

1993

West Valley City v. Dennis L. Streeter : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Jan Graham; Attorney General; Attorney for Appellee.

Robert K. Heineman; Brooke C. Wells; Salt Lake Legal Defender Association; Attorneys for Appellant.

Recommended Citation

Brief of Appellant, *West Valley City v. Dennis L. Streeter*, No. 930206 (Utah Court of Appeals, 1993).
https://digitalcommons.law.byu.edu/byu_ca1/5085

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH, :
Plaintiff/Appellee, :
v. :
DAVID C. STREETER, : Case No. 930206-CA
Defendant/Appellant. : Priority No. 2

BRIEF OF APPELLANT

Appeal from a judgment and conviction for aggravated assault, a 3rd degree felony, in violation of Utah Code Ann. § 76-5-103 (1990), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable John A. Rokich, Judge, presiding.

ROBERT K. HEINEMAN (5481)
BROOKE C. WELLS (3421)
SALT LAKE LEGAL DEFENDER ASS'N
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Appellant

JAN GRAHAM (1231)
ATTORNEY GENERAL
236 State Capitol Building
Salt Lake City, Utah 84114

Attorney for Appellee

IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH, :
Plaintiff/Appellee, :
v. :
DAVID C. STREETER, : Case No. 930206-CA
Priority No. 2
Defendant/Appellant. :

BRIEF OF APPELLANT

Appeal from a judgment and conviction for aggravated assault, a 3rd degree felony, in violation of Utah Code Ann. § 76-5-103 (1990), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable John A. Rokich, Judge, presiding.

ROBERT K. HEINEMAN (5481)
BROOKE C. WELLS (3421)
SALT LAKE LEGAL DEFENDER ASS'N
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Appellant

JAN GRAHAM (1231)
ATTORNEY GENERAL
236 State Capitol Building
Salt Lake City, Utah 84114

Attorney for Appellee

TABLE OF CONTENTS

	<u>page</u>
TABLE OF AUTHORITIES	ii
JURISDICTIONAL STATEMENT	1
STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS	1
STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW	3
STATEMENT OF THE CASE AND NATURE OF THE PROCEEDINGS	4
STATEMENT OF FACTS	6
SUMMARY OF THE ARGUMENT	9
ARGUMENT	10
POINT I. <u>POLICE MISCONDUCT REQUIRES THAT DAVID</u> <u>STREETER'S STATEMENTS BE SUPPRESSED.</u>	10
A. THE POLICE FAILED TO "SCRUPULOUSLY HONOR" DAVID STREETER'S INVOCATION OF HIS CONSTITUTIONAL RIGHTS TO COUNSEL AND SILENCE.	11
B. THE POLICE FAILED TO CALL DAVID STREETER'S ATTORNEY OR PROVIDE HIM ACCESS TO A TELEPHONE.	17
C. THE POLICE THREATENED DAVID STREETER.	21
D. DAVID STREETER'S STATEMENTS MUST BE SUPPRESSED AS THE DIRECT PRODUCT OF THE TAINT OF PRIOR POLICE ILLEGALITY.	23
POINT II. <u>THE TRIAL COURT ERRED IN FINDING THAT DAVID</u> <u>STREETER KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY</u> <u>WAIVED HIS CONSTITUTIONAL RIGHT TO COUNSEL.</u>	29
A. THE POLICE FAILED TO RE-MIRANDIZE DAVID STREETER.	30
B. POLICE MISCONDUCT NEGATED ANY UNDERSTANDING DAVID STREETER MAY HAVE HAD CONCERNING HIS CONSTITUTIONAL RIGHTS.	32
C. UNDER THE TOTALITY OF THE CIRCUMSTANCES, DAVID STREETER DID NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVE HIS RIGHT TO COUNSEL.	33
CONCLUSION	35

TABLE OF AUTHORITIES

CASES CITED

	<u>page</u>
<u>Anderson v. Smith</u> , 751 F.2d 96 (2nd Cir. 1984)	16
<u>Clewis v. Texas</u> , 386 U.S. 707, 87 S.Ct. 1338, 18 L.Ed.2d 423 (1967)	26
<u>Collazo v. Estelle</u> , 940 F.2d 411 (9th Cir. 1991)	24-26
<u>Commonwealth v. Coplin</u> , 612 N.E.2d 1188 (Mass. App. 1993)	31, 32
<u>Commonwealth v. Zook</u> , 553 A.2d 920 (Pa), <u>cert. denied</u> , 493 U.S. 873, 110 S.Ct. 203, 107 L.Ed.2d 156 (1989).	12, 20
<u>Daniel v. State</u> , 644 P.2d 172 (Wyo. 1982)	16
<u>Edwards v. Arizona</u> , 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981)	13, 14, 27, 29, 33
<u>Escobedo v. Illinois</u> , 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964)	35
<u>Fare v. Michael C.</u> , 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979)	14
<u>Hampel v. State</u> , 706 P.2d 1173 (Alaska App. 1985)	16
<u>Johnson v. Zerbst</u> , 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)	33
<u>Martin v. State</u> , 557 So.2d 622 (Fla. App. 1990)	16
<u>Mathis v. United States</u> , 391 U.S. 1, 88 S.Ct. 1503, 20 L.Ed.2d 381 (1968)	11
<u>Miranda v. Arizona</u> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)	3, 4, 10, 11, 13, 17-21, 23-34
<u>Oregon v. Bradshaw</u> , 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983)	14, 29, 30
<u>People v. Gaddy</u> , 135 A.D.2d 1082, 523 N.Y.S.2d 301 (N.Y. App. Div. 1987)	17

	<u>page</u>
<u>People v. Locke</u> , 152 Cal.App.3d 1130, 200 Cal.Rptr 20 (Cal. App. 1984)	18, 19
<u>People v. Smith</u> , 466 N.E.2d 236 (Ill.), <u>reversed</u> , 469 U.S. 91, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984)	14
<u>People v. Spivey</u> , 568 N.E.2d 327 (Ill. App. 1991)	20, 28, 29
<u>People v. St. Pierre</u> , 522 N.E.2d 61 (Ill. 1988)	12
<u>Singleton v. State</u> , 344 So.2d 911 (Fla. App. 1977)	20
<u>Smith v. Illinois</u> , 469 U.S. 91, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984)	13, 14
<u>Solem v. Stumes</u> , 465 U.S. 638, 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984)	14
<u>State v. Brown</u> , 201 Utah Adv. Rep. 4 (1992)	3
<u>State v. Griffin</u> , 754 P.2d 965 (Utah App. 1988)	12, 15, 17
<u>State v. Moore</u> , 697 P.2d 233 (Utah 1985)	18, 29
<u>State v. Nelson</u> , 748 P.2d 365 (Haw. 1987)	30, 31
<u>State v. Newton</u> , 682 P.2d 295 (Utah 1984)	30
<u>State v. Robinson</u> , 427 N.W.2d 217 (Minn. 1988)	34
<u>State v. Sampson</u> , 808 P.2d 1100 (Utah App. 1990), <u>cert. denied</u> , 817 P.2d 327 (Utah 1991), <u>and cert. denied</u> , ___ U.S. ___, 112 S.Ct. 1282, 117 L.Ed.2d 507 (1992)	3, 13, 16, 17
<u>State v. Santiago</u> , 492 P.2d 657 (Haw. 1971)	30
<u>State v. Sery</u> , 758 P.2d 935 (Utah App. 1988)	5, 9
<u>Thompson v. Wainwright</u> , 601 F.2d 768 (5th Cir. 1979)	16
<u>United States v. Chapdelaine</u> , 616 F.Supp. 522 (D. R.I. 1985)	27, 28
<u>United States v. Guido</u> , 704 F.2d 675 (2nd Cir. 1983)	20
<u>White v. State</u> , 674 P.2d 31 (Okla. Crim. App. 1983)	17

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V	1, 11, 18, 25, 30
U.S. Const. amend. VI	2
U.S. Const. amend. XIV	25
Utah Code Ann. § 76-4-101 (1990)	5
Utah Code Ann. § 76-4-201 (1990)	5
Utah Code Ann. § 76-5-102 (1990)	5
Utah Code Ann. § 76-5-103 (1990)	5
Utah Code Ann. § 76-5-203 (1990)	5
Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1992)	1
Utah Const. art. I, § 7	2
Utah Const. art. I, § 12	2, 31

OTHER AUTHORITIES CITED

Comment, <u>Equivocal Requests for Counsel: A Balance of Competing Policy Considerations</u> , 55 Cinc.L.Rev. 767, 782 (1987)	16
Note, <u>Judicial Approaches to the Ambiguous Request for Counsel</u> , 62 Notre Dame L. Rev. 460 (1987)	16

IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH, :
Plaintiff/Appellee, :
v. :
DAVID C. STREETER, : Case No. 930206-CA
Priority No. 2
Defendant/Appellant. :

JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this Court pursuant to Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1992).

STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS

The fifth amendment to the United States Constitution provides:

[Criminal actions - Provisions concerning - Due process of law and just compensation clauses.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; **nor shall be compelled in any criminal case to be a witness against himself**, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Emphasis added.

The sixth amendment to the United States Constitution provides:

[Rights of accused.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defense.

Emphasis added.

Article I, section 7 of the Utah Constitution provides:

Sec. 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

Article I section 12 of the Utah Constitution provides:

Sec. 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to testify against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Emphasis added.

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

1. Whether police misconduct requires that David Streeter's statements be suppressed?

Standard of review - CORRECTION OF ERROR. Factual findings underlying the trial court's decision to grant or deny a motion to suppress evidence are reviewed using a clearly erroneous standard. The court's conclusions of law based on those facts are reviewed using a correctness standard. State v. Brown, 201 Utah Adv. Rep. 4, 6 (1992). The facts here are undisputed; the court's legal conclusions are reviewed for correctness. "[T]he trial court's ultimate conclusions concerning the waiver of defendant's Miranda rights, which conclusions were based upon essentially undisputed facts, in particular the transcript of [an officer's] colloquy with defendant, present questions of law reviewable under a correction-of-error standard." State v. Sampson, 808 P.2d 1100, 1103 (Utah App. 1990), cert. denied, 817 P.2d 327 (Utah 1991), and cert. denied, __ U.S. __, 112 S.Ct. 1282, 117 L.Ed.2d 507 (1992). "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained counsel." Miranda v. Arizona, 384 U.S. 436, 475, 86 S.Ct. 1602, __, 16 L.Ed.2d 694, 724 (1966). "[A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course,

show that the defendant did not voluntarily waive his privilege." Id. at 476, 16 L.Ed.2d at 725.

2. Whether the trial court erred in ruling that David Streeter knowingly, intelligently, and voluntarily waived his right to counsel?

Standard of review - CORRECTION OF ERROR. See standard of review for issue number one.

STATEMENT OF THE CASE AND NATURE OF THE PROCEEDINGS

David Streeter was arrested in the early morning hours of September 22, 1990 as a result of certain alleged assaults that had occurred that morning. R. 228. He was interrogated by Detective Cowley, but invoked his right to counsel immediately upon being Mirandized. After some threatening statements by Detective Cowley, and three additional invocations of the right to counsel and silence by David, the interrogation was terminated. See transcript of interrogations, pp. 1-2, Exhibit 1 at the motion to suppress hearing (hereafter "Transcript").¹

The police took no action whatsoever with respect to David's request that his mother be telephoned to obtain counsel, or to obtain other counsel. R. 197:11-14, 201:25-202:8, 204:16-25.

¹A copy is attached as Addendum A. Although the transcript does not make it clear, the first two pages constitute the first interrogation. Page three begins the second interrogation, some two hours later. See R. 191-2.

Approximately two hours later, Detective Cowley was informed that David wanted to speak with him. R. 213, 215. David was not re-Mirandized. However, he did indicate that he desired to speak without counsel at that time. See Transcript, p. 3. David subsequently made incriminating statements. See Transcript, pp. 3-10.

David Streeter was initially charged with aggravated assault (Utah Code Ann. § 76-5-103 (1990), 3rd degree felony), conspiracy (Utah Code Ann. § 76-4-201 (1990), class A misdemeanor), and assault (Utah Code Ann. § 76-5-102 (1990), class B misdemeanor). R. 8-10. An amended information charged him with three counts of attempted homicide (Utah Code Ann. §§ 76-4-101 and 76-5-203 (1990), 2nd degree felony), and one count of aggravated assault.

Mr. Streeter filed a motion to suppress his statements. R. 67-68, as amended, R. 71-2. This motion was heard on September 23 and 25, 1991. See transcript of suppression hearing, R. 181-257. The motion to suppress was denied. R. 111 (minute entry), R. 112-116 (memorandum decision).

Pursuant to a plea agreement, David pled guilty to aggravated assault, reserving his right to appeal the denial of his motion to suppress pursuant to State v. Sery, 758 P.2d 935 (Utah

App. 1988). Counts II and III were dismissed.² See R. 161-7 (statement of defendant), R. 170 (minute entry).

Judge Jay E. Banks³ ordered a ninety day evaluation prior to sentencing. R. 171-2. David was sentenced to a prison term of 0 to 5 years, and ordered to pay restitution. R. 175.

STATEMENT OF FACTS

David Streeter⁴ was arrested in the early morning hours (5:15 A.M.) of Saturday, September 22, 1990. R. 18. At approximately 8:30-9:00 A.M., David was interrogated by Detective Cowley. R. 189-190. After being Mirandized, David immediately invoked his rights to silence and/or counsel:

²The parties appear to have been referring to the original information, rather than the amended information. This technical error is without import. The reference to aggravated assault as a lesser included offense shows the plea was contemplated with reference to the amended information, and the parties clearly intended a plea to aggravated assault committed against Craig Mortensen, with the other (severed) charges dismissed.

³Sitting by designation. R. 169.

⁴David, d.o.b. 9/14/72 (R. 6, 7, 8, etc.), was arrested less than 8 days after his eighteenth birthday. The record further discloses:

Mr. Streeter looks brighter than he is. He received a Beta II score [IQ] of 91, which places him in the lower part of the average range of intelligence. His school achievement scores are even worse. He reads at a fifth grade level, spells at the seventh grade level, and does arithmetic at the seventh grade level. He dropped out of high school in the eleventh grade . . . Psychological Evaluation, p. 1, attached to Diagnostic Evaluation Report (in court file in sealed envelope). This information obviously has direct bearing on David's ability to understand his rights, and make a knowing waiver of them.

TC⁵: Having these rights in mind do you wish to speak with us now without an attorney present?

DS⁶: No.

Transcript, p. 1. The interrogation was not terminated. Rather, Detective Cowley continued, attempted to cajole David into making a statement, and threatened him:

TC: You don't want to talk to us?

DS: I don't know why I am really even in here. All I was doing was sleeping over at my friends lawn last night and the cops just come ripping in the yard and arrested us and

TC: Well we have a bunch of questions we would like to ask you, would you be willing to answer those questions without a lawyer present [?]

DS: Maybe some of them. It just depends cause I really don't know why I am here.

TC: So does that mean we can ask you questions and you will answer the ones you want to answer?

DS: Yes[,] I have the right to stop at any time though.

TC: Well, I'll tell you right now that if you take that attitude with us.

DS: Well I ain't trying to

TC: Because we have all the witnesses we need and we know who has done what and who has done what to who. So I want the truth out of you and I want it now. Now do you understand that?

DS: Yes [.]

TC: Who were you with tonight [?]

Transcript, p. 1. David responded by reinvoking his right to counsel:

⁵Detective Cowley.

⁶David Streeter.

DS: Some of my friends, I want my lawyer here, all you have to do is call my mom and he will be down here.

TC: You want your attorney?

DS: Yes.

DS: And you don't want to talk to us?

DS: Yes.

TC: O.K.

Id. Only at this point, after four invocations of his constitutional rights, was the interrogation terminated. David was returned to a holding cell. R. 211-2.

