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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Indictment No. 22-11-00848

STATE OF NEW JERSEY, :

Plaintiff-Movant, :

v. :

FAUSTO RAMIRO
SANTOS CARILLO, :

Defendant-Respondent. :

Criminal Action
On Motion for Leave to Appeal
from an Order of the Superior Court of
New Jersey, Law Division, Union County
Granting Defendant's Motion to Suppress.

Sat Below:
Hon. Candido Rodriguez Jr., J.S.C.

BRIEF AND APPENDIX ON BEHALF OF PLAINTIFF-MOVANT

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DATED: August 30, 2024

TABLE OF CONTENTS

| | <u>Page</u> |
|---|--------------------|
| STATEMENT OF PROCEDURAL HISTORY | 1 |
| STATEMENT OF FACTS | 2 |
| <u>Homicide Facts:</u> | 2 |
| <u>Facts Relating To Defendant’s Statement:</u> | 3 |
| LEGAL ARGUMENT | 8 |
| <u>POINT I</u> | |
| THE STATE’S MOTION FOR LEAVE TO APPEAL MUST BE GRANTED IN THE INTEREST OF JUSTICE BECAUSE THE TRIAL COURT’S ORDER GRANTING DEFENDANT’S MOTION TO SUPPRESS WAS AN ABUSE OF DISCRETION. (Pa4 to 25). | 8 |
| CONCLUSION | 24 |

INDEX TO APPENDIX VOL. I

| | |
|--|-------|
| Indictment No. 22-11-00848 | Pa1 |
| Notice of Motion to Suppress | Pa3 |
| Trial Court Order Granting Defendant's Motion to Suppress, dated August 14, 2024 | Pa4 |
| Trial Court's Decision Granting Defendant's Motion to Suppress, Dated August 24, 2024 | Pa5 |
| Transcript of Fausto R. Santos Carrillo, dated November 4, 2022 | Pa26 |
| Miranda Form | Pa130 |
| Flash Drive Containing Video of Fausto R. Santos Carrillo's November 4, 2022 Statement | Pa131 |

TABLE OF CASES

Page

UNITED STATES SUPREME COURT OPINIONS

Davis v. United States, 512 U.S. 452 (1994) 13
Edwards v. Arizona, 451 U.S. 477 (1981)..... 12
Miranda v. Arizona, 384 U.S. 436 (1966).4, 11, 12

NEW JERSEY STATE OPINIONS

Brundage v. Estate of Carambio, 195 N.J. 575 (2008)..... 9
In re Pa. R.R. Co., 34 N.J. Super. 103 (App. Div. 1955)..... 9
Romano v. Maglio, 41 N.J. Super. 561 (App. Div. 1956) 9
State v. A.M., 237 N.J. 384 (2019)11, 12
State v. Alston, 204 N.J. 614 (2011)13, 14
State v. Andrews, 243 N.J. 447 (2020)..... 11
State v. Bey, 112 N.J. 123 (1988) 14
State v. Chew, 150 N.J. 30 (1997).....12, 13
State v. Diaz-Bridges, 208 N.J. 544 (2011) 13
State v. Dorff, 468 N.J. Super. 633 (App. Div. 2021)..... 13
State v. Francisco, 471 N.J. Super. 386 (App. Div. 2022)..... 10
State v. Gonzalez, 249 N.J. 612 (2022) 13, 19, 22
State v. Hubbard, 222 N.J. 249 (2015) 10
State v. Johnson, 120 N.J. 263 (1990)13, 14
State v. Miller, 76 N.J. 392 (1978)..... 12
State v. Muhammad, 182 N.J. 551 (2005) 11
State v. Nyhammer, 197 N.J. 383 (2009)11, 12
State v. Presha, 163 N.J. 304 (2000).11, 12
State v. Reed, 133 N.J. 237 (1993)..... 13
State v. Rivas, 251 N.J. 132 (2022)..... 10

State v. S.S., 229 N.J. 360 (2017) 10, 11, 13
State v. Tillery, 238 N.J. 293 (2019) 12
State v. Washington, 475 N.J. Super. 292 (App. Div. 2023) 10
State v. Wright, 97 N.J. 113 (1984)..... 14
State v. Yohnnson, 204 N.J. 43 (2010)..... 11

COURT RULES CITED

R. 2:2-2(b)..... 9
R. 2:2-4 9

RULES OF EVIDENCE

N.J.R.E. 503 11

STATUTES CITED

N.J.S.A. 2A:84A-19 11
N.J.S.A. 2C:11-3a(1) 1
N.J.S.A. 2C:11-3a(2) 1
N.J.S.A. 2C:39-4d 1

STATEMENT OF PROCEDURAL HISTORY¹

On November 15, 2022, a Union County Grand Jury returned Indictment No. 22-11-00848, charging defendant-respondent Fausto Ramiro Santos Carillo with first-degree murder, in violation of N.J.S.A. 2C:11-3a(1) and/or (2) (count one) and third-degree possession of a weapon for an unlawful purpose, in violation of N.J.S.A. 2C:39-4d (count two). (Pa1 to 2).

On July 24, 2023, defendant filed a Notice of Motion to Suppress the statement he made to law enforcement. (Pa3). On August 6, 2024, the parties appeared before the Honorable Candido Rodriguez, Jr., J.S.C., for an evidentiary hearing on defendant's motion. (1T). The motion was continued on August 8, 2024. (2T). On August 14, 2024, the court granted defendant's motion. (Pa4 to 25). This Motion for Leave to Appeal follows.

¹ Pa refers to the State's appendix.

1T refers to the Motion to Suppress Hearing transcript, dated August 6, 2024.

2T refers to the Motion to Suppress Hearing transcript, dated August 8, 2024.

STATEMENT OF FACTS²

Homicide Facts:

On July 27, 2003, at around 11:35 a.m., officers from the Plainfield Police Division responded to 624 East 3rd Street on a report of a domestic violence/homicide call. (Pa6). There, officers discovered the body of Martha Morales on the floor of the basement bedroom. Ibid. There were numerous lacerations on her body, the floor was covered in blood, and a broken knife was found close to her. Ibid. Emergency services from Muhlenberg Hospital were dispatched to the scene, and Ms. Morales was pronounced dead at 1:29 p.m. Ibid.

Statements taken from residents/family members detailed how Ms. Morales lived in the basement apartment with defendant, who is her common-law husband. (Pa7). They indicated that defendant had spent the night and morning drinking outside the apartment. Ibid. At around 6:00 a.m., witnesses heard the defendant and victim arguing loudly about financial problems. Ibid.

² This Motion for Leave to Appeal is from a Motion to Suppress defendant's statement to law enforcement and, thus, "Statement of Facts" section has been divided into two parts: (1) the facts of the crime that the State intends to prove at trial, but for which testimony has not been elicited, and (2) the facts relating to defendant's statement to police, which is the issue on appeal. Accordingly, the State cites to the trial court's opinion for the first subsection of facts and to the Motion to Suppress hearing transcripts for the second subsection of facts.

At around 10:00 a.m., witnesses went to knock on the door to the basement with no response. Ibid. At 11:30 a.m., witnesses went into the basement apartment and discovered the body of Ms. Morales. Ibid.

Law enforcement discovered soiled clothing belonging to defendant as well as identification documents. Ibid. Defendant fled from the area before officers arrived. Ibid.

Defendant remained at large for years and fled the country. Ibid. On November 4, 2022, defendant was extradited to the United States. Ibid.

