresented certain information to the defendant did not change the voluntary nature of his statement. Shelton informed the defendant that his fingerprint had been recovered at the homicide scene. This was not a true statement. However, courts have frequently held that deception alone will not render a confession involuntary, absent other aggravating circumstances. United States v. Castaneda - Castaneda, 729 F.2d 1360, 1363 (11th Cir. 1984) and United States Ex. Rel. Hall v. Director, 559 F.2d 93 (7th Cir. 1978).

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with a similar factual situation have ruled identically. See Frazier v. Cupp, 89 S. Ct. 1420 (1969); United States v. Castaneda - Castaneda, supra; United States Ex. Rel. Riley v. Frazier, 653 F.2d 1153 (7th Cir. 1983); and United States Ex. Rel. Hall v. Director, 559 F.2d 93 (7th Cir. 1978).

Employing an objective standard, there was no legally recognizable coercive element attending the statement given by the defendant in Prince William County on February 6, 1984.

The Second Statement by the Defendant was without Constitutional Defect.

Following the initial interview of the defendant in Prince William County, Detective Shelton asked the defendant to accompany him to Arlington County. Again, Shelton informed the defendant that he was not under arrest. The defendant, albeit reluctantly, agreed to travel to Arlington for a more thorough interview. En route to Arlington, the defendant was neither handcuffed nor physically escorted. Immediately upon arrival in Arlington, the defendant was apprised of his rights under Miranda v. Arizona. He acknowledged his understanding of these rights both orally and in writing.

The defendant seeks to bar the admissibility of his statements on two grounds. Firstly, he contends that the statement was involuntarily given. Secondly, he maintains that the second confession was the tainted product of the initial unlawful statement. Neither position has merit.

As mentioned above, the defendant was thoroughly advised of his rights prior to the second interview. He agreed in writing to discuss the [redacted] murder with Detective Shelton. The detective made no threats or promises to the defendant. The second interview

was of approximately an hour duration. The defendant was served lunch during the interview. Again, the record is totally devoid of any coercive tactics that would overbear the will of a "reasonable man."

The defendant also seeks exclusion of the second statement as an unlawful fruit derived from the initial interview. Since the first statement is without constitutional blemish, the defendant fails to prove any factual predicate for this issue. However, assuming arguendo that the Court believes this issue to be properly framed, the Commonwealth's evidence would demonstrate adequate attenuation.

As the Supreme Court of Virginia pointed out in Warlick v. Commonwealth, 215 Va. 263, 265 (1974), the exclusionary rule operates to exclude information or evidence acquired directly or derivatively from an unlawful confession. A recognized exception to this so called "fruit of the poisonous tree doctrine" becomes operative when the taint has been purged. When the connection between the illegal statement and evidence derived becomes so attenuated as to dissipate the taint, courts will not invoke the exclusionary rule. 215 Va. at 266.

Assuming that the defendant's statement in Prince William County was contaminated by some currently unidentified coercive influence, the second statement was sufficiently removed in time to relieve such influence. The defendant voluntarily accompanied the Detective to Arlington. They engaged in casual conversation en route. The defendant was advised of his rights and served lunch prior to the second interview. This relaxed interval clearly relieved any pressure which evolved from the first conversation. Furthermore, to conclude that the second and more incriminating

interview would never have occurred but for the initial conversation in Prince William County would require the Court to engage in pure speculation.

The final aspect of the defendant's motion addresses a third statement made on February 7, 1984. This statement was made on the morning following his arrest. Detective Shelton brought the defendant from the Arlington County jail to his office. The defendant was advised of his rights pursuant to Miranda and executed a written waiver. The interview was conducted in the same manner as the preceding two. There were no threats, promises or coercive influence. For the reasons heretofore argued, the third statement was equally constitutionally sound.

The Defendant's Low Intelligence Does Not Preclude the Finding of a Valid Waiver.

Assuming a facially valid waiver of rights preceded the second and third interviews, the defendant contends that his low intelligence would preclude a finding of voluntariness. While education and intelligence are certainly factors to be considered they are not determinative of a conscious and intelligent waiver. Akers v. Commonwealth, 216 Va. 40, 46 (1975).

The defendant is undoubtedly an individual of relatively low intelligence. However, Detective Shelton very clearly and explicitly explained the Miranda warnings to him. The defendant acknowledged his understanding of those rights and denied any inability to comprehend their import. In Simpson v. Commonwealth, decided June 14, 1984, the Supreme Court of Virginia experienced no difficulty in upholding a waiver of Miranda rights by an individual with an intelligence quotient of seventy-eight (78). The Court held that based upon the totality of the attendant circum-

cumstances, the waiver and confession which followed were voluntary. Applying that same test to the immediate case, there is no indication that the defendant's intelligence level precluded a conscious decision to cooperate with the interviewing officer.

Conclusion

Wherefore, the Commonwealth urges the Court to deny the Defendant's Motion to Suppress Statements.

Respectfully Submitted

Henry E. Hudson
Commonwealth's Attorney

Certificate of Service

I hereby certify that two certified copies of the foregoing Memorandum were hand-delivered to Matthew P. Bangs, Counsel for Defendant, 2054 North 14th Street, # 200, Arlington, Virginia 22201. This _____ day of October, 1984.

Henry E. Hudson

V I R G I N I A:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

COMMONWEALTH OF VIRGINIA,	)	
	)	
VS.	)	C-22213-22216
	)	C-22763
DAVID VASQUEZ,	)	
Defendant	)	

MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS

Statement of Facts

On February 6, 1984, the Defendant, David Vasquez, was contacted by several detectives from the Arlington and Prince William County police departments while the Defendant was working at a McDonald's restaurant in Manassas, Virginia. The Defendant was informed by his supervisor that some police detectives wanted to speak to him and that they were waiting in the lobby of the restaurant.

The detectives told the Defendant that they wanted to ask him some questions and that they wanted to ask these questions at the Manassas police station rather than at McDonald's. Despite the Defendant's repeated requests for information concerning the subject matter of this questioning, the detectives refused to tell him why they wanted to question him. They only told him that they did not want to question him in front of his fellow employees. The detectives did not inform

the Defendant that he did not have to go with them to the police station or that he did not have to answer any of their questions.

The Defendant was then transported to the Prince William County Police Department by detectives from Prince William County. Despite the fact that it was extremely cold, the Defendant was not permitted to take his coat or gloves with him. En route to the police station, the Defendant again asked what this was all about and the detectives told him that they did not know.

As soon as they arrived at the police station, the Defendant was taken to a small interrogation room and seated at a table between Detectives Carrig and Shelton of the Arlington County Police Department. They then began questioning the Defendant about the murder of [redacted], which occurred on January 23, 1984. During the course of this extensive and lengthy interrogation, the Defendant made numerous statements to the detectives. The Defendant was not advised of any of his rights under Miranda v. Arizona, 384 U.S. 436 (1966), at any time prior to or during this interrogation. While he was being interrogated, the Defendant made several requests to see and talk to his mother. All of these requests were rebuffed and put off by the detectives.

At the end of this interrogation, the Defendant was asked if he wanted to go to Arlington with the detectives. His response was "No" and he repeated his requests to see his

mother. Despite this fact he was transported to the Arlington County Police Department by Detectives Shelton and Carrig. They then took the Defendant to a small interrogation room for additional questioning. Prior to this questioning the Defendant made a request to see a psychiatrist and was informed by the detectives that he could not do so. He was then advised of his rights under Miranda and interrogated by Detectives Shelton and Carrig for a lengthy period of time. Defendant made numerous statements during this interrogation.

Subsequent to this interrogation, the Defendant was charged with murder, fingerprinted, booked and taken to the Arlington County Detention Center. On the morning of February 7, 1984, the Defendant appeared in the Arlington County District Court for arraignment and he was informed that he was charged with murder. That same morning the Defendant was taken to the interview room at the Arlington County Police Department and interrogated by Detective Shelton. After receiving his Miranda warnings, the Defendant gave numerous statements in response to questions from Detective Shelton.

Additional facts surrounding these statements will be included in the Argument portion of this Memorandum.

ARGUMENT

I. THE FAILURE TO ADVISE THE DEFENDANT OF HIS RIGHTS UNDER MIRANDA V. ARIZONA PRIOR TO THE INTERROGATION WHICH TOOK PLACE IN MANASSAS CONSTITUTES A VIOLATION OF THE DEFENDANT'S RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND SECTIONS EIGHT AND ELEVEN OF ARTICLE I OF THE VIRGINIA CONSTITUTION.