Detective Cowley made no attempt to comply with David's request that his mother be telephoned to obtain counsel. R. 197:11-14. Detective Cowley did nothing to attempt to locate an attorney for David, and did nothing to attempt to have someone else obtain an attorney for him. R. 201:25-202:8, 204:16-25.

Two hours later, David broke down and informed Officer Robert Dey that he wanted to speak with Det. Cowley. Officer Dey took David to an interrogation room for this purpose. R. 230, 234.

Detective Cowley did not re-Mirandize David. R. 205:23-206:7, 217:14-23. The second interrogation proceeded:

TC: Do you recall earlier that I had advised you of your rights?

DS: Yes [.]

TC: And after being advised of your rights you said that you wanted to talk to a lawyer?

DS: Yes [.]

TC: Now it is your desire and you come forth voluntarily that you want to talk to me now?

DS: Yes [.]

TC: And you want to talk to me without a lawyer?

DS: Yes [.]

TC: Go ahead.

Transcript, p. 3. David thereafter made incriminating statements. See Transcript, pp. 3-10.

Pursuant to State v. Sery, 758 P.2d 935 (Utah App. 1988), David pled guilty to aggravated assault and now appeals the denial of his motion to suppress.

SUMMARY OF THE ARGUMENT

Detective Cowley illegally failed to honor David Streeter's invocation of rights. David indicated in unequivocal terms that he would not submit to interrogation without the presence of an attorney. This invocation was not scrupulously honored. Detective Cowley continued to interrogate, and attempted to cajole David into retreating from his position and into waiving his rights. David was threatened. Interrogation was not terminated until after David had invoked his rights for the fourth time. Finally, the police did nothing to comply with David's request that his mother be called to obtain his attorney. David was not given access to a telephone, and no call was made on his behalf. David's subsequent "initiation" of subsequent interrogation and purported "waiver" of his rights were the direct product of the prior taint of this police illegality. David's statements must be suppressed.

The totality of the circumstances do not support a conclusion that David knowingly, intelligently, and voluntarily waived his rights at the second interrogation. David was not re-Mirandized. His understanding of his rights was irreparably colored and tainted by Detective Cowley's failure to respect his rights. The State has failed to show that, subsequent to the police misconduct, David understood his rights correctly, or that he knowingly, intelligently, and voluntarily waived those rights. David's statements must be suppressed.

ARGUMENT

POINT I. POLICE MISCONDUCT REQUIRES THAT DAVID STREETER'S STATEMENTS BE SUPPRESSED.

In Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) the United States Supreme Court set forth a simple mandate for the protection of an accused's constitutional rights:

[W]ithout proper safeguards the process of in[-]custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.

Id. at 467, 86 S.Ct. at ___, 16 L.Ed.2d at 719.

Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise

his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

Miranda, 384 U.S. at 467, 86 S.Ct. at __, 16 L.Ed.2d at 719 (emphasis added, footnote omitted).

While in custody, the protections of Miranda attach to any interrogation on any subject. Mathis v. United States, 391 U.S. 1, 4-5, 88 S.Ct. 1503, __, 20 L.Ed.2d 381, 385 (1968). There can be no dispute that David Streeter was in custody. The record is undisputed that prior to and in between interrogations, David Streeter was detained in a holding cell. R. 228-30. See also R. 18 (indicating David was arrested at 5:15 A.M., over three hours prior to his interrogation).

A. THE POLICE FAILED TO "SCRUPULOUSLY HONOR"⁷ DAVID STREETER'S INVOCATION OF HIS CONSTITUTIONAL RIGHTS TO COUNSEL AND SILENCE.

The police in this case failed to follow Miranda's simple mandate. When asked, "Having these rights in mind do you wish to speak with us now without an attorney present?", David responded

⁷See Miranda v. Arizona, 384 U.S. 436, 479, 86 S.Ct. 1602, __, 16 L.Ed.2d 694, 726 (1966).

with an emphatic "No." This clear, unequivocal invocation of constitutional rights was ignored by the police.

The police are entitled to clarification of an equivocal request for counsel. State v. Griffin, 754 P.2d 965, 969 (Utah App. 1988). David Streeter's response of "No." when asked "do you wish to speak with us now without an attorney present" was not in the least bit equivocal. Compare People v. St. Pierre, 522 N.E.2d 61, 66-8 (Ill. 1988) ("Q. Do you wish one [an attorney]? A. Yes." held unequivocal invocation, follow-up "clarification" could not render invocation ambiguous); see also Commonwealth v. Zook, 553 A.2d 920 (Pa), cert. denied, 493 U.S. 873, 110 S.Ct. 203, 107 L.Ed.2d 156 (1989), discussed infra at 12, 20. At most, there is a question whether David is invoking the right to counsel, the right to silence, or both. Regardless of which situation pertains, the police were obligated to immediately terminate the interrogation.

At the hearing on the motion to suppress, Detective Cowley tried to show that in fact the continuation of the interrogation was merely clarification:

A. [by Det. Cowley] I said, "Having these rights in mind, do you wish to speak to us now without having an attorney present?"

Q. And what was Mr. Streeter's response?

A. He said, "No."

Q. That answer was unequivocal, wasn't it?

A. That's right.

Q. It required no clarification, did it?

A. Well, in my mind it did.

Q. All right. Well, what words did he say, detective Cowley, after the word no that indicated to you that that was not [un]equivocal? What words?

A. Right after no? He didn't say anything.

Q. All right. So he indicated to you that he does not wish to go forward without an attorney being present, correct?

A. He said, "No."

Q. And he said nothing further; we have got that clear, right?

A. That's right.

Q. All right. And yet you continued with this interrogation, did you not?

A. I wanted to clarify and that's why I asked him the next question.

R. 195:2-25 (emphasis added).

No means no. The only point that could possibly be clarified was whether David had invoked the right to silence, the right to counsel, or both. In any instance, the police were required to terminate the interrogation.

The Transcript does not reveal David's initial invocation to be equivocal. Subsequent responses do not alter this result. "Under Miranda and Edwards, however, an accused's postrequest responses to further interrogation may not be used to cast doubt on the clarity of his initial request for counsel." Smith v. Illinois, 469 U.S. 91, 92, 105 S.Ct. 490, ___, 83 L.Ed.2d 488, 491 (1984) (per curiam); accord Sampson, 808 P.2d at 1111 ("The fact that defendant continued to answer questions was not a sufficient indication that he was abandoning his right to counsel.").

Edwards set forth a "bright-line rule" that all questioning must cease after an accused requests counsel. Solem v. Stumes, 465 U.S. 638, 646, 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984). In the absence of such a bright-line prohibition, the authorities through "badger[ing]" or "overreaching"--explicit or subtle, deliberate or unintentional--might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance. Oregon v. Bradshaw, 462 U.S. 1039, 1044, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983); Fare v. Michael C., 442 U.S. [707,] 719, 99 S.Ct. 2560, 61 L.Ed.2d 197 [(1979)]. With respect to the waiver inquiry, we accordingly have emphasized that a valid waiver "cannot be established by showing only that [the accused] responded to further police-initiated custodial interrogation." Edwards v. Arizona, 451 U.S. [477,] 484, 101 S.Ct. 1880, 68 L.Ed.2d 378 [(1981)]. Using an accused's subsequent responses to cast doubt on the adequacy of the initial request *itself* is even more intolerable. "No authority, and no logic, permits the interrogator to proceed . . . on his own terms and as if the defendant had requested nothing, in the hope that the defendant might be induced to say something casting retrospective doubt on his initial statement that he wished to speak through an attorney or not at all." [People v. Smith,] 102 Ill.2d [365,] 376, 466 N.E.2d [236,] 241 [(1984)] (Simon, J., dissenting).

Smith v. Illinois, 469 U.S. at 98-100, 105 S.Ct. at ___, 83 L.Ed.2d at 495-6 (footnote omitted).

Detective Cowley wasn't trying to clarify; rather, he was attempting to get David to recant his unequivocal invocation of constitutional rights:

TC: You don't want to talk to us?