Facts Relating To Defendant's Statement:

On November 4, 2022, Detective Nora Foster of the Union County Prosecutor's Office, took a statement from defendant. (1T15-20 to 22). Defendant was a fugitive and he was extradited from Guatemala. (1T17-4 to 8). He arrived on November 3, 2022 near midnight, and he was brought by the Marshalls or the sheriff department to the homicide unit at the Union County Prosecutor's Office and handcuffed to a bench in the office. (1T17-20 to 19-20-6).

Detective Foster introduced herself to defendant and asked him if he wanted something to drink or eat. (1T20-10 to 15). He said no, he was fine. (1T20-15 to 16). Detective Foster then set up the monitoring room. (1T22-14 to 23-16). She and Detective Kenneth Luongo then transported defendant to

the statement room. (1T23-17 to 25). They then took a statement from defendant. (1T47-10 to 15; Pa26 to Pa129; Pa131). She spoke in Spanish because that was defendant's preferred language. (1T28-4 to 11).

Detective Foster began the statement by reintroducing herself. (1T27-2 to 6; Pa26 to 27; Pa131). She then informed defendant that he was charged with murder, possession of a weapon, and possession of a weapon for an unlawful purpose, and she gave him a copy of the complaint. (1T27-11 to 28-24; Pa27 to 28; Pa131). She then confirmed that defendant could read, write, and understand and that he was not under the influence of any medication or intoxicated. (1T29-6 to 15; Pa28 to 29; Pa131). Specifically, defendant stated that he was fifty-six years old, that he could read and write, and that he understood Spanish. (1T29-16 to 30-1; Pa28 to 29; Pa131). When asked about his education, defendant stated that he had three years of business administration and engineering. (1T30-9 to 12; Pa29; Pa131).

Detective Foster then provided defendant with his Miranda³ warnings. (1T29-2 to 5; 1T33-14 to 21; Pa29 to 33; Pa131). Defendant asked Detective Foster to read them to him aloud. (1T33-14 to 21; Pa29; Pa131). Detective

³ Miranda v. Arizona, 384 U.S. 436 (1966).

Foster told defendant that he had the right to remain silent and then asked if defendant understood that right. (1T37-9 to 12; Pa29; Pa131). He responded that he did and initialed next to the right. (1T37-13 to 14; Pa29; Pa130; Pa131). Detective Foster then told defendant, whatever you may say can be used against you at trial and she asked if he understood. (1T37-23 to 24; Pa29 to Pa30; Pa131). Defendant signed the form and indicated that he understood. (1T37-25 to 38-8; Pa130; Pa131). Detective Foster then advised defendant he had a right to talk to a lawyer and have him present while defendant was being questioned. (1T38-9 to 13; Pa30; Pa131). She then asked if he understood that right. (1T38-13; Pa30; Pa131). Defendant stated that he had a question. (1T38-15 to 17; Pa131). The following exchange occurred:

[Defendant]: Yes, but I just want to say something there. Eh yes like basically like I do not, I come from another, another country to here I do not know if you guys assign an attorney to me or I have to look for an attorney on my own? (Pa30).

[Detective Foster]: So part of this I have to explain I, I am only Reading, but this is Spanish

[Defendant]: Mm-hmm

[Detective Foster]: I cannot give you any type of legal advice ok umm this is very simple if you want to have an attorney present that is your right. If you want to talk with me and then consult with an attorney that is something that you, but I cannot give you any type of-of like of advice

[Defendant]: Oh ok

[Detective Foster]: You know that is in Spanish if you understand it.

[Defendant]: Mm-hmm.

[Detective Foster]: That is something that you have to say if you, on your own.

[Defendant]: Well yes

[Detective Foster]: So you can put your answer and your initials. If you do not have money to hire a lawyer, one will be appointed to represent you before any questioning, if you wish. Do you understand this right?

[Defendant]: Yes

[Pa30 to 31; Pa131].

Detective Foster then advised defendant that he could exercise his rights at anytime and not answer any questions or make any statements. (1T40-21 to 24; Pa31; Pa131). Defendant indicated that he understood and signed the Miranda form. (1T41-3 to 6; Pa130; Pa131). Detective Foster then read the waiver portion to defendant, he stated he understood, and he signed the form. (1T41-7 to 42-22; Pa32 to 33; Pa130; Pa131).

Detective Foster then questioned defendant about the homicide. (Pa33 to 129; Pa131). Defendant never asked to stop the statement, asked for an

attorney, or indicate that he was too tired to continue. (1T50-25 to 51-10). He did ask for water, which was provided. (1T50-11 to 15).

Defendant took the stand on his own behalf. (1T62-22 to 113-22). However, when the parties returned for the continuation of the proceeding, defendant refused to answer any more questions and his testimony was stricken. (2T4-14 to 7-17).

LEGAL ARGUMENT

POINT I

THE STATE’S MOTION FOR LEAVE TO APPEAL MUST BE GRANTED IN THE INTEREST OF JUSTICE BECAUSE THE TRIAL COURT’S ORDER GRANTING DEFENDANT’S MOTION TO SUPPRESS WAS AN ABUSE OF DISCRETION. (Pa4 to 25).

A defendant’s use of the word “attorney” does not automatically amount to an ambiguous invocation of a defendant’s right to an attorney. Rather, courts must determine on a case-by-case basis, after reviewing the totality of the circumstances, including the defendant’s words and conduct, whether the mention of counsel constitutes an invocation of that right. Here, contrary to the trial court’s finding, defendant’s comment, made while Detective Foster was advising defendant of his Miranda rights, that “I do not know if you guys assign an attorney to me or I have to look for an attorney on my own[,]” was not an ambiguous invocation of defendant’s right to an attorney. Rather, it was a statement expressing uncertainty about the legal process, which Detective Foster aptly clarified and explained. Accordingly, the trial court abused its discretion in granting defendant’s Motion to Suppress. Because the

State cannot appeal this evidentiary ruling from a dismissal or an acquittal, this is the only opportunity for the State to challenge the adverse ruling at issue and, therefore, the State's Motion for Leave to Appeal must be granted in the interest of justice.

Parties do not have a right to appeal an interlocutory order under the Rules of Court. In re Pa. R.R. Co., 34 N.J. Super. 103, 107-08 (App. Div. 1955), aff'd, 20 N.J. 398 (1956). Rather, leave to file an interlocutory appeal of a trial court's order only is permitted "in the interest of justice." R. 2:2-4; Brundage v. Estate of Carambio, 195 N.J. 575, 598-99 (2008). See R. 2:2-2(b) (providing that this Court may take appeals from interlocutory orders to "prevent irreparable injury"). An interlocutory appeal is not appropriate to "correct minor injustices" Romano v. Maglio, 41 N.J. Super. 561, 567 (App. Div.), certif. denied, 22 N.J. 574 (1956), cert. denied, 353 U.S. 923 (1957). When leave is granted, it is because there is the possibility of "some grave damage or injustice" resulting from the trial court's order. Id. at 568. The moving party must establish, at a minimum, that the desired appeal has merit and that "justice calls for [an appellate court's] interference in the cause." Romano, 41 N.J. Super. at 568.

Here, the trial court incorrectly found defendant made an ambiguous invocation of his right to counsel and that Detective Foster failed to clarify

same. Relying upon this erroneous finding, the court abused its discretion and suppressed defendant's statement to police. Defendant's statement is a pivotal piece of evidence and because the State cannot appeal this evidentiary ruling from a dismissal or an acquittal, this is the only opportunity for the State to challenge the adverse ruling at issue. As such, the State's Motion for Leave to Appeal must be granted and the trial court's clearly erroneous ruling must be reversed in the interest of justice.