The Supreme Court clearly established, in Miranda v. Arizona, supra, that a person who is subject to a custodial interrogation must be given notice of certain rights including the right to remain silent, the right to an attorney, the right to have an attorney appointed if indigent, etc. The failure to provide a defendant with notice of the rights requires the suppression of any statement given by the defendant during the course of the custodial interrogation.

In the case at bar, the Defendant was not advised of any of his rights under Miranda either prior to or during his interrogation in Manassas. Accordingly, if the Court determines that this was a custodial interrogation, the Defendant's statement must be suppressed.

In Miranda, the Supreme Court defined "custodial interrogation" as follows:

> By custodial interrogation, we mean questioning by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way

384 U.S. at 444.

The questioning of a person in a police station does not by itself constitute a custodial interrogation entitling a person to receive Miranda warnings. California v. Beheler 463 U.S. _____, 103 S.Ct. 3517 (1983); Oregon v. Mathiason,

429 U.S. 711, 97 S.Ct. 711 (1977). However, questioning in the coercive and compulsive atmosphere of a police station is an important factor in establishing that there was a custodial interrogation. Miranda v. Arizona, supra; Moore v. Ballone, 658 F.2nd 218 (4th Cir. 1981).

The facts in cases such as Oregon v. Mathiason, supra; and California v. Beheler, supra, which involved police station interviews that were not considered to be custodial interrogations, are clearly distinguishable from the facts in the present case. In Oregon v. Mathiason, supra, the defendant was a suspect in a burglary and the investigating detective had made several attempts to locate him and left messages asking the defendant to contact him. Twenty-five days after the crime occurred the defendant telephoned the detective and the detective asked him to select a place where it would be convenient for them to meet. When the defendant stated that he had no preference as to the location of the meeting, the detective suggested that they meet at the state police barracks located two blocks from the defendant's home.

When the defendant arrived at the police barracks, he accompanied the detective to an office. The detective immediately informed the defendant that he was not under arrest, but that he wanted to talk to the defendant about a burglary. He informed the defendant that his truthfulness would be

considered by the district attorney and the judge and that his fingerprint had been found in the house where the crime was committed. The defendant sat quietly for a few minutes and then said that he had taken the property. The detective advised him of his Miranda rights and the defendant gave a complete statement.

Based on these facts, the Court held that the defendant did not have to be advised of his Miranda rights at the start of the interview. The Court noted that the defendant's freedom to leave the police barracks had not been restricted in any way and that he had come to the barracks voluntarily. In addition, he was immediately informed that he was not under arrest and he was allowed to leave the barracks as soon as the interview was concluded. Since all of these facts demonstrated that the defendant's freedom had not been restrained, the Court concluded that there had not been a custodial interrogation.

A similar result was reached in California v. Beheler, supra, in which the defendant was a participant in an attempted robbery resulting in the shooting and death of the victim. The defendant initiated contact with the police by telephoning them and telling them who did the shooting. He also showed the police where the gun was located. The defendant then voluntarily accompanied the police to the police station after having been informed that he was not under arrest. He was interviewed for approximately thirty minutes and allowed to go home. The police did not give him his Miranda warnings at any time. Five days

later the defendant was arrested and given his Miranda warnings. He then gave a statement in which he stated that his prior statement was voluntary.

The Court held that under these circumstances, the police were not required to provide the defendant with his Miranda warnings at the initial interview. Since the defendant had not been arrested and his freedom of movement had not been restrained, this interview did not constitute a custodial interrogation.

Unlike the defendants in Mathiason and Beheler, the Defendant in the present case did not initiate the contact with the police. Rather, they came to his place of employment and told him that they wanted to talk to him at the police station. Unlike the defendant in Mathiason, Mr. Vasquez was not given a choice as to where the questioning would be conducted and the detectives insisted that the questioning be conducted at the police station.

Another important distinction between these cases is the fact that in both Mathiason and Beheler the defendants were immediately informed that they were not under arrest. Mr. Vasquez was not given any such information at McDonald's or when he arrived at the police station. Instead the detectives waited until halfway through the interrogation before they told the Defendant that he was not under arrest. By this time, the detectives had already accused the Defendant of lying several times concerning his presence in Arlington and had told him that his fingerprints had been found in a house in Arlington.

Thus, by the time Detective Carrig stated that the Defendant was not under arrest, he had already been transported to the police station, his requests for information were repeatedly ignored, he was being accused of lying and committing a crime, he was sobbing, upset and confused as a result of these accusations, and his request to talk to his mother had been rebuffed by Detectives Shelton and Carrig. Under these circumstances, the Defendant had reasonable grounds for believing that he was not free to leave despite Detective Carrig's statement that he was not under arrest.

The fact that a defendant is not deprived of his right to receive Miranda warnings because he was told that he was not under arrest is supported by the decision in Dickerson v. State, 276 N.E. 2nd 845 (Ind. 1972), in which the defendant was convicted of rape. The defendant had been in the police station voluntarily on another matter when an officer saw him in the hallway and told him that someone had filed a rape complaint against him. The officer told the defendant that he was not under arrest, but that he would like to talk to him about the complaint. The defendant accompanied the officer to an interview room and gave a statement. In holding that the defendant was not deprived of his right to receive Miranda warnings merely because he had been informed that he was not under arrest, the Court stated:

> Although appellant was informed that he was not under arrest, it is abundantly clear that Officer Brunkhart wanted to question him. We believe that an interrogation, initiated by the police and conducted in the compelling atmosphere of the interrogation room at the police station, at

> a time when the investigation had focused on the accused, constitutes circumstances which would indicate a significant deprivation of freedom so as to require the interrogating officers to advise the suspect of his constitutional rights.

276 N.E. 2nd at 848.

Likewise, in the present case, the circumstances surrounding the Defendant's interrogation clearly indicate that he had been deprived of his freedom to an extent comparable to an arrest. One of the circumstances leading to this conclusion is the refusal to respond to the Defendant's repeated requests for information as to why the detectives wanted to talk to him. A similar situation existed in Commonwealth v. Haas, 373 Mass. 545, 369 N.E. 2d 692 (1977), in which the defendant had made repeated requests for information as to what was happening as he was being transported from his home to the police station. He had voluntarily agreed to accompany the officers to the station. The Court concluded that the refusal of the police officers to tell the defendant what was happening until they reached the police station was a factor indicating that there had been a custodial interrogation as defined in Oregon v. Mathiason, supra.

Another essential fact which existed in both Mathiason and Beheler is that in those cases the defendants were allowed to leave as soon as they gave their statements. In addition, the defendant in Mathiason received the Miranda warnings as soon as he made his first incriminating statement.

On the other hand, the Defendant in the present case was not released after he was interrogated in Manassas. Instead

he was transported to Arlington for additional questioning. When he was asked if he wanted to go to Arlington, the Defendant responded "No". /page 68 of transcript/ Also, by this time the Defendant was extremely upset and his repeated requests to see his mother were being rejected by Detectives Carrig and Shelton. In addition, the Defendant had already made statements implicating him in a murder and it is ludicrous to suggest that he was free to leave the police station after giving such a statement.

As the foregoing discussion indicates, there are numerous important distinctions between the facts in Mathiason and Beheler and the facts in the present case. One case which has facts extremely similar to those in the present case is Moore v. Ballone, 658 F.2d 218 (4th Cir.1981), which involved a habeas corpus petition from a conviction for rape and murder by a state court. Although the defendant was not arrested, he was picked up for questioning and transported ten miles to the sheriff's office. He was then taken to a back room in which there were four officers and a tape recorder. The sheriff testified at a suppression hearing that the defendant was free to leave at any time, but the defendant was never informed that he was free to leave. The defendant stated that he was sleepy and he wanted to go home. The sheriff repeatedly told him that he could go home after he told them what happened the night of the murder. After forty-five minutes of leading questions and accusations the defendant admitted having a sexual encounter with a woman at her house and he agreed to show the sheriff the house. He was given the Miranda warnings en route to the house and, thereafter, confessed to the rape and murder.

Based on these facts, the Court concluded that there had been a custodial interrogation and that the defendant should have been advised of his rights under Miranda. In reaching this conclusion, the Court stated:

> The meaning of custody for purposes of Miranda v. Arizona was described by the Court as the "incommunicado interrogation of individuals in a police dominated atmosphere" where a person has been "deprived of his freedon of action in any significant way". 384 U.S. at 445, 86 S.Ct. at 1612. The classic example under Miranda involves interrogation of the person in a police stationhouse, just as Moore was interrogated here.