DS: I don't really know why I am even in here. All I was doing was sleeping over at my friends lawn last night and the cops just come ripping in the yard and arrested us and

TC: Well we have a bunch of questions we would like to ask you, would you be willing to answer those questions without a lawyer present[?]^[8]

DS: Maybe some of them. It just depends cause I really don't know why I am here.

TC: So does that mean we can ask you questions and you will answer the ones you want to answer?

DS: Yes[,] I have the right to stop at any time though.

TC: Well, I'll tell you right now that if you take that attitude with us.

DS: Well I ain't trying to

TC: Because we have all the witnesses we need and we know who has done what and who has done what to who. So I want the truth out of you and I want it now. Now do you understand that?

DS: Yes [.]

TC: Who were you with tonight [?]^[9]

Transcript, p. 1.

This further questioning by the detective was not directed at clarification. Instead, he threatened David, and did his utmost to convince and persuade him to give a statement despite

⁸This question doesn't even address the possible ambiguity of whether David was invoking his right to counsel, silence, or both. The only possible responses to this question are a repeat of the prior invocation of rights (resulting in no clarification), or a retreat from Mr. Streeter's prior position (again, providing no clarification). Detective Cowley wasn't seeking clarification; instead he was seeking a retreat from David's prior invocation of rights.

⁹This question is substantive interrogation. Leaving aside the issue of police persuasion, as of this point the police must assert that all necessary clarification has occurred. See Griffin, 754 P.2d at 969 ("If, however, the accused, absent police persuasion, indicates he does not want counsel present at that time, the interrogation may continue."). However, as of this point in time no clarification had occurred.

his invocation of rights. This colloquy only clarified that Detective Cowley was not going to respect David's invocation, and wanted a statement right then and there.

Giving the State the benefit of the doubt and assuming *arguendo* that David's request was equivocal, conduct of this type has been roundly condemned by this Court:

The main problem inherent in the clarification approach is "the additional opportunity given to law enforcement officials to . . . [use] clarifying questions to dissuade" suspects from asserting their right to counsel. [Note, Judicial Approaches to the Ambiguous Request for Counsel, 62 Notre Dame L. Rev. 460 (1987)] at 472. See Anderson v. Smith, 751 F.2d 96, 104 n.9 (2nd Cir. 1984); Daniel v. State, 644 P.2d 172, 177 (Wyo. 1982) (permissible for officer to "seek clarification of the suspect's desires, as long as he does not disguise the clarification as a subterfuge for coercion or intimidation"). See also Thompson v. Wainwright, 601 F.2d 768, 771-2 (5th Cir. 1979) (during purported effort to clarify, officer asserted that obtaining counsel may not be in defendant's best interest); Hampel v. State, 706 P.2d 1173, 1182 (Alaska App. 1985) (during purported effort to clarify, officer emphasized delay and complexity of obtaining an attorney).

One commentator has suggested that only one question should be permitted to seek clarification. With our embellishment in the form of an introductory statement, that question is as follows: You have been advised of your rights, including the right to have an attorney with you during this interview even if you cannot afford to hire one. What you just said leads me to wonder whether or not you wish to avail yourself of that right. "Do you want the assistance of [an attorney] at this time or do you agree to answer questions without the presence of [an attorney]?" Comment, Equivocal Requests for Counsel: A Balance of Competing Policy Considerations, 55 Cinc.L.Rev. 767, 782 (1987).

State v. Sampson, 808 P.2d 1100, 1111 n.18 (Utah App. 1990), cert. denied, 817 P.2d 327 (Utah 1991), and cert. denied, __ U.S. __, 112 S.Ct. 1282, 117 L.Ed.2d 507 (1992). See also Martin v. State, 557 So.2d 622, 625 (Fla. App. 1990) ("At the very least the Detective

was required to take a neutral stance on whether [defendant] needed counsel. Any other conclusion would vitiate the protections which are to be supplied by Miranda."); People v. Gaddy, 135 A.D.2d 1082, 523 N.Y.S.2d 301, 302 (N.Y. App. Div. 1987) (improper to tell defendant that stepchild would be placed in a shelter if he wanted an attorney); White v. State, 674 P.2d 31, 36 (Okla. Crim. App. 1983) (improper to attempt to dissuade prisoner from exercising right to counsel by threatening the death penalty and saying no attorney would be needed if defendant were not guilty).

The police conduct here runs afoul of Griffin, Sampson, and Miranda. David Streeter's invocation of his constitutional rights was not "scrupulously honored." The interrogation should have ceased immediately when David evidenced his refusal to proceed without an attorney. Instead, David had to invoke his rights four times before Detective Cowley reluctantly complied.

B. THE POLICE FAILED TO CALL DAVID
STREETER'S ATTORNEY OR PROVIDE HIM
ACCESS TO A TELEPHONE.

In response to improper continued interrogation after invoking his constitutional rights, David said "I want my lawyer here, all you have to do is call my mom and he will be down here." Transcript, p. 2. The police completely ignored this request. Detective Cowley did not call David's mother to obtain Mr. Streeter's attorney. R. 202:6-8,¹⁰ 204:23-25.¹¹ Detective Cowley

¹⁰ Q. Did you call his mother as he had suggested you do so that she might contact an attorney?

A. I did not.

did not have anyone else attempt to get David an attorney. R. 204:20-22.¹² Police action or inaction that prevents a defendant from obtaining counsel in a timely fashion violates a defendant's right to counsel. State v. Moore, 697 P.2d 233, 236 (Utah 1985).¹³

California has found the right to use of a telephone to be of constitutional dimension. In People v. Locke, 152 Cal.App.3d 1130, 200 Cal.Rptr 20 (Cal. App. 1984), defendant was detained in connection with an attempted homicide. After being read her rights, she invoked her right to counsel. She remained in the officer's presence for the next three hours. The officer respected her invocation of rights, but did nothing to obtain an attorney or provide access to a phone. After three hours, she was transferred to the custody of another officer. Defendant was re-Mirandized, and again invoked her right to counsel. Again, nothing was done concerning her request for counsel, but her rights were otherwise respected. After a time defendant began to sob, and the officer

¹¹ Q. Did you call either of Mr. Streeter's parents as Mr. Streeter indicated he wanted you to do?

A. No, I did not.

¹² Q. What did you do to attempt to have anyone else obtain an attorney for him?

A. I didn't do anything.

¹³Miranda recognizes that "If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privilege so long as they do not question him during that time." Id., 384 U.S. at 474, 86 S.Ct. at ___, 16 L.Ed.2d at 724. The State has presented no evidence here that any continuing investigation was underway; rather it appears that counsel was denied solely in hopes that David might break down and make incriminating statements.

attempted to console her. Defendant then made incriminating statements, which were admitted at trial. The jury conviction was reversed:

A Miranda explanation of one's rights must be meaningfully implemented, in order that the constitutional purpose be served. We are of the opinion, under the facts and circumstances of a case such as this, that a minimal requirement is that the arrested suspect be told of his or her right, and be given an opportunity, to use a telephone for the purpose of securing the desired attorney. Such telephone calls should be allowed immediately upon request, or as soon thereafter as practicable. Anything less would make of Miranda a hollow ineffectual pretense.

We accordingly find prejudicial error of constitutional dimension.

Locke, 152 Cal. App.3d at 1133, 200 Cal.Rptr at 22 (cites omitted).

One court has commented on the inappropriateness of a delay of even so much as one hour in providing access to a telephone:

Legitimate security concerns may have prompted the arresting agents to deny [defendant] Guido's initial request to call his attorney while still at the apartment where he was arrested. But we see no valid reasons apart from administrative convenience to prevent a suspect from calling his attorney once he is brought to a courthouse for processing. In our view, the accused's interest in obtaining the prompt assistance of counsel outweighs any such administrative concerns. In this case, we see no substantial evidence in the record to suggest that the officers delayed Guido's access to an attorney in the hope that he might incriminate himself. Moreover, Guido was allowed to call his attorney within approximately one to one-and-a-half hours of his arrest. Under these circumstances, we cannot say the delay was egregious. Nonetheless, we think the better procedure would have been to permit Guido to call his attorney on Guido's arrival at the [] courthouse, and we expect that such requests will be so honored in the future.