Appellate review of a trial court's decision on a suppression motion is well established. State v. Washington, 475 N.J. Super. 292, 300 (App. Div. 2023). Review of a trial court's decision to suppress a defendant's custodial statement to police is limited. State v. Francisco, 471 N.J. Super. 386, 409 (App. Div. 2022). When reviewing a motion to suppress, appellate courts defer "to the trial court's factual findings that are supported by sufficient credible evidence in the record and will not disturb those findings unless they are 'so clearly mistaken that the interests of justice demand intervention and correction.'" State v. Rivas, 251 N.J. 132, 152 (2022) (quoting State v. S.S., 229 N.J. 360, 374 (2017)). However, the trial court's legal conclusions are reviewed de novo. State v. Hubbard, 222 N.J. 249, 263 (2015).

"The right against self-incrimination is guaranteed by the Fifth Amendment to the United States Constitution and this state's common law,

now embodied in statute, N.J.S.A. 2A:84A-19, and evidence rule, N.J.R.E. 503.” State v. S.S., 229 N.J. 360, 381 (2017) (quoting State v. Nyhammer, 197 N.J. 383, 399 (2009)). See also State v. Andrews, 243 N.J. 447 (2020); State v. Muhammad, 182 N.J. 551, 567 (2005). To protect a person’s right against self-incrimination, a person in custody

must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

[Miranda v. Arizona, 384 U.S. 436, 479 (1966)].

The purpose of the Miranda warnings is to protect a suspect from the “inherently coercive atmosphere of custodial interrogation.” State v. A.M., 237 N.J. 384, 397 (2019).

A suspect may waive his Miranda rights, but the waiver will not be valid unless it is “knowing, intelligent, and voluntary in light of all the circumstances” and is not “the product of police coercion.” State v. Presha, 163 N.J. 304, 313 (2000). The State has the burden of “prov[ing] beyond a reasonable doubt that the suspect’s waiver [of Miranda rights] was knowing, intelligent, and voluntary’ ... based upon an evaluation of the totality of the circumstances.” State v. Yohnnson, 204 N.J. 43, 59 (2010) (citations omitted)

(quoting Presha, 163 N.J. at 313); see also State v. Tillery, 238 N.J. 293, 316 (2019).

In its assessment of the totality of the circumstances, a court must determine “whether the suspect understood that he [or she] did not have to speak, the consequences of speaking, and that he [or she] had the right to counsel before doing so if he [or she] wished.” A.M., 237 N.J. at 397 (quoting Nyhammer, 197 N.J. at 402). Factors relevant to this determination “include the suspect’s age, education[,] ... intelligence[, and previous encounters with the law,] advice as to constitutional rights, length of detention, whether the questioning was repeated and prolonged in nature[,] and whether physical punishment or mental exhaustion was involved.” State v. Miller, 76 N.J. 392, 402 (1978); see also Tillery, 238 N.J. at 317.

Moreover, if a suspect requests counsel during an interview, “the interrogation must cease until an attorney is present.” Miranda, 384 U.S. at 474. Questioning may not resume “until counsel has been made available [or] unless the accused [] initiates further communication, exchanges, or conversations with police.” State v. Chew, 150 N.J. 30, 61 (1997) (alterations in original) (quoting Edwards v. Arizona, 451 U.S. 477, 484-85 (1981)).

In federal courts, law enforcement must only stop questioning if a suspect’s request for counsel is “unambiguous or unequivocal.” Davis v.

United States, 512 U.S. 452, 461-62 (1994). However, under New Jersey law, even an ambiguous assertion is sufficient to require police to cease questioning. State v. Gonzalez, 249 N.J. 612, 629 (2022). “[A] suspect need not be articulate, clear, or explicit in requesting counsel; any indication of a desire for counsel, however ambiguous, will trigger entitlement to counsel.” Id. at 630 (quoting State v. Reed, 133 N.J. 237, 253 (1993)). “[A]n equivocal request for an attorney is to be interpreted in a light most favorable to the defendant.” Chew, 150 N.J. at 63 (citing Reed, 133 N.J. at 253).

If a suspect makes an ambiguous assertion that is “susceptible to two different meanings, the interrogating officer must cease questioning and ‘inquire of the suspect as to the correct interpretation.’” S.S., 229 N.J. at 382-83 (quoting State v. Johnson, 120 N.J. 263, 283 (1990)). However, “[n]ot every reference to a lawyer ... requires a halt to questioning.” State v. Dorff, 468 N.J. Super. 633, 647 (App. Div. 2021). The court must review the totality of the circumstances, “including all of the suspect’s words and conduct,” to determine whether a mention of a lawyer invokes the right to counsel. Ibid. (quoting State v. Diaz-Bridges, 208 N.J. 544, 569 (2011)). “[A]ny words or conduct that reasonably appear to be inconsistent with defendant’s willingness to discuss his case with the police are tantamount to an invocation of the privilege against self-incrimination.” State v. Alston, 204 N.J. 614, 622 (2011)

(quoting State v. Bey, 112 N.J. 123, 136 (1988)). “[B]ecause the right to counsel is so fundamental, an equivocal request for an attorney is to be interpreted in the light most favorable to defendant.” State v. Wright, 97 N.J. 113, 119 (1984).

Generally, police are not obligated to advise suspects about whether they should assert their Miranda rights. Alston, 204 N.J. at 628. If an ambiguous invocation is made, however, further questioning of a suspect is permissible provided the inquiry is aimed at clarifying the meaning of the statement. Id. at 623. Such clarification is necessary where the suspect’s statement “leave[s] the investigating officer ‘reasonably unsure whether the suspect was asserting that right.’” Diaz-Bridges, 208 N.J. at 564 (quoting State v. Johnson, 120 N.J. 263, 283 (1990)). In clarifying the meaning of a suspect’s statement, an officer is limited “to neutral inquiries[,]” and these clarifying inquiries must not “operate to delay, confuse, or burden the suspect in his [or her] assertion of his rights.” Alston, 204 N.J. at 623-24. See also Johnson, 120 N.J. at 283.

Here, the trial court erroneously found that defendant made an ambiguous invocation of his right to counsel and that the State failed to honor that invocation. However, this finding is unsupported by the record and cannot stand. Accordingly, the State’s Motion for Leave to Appeal must be granted and the trial court’s order must be reversed in the interest of justice.

On November 4, 2022, Detectives Nora Foster⁴ and Kenneth Luongo met with defendant. They confirmed which language defendant preferred, Spanish, and then conducted the interview in that language. (Pa26). Detective Foster advised defendant that he was charged with the homicide for the death of Martha Morales, possession of a weapon for an illegal purpose, and unlawful possession of a weapon, and she provided defendant with a copy of the Complaint-Warrant. (Pa27). After obtaining defendant's credentials, Detective Foster told defendant "I am going to try to explain some things if there is something in Spanish that I tell you or that you do not understand me please tell me I do not understand you and I will try to find the way to explain it to you." (Pa27 to 28). Detective Foster then explained that "before I am able to continue to speak with you or if you have a question or have a conversation I have to explain your rights ok." (Pa28).

Detective Foster confirmed defendant could read and write and provided him with the Miranda Rights Form in Spanish. (Pa29 to 30). Defendant, who "did three years in engineering and business administration" in his home country was provided the form, but ultimately preferred to have Detective

⁴ At the time of the hearing, Detective Berrio was married and the trial court referenced her as Detective Foster. The State refers to her as Detective Foster for ease of reference.

Foster read it to him, which she did. (Pa30). While Detective Foster was advising defendant of his rights, the following exchange occurred,

NB: [...] You have the right to talk to a lawyer and have him present while you are being questioned. Do you understand this right?