658 F.2d at 225.

The Court then compared these facts with the facts in Oregon v. Mathiason and concluded that the following factors indicated a clear distinction between the two cases. First, in Mathiason, the defendant voluntarily appeared at the police station after receiving a polite request to meet with the detective. Moore was approached by officers who asked him to accompany them to the police station for questioning. He left his bicycle behind and was driven ten miles to the station. Second, Mathiason was questioned by only one officer and there were four officers in the room while Moore was being questioned. Third, Mathiason was immediately informed that he was not under arrest whereas, in Moore although the sheriff said that Moore was not under arrest, he did not inform him of this fact. Fourth, the length of the questioning of Moore was greater than in Mathiason. Fifth, the questioning of Moore was of an accusatory nature and the sheriff was attempting to incriminate Moore. The Court then concluded that all of these factors were sufficient to create a custodial interrogation.

The differences between the facts in the present case and those in Mathiason have previously been discussed in this memorandum and it is clear that there is a great deal of similarity between Moore v. Ballone, supra, and the present case. In both cases the suspects were asked to come in for questioning and then transported to a police station. The facts in the present case create an even stronger showing of custodial interrogation in that the Defendant was taken from his place of employment and his repeated questions concerning the purpose of the questioning went unanswered. Neither suspect was immediately informed that he was not under arrest or that he was free to leave and both men were questioned for an extended period of time. Also, in both cases, the questioning was of an accusatory nature with the questioner telling the suspect that he was not telling the truth. In Moore there were four officers in the room and in the present case, the Defendant was seated at a table between two detectives in a small room.

A comparison of the facts in this case with those in Moore v. Ballone, supra, clearly indicates that the Defendant's freedom was sufficiently restricted so as to constitute a custodial interrogation. The showing of restrictions on freedom in the present case is as strong, if not stronger, than the one in Moore v. Ballone, supra. Accordingly, the failure to provide the Defendant with his Miranda warnings prior to or during the Manassas interview requires the suppression of his statement.

An additional basis for the conclusion that the Defendant was subject to a custodial interrogation becomes apparent when one examines the reasoning behind the decision in Miranda. The Court stated that it was gravely concerned with incommunicado interroga-

tions in which the police used psychological ploys and techniques to obtain confessions from suspects. Among these ploys were the providing of false information; assuming that the suspect was guilty and acting as if they knew he was guilty; and the use of the good guy-bad guy or Mutt and Jeff technique. The Court concluded that all of these techniques created a subtle form of coercion and that protective devices had to be employed to prevent suspects from being compelled to incriminate themselves when these methods were being utilized. Miranda v. Arizona, 384 U.S. at 456-8.

These methods were used by Detectives Carrig and Shelton with a great deal of success. They provided the Defendant with false information by telling him that his fingerprints had been found and that he had been seen in the window of the house. They also repeatedly overrode Defendant's denials of being in Arlington by telling him that it was not an issue because they knew that he had been in Arlington and they were only interested in the reasons why he was there. The detectives also used the good guy-bad guy technique during the interrogation in Manassas.

Since this was exactly the type of interrogation that Miranda was designed to prevent, the failure to provide the Defendant with the Miranda warnings constituted an impermissible violation of his constitutional rights.

It should also be noted that although the Court has created a "good faith" exception in search and seizure cases, this exception is not applicable to a failure to provide Miranda warnings. In the recent case of Berkemer v. McCarty, 468 U.S.

82 L.Ed 2d 317, 333 (1984), the Court held that Miranda must be strictly enforced and since the Miranda safeguards were designed to "ensure" the protection of a person's constitutional rights, they were not affected by the fact that police officers acted in a responsible manner.

In conclusion, the determination of whether a person was subject to a custodial interrogation is based upon "how a reasonable man would have understood his situation". Berkemer v. McCarty, 82 L.Ed. 2d at 336. In the present case, any reasonable person who was faced with the situation in which the Defendant found himself would have concluded that his freedom of movement was significantly restricted and that he was not free to leave. Accordingly, the questioning of the Defendant at the Manassas police station was a custodial interrogation and the Defendant should have been advised of his Miranda rights. The failure to provide him with these warnings is a violation of his rights under the Fifth and Fourteenth Amendments of the United States Constitution and Sections Eight and Eleven of Article I of the Constitution of Virginia. For this reason the Defendant's statement in Manassas must be suppressed.

II. THE STATEMENT GIVEN BY THE DEFENDANT IN MANASSAS WAS INVOLUNTARY AND SHOULD BE SUPPRESSED

It is a well established rule of law that the use of an involuntary statement made by a defendant is an impermissible violation of his right to due process. Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745 (1963); Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772 (1966); Rodgers v. Commonwealth, 227 Va. _____ , 227 VRR 642 (1984); Simpson v. Commonwealth, 227 Va. ____ , 227 VRR 595 (1984). The distinction between a voluntary and an involuntary statement has been described as follows:

> Whether the statement is the product of an essentially free and unconstrained choice by its maker, or whether the maker's will has been overborne and his capacity for self-determination critically impaired.

Rodgers v. Commonwealth, 227 VRR at 643. The Commonwealth has the burden of proving that a statement was voluntary. Green v. Commonwealth, 223 Va. 706, 292 S.E.2d 605 (1982); Akers v. Commonwealth, 216 Va. 40, 216 S.E.2d 28 (1975).

The determination of whether a statement was voluntary must be based on a review of the totality of the circumstances surrounding the statement. Schneckloth v. Bustamonte, 412 U.S. 93 S.Ct. 2041 (1973); Stockton v. Commonwealth, 227 Va. _____ , 227 VRR 138 (1984). The Court in Schneckloth v. Bustamonte, supra, noted that the following factors are indicative that a statement is involuntary: youthfulness; lack of education; low intelligence; failure to advise of constitutional rights; a lengthy detention; repeated and prolonged questioning; and the use of physical punishment including deprivation of sleep or nourishment.

Although not all of these factors exist in the present case, there are numerous facts which indicate that the Defendant's statement was involuntary. First, the Defendant was not advised of his Miranda rights or of any of his other constitutional rights. The failure to provide such information is one factor to consider in determining whether a statement was voluntary. Beckwith v. United States, 425 U.S. 341, 96 S.Ct. 1612 (1976); Johnson v. New Jersey, supra. Since the Defendant had very little experience with the criminal justice system, he was unaware of what his rights were in this situation.

Secondly, the Defendant has a low intelligence level and his ability to understand and comprehend is minimal. For this reason, he is easily influenced by others and his will can be overborne rather easily.

The failure to grant a person access to outside assistance is another indication that a statement is involuntary. Johnson v. New Jersey, supra. In the present case, the Defendant was removed from his familiar surroundings at McDonald's and taken to a small room at the police station. In addition, his repeated requests to see his mother were ignored. Under these circumstances, it is clear that the detectives intended to deprive the Defendant of any outside assistance.

The detectives also sought to confuse and trick the Defendant by providing false information concerning the finding of his fingerprints at the scene of the crime. Although giving a suspect false incriminating evidence does not in itself render a statement involuntary, it is certainly a factor in support of the contention that the statement was not given voluntarily.

The detectives also repeatedly told the Defendant that they were there to help him and they only wanted to clear things up for him. /Transcript pp. 17, 19, 20, 22, 27/. Detective Shelton stated to the Defendant:

> If you got a problem and you need help with it...we are the ones that can help you. We do it all the time. That's part of our job is to help guys who have a problem, OK.

/Transcript, p. 22/. Continued statements such as this constituted promises of leniency and helped the detectives to override the Defendant's free will.

The fact that the detectives were able to override the Defendant's will is clearly demonstrated by an examination of the manner in which the detectives lead the Defendant and had him parroting their statements back to them. They continually planted ideas in the Defendant's mind and then had him repeat these ideas back to them. This process was repeated so many times that it is impossible to list them all in this memorandum. However, two examples demonstrate the extent to which the detectives controlled the Defendant's statements.

The first example concerns the tieing of the victim's hands. The detectives told the Defendant that he had tied her hands and then asked him what he used to tie them. The Defendant said that he had used the rope that the detectives had mentioned earlier. When the detectives said no, the Defendant said he had used his belt. The detectives then told him that he had cut something down in the sun room. When the Defendant said that he had used a clothes line, they finally told him that he had used the venetian blind cord. At this point, the Defendant agreed that he had used the cord from the venetian blinds. /Transcript p. 43/.

A similar sequence of events occurred when they discussed the manner in which the victim was killed. The Defendant agreed with the detectives' statements that the victim had asked him to kill her and they then asked him how he did it. The Defendant stated that he grabbed a knife and stabbed her. Detective Carrig then slammed his hand on the table and yelled, "You hung her. You hung her." The Defendant then responded, "Ok, so I hung her." /Transcript p. 46/.