United States v. Guido, 704 F.2d 675, 678 (2nd Cir. 1983). Here, it appears that the police may have delayed telephonic access precisely in hopes that David might incriminate himself.

Requests to call attorneys should be granted without delay:

We do not view Lt. Landis' *continued* questioning as intended to clarify Appellant's desires respecting counsel. What, in Appellant's request, needs clarification? What was equivocal or ambiguous? Appellant reportedly said, "Can I use the phone to call my mother to see if she can get me an attorney?" to paraphrase Lt. Landis' testimony. The only acceptable response from the police should have been "YES"! Not, "are you saying you want us to stop questioning you until you have an attorney present?"

Commonwealth v. Zook, 553 A.2d 920, 923 (Pa.), cert. denied, 493 U.S. 873, 110 S.Ct. 203, 107 L.Ed.2d 156 (1989). David Streeter's request deserved equal dignity, and immediate access to a phone. See also Singleton v. State, 344 So.2d 911, 912-3 (Fla. App. 1977) (defendant should have been given opportunity to phone when she stated, "Maybe I had better ask my mother if I should get [an attorney].")

See also People v. Spivey, 568 N.E.2d 327 (Ill. App. 1991), discussed infra at 28, dealing with "*incommunicado* interrogation" as a Miranda violation.

David Streeter was improperly denied an opportunity to use a telephone to obtain an attorney.

C. THE POLICE THREATENED DAVID
STREETER.

After David Streeter had invoked his right to counsel and silence, Detective Cowley's "clarification" resulted in the following exchange:

TC: So does that mean we can ask you questions and you will answer the ones you want to answer?

DS: Yes[,] I have the right to stop at any time though.

TC: Well, I'll tell you right now that if you take that attitude with us.

DS: Well I ain't trying to

TC: Because we have all the witnesses we need and we know who has done what and who has done what to who. So I want the truth out of you and I want it now. Now do you understand that?

DS: Yes [.]

TC: Who were you with tonight [?]

Transcript at p. 2 (emphasis added). Miranda clearly requires that an accused be permitted to terminate an interrogation at any time. "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." Id., 384 U.S. at 467, 86 S.Ct. at ___, 16 L.Ed.2d at 719. When David sought assurance that he could terminate interrogation at any time, the police instead threatened him and indicated that such conduct would have some unspecified dire consequences. As of this point in the interrogation, Detective Cowley's "clarification" has just confirmed that David Streeter does NOT have the right to terminate questioning without further sanction. This conduct is illegal and inexcusable. Miranda

requires that the accused be accurately informed of their rights. The police cannot thereafter indicate that these rights do not exist without tainting the initial warnings.

At the hearing on David's motion to suppress, Detective Cowley understandably denied that his statements were threatening:

Q. All right. Detective Cowley, your next question to him, as indicated in this transcript is, "I'll tell you right now if you take that attitude with us" and then you stop, isn't that correct?

A. That's correct.

Q. All right. In other words you were telling him that if he indicated an attitude that he would only answer some of the questions or none of the questions you apparently were going to do something. What was it?

A. I can't recall.

Q. But your words were-- would you consider these words a threat, "I tell you right now if you take that attitude with us"?

A. In my opinion, no, that's not a threat.

Q. Then what is the explanation of that term?

MS. BYRNE: The question is asked and answered, your honor. I don't think there's any point in continuing to badger this witness.

MS. WELLS: I don't think this is badgering, your honor.

THE COURT: The objection is overruled.

Q. (BY MS. WELLS) If it was not a threat, Detective Cowley, what is the-- what was the meaning of your question to him, "I'll tell you right now, if you take that attitude with us"?

A. Apparently I wanted to clarify and tell him that if he wanted to answer certain questions and not answer others that we were interested in finding answers

to and the way he was acting at that time, apparently that's why I said it.^[14]

. . .

Q. So your previous response that you asked him or told him that you-- if he took a certain type of attitude with you was said in order to clarify his response isn't followed up with any clarifying questions is it, Detective?

A. No.

Q. In fact what it's followed up with is another type of threat, isn't it? "We have all the witnesses we need and we know who has done what to who." Isn't that right?

A. That's a statement of fact. It's not a threat.

R. 198:14-199:19, 200:17-201:3. Statement of fact or otherwise, these statements are clearly threatening in nature. They do not accurately indicate, as Miranda requires, that David has the absolute right to terminate the interrogation at any time for any reason without fear of reprisal or other adverse consequence. As a result of these threats, David Streeter's rights were not scrupulously honored.

D. DAVID STREETER'S STATEMENTS MUST BE
SUPPRESSED AS THE DIRECT PRODUCT OF
THE TAINT OF PRIOR POLICE
ILLEGALITY.

As a result of the police misconduct in failing to honor David Streeter's rights, failing to phone or provide access to a phone, and threatening David, his statements must be suppressed.

¹⁴An interesting response. The words are all there, but they don't say anything. The reason is clear: this statement was a threat, but Detective Cowley is unwilling to admit it.

Collazo v. Estelle, 940 F.2d 411 (9th Cir. 1991) (en banc) is on all fours with this case. The Ninth Circuit introduces the case as follows:

Appellant Collazo was arrested for murder and advised of his Miranda rights. He declined to waive them, asking instead to talk to a lawyer. The police responded to his request by telling Collazo it "might be worse" for him if he talked to an attorney, and that it was in his best interest to talk to them without one. Three hours later,^[15] he "changed his mind," was readvised of his rights,^[16] and talked to the police. What he told them was used to convict him and send him to prison. . . . We conclude that Collazo's confession was involuntary, and that its use to convict him violated his Constitutional rights.

Id. at 413. After Mr. Collazo requested counsel, the colloquy between Mr. Collazo and Officer Destro continued:

Collazo: Oh, you know, ah, can I, you know, talk to a lawyer?

Destro: It's up to you. This is your last chance to talk to us, though.

Collazo: I understand that.

Destro: Once you get a lawyer, he's gonna say forget it. You know, don't talk to the police. Then it might be worse for you.

Collazo: Pardon me?

Destro: Then it might be worse for you.

Collazo: Why?

Destro: Because, ah, you know, there's other people involved in this thing, and we would like to

¹⁵Unlike the present case, Collazo was given access to a phone and talked to his wife. The *incommunicado* nature of David's detention makes reversal more compelling here.

¹⁶Unlike this case, where David was not readvised of his complete rights. This distinction only makes reversal in this case more compelling.

get everybody. If you don't want to talk about it, uh--

Rolen: Well, he's asked for a lawyer, so why don't we, I guess we'll end our interview right there.

Collazo: If, ah, if ah, this gonna be stupid for you, you know, for me it means a lot, you know.

Destro: If you're arrested for murder, it does mean a lot.

The police then departed, leaving Collazo in the interview room to ponder Officer Destro's inappropriate admonition and to consider whether he could afford to exercise his Constitutional rights.

Id. at 414. The Ninth Circuit, en banc, analyzes this police conduct in detail, Id. at 416-419, and concludes:

Based on the foregoing, our plenary review of the tactics used by Officer Destro in an attempt to pressure Collazo into talking to his adversaries leads us to a two-part conclusion. First, Officer Destro's tactics add up to a flagrant breach of the prophylactic rules established by the Supreme Court in Miranda and its progeny to protect a defendant's Constitutional right against self-incrimination. Second, Officer Destro's overreaching behavior violated not only Miranda, but also the general Constitutional prohibition against coercive interrogation practices likely to result in involuntary responses. Officer Destro's gambit was inconsistent with Collazo's Fifth Amendment right against self-incrimination as well as his right to consult an attorney. His inquisitorial stratagem was calculated to break Collazo's will. As such, it offends due process as guaranteed by the Fourteenth Amendment.

Collazo, 940 F.2d at 419-20.