FS: Yes, but I just want to say something there. Eh yes like basically like I do not, I come from another, another country to here I do not know if you guys assign an attorney to me or I have to look for an attorney on my own?

NB: So part of this I have to explain I, I am only Reading, but this is Spanish.

FS: Mm-hmm.

NB: I cannot give you any type of legal advice ok umm this is very simple if you want to have an attorney present that is your right. If you want to talk with me and then consult with an attorney that is something that you, but I cannot give you any type of-of like of advice.

FS: Oh ok.

NB: You know that is in Spanish if you understand it.

FS: MM-hmm.

NB: That is something that you have to say if you, on your own.

FS: Well yes.

NB: So, you can put your answer and your initials. If you do not have money to hire a lawyer, one will be appointed to represent you before any questioning if you wish. Do you understand this right?

FS: Yes.

NB: Put your answer and your initials. You can decide at any time to exercise these rights and not answer any questions or make any statements. Do you understand this right?

FS: Yes.

[Pa30 to 31 (emphasis added)].

Detective Foster then read the waiver of rights to defendant. (Pa32). She then asked “Is there anything about this that you, a word or something that you do not understand or anything that you want me to explain to you or do you understand? Or if you want to read it.” Ibid. Defendant asked what he had to do and eventually signed the waiver. (Pa32 to 33).

Focusing on the underlined portion of the above conversation, the trial court found defendant made an ambiguous invocation of his right to counsel. (Pa23 to 24). The court further held that the detective’s response was confusing and did not clarify defendant’s request. Ibid. These findings were erroneous.

Foremost, defendant did not make an ambiguous invocation of his right to counsel. Defendant asked if he needed to find his own attorney or if one would be provided. Such a question is not a request for an attorney at that time, but rather a request about how to obtain an attorney if/when defendant decides that he wants one. It is a question about procedure and not an invocation of defendant's right to counsel, ambiguous or otherwise. Thus, the trial court's finding was incorrect.

However, even assuming defendant's comment was ambiguous and could be viewed as a possible invocation of his right to counsel, the detective's responses and subsequent comments were proper and the totality of the circumstances clearly establish that defendant was not invoking his right to have an attorney present during questioning. After defendant inquired about whether he would be assigned an attorney or if he would have to look for one, Detective Foster unequivocally reiterated that defendant had a right to an attorney, stating "this is very simple if you want to have an attorney present that is your right." (Pa30). Immediately thereafter, and before any substantive questioning occurred, Detective Foster told defendant, "[i]f you do not have money to hire a lawyer, one will be appointed to represent you before any questioning if you wish." (Pa31). This statement clearly answered defendant's question and, notably, defendant did not respond by reiterating his

prior question, he did not say he could not afford an attorney, and he did not ask for a lawyer. Rather, defendant said “yes” he understood what he was told. Therefore, the record clearly establishes that defendant’s prior question was not a request for an attorney or an invocation of his right. Indeed, the record demonstrates that defendant was fully advised of his rights, and that he knowingly, voluntarily, and intelligently waived them prior to answering any questions. Accordingly, the statement should have been deemed admissible and defendant’s Motion to Suppress should have been denied.

Finally, in reaching its conclusion, the trial court found the facts of this case were similar to those of State v. Gonzalez, 249 N.J. 612 (2022). The court’s analysis and ultimate decision was incorrect because this case is distinguishable from that matter. In Gonzalez, police questioned the defendant, after providing her with her Miranda warnings, in connection with the discovery that the infant for whom she served as a nanny had two fractures in his right leg and one in his left. Id. at 619. In the middle of the interview, the following exchange occurred:

Detective Reyes: I don’t know what could happen.
And I’m not going to lie to you[,] but yes[,] I can say
that if you lie --

Defendant: Uh-humm.

Detective Reyes: The situation is going to get worse.

Defendant: But now what do I do about an attorney and everything?

Detective Reyes: That is your decision. I can't give you an opinion about anything.

Defendant: Yes, but --

Detective Reyes: The only thing I can say to you is, that telling the truth --

Defendant: Uh-humm.

Detective Reyes: You will have a better option by telling the truth.

Defendant: Ok.

Detective Reyes: Than lying.

Defendant: No, there is nothing else, [Detective].

After, Detective Reyes suggested defendant was supplying information "little piece by little piece," and the following colloquy ensued:

Defendant: You're going to help me with an attorney.

Detective Reyes: I'm going to help you with an attorney? Or no --

Defendant: Yes, (inaudible).

Detective Reyes: Oh no, that is your decision what you want to do.

....

Defendant: I don't know I need you to guide me, I am honest, I don't know.

Detective Reyes: I can't guide you, all that [I] want is to know what happened to the boy. And I can see that you are not helping.

[Id. at 622].

The Gonzalez Court found that the defendant's question "[b]ut what do I do about an attorney and everything?" was an ambiguous invocation of her right to counsel that required the detective to cease all questioning and seek clarification. Id. at 631. The Gonzalez Court found that the question "did not seek an opinion about whether she should have a lawyer present, but rather inquired about the availability of counsel." Ibid. The Gonzalez Court further found that the defendant's vague query made it unclear whether she wanted an attorney present at that time or in the future. Id. at 631-32. Thus, the Gonzalez Court found that the defendant's statement was "arguably" a request for counsel. Id. at 632.

Contrary to the trial court's finding, the facts of this case are not analogous to Gonzalez. Unlike Gonzalez, where the defendant asked "But now what do I do about an attorney and everything?" a question that could be viewed as a request for an attorney at that moment, here, the question posed by defendant was about the process as a whole: I understand that I have a right to

an attorney, but will I need to find an attorney or do you appoint one. The question could not be viewed as asking for an attorney at that moment, but rather was a question about the process of obtaining an attorney when he elects to have one. Therefore, the cases are distinguishable because the questions are not analogous.

Moreover, the cases are distinguishable because the detective in this case properly responded to defendant's inquiry. Specifically, before any substantive questions occurred, Detective Foster told defendant "[i]f you do not have money to hire a lawyer, one will be appointed to represent you before any questioning if you wish." (Pa31). This response was not misleading and it correctly answered defendant's question. Indeed, unlike the Detectives in Gonzalez, who misled the defendant by saying she would have better options by telling the truth, the detective in this case not only provided a proper answer to defendant's question, she reiterated that defendant had a right to an attorney before any questioning occurred. (Pa31). Thus, the trial court erred in using the holding of Gonzalez to grant defendant's Motion to Suppress.

In sum, the record clearly shows that defendant did not invoke his right to counsel. His question was about procedure, it was aptly answered, and he was aware that he had a right to remain silent, that he had a right to counsel, who would be appointed if he could not afford an attorney, and that he could

exercise his rights at any time. Defendant elected to waive his rights and speak with the detective. As such, defendant's statement should have been deemed admissible and the trial court order granting defendant's Motion to Suppress was an abuse of its discretion. Thus, the State's Motion for Leave to Appeal should be granted in the interest of justice.

CONCLUSION

For the foregoing reasons, the State respectfully requests that its Motion for Leave to Appeal be granted in the interest of justice.

Respectfully submitted,

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s/Milton S. Leibowitz

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Of Counsel and
On the Letter-Brief

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000308-24

| | | |
|-----------------------|---|---------------------------------------|
| STATE OF NEW JERSEY, | : | <u>CRIMINAL ACTION</u> |
| Plaintiff-Appellant, | : | On Appeal From An Interlocutory Order |
| | : | Of the Superior Court of New Jersey |
| v. | : | Criminal Division, Union County |
| FAUSTO RAMIRO SANTOS | : | |
| CARILLO, | : | Indictment No. 22-11-00848-I |
| | : | |
| Defendant-Respondent. | : | Sat Below: |
| | : | Hon. Candido Rodriguez Jr., J.S.C |
| | : | |
| Your Honors: | : | |

This letter-brief is submitted on behalf of Defendant in lieu of a formal brief pursuant to R. 2:6-2(b).