An examination of these and other statements reveals that the Defendant was willing to repeat anything that the detectives said. They put words in his mouth and he merely repeated them. Under these circumstances, it is clear that his will had been overborne and he was willing to say whatever the detectives wanted him to say.

Further evidence that the Defendant's capacity to make his own decisions was impaired is reflected in his repeated requests for help from his mother. The Defendant was also sobbing and crying frequently which indicates that he was in no condition to make a free and unconstrained choice.

In sum, when one listens to the tapes of the interrogation in Manassas and evaluates all of the circumstances surrounding this interrogation, it becomes obvious that the Defendant's statements were not voluntary. Therefore, these statements should be suppressed.

III. THE STATEMENTS THAT THE DEFENDANT GAVE IN ARLINGTON OF FEBRUARY 6TH AND 7TH, 1984, WERE THE DIRECT RESULT OF THE STATEMENT GIVEN IN MANASSAS AND THE TAINT FROM THAT UNCONSTITUTIONAL INTERROGATION REQUIRES THE SUPPRESSING OF THE STATEMENTS GIVEN IN ARLINGTON.

The "fruit of the poisonous tree" doctrine, which was enunciated in Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1963), provides that evidence which is obtained after other evidence is obtained in an unconstitutional manner may be so tainted that it must also be suppressed. Although that case involved unlawful searches and seizures, this doctrine has also been extended to confessions.

The basis for such a rule is explained in United States v. Bayer, 331 U.S. 532, 540, 67 S.Ct. 1394 (1947), wherein the Court stated:

> Of course, after an accused has let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession may always be looked upon as fruit of the first.

When a prior confession is invalid, a presumption is created that a second confession is tainted by the first. Bunting v. Commonwealth, 208 Va. 309, 157 S.E.2d 204, 207 (1967). In order for the second statement to be admissible, the Commonwealth must make a showing of strong and clear evidence that the mind of the accused was free from the influence which induced the earlier confession. Mathews v. Commonwealth, 207 Va. 915, 153 S.E.2d 238 (1967).

Providing a suspect with Miranda warnings prior to obtaining a second statement is not in itself sufficient to dissipate the taint from a prior invalid confession. Moore v. Ballone, supra, Commonwealth v. Haas, supra. In Moore, the defendant was informed of his rights under Miranda after he had made incriminating statements. He then went on to make additional incriminating statements. There was not a great deal of time between the two series of statements and defendant remained with the police during this time.

The Court concluded that the failure to provide the defendant with the Miranda warnings prior to his making his first

incriminating statement tainted all the statements he gave after he had received these warnings. This was particularly true in light of the fact that some of the questions asked the defendant were based on answers he had given before he was advised of his rights. The Court held that all of his statements must be suppressed.

In the present case, there was no break in the stream of events between the statements given in Manassas and those given in Arlington. The only break in time was the brief period of time that it took to transport the Defendant from Manassas to Arlington. During the second interrogation the detectives repeatedly referred to the statements that the Defendant made in Manassas. At one point Detective Carrig stated:

> Let me ask you this. Let me ask you this. Do you remember telling us everything that happened? You remember telling us all about it? /Transcript, p. 8/.

Similarly, during the February 7, 1984, interrogation the detectives referred back to the two prior statements given by the Defendant.

Under these circumstances, it is readily apparent that the three statements are so closely interconnected that the second two statements are significantly tainted by the statement given in Manassas. For this reason, the statements the Defendant gave in Arlington must also be suppressed.

IV. THE STATEMENT GIVEN IN ARLINGTON ON FEBRUARY 6, 1984 WAS INVOLUNTARY AND SHOULD BE SUPPRESSED.

A review of the totality of the circumstances surrounding the statement given in Arlington on the afternoon of February 6, 1984 indicates that the statement was not the product of a rational intellect and a free will. The Defendant was still being held incommunicado and his repeated pleas to see his mother were rejected and he was denied access to any outside assistance.

The Defendant was so confused by what was happening to him that he asked the detectives if he could see a psychiatrist. This request was also denied and the detectives told him that he could not see a psychiatrist until later /Transcript, p. 3/. As a result of the Defendant's request for a psychiatrist, the detectives should have been aware that the Defendant lacked the capacity to make a rational decision on whether to answer the detectives' questions.

A review of the statements given by the Defendant also reflects that he was unable to make an intelligent choice on whether to talk to them. His statements were frequently rambling and incoherent and his responses to the detectives' questions indicated that he was confused and did not fully comprehend what was happening to him. The lack of the assertion of a free will is also demonstrated by the way in which the Defendant continually repeated the detectives' words and allowed them to lead him into statements. Thus, unlike the defendant in Rodgers v. Commonwealth,

supra, the Defendant did have words put into his mouth as a result of his inability to resist anything the detectives suggested.

In conclusion, the following factors demonstrate that the Defendant's statement was not the result of a rational intellect and free will: Defendant's lack of intelligence; his repeated requests to see his mother; his request for a psychiatrist; his inability to resist the detectives' suggestions and his parroting of their statements; the incoherent, unresponsive and rambling statements; the detectives' promises to help the Defendant; and the fact that the Defendant was upset and sobbing at numerous times during the interrogation. Taken as a whole, these factors render the Defendant's statement involuntary and it should be suppressed.

V. THE STATEMENT GIVEN BY THE DEFENDANT ON FEBRUARY 7, 1984, WAS INVOLUNTARY AND SHOULD BE SUPPRESSED.

All of the factors that were present in the giving of the two statements on February 6, 1984 were also present when the Defendant was interrogated on February 7, 1984. In addition, the February 7, 1984 statement is even more incoherent than the prior statements. Detective Shelton was able to get the Defendant into an almost hypnotic state and the Defendant began to relate things that had happened to him in a dream. The Defendant's statements concerning this dream were frequently incoherent and incomprehensible, and it is readily apparent that the Defendant was in a dazed condition.

The Defendant was also extremely frightened and upset by this dream and he kept repeating "horrible dream". He was also continually crying and sobbing while he was relating this dream.

The Defendant's condition and state of mind throughout this interrogation was such that he was totally unable to exercise any rational intellect or free choice. Under these circumstances, his statements were definitely involuntary and should be suppressed.

VI. THE DEFENDANT DID NOT GIVE A KNOWING, INTELLIGENT AND VOLUNTARY WAIVER OF HIS MIRANDA RIGHTS PRIOR TO GIVING THE STATEMENT IN ARLINGTON ON FEBRUARY 6, 1984.

When a person waives his Miranda rights and makes a statement to the police, the state has the burden of proving that there was a knowing, intelligent and voluntary waiver and the state cannot rely on a presumption that the person understood his rights. Tague v. Louisiana, 444 U.S. 692, 100 S.Ct. 652 (1980). The government has a heavy burden of proving that there has been a knowing and intelligent waiver. Miranda v. Arizona, supra.

The determination of whether there has been a knowing and intelligent waiver requires a review of the totality of the circumstances surrounding the waiver. Fare v. Michael C., 442 U.S. 707, 99 S.Ct. 2560 (1979); Green v. Commonwealth, 223 Va. 706, 292 S.E.2d 605 (1982). Some of the factors which should be evaluated in making this determination are: the defendant's age, mental capacity, and educational level; his prior experience with the criminal justice system; the manner in which the Miranda rights were given; and statements or acts by the defendant indicating that he comprehended his rights. Fare v. Michael C., supra; Toliver v. Gathright, 501 F.Supp. 148 (E.D. Va. 1980); Green v. Commonwealth, supra.

In the present case, Detective Shelton read the Defendant his rights in an extremely rapid manner and without pausing. When

the detectives were discussing the waiver form that the Defendant signed, they asked him if he read and wrote English. He responded:

> Yes, a little bit...I'm still behind, I'm still can't read most of the time.

/Transcript, p. 2/.

Although the Defendant stated that he understood the waiver form, he was merely continuing his pattern of agreeing with and repeating everything the detectives said.

Given the Defendant's limited intelligence and comprehension abilities, one cannot presume that he understood his rights merely because he said that he did. This is particularly true in light of the Defendant's statement that he "can't read most of the time" and the fact that the Defendant's friends had told the detectives that he "gets confused at times". /Manassas transcript, p. 27/.