Having found initial illegality,¹⁷ the court went on to determine that Collazo's decision to initiate further contact with the detectives was the product of this initial taint:

It is readily apparent from the historical facts that Collazo's "change of mind"--including his alleged Miranda waiver--was the direct product of the primary illegality in this case. Officer Destro's strategy was successful. Collazo caved in. There is nothing of substance to demonstrate otherwise. There was "no break in the stream of events . . . sufficient to insulate the statement from the effect of all that went before." Clewis [v. Texas], 386 U.S. [707,] 710, 87 S.Ct. [1338,] 1340[, 18 L.Ed.2d 423, 427 (1967)]. Under the circumstances, Officer Rolan's readvice of rights and Collazo's alleged waiver thereof was an empty ceremony.

Collazo, 940 F.2d at 422-3.

The present case is, if anything, more egregious than Collazo. David was of a tender age, with only a fifth grade reading level. Like Collazo, David was threatened. His invocation of the right to counsel was ignored. Unlike Collazo, David was not re-Mirandized in full, and was not provided access to a telephone. Finally, David caved in after only two hours, rather than three in Collazo. The taint from the police misconduct is therefore even less attenuated here than in Collazo. At the second interrogation, the incomplete "readvice of rights and [David]'s alleged waiver thereof [were] an empty ceremony." For precisely the reasons given in Collazo, David's statements must be suppressed here.

¹⁷As was found in this case (R. 237:1-7):

MS. WELLS: . . . It's our position, Your Honor, that during the initial interview conducted by Detective Cowley, that upon-- when the defendant indicated No, the very first time, that the interview should have stopped at that point.

THE COURT: There's no question about that.

United States v. Chapdelaine, 616 F.Supp. 522 (D. R.I. 1985) is also illustrative. Chapdelaine was arrested for drug trafficking. Id. at 523. He was advised of his rights at the police station, whereupon he requested that his attorney be summoned, but was not permitted any access to a telephone. Chapdelaine was then asked for consent to search his vehicle, but he declined. Chapdelaine was subsequently questioned. Id. at 529-30.

As evidence that Chapdelaine had waived his right to an attorney, the State presented evidence that he had initiated contact with an officer. The court noted:

The government has stressed, with considerable fanfare, the fact that the defendant had been given his Miranda warnings by [an officer] early on, and thus knew that he had a right not to talk with [officer] McCarthy. But, Miranda requires not only that a defendant be informed of his rights, but that the police behave in a manner consistent with those rights. Thus, a defendant who is abstractly aware of his Miranda rights (and with the popularity of police shows on television, there are few persons who are not familiar with the litany) must also be assured that they will be respected in his situation.

. . . Even if, as the government would have it, McCarthy's interrogation came about in consequence of Chapdelaine's invitation, the prosecution has not convincingly refuted Chapdelaine's claim that he requested an attorney, nor has it offered any substantial evidence whatsoever to indicate that, as Edwards demands in such circumstances, he knowingly and intelligently abandoned his right to counsel and his right to silence.

. . . The court must also note that the circumstances of this case do not readily suggest a waiver. This defendant was arrested at gunpoint and taken to the police station. There, he was confronted by a veritable array of officers from several different law enforcement agencies, accompanied by the United States Attorney. Despite his requests to be allowed to call his attorney, he was not permitted to do so until his arraignment the following day. Under the circumstances,

any withdrawal of the defendant's original insistence that his attorney be present should not be lightly inferred.

Chapdelaine, 616 F.Supp. at 530-1.

The situation here is similar. David Streeter was asleep in a friend's yard when "the cops just come ripping in the yard and arrested us . . ." Transcript p. 1. David was interrogated in the presence of Detective Cowley, Officer Allen Call, Deputy Sterner, and possibly Officer Bob Dey. R. 206:8-10. David asked that his mother be called to obtain counsel, but no call was made and he was not provided access to a phone. Finally, his invocations of constitutional rights were ignored by the police. As in Chapdelaine, David Streeter's statements must be suppressed.

People v. Spivey, 568 N.E.2d 327 (Ill. App. 1991) also has marked similarities to this case. Spivey, a 17 year old, was questioned in a hospital in the presence of his parents, and invoked his right to silence and to an attorney. He was later arrested, and was not permitted to speak with his parents or an attorney.¹⁸ Spivey was Mirandized, "waived" his rights, and made incriminating statements. The Illinois Court of Appeals reversed:

[D]efendant's pre-arrest invocation of his fifth amendment rights to remain silent and to have an attorney present was ignored immediately following his arrest, and that notwithstanding the Miranda warnings, the police created a coercive environment to obtain the statements by subjecting defendant to incommunicado incarceration. Such police action and conduct caused defendant's statements to be taken in violation of his constitutional rights.

¹⁸The police went so far as to deny that Spivey was present at the police station. See 566 N.E.2d at 329, 333.

Id. at 334.

More specifically, the court found "that the trial court's conclusion is proper that the police created the *incommunicado* environment because they knew defendant would not submit to interrogation while in the presence of his mother and stepfather, which was a clear violation of Miranda." Id. at 333 (emphasis in original). The police here had identical concerns that David Streeter would not submit to interrogation after consultation with an attorney. They therefore held David *incommunicado* until he broke down and talked. David should have been afforded an opportunity to use the telephone and consult with his attorney. Instead, his will was broken and he was coerced into making incriminating statements. These statements must be suppressed.

POINT II. THE TRIAL COURT ERRED IN FINDING THAT DAVID STREETER KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED HIS CONSTITUTIONAL RIGHT TO COUNSEL.

[A]n accused's statements made after he has invoked his right to counsel and before counsel is made available to him are admissible if three conditions are satisfied. First, it must be the accused, not the law enforcement officers, who initiates the conversations in which the incriminating statements are made. Second, the prosecution must show, on the motion to suppress, a knowing and intelligent waiver of the right to counsel. Third, the accused's statements must be shown by a preponderance of the evidence to have been voluntarily made.

State v. Moore, 697 P.2d 233, 236 (Utah 1985) (citing Oregon v. Bradshaw, 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983) (plurality opinion), Edwards v. Arizona, 451 U.S. 477, 1101 S.Ct.

1880, 16 L.Ed.2d 378 (1981), and State v. Newton, 682 P.2d 295 (Utah 1984)).

But even if a conversation taking place after the accused has "expressed his desire to deal with the police only through counsel," is initiated by the accused, where reinterrogation follows, the burden remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation.

Bradshaw, 462 U.S. at 1044, 103 S.Ct. at ___, 77 L.Ed.2d at 412.

A. THE POLICE FAILED TO RE-MIRANDIZE
DAVID STREETER.

The record is undisputed that David Streeter was not re-Mirandized prior to the second interrogation. R. 205:23-206:7, 217:14-23. This fact is critical to a complete understanding and review of the extent to which David Streeter understood his rights.

Re-Mirandizing should be required prior to all subsequent interrogations. Hawaii requires that officers re-Mirandize defendants at subsequent interrogations despite proper warnings at prior interrogations. State v. Nelson, 748 P.2d 365 (Haw. 1987). In Nelson, defendant was Mirandized and interrogated on Christmas day concerning certain harassing phone calls. Two days later, officers went to defendant's house and interrogated him concerning other phone calls. After noting that "'the protections which the United States Supreme Court enumerated in Miranda have an independent source in the Hawaii Constitution's privilege against self incrimination.'", Nelson, 748 P.2d at 369 (quoting State v. Santiago, 492 P.2d 657, 664 (Haw. 1971), the Hawaii Supreme Court ruled:

This was hardly "the same interrogation" conducted on Christmas Day. The officers had new information regarding different offenses, and it was incumbent upon them to "Mirandize" the defendant again.

Nelson, 748 P.2d at 372. Utah should adopt a similar rule under Article I, section 12 of the Utah Constitution.

Commonwealth v. Coplin, 612 N.E.2d 1188 (Mass. App. 1993) involved the issue of whether Miranda warnings given at the time of arrest carried over to a subsequent interrogation where incomplete warnings were given.¹⁹ There was no evidence that the earlier warnings were understood. The court reversed, holding that the prior warnings were inadequate to show a knowing and intelligent waiver at a later time.