TABLE OF CONTENTS

PROCEDURAL HISTORY1
STATEMENT OF FACTS.....2
LEGAL ARGUMENT3

POINT I

THIS COURT SHOULD AFFIRM THE ORDER
SUPPRESSING DEFENDANT’S STATEMENT
BECAUSE THE MOTION COURT CORRECTLY
FOUND THAT DEFENDANT AMBIGUOUSLY
INVOKED HIS RIGHT TO COUNSEL AND
DETECTIVE FOSTER FAILED TO CLARIFY
WHETHER HE WAS ASKING FOR COUNSEL.....3

CONCLUSION15

INDEX TO APPENDIX

(Submitted under separate cover)

State v. Atkins, No. A-0732-13T2, 2015 WL 4067367

(App. Div. July 6, 2015)Da1-12

PROCEDURAL HISTORY

Fausto Ramiro Santos Carillo relies on the State’s Procedural History (Pb1)¹, but adds the following regarding the arguments raised below.

In arguing that his statement should be suppressed, Santos Carillo argued: (1) that Santos Carillo at least ambiguously invoked his right to counsel and Detective Nora Foster failed to clarify whether he was requesting counsel; (2) that Santos Carillo’s waiver was not knowing, voluntary, and intelligent because Foster asked Santos Carillo to sign the waiver “under the guise of simply asking if he underst[ood] the paragraph;” and (3) that Santos Carillo’s statement was not voluntary under the due process clause because he had been subjected to “coercive and traumatic experiences” while incarcerated in Guatemala for months immediately prior to his extradition to the United States. (Pa14-15) The motion court agreed with Santos Carillo’s first argument—that Santos Carillo ambiguously invoked his right to counsel, which was never clarified by Foster—and granted suppression on that ground. (Pa24-25) Because the court granted suppression on Santos Carillo’s first asserted ground, the court did not reach and

¹ The following abbreviations are used:
1T – Motion Hearing (August 6, 2024)
2T – Motion Decision (August 8, 2024)
Pb – State’s Brief
Pa – State’s Appendix
Da – Defendant-Respondent’s Appendix

did not render a decision on either of Santos Carillo's other two proffered grounds for suppression. (Pa24-25)

STATEMENT OF FACTS

Defendant relies on the State's Statement of Facts. (Pb2-7)

LEGAL ARGUMENT

POINT I

THIS COURT SHOULD AFFIRM THE ORDER SUPPRESSING DEFENDANT’S STATEMENT BECAUSE THE MOTION COURT CORRECTLY FOUND THAT DEFENDANT AMBIGUOUSLY INVOKED HIS RIGHT TO COUNSEL AND DETECTIVE FOSTER FAILED TO CLARIFY WHETHER HE WAS ASKING FOR COUNSEL.

To safeguard the right against self-incrimination guaranteed by the Fifth Amendment to the United States Constitution and New Jersey’s common law, a suspect in police custody “must be adequately and effectively apprised of his rights” before the police can interrogate him, and the suspect’s “exercise of those rights must be fully honored.” Miranda v. Arizona, 384 U.S. 436, 467 (1966); State v. O’Neill, 193 N.J. 148, 168 (2007). Apprising a suspect of his rights and honoring the exercise of those rights is necessary to protect the privilege against self-incrimination because “in-custody [police] 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.” Miranda, 384 U.S. at 467. While a suspect may waive his rights after having been advised of them and give a statement to police, under New Jersey law the State “must prove beyond a reasonable doubt that the suspect's waiver was knowing,

intelligent, and voluntary in light of all the circumstances” in order for the statement to be admissible at trial. State v. Presha, 163 N.J. 304, 313 (2000).

With respect to the Fifth Amendment right to counsel, honoring the exercise of that right requires that, “[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present.” Miranda, 384 U.S. at 474. Under federal law, officers must stop questioning a suspect only when the suspect's request for counsel is “unambiguous or unequivocal.” Davis v. United States, 512 U.S. 452, 461-62 (1994). However, under New Jersey law, “a suspect need not be articulate, clear, or explicit in requesting counsel; any indication of a desire for counsel, however ambiguous, will trigger entitlement to counsel.” State v. Reed, 133 N.J. 237, 253 (1993); see also State v. Wright, 97 N.J. 113, 126 (1984) (finding that the defendant’s statement concerning an attorney, “although somewhat ambiguous, sufficiently constituted an invocation of his fifth-amendment rights”). “Because the right to counsel is so fundamental, an equivocal request for an attorney is to be interpreted in a light most favorable to the defendant.” State v. Chew, 150 N.J. 30, 63 (1997). If a suspect’s “words amount to even an ambiguous request for counsel, the questioning must cease, although clarification is permitted.” State v. Alston, 204 N.J. 614, 624 (2011). “[I]f the statements are so ambiguous that they cannot be understood to be the assertion of a right, clarification is not

only permitted but needed.” Ibid.

Under our case law, when a suspect asks a question about obtaining an attorney that does not clearly or directly request an attorney at the present time, our courts have found the question to be at least an ambiguous assertion of the right to counsel when it concerned the process of obtaining an attorney; however, if the question solicited advice about whether the suspect should have an attorney, it has been found not to be an assertion of the right to counsel. Thus, in State v. Messino, 378 N.J. Super. 559, 573 (App. Div. 2005), this Court found that the defendant’s question, “[d]o you think I need a lawyer?”, “was a request for the officer’s opinion,” “not a request for counsel.” Likewise, in Alston, the Supreme Court found that defendant’s question, “should I not have a lawyer?”, was a “request for advice about what the detective thought that defendant should do.” 204 N.J. at 626.

Conversely, in State v. Gonzalez, 249 N.J. 612, 631–32, (2022), the Court found that the defendant’s question, “[b]ut what do I do about an attorney and everything?”, “was an ambiguous invocation of her right to counsel” because “defendant did not seek an opinion about whether she should have a lawyer present, but rather inquired about the availability of counsel.” Likewise, this Court in State v. Atkins, No. A-0732-13T2, 2015 WL 4067367, at *8-9 (App. Div. July 6, 2015), found that the defendant’s question, “How do

I go about getting me a lawyer? . . . A Public Defender?”, was at least an ambiguous request for counsel. (Da10-11) See also United States v. Allegra, 187 F. Supp. 3d 918, 924 (N.D. Ill. 2015) (“Allegra's question to the Agents—‘So can you provide me with an attorney?’—was sufficient to invoke his right to counsel and should have ended the interrogation.”); Hampel v. State, 706 P.2d 1173, 1179-81 (Alas. Ct. App. 1985) (interpreting suspect's question, “first of all how would I be able to get one, a lawyer,” to be an ambiguous or equivocal request for an attorney, requiring clarification); State v. Bittick, 806 S.W.2d 652, 655 (Mo. 1991) (affirming trial court's finding that the defendant's statement “‘How do I get an appointed attorney’ constituted a request for an attorney” despite “the equivocal nature of the ‘request’”); Huff v. State, 678 S.W.2d 236, 241-42 (Tex. Ct. App. 1984) (stating that suspect's “questions regarding how he could obtain an attorney were sufficient to require a cessation of the interrogation”).