The Defendant's repeated requests for his mother also should have put the detectives on notice that he had a limited ability to give a knowing and intelligent waiver of his rights. In addition, the statements that he had given in Manassas indicated that he was confused and emotionally distraught. A similar situation existed in Moore v. Ballone, supra, in which the Court stated:

> Here Moore's understanding and coherence should have been doubted by the officers during the interrogation; despite his requests for his mother, they continued to question him and apparently assumed he was competent to waive his rights.

658 F.2d at 229.

The Defendant's lack of prior experience with the criminal justice system is another factor which indicates that he did not give a knowing and intelligent waiver of his rights. Moore v. Ballone, supra. His only prior arrest was for larceny, which occurred over fifteen years ago, and at that time he was not subjected to this type of interrogation.

The fact that the Defendant has a very dependent and compliant personality, who cannot handle stressful situations, also supports the contention that he was incapable of giving a knowing and intelligent waiver of his rights. The interrogations themselves demonstrate that the Defendant was highly susceptible to suggestion and that he would say anything that the detectives wanted him to say.

Given an evaluation of all of these factors and a review of the totality of the circumstances surrounding the Defendant's waiver of his rights, it is plainly obvious that the Commonwealth is unable to meet its heavy burden of proving that the waiver was knowing, intelligent and voluntary. Accordintly, the statement given at the Arlington County Police Station on February 6, 1984 should be suppressed.

VII. THE DEFENDANT DID NOT GIVE A KNOWING, INTELLIGENT AND VOLUNTARY WAIVER OF HIS MIRANDA RIGHTS PRIOR TO THE STATEMENT WHICH WAS GIVEN ON FEBRUARY 7, 1984.

All of the factors which existed when the waiver was given on Feburary 6, 1984 also existed when the Defendant waived his rights on February 7, 1984. However, by the time this second waiver was given, the Defendant had spent the night in jail and he was even more frightened and confused that he had been

on the previous day. In addition, the Defendant's statement was even more incoherent than the prior ones and he kept referring to his "horrible dream". He also appeared to be in an almost trance-like condition when he was discussing this dream.

Under these circumstances, the Defendant's waiver of his Miranda rights was not knowing and intelligent and the statement given on February 7, 1984 must be suppressed.

VIII. THE STATEMENT GIVEN BY THE DEFENDANT ON FEBRUARY 7, 1984 WAS OBTAINED IN VIOLATION OF THE DEFENDANT'S RIGHTS UNDER THE SIXTH AMENTMENT OF THE UNITED STATES CONSTITUTION.

A person's Sixth Amendment right to counsel attaches when judicial proceedings are initiated against him whether by formal charge, preliminary hearing, indictment, information or arraignment. Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232 (1977); Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877 (1972). In the present case, judicial proceedings had been initiated against the Defendant prior to the February 7, 1984 interrogation in that he had been charged with murder and he had been arraigned in the General District Court. Accordingly, his right to counsel had attached prior to this interrogation.

Although a person may waive this right, the government must prove that there has been an intentional relinquishment or abandonment of a known right. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019. This abandonment cannot be established merely by proof that the person had not requested an attorney. Brewer v. Williams, supra. The test for determining whether or not there has been a waiver is a strict standard and the "courts indulge in every reasonable presumption against waiver". Brewer v. Williams, 430 U.S. at 404.

In the case at bar, the only evidence that the Defendant had abandoned his right to counsel is the fact that he never asked for an attorney after he received a rapid recitation of his Miranda rights. Based on the circumstances surrounding this interrogation, which have previously been discussed, it is clear that the Commonwealth has failed to prove an intentional relinquishment of a known right. Since this Court must "indulge in every reasonable presumption against waiver" of the Defendant's right to counsel, it should find that the Defendant did not waive his right to counsel.

For this reason, the statement given on February 7, 1984 should be suppressed.

CONCLUSION

For the foregoing reasons, all of the statements given by the Defendant should be suppressed and the Commonwealth should be barred from using these statements as evidence against the Defendant.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was

hand-delivered to Henry E. Hudson, Commonwealth's Attorney for Arlington County, this 5th day of November, 1984.

Richard J. McCue

DEC 0 1984

VIRGINIA:

CIRCUIT COURT

IN THE CIRCUIT COURT OF ARLINGTON COUTY

COMMONWEALTH OF VIRGINIA	)	
	)	
V.	)	C-22213-22216
	)	C-22763
DAVID VASQUEZ,	)	
Defendant	)	

MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS

This supplemental memorandum is being submitted in response to the Court's request for additional authority on issues concerning the "fruit of the poisonous tree" doctrine. This issue was addressed in part III of the Defendant's initial memorandum and on page ten of the Commonwealth's memorandum.

The Commonwealth has contended that the approximately one hour interval between the initial interrogation in Manassas and the second interrogation in Arlington is sufficient to purge any taint from the first interrogation. In addition, the Commonwealth also relies on the fact that the Defendant was given his Miranda warnings as evidence that the taint from the initial interrogation had been dissipated.

However, in Moore v. Ballone, 658 F.2d 218 (4th Cir. 1981), the Court of Appeals for the Fourth Circuit held that the giving of Miranda warnings prior to a defendant's second confession did not eliminate the taint from prior inculpatory statements that were inadmissible due to the failure to provide the defendant with the Miranda warnings. Accordingly, the Court held that all of the statements given by the defendant were inadmissible.

Giving Mr. Vasquez his Miranda warnings was insufficient to purge the taint from his earlier statements because it failed to inform him that his

prior statements could not be used against him. Since the Defendant had already given one statement, he knew that he could not do any more damage to himself by giving a second or third statement.

A similar situation existed in State v. Williams, 249 S.E.2d 758 (W.Va. 1978), the defendant gave several confessions after he had been repeatedly advised of his rights under Miranda. The police officers conducting the interrogation were aware that the defendant had limited intelligence and gave detailed warnings to make sure that he understood them. After ruling that the first confession was the result of an unlawful search and seizure, the Court was confronted with the issue of whether all of the subsequent confessions were tainted by the unlawful search and seizure. The defendant's first statement was given at 3:00 a.m. on February 28 and a second statement was given at 5:05 a.m. The defendant was jailed at 6:00 a.m. and the following day he gave another confession. A fourth confession was given at 1:15 p.m. on March 2nd and a fifth confession was given at 6:45 p.m. on March 3rd.

In evaluating the State's argument that giving the defendant his Miranda warnings prior to each confession was sufficient to dissipate any taint from the first confession, the Court stated:

> The fact that the Miranda warnings were given prior to each confession is not sufficient standing alone to purge the primary taint of the illegal search and seizure. Had the defendant also been informed that the victim's watch and his first confession could not be introduced at trial against him in the State's case in chief, a different outcome might obtain as to the subsequent confessions.

249S.E.2d at 764. Since the defendant had not been provided with this type of information, the Court ruled that the defendant's second confession was also inadmissible.

In a later appeal after a retrial of the same case, State v. Williams, 301 S.E.2d 187 (W.Va. 1983), the Court ruled that all of the defendant's confessions were tainted by the first confession and the unlawful search and seizure. In reaching this conclusion, the Court held that the following factors indicated that there was no break in the causal link between the confessions: (1) the uninterrupted detention of the defendant; (2) the repeated interrogation without the presence of a lawyer; (3) the presence of the same officers at each interrogation; (4) the confessions were cumulative in that the purpose of each succeeding confession was to obtain more information and to fill in gaps in the previous confessions.

These factors also exist in the present case. Mr. Vasquez was detained and isolated from the time that he was taken from the McDonald's to the time that he gave his third statement. In addition, the detectives ignored his repeated requests for his mother until after he gave his second statement. As in Williams, all of these interrogations occurred without a lawyer being present and the same detectives were present during all three of the interrogations.

These statements were also cumulative in that each statement was based upon the prior statement. At the start of the first interrogation in Arlington the detectives referred to the "long conversation" that they had in Manassas and the fact that they had already gone through the "whole story." When the Defendant denied involvement in the crime the detectives repeatedly reminded him of the things he had told them in Manassas.

This type of questioning by Detectives Shelton and Carrig is illustrated by the following examples:

> "You went through the whole thing with us from the time that you knew you went into the house

> to the time you left the house. You threw the camera away. Uh and we're gonna have to go through it again. (T. p.4).
>
> In the other tape you described the window, what you had to do to get in. Do you remember that? (T. p.5).
>
> What about the night that this happened? You already described it to us...You told us about how you came in the back window. (T. p.7).
>
> Let me ask you this. Let me ask you this. Do you remember telling us everything that happened. You remember telling us all about it? (T. p.8).
>
> You told us you had sex with her, you had to see her face. (T. p.10).
>
> You told us about having sex with her. Remember that. (T. p.12).
>
> Remember what you told us earlier? (T. p. 13).
>
> Ok earlier you mentioned to us a rope, do you recall a rope? (T. p.16).