In this case, David may have understood his rights when they were first read to him. However, his understanding was tempered and colored by subsequent conduct of the police. At the second interrogation, the only warnings given were as follows:

TC: Do you recall earlier that I had advised you of your rights?

DS: Yes [.]

TC: And after being advised of your rights you said that you wanted to talk to a lawyer?

DS: Yes [.]

TC: Now is it your desire and you come forth voluntarily that you want to talk to me now?

DS: Yes [.]

TC: And you want to talk to me without a lawyer?

¹⁹The accused was not told that anything he said could be used against him in a court of law. The incomplete warnings given David Streeter at the second interrogation share this same flaw.

DS: Yes [.]

TC: Go ahead.

Transcript p. 3. In the totality of the circumstances, it is true that David was advised of his rights, but his invocation of those rights was not honored. Additionally, he was threatened by Detective Cowley. The State has made no showing that David's statements were not the product and result of these prior threats. As in Coplin, the prior Miranda warnings cannot carry over to the subsequent interrogation. At minimum, David should have been re-Mirandized.²⁰

B. POLICE MISCONDUCT NEGATED ANY UNDER-
STANDING DAVID STREETER MAY HAVE HAD
CONCERNING HIS CONSTITUTIONAL
RIGHTS.

At the second interrogation, David Streeter's knowledge of his rights was limited to his prior receipt of Miranda warnings, as colored by Detective Cowley's threats and failures to honor David's rights.

David invoked his right to counsel and silence, Transcript p. 1, but his invocation was ignored. After stating

²⁰The trial court improperly relied on this incorporation of the prior Miranda warnings to support his finding that David made a knowing, intelligent, and voluntary waiver of his rights. See Memorandum Decision, R. 112-116 at 115 ("The defendant made a knowing and intelligent waiver of his right to counsel. In reading lines 1 through 8 of page 3 of the transcript of the interrogation it is evident that defendant understood that he had a right to counsel and that he elected to proceed without benefit of counsel."). As explained in POINT I.D., supra at 23, this purported "waiver" is the direct product of the prior taint resulting from Detective Cowley's misconduct.

that he might answer some questions but wanted to reserve the right to terminate the interrogation, Transcript p. 2, the officer threatened David rather than confirm and reaffirm his Miranda right to terminate interrogation. Only after three additional invocations of his right to counsel and silence was the interrogation finally terminated.

David was informed of his right to counsel, but the police did nothing to secure him that right. David stated "I want my lawyer here, all you have to do is call my mom and he will be down here," Transcript p. 2, but he was neither provided access to a telephone, nor was a call to his mother to secure counsel made on his behalf by the police.

After being threatened by Detective Cowley, David was placed in a holding cell, and kept *incommunicado*. Barely 18, living at home, and with a fifth grade reading level, David's will was overborne. After two hours, he broke down and asked to talk to the detective.

C. UNDER THE TOTALITY OF THE CIRCUMSTANCES, DAVID STREETER DID NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVE HIS RIGHT TO COUNSEL.

Findings of waiver must be based on the particular facts and circumstances of each case, including the "background, experience, and conduct of the accused." Edwards, 451 U.S. at 482, 101 S.Ct. at ___, 68 L.Ed.2d at 385 (quoting Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)). That David

may have been particularly susceptible to the threats and coercion of Detective Cowley does not in any fashion assist the State in showing that David made a knowing, intelligent, and voluntary waiver.

The Miranda warnings David received prior to his first interrogation were vitiated by the subsequent police misconduct. David was aware of the rote litany, but was further aware that the police were not going to help him obtain his attorney or release him until he made a statement. When he attempted to confirm that he could terminate interrogation, the police responded with threats. At the conclusion of this travesty, David's knowledge of his rights was that they existed in a vacuum, in name only, and would not be honored by the police.

Where an accused accedes to questioning only after it becomes apparent that his request for counsel is going to be denied, to the extent this may even be considered a waiver it cannot be said to be voluntary. State v. Robinson, 427 N.W.2d 217, 226 (Minn. 1988). David only asked to speak to the detective after his rights were not honored, he was threatened, and placed *incommunicado* in a holding cell. The police made clear that his right to an attorney would not be honored. David's will was overborne, and he acceded to further questioning. His statements must be suppressed.

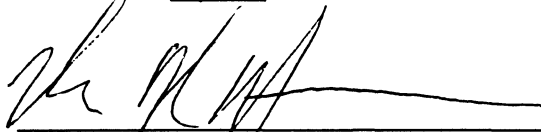
CONCLUSION

No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.

Escobedo v. Illinois, 378 U.S. 478, 490, 84 S.Ct. 1758, ___, 12 L.Ed.2d 977, 985-6 (1964) (footnotes omitted, emphasis in original).

The police misconduct in this case, and the continuing taint of that misconduct in compelling David Streeter to make incriminating statements, requires that David Streeter's statements be suppressed.

RESPECTFULLY SUBMITTED this 22nd day of July, 1993.

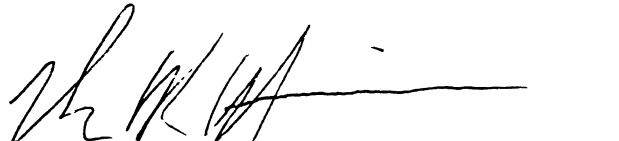


ROBERT K. HEINEMAN
Attorney for Defendant/Appellant

BROOKE C. WELLS
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, Robert K. Heineman, hereby certify that I have caused eight copies of the foregoing to be delivered to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102, and four copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 22nd day of July, 1993.


Robert K. Heineman

DELIVERED/MAILED this ____ day of July, 1993.

ADDENDUM A

Transcript of September 22, 1990 Interrogations

TC: O.K. I'm Detective Cowley with the police department and what is your name?

DS: David

TC: David what?

DS: David Streeter

TC: Spell your last name for me.

DS: Streeter

TC: What is your date of birth?

DS: 09-14-72

TC: And your address?

DS: 3551 South 7200 West

TC: Your home phone number?

DS: 250-9546

TC: Have you been advised of your rights?

DS: Yes

TC: I'm going to do it again. You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford a lawyer, one will be appointed to represent you before any questioning if you wish. You can decide at anytime to exercise these rights and not answer any questions or make any statements. Do you understand these rights that I have explained to you?

DS: Yes

TC: Having these rights in mind do you wish to speak with us now without an attorney present?

DS: No

TC: You don't want to talk to us?

DS: I don't know why I am really even in here. All I was doing was sleeping over at my friends lawn last night and the cops just come ripping in the yard and arrested us and

TC: Well we have a bunch of questions we would like to ask you, would you be willing to answer those questions without a

Page 2

Interview with David Streeter

lawyer present.

DS: Maybe some of them. It just depends cause I really don't know why I am here.

TC: So does that mean we can ask you questions and you will answer the ones you want to answer?

DS: Yes I have the right to stop at any time though.

TC: Well, I'll tell you right now that if you take that attitude with us.

DS: Well I ain't trying to

TC: Because we have all the witnesses we need and we know who has done what and who has done what to who. So I want the truth out of you and I want it now. Now do you understand that?

DS: Yes

TC: Who were you with tonight

DS: J.D.

TC: Who else?

2 DS: Some of my friends, I want my lawyer here, all you have to do is call my mom and he will be down here.

TC: You want your attorney?

3 DS: Yes

TC: And you don't want to talk to us?

4 DS: Yes

TC: O.K.

Page 3

Interview with David Streeter

TC: Do you recall earlier that I had advised you of your rights?

DS: Yes

TC: And after being advised of your rights you said that you wanted to talk to a lawyer?

DS: Yes

TC: Now is it your desire and you come forth voluntarily that you want to talk to me now?

DS: Yes

TC: And you want to talk to me without a lawyer?

DS: Yes

TC: Go ahead.

DS: Just tell the story.

TC: Tell the story.

DS: O.K. we was just coming home from that party...