In this case, the motion court correctly found “that the Defendant's initial statement that he was not from this country and was not sure if he had to obtain his own counsel or would be provided one amounted to ambiguous invocation of his right to counsel which required clarification by Det. Foster.” (Pa23) Santos Carillo asked this question in response to Detective Foster’s reading of Santos Carillo’s right to an attorney. The exchange is as follows:

Foster: Usted tiene el derecho a consultar con un abogado y tenerlo presente durante su interrogatorio. Entiende usted este derecho? (*You have the right to talk to a lawyer and have him present while you are being questioned. Do you understand this right?*)

Santos Carillo: Si, pero solamente quiero algo decir ahí. Eh si yo prácticamente como yo no, yo vengo de otro, de otro país para acá no sé si el abogado me lo proporciona² ustedes o tengo que yo buscar por mis medios un abogado? (*Yes, but I just want to say something there. Eh yes like basically like I do not, I come from another, another country to here I do not know if you guys assign an attorney to me or I have to look for an attorney on my own?*)

[(Pa30)]

Santos Carillo’s question is unlike the questions asked by the suspects in Alston and Messino because Santos Carillo was plainly not asking “for advice about what the detective thought that defendant should do.” Alston, 204 N.J. at 626. Santos Carillo’s question about whether the detectives would provide him with an attorney or whether he would have to look for an attorney on his own “did not seek an opinion about whether [he] should have a lawyer present, but rather inquired about the availability of counsel.” Gonzalez, 249 N.J. at 631.

² Santos Carillo used the Spanish word “proporciona,” which is better translated as “provide” rather than “assign.” “Proporcionar,” Cambridge Dictionary: Spanish-English Dictionary, <https://dictionary.cambridge.org/dictionary/spanish-english/proporcionar> (last accessed Nov. 4, 2024). Indeed, the State’s translator translated several later uses of “proporciona” by Santos Carillo as “provide.” (Pa77, 99)

Like in Atkins, Allegra, Hampel, Bittick, and Huff, Santos Carillo was asking about the process for obtaining an attorney—whether the attorney would be provided for him by the detectives upon his request or whether he had to find one on his own. Even if it was “unclear whether [Santos Carillo] wanted an attorney present at that time or in the future,” as in Gonzalez, the question was nonetheless “‘arguably’ a request for counsel.” Id. at 631-32. Accordingly, Santos Carillo’s question was “an ambiguous invocation of [his] right to counsel that required the detective to cease all questioning and seek clarification.” Id. at 631.

Because Santos Carillo’s question was at least an ambiguous request for counsel, the “detective was required either to cease questioning or to pose only questions designed to clarify whether defendant was invoking [his] right to consult with an attorney.” State v. Dorff, 468 N.J. Super. 633, 652 (App. Div. 2021); see also Alston, 204 N.J. at 624. An officer’s question or response to clarify whether the suspect is requesting counsel must not “‘operate to, delay, confuse, or burden the suspect in his assertion of his rights.’” Alston, 204 N.J. at 623 (quoting State v. Johnson, 120 N.J. 263, 283 (1990)) (additional quoted source omitted). The means by which police must clarify the suspects words are utterly simple—the police must simply ask the suspect whether he wants or is asking for an attorney. Gonzalez, 249 N.J. at 632 (“[I]n Alston . . . the

officer . . . clarified by asking ‘You want a lawyer,’ to which the suspect replied, ‘No, I am asking you guys, man.’”) (quoting Alson, 204 N.J. at 626); State v. Hahn, 473 N.J. Super. 349, 360 (App. Div. 2022) (finding that the officers properly clarified the defendant’s ambiguous reference to an attorney by asking, “At this time, are you requesting the presence of an attorney?”).

Here, when confronted with Santos Carillo’s question whether he would be provided with an attorney or had to get one on his own, Detective Foster neither asked him a clarifying question of whether he was requesting an attorney nor answered his question. Instead, Detective Foster responded confusingly and explained her failure to answer his question by saying she could not provide any legal advice. Specifically, when Santos Carillo asked, “I come from another, another country to here I do not know if you guys assign an attorney to me or I have to look for an attorney on my own?”, Foster responded:

Foster: So parte de esto yo tengo explicar yo lo yo solo estoy leyendo, pero está en español. (*So part of this I have to explain I, I am only reading, but this is Spanish*).

Santos Carillo: Mm-hmm.

Foster: Yo no puedo darle eh ningún tipo de aviso legal ok umm este es muy simple si usted quiere tener un abogado presente eso es su derecho. Si usted quiere hablar conmigo y consultar con un abogado después es algo usted, pero yo no puedo

darle ningún tipo de-de-de ósea de con, de consultación. (*I cannot give you any type of legal advice ok umm this is very simple if you want to have an attorney present that is your right. If you want to talk with me and then consult with an attorney that is something that you, but I cannot give you any type of-of like of advice*).

Santos Carillo: Oh ya. (*Oh ok*).

Foster: You know eso está en español si usted lo entiende. (*You know that is in Spanish if you understand it*).

Santos Carillo: Mm-hmm.

Foster: Es algo que usted tiene que decir si usted, usted mismo. (*That is something that you have to say if you, on your own*).

Santos Carillo: Si pues. (*Well yes*).

Foster: So usted puede poner su respuesta y sus iniciales. Si usted no tiene dinero para contratar o a un abogado se le asignara uno para que lo represente antes de ser interrogado si usted así lo desea. Entiende usted este derecho? (*So you can put your answer and your initials. If you do not have money to hire a lawyer, one will be appointed to represent you before any questioning, if you wish. Do you understand this right?*).

Santos Carillo: Si. (*Yes*)

[(Pa30-31)]

Foster's first statement, "So part of this I have to explain I, I am only reading, but this is Spanish," is confusing at best and misleading at worst. By saying that she was "only reading" suggested either that (a) she could not

answer Santos Carillo’s questions about what she was reading because she could “only read” the paper to Santos Carillo, or (b) that he did not need to ask any questions because all she was doing was reading a paper in Spanish to Santos Carillo—downplaying the critical importance of the fact that she was reading him his rights to then ask him to waive those rights. This latter interpretation bears some resemblance—although not to the same extent—of the detective’s “minimizing of the warnings’ significance” and implication “that the warnings were just formalities” in Doody v. Ryan, 649 F.3d 986, 1002 (9th Cir. 2011), when the detective said, among other things, “we read these things to people on somewhat of a regular basis.” Cf. State v. Burno-Taylor, 400 N.J. Super. 581, 595 (App. Div. 2008) (“Just like anybody else we bring in here we want to talk to we read them their rights. It’s just a formality.”).

Even if this Court does not find that Foster’s statement, “I’m only reading,” minimized or undermined the importance of the Miranda warnings, it undoubtedly “operate[d] to, delay, confuse, or burden the suspect in his assertion of his rights.” Alston, 204 N.J. at 623. Santos Carillo asked a critical question concerning his ability to assert his rights, and Foster’s statement, “I’m only reading,” operated to tell Santos Carillo that she could not answer his question about how he would actually go about obtaining an attorney. She

cemented this impression when she further responded to Santos Carillo’s question by saying she could not give him any type of legal advice. Although Santos Carillo’s question clearly asked about the process for obtaining an attorney rather than legal advice, Foster’s response to his question—that she could not give him legal advice—had the effect of telling him she could not answer his question.