These statements and similar attempts by the detectives to remind the Defendant of the statements he made in Manassas clearly indicate that there was no break in the causative link between the statement given in Manassas and the one given one hour later in Arlington. Under these circumstances, it would have been impossible for the Defendant to separate one statement from the other and this is particularly true when one considers the Defendant's confused condition and his limited intelligence.

The final statement given on February 7, 1984 is also closely linked to the first two statements. This interrogation was based upon the two prior statements and the questioning was designed to remind the Defendant of his other statements. The Commonwealth's own Memorandum, at page 4, states that during this interrogation Detective Shelton "reviewed some points from

his [Defendant's] previous statements". Thus, this final statement is directly tied together with the Defendant's two prior statements and is tainted by these statements.

Although the Defendant's second statement occurred one hour after the Manassas interrogation and the third statement was given on the following day, this brief passage of time was insufficient to dissipate the taint from the unlawful statement obtained in Manassas. An even greater time interval existed in State v. Williams, supra, in which the final confession was three days after the initial confession. Despite this fact, the court held that all of the confessions were inadmissible.

Similarly, in Bunting v. Commonwealth, 208 Va. 309, 157 S.E.2d 204 (1967), the defendant gave one statement when he was picked up by the police and another confession two days later. The trial judge ruled that the first statement was inadmissible, but admitted the second confession. The Court held that the Commonwealth had failed to prove that the second statement was free from the influences present when the first statement was given and, therefore, the second statement was also inadmissible. Accordingly, the defendant's conviction was reversed.

The facts in the present case are substantially different from the facts in Bunch v. Commonwealth, ___Va.___, 304 S.E.2d 271 (1983), in which the defendant gave an invalid confession in Japan. He was then transported by military personnel from Japan to Quantico, Virginia, a trip which took 42 hours. He was advised of his Miranda rights en route. In Quantico a military attorney informed him of the charges against him and advised him of his rights under Miranda. This attorney also told the defendant that it was not in his best interest to say anything until he consulted with his civilian attorney. He was then turned over to the authorities in Prince William County. The

defendant told them that he had been advised not to talk but that he wanted to get things off his chest. He was then given his Miranda rights for the third time and signed a waiver of counsel prior to giving a confession.

In holding that this confession was admissible the Court noted that the defendant was a sergeant in the Marines with a specialty in the military police field. He had also been informed of his Miranda rights on three separate occasions and had an opportunity to consult with a military attorney who told him not to talk until he consulted with a lawyer. The Court also noted that the defendant's decision to give a statement was based upon a desire to get things off his chest and was not influenced by the confession he gave in Japan.

The facts in the present case are clearly distinguishable from the facts in Bunch in several particulars. First, Bunch was a ten year Marine sergeant who had experience in the military police field and had a clear understanding of his legal rights and the legal system. On the other hand, Mr. Vasquez has limited intelligence, is highly suggestible and had no experience with the legal system. Second, Bunch had been advised of his Miranda rights on three separate occasions and had consulted with an attorney who told him not to say anything. Mr. Vasquez was not given the opportunity to consult with an attorney and his repeated requests to see his mother were denied. He received a rapid rendition of his Miranda rights, which he lacked the ability to understand. Third, Bunch was not in the company of the Prince William authorities while he was transported from Japan to Quantico and he had over 42 hours to consider his situation. The Defendant remained with Detectives Shelton and Carrig at all times and there was only a one hour break between his first and second statements.

In addition, Bunch gave his confession without any prompting from the police. In fact, they had not questioned him at all when he informed them that he wanted to get things off his chest. Thus, this confession was not influenced by what he had said in Japan. This was substantially different from the situation in the present case in which the Defendant was repeatedly reminded of what he had said in Manassas and the detectives used the Manassas statement to convince the Defendant to give additional statements. Thus, while there was no connection between the two statements in Bunch, the statements in the present case are closely linked and intertwined.

In conclusion, a review of the facts and circumstances surrounding the three statements given by Mr. Vasquez demonstrates that the Commonwealth cannot make the required showing of strong and clear evidence that the taint from the Manassas statement had been dissipated. Mathews v. Commonwealth, 207 Va. 915, 153 S.E.2nd 238 (1967). Thus, the Commonwealth is unable to rebut the presumption that the second and third statements are tainted by the Manassas statement. For this reason, all of the statements given by the Defendant should be suppressed.

Respectfully submitted,

DAVID VASQUEZ
By Counsel

Richard J. McCue
945 South George Mason Drive
Arlington, Virginia 22204
(703) 892-9540

Matthew P. Bangs
2054 North 14th Street
Arlington, Virginia 22201

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was hand delivered to Henry E. Hudson, Commonwealth's Attorney for Arlington County, this 3rd day of December, 1984.

Richard J. McCue

V I R G I N I A :

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

COMMONWEALTH OF VIRGINIA,	)	
	)	
	)	
vs.	)	C-22,213 through
	)	C-22,216
	)	C-22,763
DAVID VASQUEZ,	)	
	)	
Defendant.	)	

SUPPLEMENTAL MEMORANDUM IN OPPOSITION
TO DEFENDANT'S MOTION TO SUPPRESS STATEMENTS

The Court has requested counsel to enlarge on the issue of attenuation heretofore touched in memoranda filed in this case. Preliminarily the Commonwealth wishes to restate her steadfast view that the initial interview of the defendant was free of any form of illegality. However, if the Court determines that the defendant's initial statement in Prince William County suffers some type of Constitutional infirmity, it must next decide whether the second and subsequent interviews were a direct or derivative product of that illegality. An affirmative finding would warrant the invocation of the exclusionary rule, unless the causal connection between the initial illegality and the statement which followed had become so attenuated as to dissipate the taint. See Warlick v. Commonwealth, 215 Va. 263, 265 (1974) and Reese v. Commonwealth, 220 Va. 1035, 1040-41 (1980). This forms the conceptual basis for the recognized exceptions to the so called "fruit of the

poisonious tree doctrine," the application of which are here at issue.

As the United States Supreme Court pointed out in the seminal case of Wong Sun v. United States, 83 S. Ct. 407, 417 (1983), evidence is not per se fruit of the poisonious tree simply because it would not have come to light but for illegal official action. Rather, the determinative question is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinquishable to be purged of the primary taint." In Brown v. Illinois, 95 S.Ct. 2254, 2261-2262 (1975) the Court identified several factors to be considered in determining whether the taint has dissipated. These include the temporal proximity between the arrest (or illegal conduct) and the challenged confession, the presence of intervening circumstances and the purpose and flagrancy of the official misconduct. The Court also mentioned that the providing of Miranda warnings was an important consideration in determining whether the confession was obtained by exploitation of illegal police conduct.

Reviewing in inverse order the factors enunciated in Brown, the impropriety demonstrated by Detective Shelton, if any, was of a purely technical nature. The Defendant accompanied the Detective to the Prince William County Police Department solely for the purpose of an interview. There was no

indication that the Defendant was an active suspect at that time. None of the traditional indices of arrest were present, i.e. frisking, handcuffing, escorting, or advisement of rights. In fact, the Defendant was informed that he was not in custody. Absent some objective manifestations of arrest, the Defendant's subjective belief that he was unfree to leave is insufficient to render the setting custodial. Pulaski v. Buttermost, 677 F.2d 8,9 (1st Cir. 1982) United States v. Brunson 549 F.2d 348, 358 (5th Cir. 1977) cert. denied 98 S.Ct. 140. Moreover, the developement of probable cause during the course of the interview did not trigger the requirement of Miranda. See California v. Beheler, 103 S.Ct. 351 (1983).

At the conclusion of the interview in Prince William County, Detective Shelton asked the Defendant to accompany him and his partner to Arlington County for more thorough questioning. Although the Detectives had ample probable cause to arrest the Defendant, in light of his admitted involvement in the death of [redacted], they elected not to do so. The Defendant voluntarily traveled to Arlington with the Detectives and was fully apprised of his rights before the commencement of any further questioning. Given the quantum of probable cause extent at that point, the voluntariness of the defendant's accompaniment of the Detectives to Arlington County was of minimal significance.