TC: Now hold on, you say "we" who is "we".

DS: It was me and Bart in the car. In his car.

TC: Now does Bart go by Kevin.

DS: Yes

TC: And who's car is that?

DS: Bart's car, and some guy, he had his brights on, Bart did, and that guy in front of us.

TC: Which direction were you going?

DS: West

TC: So you were going West on?

DS: On 41, so then he pulled over and let us go ahead of him and then he pulled behind us and turned his brights on? So we pulled over and let him go in front of us and we pulled down the street and then he started to get out of his-

Page 4

Interview with David Streeter

car and so we jumped out of our car and he got back in his and I smacked the window.

TC: With what?

DS: My hand, and then (inaud)

TC: You don't know who they were?

DS: No

TC: Did you ever kick the car?

DS: No, I didn't kick the car. And then he drove away and then we was going back to my house and we drove by 41 and we got back from 41 and went to 72 and he was at the 7-11 and he started saying shit to us so-- we pulled over went back and walked up to him.

TC: So after the occurrence of hitting the car and kicking the car, then he left. Then you left right after him?

DS: No, about 5 minutes.

TC: So, on your way to your house you saw.

DS: Yes, we got back on 41 and he was at the 7-11.

TC: You saw the station wagon at the 7-11?

DS: Yes, and they started yelling shit at us.

TC: Which 7-11 were you at?

DS: The one on 4100 and 6400.

TC: So you drove by and you saw the car there?

DS: And he started yelling shit at us and so we pulled over and walked up there.

TC: Where did you pull over at?

DS: Just on 4100.

TC: So you didn't pull into the 7-11 parking lot?

DS: And he had a hammer and he said "Now I can kick your guys ass", something to that effect. So he was coming at us and so I picked a rock up and threw it at him.

Page 5

Interview with David Streeter

TC: How big was the rock?

DS: Just a little bigger than a golf ball.

BS: Bigger than a golf ball and smaller than a soft ball?

DS: Yes; a lot smaller than a soft ball, smaller than a baseball.

TC: So you picked up a rock, where did you get the rock from?

DS: Just on the ground, I just reached down and grabbed it.

TC: And then you threw it and hit him in the head.

DS: I guess it hit him in the head, I don't know. All I was really going to do was scare him; try to get him to back up with the hammer.

TC: Then what happened?

DS: I guess he hit Bart with that hammer.

TC: Then what happened?

DS: Then the girl jumped on me.

TC: What did they do?

DS: Wrestled me to the ground, and then I got up and I got that guy off Bart and I said "let's get out of here".

TC: Did you do anything else to that guy besides throw a rock at him and hit him.

DS: I might have kicked him.

TC: Where?

DS: In the chest (inaud)

TC: Was he laying on the ground when you did that?

DS: He was on top of Bart.

TC: Did you do anything else.

DS: No

TC: You didn't hit him in the head and chest and you didn't grab a rock and hit him in the head with a rock.

Page 6

Interview with David Streeter

DS: Oh, I hit him when I threw that rock the first time.

TC: But you didn't hit him with a rock after that?

DS: No

TC: But you didn't hit him in the head.

DS: No, (inaud)

TC: Did you hit him with anything else?

DS: No

TC: Then what happened?

DS: We took off and went back to my house and sat there and everybody was leaving and Dustin and Ron and Nerd they was leaving and I guess they went to the 7-11 to get gas; I don't know. We was all getting ready for bed and the next thing you know Nerd was knocking at the door.

TC: Who is Nerd?

DS: Nerd is Cody.

DS: And he says "some guy started a fight down there with Dustin".

TC: Down where?

DS: The 7-11.

TC: Which one?

DS: 3500 and 7200.

TC: Go ahead.

DS: So we ran down there....

TC: Now you say "we", who is "we"?

DS: Me and J.D. and Nerd was with us.

TC: So Cody.

DS: And that is all that was in the house.

TC: What about Kevin?

Page 7

Interview with David Streeter

DS: Oh yes, Bart too.

TC: So you guys went down to the 7-11 to help Dustin out?

DS: Yes

TC: Then what happened?

DS: There were two guys chasing him around the parking lot.

TC: Chasing Dustin?

DS: Yes and I don't know where Ron was. Ron wasn't helping him. And the one run up to Bart, Dustin was backing up and Bart walked up by him and one grabbed Bart and threw him against the car and Dustin came from around the side of him and punched him and dropped him.

TC: With one punch?

DS: Yes

TC: And he fell down on the ground and this was in the parking lot of 7-11.

DS: Yes

TC: Then what happened?

DS: Then the other one had Jay by the hair and so we ran up there and got him off and we just took off.

TC: Who kicked this guy on the ground?

DS: I kicked him once.

TC: Where?

DS: In the head.

TC: Did you see anyone else kick him?

DS: No

TC: So after Dustin hit him and this guy fell down on the ground you kicked him in the head?

DS: Yes

TC: And you didn't see anyone else kick him?

Page 8

Interview with David Streeter

DS: I was getting out of there, all I did was vent and got that guy off Jay and we took off running back to my house.

TC: Who is "we"?

DS: Me and Jay and Bart, Bart was probably already at my house. I just told them to get out of there.

TC: Who had the gun?

DS: Jay had a BP gun.

TC: When did he get that?

DS: Probably after we went back to the house, I didn't even know he had it cause I took off, I was getting out of there I didn't want nothing to do with cops.

TC: So you went back to your house and did you guys come back to the 7-11 again after J.D. got the gun?

DS: No, the Jeep came up by my house from the parking lot with a crowbar and was going to kill Dustin.

TC: From what parking lot?

DS: Ream's, so we all ran over there and

TC: So you ran over to the Ream's parking lot to help Dustin?

DS: Just to see what was going on because all we could hear was Dustin saying "he's got a crowbar" or something.

TC: And that's when J.D. had the gun.

DS: Yes, cause when I got over there that is when J.D. had the gun.

TC: Who's gun does that belong to?

DS: It was Jay's.

TC: Where is the gun now?

DS: I have no idea.

TC: You don't know what happened to it?

DS: No, I was getting out of there. I didn't want nothing to do with it.

Page 9

Interview with David Streeter

TC: What did you see J.D. do with the gun, did you see him point it at anybody?

DS: He just had it in his hand, he didn't point it at anybody.

TC: Did he point it at anybody, did he shoot at anybody?

DS: No, it wasn't loaded (inaud)

TC: Then after the altercation in the parking lot at Ream's what happened?

DS: That guy left and then we left and we went over to Jay's house.

TC: So you didn't go back down by the 7-11 to check on this other guy. So you don't know what happened to him? But ~~you~~ kicked him once in the head while he was on the ground?

DS: He was on his way down

TC: Did you see anybody else kick him or hit him on the ground, how about Kevin?

DS: The only time I saw Bart was when that guy had him up against the car and Dustin smacked that guy and he was on his was down and I kicked him and that is the last time I seen Kevin. (inaud)

TC: Going back to the first incident at the 7-11 on 6400 West how many times did you hit and kick that guy?

DS: I kicked him one time and I don't even think I hit him

TC: You didn't hit him with your fist?

DS: No

TC: So you only hit him once with a rock and that was in the head?

DS: I guess so

TC: And then you kicked him in the head?

DS: No

TC: Where did you kick him?

DS: Across the *shoulder*

Page 10

Interview with David Streeter

TC: Across the shoulder, was he laying on the ground when you kicked him?

DS: He was on top of Bart.

TC: What did you see Bart do to him?

DS: (inaud) I didn't have a chance, them girls jumped on my quick.

TC: What did they do?

DS: Just wrestled me down.

TC: What did you do to the girls?

DS: Just pushed them away and told them to back off.

TC: You didn't hit them with your fist or kick them?

DS: No, I wouldn't hit a girl.

TC: You didn't hit them with a rock.

DS: No, that lady came after me with a hammer.

TC: Did you hit her with a rock?

DS: No

TC: Did you throw a rock at her?

DS: No

TC: You are sure?

DS: I'm positive.