Furthermore, even Foster would eventually read the final Miranda warning that an attorney would be provided for him if he could not afford an attorney Foster never said this *in response* to Santos Carillo’s question. In responding to his question she just repeated, “if you want to have an attorney present that is your right.” (Pa30) When a suspect asks a detective if the detective will provide the suspect with an attorney, and the detective responds only by saying, “this is very simple if you want to have an attorney present that is your right,” any reasonable person would interpret that answer to mean, “No, if you have an attorney on your own you have the right to have that attorney present.” Especially to a person who had not set foot in the United States for nineteen years prior to his extradition to the United States that very day—who clearly did not know any lawyers in the United States—Foster’s response would have reasonably been interpreted by Santos Carillo to suggest that while he had a right to have a lawyer present, he had to obtain the

presence of the lawyer on his own without any assistance.

Foster's next two statements further confused the issue: "You know that is in Spanish if you understand it. . . . That is something that you have to say if you, on your own." (Pa31) It is entirely unclear what Foster intended to communicate with those sentences. But in the context of her prior statement, that she was "only reading" a document to Santos Carillo that was in Spanish, this would have reasonably been interpreted by Santos Carillo to mean that Foster was just reading a document to him in Spanish, and he had to indicate whether he understood the Spanish of the document on his own—i.e. without any help.

It was only after this incredibly confusing exchange that Foster read Santos Carillo the final Miranda warning, "If you do not have money to hire a lawyer, one will be appointed to represent you before any questioning, if you wish." (Pa31) The State argues that this warning answered Santos Carillo's question and rendered harmless any earlier confusion. (Pb18-19) This argument fails for three reasons.

First, when a suspect asks a question concerning his rights, and the detective's response effectively says that she cannot answer his question about his rights, a suspect will reasonably assume that all subsequent statements by the detective are not an answer to his question. So whatever Santos Carillo

might have understood the final Miranda warning to mean, he necessarily could not have understood it to answer his question about whether the police would provide him with an attorney.

Second, this final warning did not actually inform him of what would happen (a) if he were requesting an attorney at that time or (b) if he could afford an attorney but simply did not know any attorneys in the United States. Foster never informed Santos Carillo that if he were requesting an attorney, the interview would end until Santos Carillo actually obtained an attorney.

Third, the reading of the final Miranda warning, especially after several confusing statements that told Santos Carillo that this final warning was not an answer to his question, did not obviate Foster's obligation to ask a clarifying question after Santos Carillo's ambiguous request for an attorney. In response to Santos Carillo's question about whether the police would provide him with an attorney, Foster was obligated "to clarify whether defendant was invoking [his] right to consult with an attorney." Dorff, 468 N.J. Super. at 652. Foster never asked Santos Carillo whether he was requesting an attorney. For that reason, the motion court properly found that Santos Carillo's potential confusion regarding his rights was not clarified by Foster before substantive questioning occurred. (Pa24)

Because Santos Carillo's question was an ambiguous invocation of his

right to counsel, and because Foster’s response failed to clarify whether he was asserting his right to counsel but rather “operate[d] to, delay, confuse, or burden the suspect in his assertion of his rights.” Alston, 204 N.J. at 623, the motion court properly suppressed Santos Carillo’s statement.

CONCLUSION

For the aforementioned reasons, this Court should affirm the order of the motion court suppressing Defendant’s statement. If the Court reverses the grounds under which the motion court suppressed Defendant’s statement, the Court should remand to the motion court for consideration of the two other grounds for suppression raised by Defendant on which the motion court did not rule.

Respectfully submitted,

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By:  _____

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Date: November 7, 2024



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LETTER IN LIEU OF REPLY BRIEF
ON BEHALF OF THE STATE OF NEW JERSEY

Honorable Judges of the Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex - CN 006
Trenton, New Jersey 08625

Re: State of New Jersey (Plaintiff-Movant) v.
Fausto Ramiro Santos Carillo (Defendant-Respondent)
Indictment No.: 22-11-00848
Appellate Docket No.: A-0308-24T4

Criminal Action: On Motion for Leave to Appeal from an Order of the
Superior Court of New Jersey, Law Division, Union County Granting
Defendant's Motion to Suppress.

Sat Below: Hon. Candido Rodriguez, Jr., J.S.C.

Honorable Judges:

Pursuant to R. 2:6-2(b), and R. 2:6-4(a), this letter in lieu of a formal brief is
submitted on behalf of the State.

TABLE OF CONTENTS

| | <u>Page</u> |
|--|--------------------|
| STATEMENT OF PROCEDURAL HISTORY | 1 |
| STATEMENT OF FACTS | 1 |
| LEGAL ARGUMENT | 1 |
| <u>POINT I</u> | |
| THE TRIAL COURT’S ORDER GRANTING DEFENDANT’S MOTION TO SUPPRESS WAS AN ABUSE OF DISCRETION AND MUST BE REVERSED ON APPEAL. (Pa4 to 25). | |
| | 1 |
| CONCLUSION | 11 |

STATEMENT OF PROCEDURAL HISTORY¹

The State relies upon the procedural history set forth in its brief dated August 30, 2024.

STATEMENT OF FACTS

The State relies upon the statement of facts set forth in its brief dated August 30, 2024.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT'S ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS WAS AN ABUSE OF DISCRETION AND MUST BE REVERSED ON APPEAL. (Pa4 to 25).

The record in this case clearly establishes that defendant knowingly, voluntarily, and intelligently waived his right to counsel. Moreover, and more relevant to this appeal, the record also clearly establishes that defendant did not invoke his right to counsel and, even if his comment could be deemed an ambiguous invocation of his rights, the discussion between defendant and the detective resolved any ambiguity. Accordingly, the trial court erred in

¹ Pa refers to the State's appendix.

Db refers to the defendant's brief dated November 7, 2024.

1T refers to the Motion to Suppress Hearing transcript, dated August 6, 2024.

2T refers to the Motion to Suppress Hearing transcript, dated August 8, 2024.

granting defendant's Motion to Suppress and, thus, the court's order must be reversed on appeal.

As set forth in the State's initial brief, review of a trial court's decision to suppress a defendant's custodial statement to police is limited. State v. Francisco, 471 N.J. Super. 386, 409 (App. Div. 2022). When reviewing a motion to suppress, appellate courts defer "to the trial court's factual findings that are supported by sufficient credible evidence in the record and will not disturb those findings unless they are 'so clearly mistaken that the interests of justice demand intervention and correction.'" State v. Rivas, 251 N.J. 132, 152 (2022) (quoting State v. S.S., 229 N.J. 360, 374 (2017)). However, the trial court's legal conclusions are reviewed de novo. State v. Hubbard, 222 N.J. 249, 263 (2015).

Here, the trial court's factual finding, that defendant made an ambiguous invocation, was clearly mistaken. Moreover, the court then compounded that error by finding the detective's response failed to eliminate the ambiguity. The trial court's erroneous findings cannot stand and the trial court's legal conclusion, premised upon same, must be reversed.

Indeed, when the conversation between the detective and defendant is viewed completely and not artificially parsed, line-by-line from afar, it is clear

that defendant did not invoke his right to counsel. Rather, defendant merely was inquiring how he would obtain an attorney if he wanted one. In response, and prior to asking any substantive questions, Detective Foster properly advised defendant that an attorney would be appointed if he could not afford one. And, despite that advisement and stating that he understood that right, defendant nevertheless did not ask for an attorney and answered the detective's question. Thus, a review of the whole record establishes that defendant knowingly, voluntarily, and intelligently spoke with the detective and, therefore, defendant's Motion to Suppress should have been denied.