Consequently the only conceivable police impropriety

in this case would be their request that the defendant accompany them to Prince William County Police Headquarters and the ensuing interview. As with all seizures the standard of its legality is that of reasonablness. United States v. Brunson, 549 F.2d at 357. The circumstances attending the defendant's contact with the police in Prince William is markedly in contrast to those present in cases where police conduct has contaminated a subsequent confession. See Brown v. Illinois, supra; Dunaway v. New York, 99 S.Ct. 2248 (1979) and Taylor v. Alabama, 102 S.Ct. 2664 (1979) 102 S. Ct. 2664 (1982). In each of those cases, which have collectively fashioned the contemporary application of the "fruit of the poisonious tree doctrine," the predicate illegally was a custodial arrest without warrant or probable cause. To invoke the exclusionary rule on the strength of the purported illegality in this case would represent a substantial enlargement of the rules present contour.

Turning next to the circumstances intervening between the defendant's initial contact with the police and the interview in Prince William County, the most significant circumstance was the defendant's reassurance that he was not under arrest. The defendant was advised that he had been seen in the vicinity of the homicide on the evening of its occurrence. He was, however, told unequivocally that he was not under arrest. Furthermore, during the Prince William County

interview, the defendant's freedom of movement was not restricted in any fashion. The defendant was also informed that his mother would be contacted so that she could meet him in Arlington County. En route to Arlington, the defendant engaged in casual conversation with the Detectives and remained unfettered at all times. He was thoroughly advised of his Miranda rights, both orally and in writing, before being interviewed in Arlington.

The temporal proximity factor has marginal significance in this case with respect to the statements of February 6, 1984. These statements were taken within hours of the initial police encounter. If the initial police contact was improper, the time lapse could not have purged the taint. However, a different result would obtain with respect to the defendant's statement of February 7, 1984. There, the defendant had appeared before a magistrate and General District Court Judge before submitting to a final interview. These events certainly served to relieve the primary taint. Notwithstanding the legal significance of the prior police action, the defendant's statement given the day following his arrest was an independent act of free will.

In the final analysis, the actions of Detective Shelton were neither unreasonable nor exploitive. The admission which ultimately ensued was not the direct product of any form of illegality, but rather the result of a conscious decision on

his part. Consequently, there is no basis for invoking the exclusionary rule in this case.

Respectfully submitted,

Henry E. Hudson
Commonwealth's Attorney

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of December, 1984, a true copy of the foregoing memorandum was hand-deliverd to Matthew P. Bangs, Counsel for Defendant, 2054 North 14th Street, # 200, Arlington, Virginia 22201.

Henry E. Hudson
Commonwealth's Attorney

170

COMMONWEALTH OF VIRGINIA

VS C-22213 thru C-22216

DAVID VASQUEZ

Jan 25 85 170

THE 5th day of January 1985 came the Commonwealth of Virginia by its Attorney, Henry Hudson, the Defendant in Custody of the Sheriff and his Court Appointed Attorneys, Matthew Bangs and Richard McCue.

WHEREUPON this case came to be heard on the "Defendant's Motion to Suppres Certain Statements", and sworn testimony and argument of counsel was had on sam until 5:00P.M. at which time the Court adjourned until 9:30A.M. December 6, 1984.

THEREUPON the Court Ordered that this case be and it hereby is continued tc December 6, 1984 for further hearing.

AND the Defendant is hereby remanded to jail.

Entered this 25th day of January 1985.

Judge

DAVID A. BELL, CLERK
ARLINGTON COUNTY
ARLINGTON, VIRGINIA

171

COMMONWEALTH OF VIRGINIA

VS C-22213 thru C-22216

DAVID VASQUEZ

PURSUANT TO ADJOURNMENT, THE 10th day of December came the Commonwealth of Virginia by its Attorney, Henry Hudson, the Defendant in Custody of the Sheriff and his Court Appointed Attorneys, Matthew Bangs and Richard McCue.

WHEREUPON pursuant to prior proceedings the Court continued to hear sworn testimony and argument of counsel on the Defendant's Motion.

THEREUPON the Court took the aforesaid Motion under advisement.

WHEREUPON the Court Ordered that the Court Reporter prepare three (3) copies of certain portions of testimony and argument of counsel of the Defendant's "Motion to Suppress Certain Statements" heard by this Court on the 5th, 6th, and 10th of December 1984.

AND the Defendant is hereby remanded to jail.

Entered this 25th day of January 1985.

Judge

COMMONWEALTH OF VIRGINIA

VS 172 C-22213 thru C-22216

DAVID VASQUEZ

PURSUANT TO ADJOURNMENT, THE 6th day of January 1985 came the Commonwealth of Virginia, by its Attorney, Henry Hudson, the Defendant in Custody of the Sheriff and his Court Appointed Attorneys, Matthew Bangs and Richard McCue.

WHEREUPON pursuant to prior proceedings the Court continued to hear argument of counsel and sworn testimony on the Defendant's Motion until 5:00P.M. at which time the Court adjourned until 9:30A.M. December 10, 1984.

THEREUPON the Court Ordered that this case be and it hereby is continued to December 10, 1984 for further hearing.

AND the Defendant is hereby remanded to jail.

Entered this 25th day of January 1985.

Judge

Jan 25 85 172

V I R G I N I A :

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

COMMONWEALTH OF VIRGINIA	)	
	)	C-22213-22216
vs.	)	C-22763
	)	
DAVID VASQUEZ	)	

MEMORANDUM

TO: Henry E. Hudson, Esquire, Commonwealth Attorney
Matthew P. Bangs, Esquire
Richard J. McCue, Esquire

FROM: William L. Winston, Judge

The first question to be determined is whether or not the questioning of the defendant at the Manassas police station was "custodial." In no sense was it the mere questioning of a witness. Any fair reading of the tape or transcript will reveal this. Most significantly the interrogation occurred at the police station in an interrogation room. This occurred without Miranda warnings and without the suspect being advised of the subject of the interrogation when he was taken following prearrangement from his place of employment to the police station.

All the methods employed by the officers were those used to obtain a confession. None were those used to obtain information from a witness, which are usually soft and solicitous. Here we have a two-on-one situation at the police station, the use of good guy/bad guy methods of interrogation and the careful use of factual misstatements of the evidence.

Against this evidence, we have only the conclusory statement made to Vasquez by the Arlington detectives to the effect that he was not under arrest. This statement was made during the course of the Manassas encounter.

I have examined these occurrences in the light of the decisions in California v. Beheler, 103 S.Ct. 3517 (1983), Oregon v. Mathiason, 97 S.Ct. 711 (1977), Podlaski v. Butterworth, 677 F.2d 8 (1st Cir., 1982) and United States v. Abell, 586 F.Supp. 1414 (D.MA, 1984), among other authorities cited to the Court.

In Beheler, the defendant called the police, gave them information,

voluntarily accompanied them to the police station, was questioned for thirty minutes and released. This was noncustodial.

In Mathiason, the defendant appeared at the police station after messages were left for him. The questioning finally occurred at the police station by agreement. Following the making of an incriminating statement, the defendant was allowed to leave after the interview and was ultimately charged. This setting was held not to be custodial.

The Podlaski case states emphatically that mere suspicion does not necessitate the giving of the Miranda warnings. Nor does the defendant's opinion that he would have been arrested had he tried to leave put the question to rest. In Podlaski the questioning occurred on the cellar steps of a home, and was ruled by the Court to be information gathering and not custodial interrogation.

The Abell case, which arose in the District Court of Massachusettes, appears to be factually inapplicable to the case before us. That case dealt with the admissibility of routine booking questions and answers in the face of Miranda, hearsay and voluntariness objections, all of which were overruled.

In the examination of the motion before this Court careful consideration has been given to the "custodial interrogation" definition given in Miranda v. Arizona, 86 S.Ct. at page 1612, and to the four-factor test cited to me from United States v. Lueck, 678 F.2d 895 (11th Cir. 1982).

These authorities, when viewed beside the evidence as set forth in the transcript and the tapes, lead the Court to the inescapable conclusion that the motion to suppress the statements of February 6, 1984, be granted on Miranda grounds as being violative of the defendant's rights under the Fifth and Fourteenth Amendments of the United States Constitution and Sections 8 and 11 of Article I of the Virginia Constitution. In oral argument the Commonwealth conceded that the first and second interviews on February 6 would stand or fall together, although the latter questioning was preceded by the giving of Miranda warnings.

This leads to a consideration of the motion to suppress when applied to the statement of February 7. This interview was preceded by the

execution by the defendant of a waiver of his rights under Miranda. This was a reiteration, although briefer than the one given prior to the execution of the waiver of rights made before the second interview on the sixth of February.

The Court finds that the defendant's execution of the waiver of rights was done voluntarily and without the application of any duress or force. This finding is made on the conflicting evidence given by the psychiatrists at the evidentiary hearing. Thus any motions to suppress based upon the involuntariness of the statements are denied. Evidence of the voluntariness, however, may become a question for the jury at trial.

With respect to the defendant's motion to suppress on Miranda grounds the statement of February 7, the Court is of the opinion that if the taint of illegality of the earlier statement has been removed then the statement would not be excluded under the "fruit of the poisonous tree doctrine." It had been removed here by reason of the Miranda warnings, the passage of time, and his Court appearance. The motion to suppress the statement of February 7 is therefore denied.

Counsel will prepare an order, with exceptions noted, incorporating by reference this memorandum.

DATED this 25th day of January, 1985.

JUDGE

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The first question to be determined is whether or not the questioning of the defendant at the Manassas police station was "custodial." In no sense was it the mere questioning of a witness. Any fair reading of the tape or transcript will reveal this. Most significantly the interrogation occurred at the police station in an interrogation room. This occurred without Miranda warnings and without the suspect being advised of the subject of the interrogation when he was taken following prearrangement from his place of employment to the police station.

All the methods employed by the officers were those used to obtain a confession. None were those used to obtain information from a witness, which are usually soft and solicitous. Here we have a two-on-one situation at the police station, the use of good guy/bad guy methods of interrogation and the careful use of factual misstatements of the evidence.

Against this evidence, we have only the conclusory statement made to Vasquez by the Arlington detectives to the effect that he was not under arrest. This statement was made during the course of the Manassas encounter.

I have examined these occurrences in the light of the decisions in California v. Beheler, 103 S.Ct. 3517 (1983), Oregon v. Mathiason, 97 S.Ct. 711 (1977), Podlaski v. Butterworth, 677 F.2d 8 (1st Cir., 1982) and United States v. Abell, 586 F.Supp. 1414 (D.MA, 1984), among other authorities cited to the Court.

In Beheler, the defendant called the police, gave them information,

voluntarily accompanied them to the police station, was questioned for thirty minutes and released. This was noncustodial.

In Mathiason, the defendant appeared at the police station after messages were left for him. The questioning finally occurred at the police station by agreement. Following the making of an incriminating statement, the defendant was allowed to leave after the interview and was ultimately charged. This setting was held not to be custodial.

The Podlaski case states emphatically that mere suspicion does not necessitate the giving of the Miranda warnings. Nor does the defendant's opinion that he would have been arrested had he tried to leave put the question to rest. In Podlaski the questioning occurred on the cellar steps of a home, and was ruled by the Court to be information gathering and not custodial interrogation.

The Abell case, which arose in the District Court of Massachusettes, appears to be factually inapplicable to the case before us. That case dealt with the admissibility of routine booking questions and answers in the face of Miranda, hearsay and voluntariness objections, all of which were overruled.

In the examination of the motion before this Court careful consideration has been given to the "custodial interrogation" definition given in Miranda v. Arizona, 86 S.Ct. at page 1612, and to the four-factor test cited to me from United States v. Lueck, 678 F.2d 895 (11th Cir. 1982).

These authorities, when viewed beside the evidence as set forth in the transcript and the tapes, lead the Court to the inescapable conclusion that the motion to suppress the statements of February 6, 1984, be granted on Miranda grounds as being violative of the defendant's rights under the Fifth and Fourteenth Amendments of the United States Constitution and Sections 8 and 11 of Article I of the Virginia Constitution. In oral argument the Commonwealth conceded that the first and second interviews on February 6 would stand or fall together, although the latter questioning was preceded by the giving of Miranda warnings.

This leads to a consideration of the motion to suppress when applied to the statement of February 7. This interview was preceded by the

execution by the defendant of a waiver of his rights under Miranda. This was a reiteration, although briefer than the one given prior to the execution of the waiver of rights made before the second interview on the sixth of February.

The Court finds that the defendant's execution of the waiver of rights was done voluntarily and without the application of any duress or force. This finding is made on the conflicting evidence given by the psychiatrists at the evidentiary hearing. Thus any motions to suppress based upon the involuntariness of the statements are denied. Evidence of the voluntariness, however, may become a question for the jury at trial.

With respect to the defendant's motion to suppress on Miranda grounds the statement of February 7, the Court is of the opinion that if the taint of illegality of the earlier statement has been removed then the statement would not be excluded under the "fruit of the poisonous tree doctrine." It had been removed here by reason of the Miranda warnings, the passage of time, and his Court appearance. The motion to suppress the statement of February 7 is therefore denied.

Counsel will prepare an order, with exceptions noted, incorporating by reference this memorandum.

DATED this 25th day of January, 1985.

JUDGE

V I R G I N I A :

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

COMMONWEALTH OF VIRGINIA,	)	
	)	
vs.	)	C-2213-2216
	)	C-22763
DAVID VASQUEZ,	)	
	)	
Defendant.	)	

MOTION IN LIMINE

COMES NOW the Defendant, DAVID VASQUEZ, by counsel, and before trial and the selection of the jury, respectfully moves this Honorable Court in limine to instruct the Commonwealth and her counsel as set forth on the following grounds:

1. On February 6, 1984, the Defendant was interrogated by two detectives from the Arlington County Police Department and provided them with two statements concerning the crimes with which he is charged.

2. On February 7, 1984, the Defendant was interrogated again and gave the detectives a third statement.

3. On January 25, 1985, this Court ruled that the two statements given by the Defendant on February 6, 1984 should be suppressed, but that the motion to suppress the statement of February 7, 1984 was denied.

4. Facts concerning these alleged crimes that were recited by the Defendant in his statement of February 7, 1984 had been provided to him by the detectives during the interrogation on February 6, 1984. Defendant had not made any mention of these facts until he received this information from the detectives.

5. Counsel for the Defendant intend to introduce evidence indicating that the detectives provided the Defendant with information concerning many of the facts that were related by the Defendant in his statement of February 7, 1984. This evidence would be limited to statements made by the detectives during the interrogations on February 6, 1984 and no evidence concerning statements made by the Defendant would be introduced.

6. Once this evidence is introduced by the Defendant, the Commonwealth will attempt to enter into evidence the statements given by the Defendant on February 6, 1984.

7. The introduction of evidence concerning the statements made by the detectives on February 6, 1984 does not provide a basis for the Commonwealth to introduce evidence concerning statements made by the Defendant on February 6, 1984.

8. If the Commonwealth is allowed to introduce evidence concerning these statements it will result in severe prejudice to the Defendant and it will effectively prohibit him from presenting any evidence indicating that the detectives had provided him with a considerable amount of information concerning the facts of these alleged crimes.

WHEREFORE, in consideration of the foregoing the Defendant moves this Court to order the Commonwealth and her counsel that if the Defendant introduces evidence concerning statements made by the detectives on February 6, 1984, the Commonwealth shall not mention, refer to, interrogate concerning, or attempt to convey to the jury in any manner, either directly or indirectly, any information indicating that on February 6, 1984 the Defendant made statements concerning these alleged crimes,

and that the Court further instruct the Commonwealth and her counsel to caution each and every one of the witnesses to strictly follow these same instructions.

Respectfully submitted,
DAVID VASQUEZ
BY COUNSEL

RICHARD J. McCUE
945 South George Mason Drive
Arlington, Virginia 22204
(703)892-9540

MATTHEW P. BANGS
2054 North 14th Street
Arlington, Virginia 22201

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was hand-delivered to Henry E. Hudson, Commonwealth's Attorney for Arlington County, Virginia this 30th day of January, 1985.

RICHARD J. McCUE

V I R G I N I A :

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

COMMONWEALTH OF VIRGINIA,	)	
	)	
vs.	)	C-2213-2216
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V I R G I N I A :

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

FILED
JAN 30 1985
DAVID A. P
Circuit Court, Ar
By

COMMONWEALTH OF VIRGINIA,	)	
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RICHARD J. McCUE

COMMONWEALTH OF VIRGINIA

VS

DAVID VASQUEZ

C-22213 thru C-22216
C-22763

IT APPEARING to the Court that the Defendant's motion to suppress was heretofore taken under advisement.

UPON CONSIDERATION WHEREOF it is the opinion of the Court that the said motion should be, and it hereby is granted as to the statements of February 6, 1984, and denied as to the statement of February 7, 1984, said rule being more specifically set forth in the Court's memorandum of January 25, 1985.

BE IT REMEMBERED that the Defendant notes his exception to the Court's ruling herein.

AND the Defendant is hereby remanded to jail.

Entered this 15th day of February 1985.

Judge

DAVID A. BELL, CLERK
ARLINGTON COUNTY
ARLINGTON, VIRGINIA