Defendant, who is fifty-six years old, could read and write and he understood Spanish. (1T29-16 to 30-1; Pa28 to 29; Pa131). Moreover, defendant had three years of business administration and engineering. (1T30-9 to 12; Pa29; Pa131). Therefore, it is clear that defendant understood the conversation and what was occurring. Indeed, while reviewing his rights, defendant answered responsively and asked questions when he did not understand. (Pa26 to 33). Furthermore, during the interview, defendant willingly signed the consent to obtain a buccal swab form. (Pa101 to 107). And, as evidenced by defendant's behavior during the Motion to Suppress hearing, he only answers what he wants to answer. (2T4-14 to 7-17). In short,

it is clear that defendant's will was not overborne and he spoke with the detective because he wanted to do so. Stated differently, if defendant wanted an attorney, the record establishes he would have asked for one. But he did not.

Nevertheless, the trial court found the following was an ambiguous invocation of defendant's right to counsel.

NB: [...] You have the right to talk to a lawyer and have him present while you are being questioned. Do you understand this right?

FS: Yes, but I just want to say something there. Eh yes like basically like I do not, I come from another, another country to here I do not know if you guys assign an attorney to me or I have to look for an attorney on my own?

[Pa30 (emphasis added)].

As argued in the State's initial brief, this is not an invocation of one's right to counsel, ambiguous or otherwise. Defendant merely asked if he needed to find his own attorney or if one would be provided. That is a request about how to obtain an attorney if/when defendant decides that he wants one, not a statement that he wants one at that time. Thus, the trial court's finding was incorrect.

However, even assuming defendant's comment was ambiguous and could be viewed as a possible invocation of his right to counsel, the detective's responses and subsequent comments were proper and the totality of the circumstances clearly establish that defendant was not invoking his right to have an attorney present during questioning. In opposition, defendant argues that the detective's response to defendant failed to answer the question, that her answer was confusing and misleading, and that it undermined the importance of Miranda. Defendant's argument, and the trial court's findings below, are based upon an unduly narrow view of the detective's response. Stated differently, both the court and defendant failed to view the conversation and detective's response as a whole, where it is clear that defendant's question was answered, that he was properly advised of his rights, and that he did not invoke his right to counsel. Accordingly, the trial court's findings were an abuse of discretion and they must be reversed on appeal.

Detective Foster responded to defendant's question by stating the following:

NB: So part of this I have to explain I, I am only Reading, but this is Spanish.

FS: Mm-hmm.

NB: I cannot give you any type of legal advice ok umm this is very simple if you want to have an attorney present that is your right. If you want to talk with me and then consult with an attorney that is something that you, but I cannot give you any type of-of like of advice.

FS: Oh ok.

NB: You know that is in Spanish if you understand it.

FS: MM-hmm.

NB: That is something that you have to say if you, on your own.

FS: Well yes.

NB: So, you can put your answer and your initials. If you do not have money to hire a lawyer, one will be appointed to represent you before any questioning if you wish. Do you understand this right?

FS: Yes.

NB: Put your answer and your initials. You can decide at any time to exercise these rights and not answer any questions or make any statements. Do you understand this right?

FS: Yes.

[Pa30 to 31 (emphasis added)].

Contrary to the trial court's findings and defendant's arguments on appeal, the detective's response was clear and it answered defendant's request. Detective Foster unequivocally reiterated that defendant had a right to an attorney, stating "this is very simple if you want to have an attorney present that is your right." (Pa30). Immediately thereafter, and before any substantive questioning occurred, Detective Foster told defendant, "[i]f you do not have money to hire a lawyer, one will be appointed to represent you before any questioning if you wish." (Pa31). This statement clearly answered defendant's question and, notably, defendant did not respond by reiterating his prior question, he did not say he could not afford an attorney, and he did not ask for a lawyer. Rather, defendant said "yes" he understood what he was told. Therefore, the record clearly establishes that defendant's prior question was not a request for an attorney or an invocation of his right. Indeed, the record demonstrates that defendant was fully advised of his rights, and that he knowingly, voluntarily, and intelligently waived them prior to answering any questions. Accordingly, the statement should have been deemed admissible and defendant's Motion to Suppress should have been denied.

Defendant's arguments to the contrary are misplaced. Foremost, this case is distinguishable from those cited by defendant, namely, the unpublished

case of State v. Atkins, No. A-0732-13T2, 2015 WL 4067367 (App. Div. July 6, 2015), the federal district case from northern Illinois: United States v. Allegra, 187 F. Supp. 3d 918 (N.D. Ill. 2015), a case from Alaska: Hampel v. State, 706 P.2d 1173 (Alas. Ct. App. 1985), and a case from Texas: Huff v. State, 678 S.W.2d 236 (Tex. Ct. App. 1984). In each of these cases, the offending comment came in the middle of questioning and the questioning continued. Comparatively, and importantly, here, defendant's question was made during the advisement of rights. Here, substantive questioning did not continue after defendant made that question at issue. Indeed, it had not even begun. Rather, one of the rights the detective had yet to provide specifically answered defendant's question, it was provided to defendant before any interrogation began, and notably, instead of invoking his right to counsel, defendant signed the waiver and spoke with the detective. As such, those cases are factually distinguishable and do not support the trial court's ruling.

Defendant's arguments that Detective Foster's response was confusing and diminished the importance of the Miranda warnings is similarly unavailing. As previously argued, defendant's view of the interview is based upon an unnatural, line-by-line parsing of what occurred. However, the conversation was not nearly as cold and disjointed as defendant asserts. The

detective did not answer defendant's question and stop for long pauses. The answers provided were not "one and done." The whole conversation, tone, tenor, demeanor need to be considered. Indeed, Detective Foster's answer to defendant's question was comprised of multiple statements, which completely answered defendant's inquiry. Detective Foster may have told defendant she could not give him legal advice or that she was reading off the form, she also told him what he wanted to know: that an attorney would be provided if he could not afford one. That answer was not diminished by any prior comments and that answer should not be ignored merely because it was not the immediate response that was provided. Moreover, contrary to defendant's claim, (Db12), it was made in response to defendant's question.

Finally, this Court also should reject defendant's claim that Detective Foster's responses undermined the importance of the Miranda warnings. Foremost, defendant did not make this claim below and the trial court did not find Detective Foster's statements had such an effect. Thus, this allegation should not be considered on appeal.

However, even if this Court were to consider defendant's belated claim, the record rebuts such an assertion. Although Detective Foster told defendant that she was reading from the form, she did not refer to the warnings as a mere

formality. State v. O.D.A.-C., 250 N.J. 408, 422 (2022). And, contrary to defendant's self-serving assertion, such a comment does not imply the rights were a mere technicality. Indeed, prior to providing defendant with his rights, Detective Foster told defendant, twice, that she had to advise him of his rights before she could speak with him. (Pa28; Pa29). Thus, Detective Foster's comment did not have the effect defendant asserts.

Moreover, Detective Foster did not suggest whatever defendant said would remain confidential, or that it would not be used against him. She also did not say that anything he told her would only help. Cf. State v. Puryear, 441 N.J. Super. 280, 298 (App. Div. 2015); see also State in Interest of A.S., 203 N.J. 131, 140, 151 (2010). She also did not imply that innocent people do not need attorneys. State v. Dorff, 468 N.J. Super. 633, 652 (App. Div. 2021). Rather, the record establishes that Detective Foster tried to stay as close as she could to the literal words on the Miranda advisement form. The record also shows that she repeatedly asked defendant if he understood those rights before moving on, and he stated that he did. Thus, it is clear that her statements did not undermine the importance of the Miranda advisement.

In sum, the record clearly shows that defendant did not invoke his right to counsel. Defendant's question to Detective Foster was about procedure and

it was aptly answered. Before any questioning began, defendant was aware that he had a right to remain silent, that he had a right to counsel, who would be appointed if he could not afford an attorney, and that he could exercise his rights at any time. Despite this knowledge, defendant elected to waive his rights and speak with the detective. As such, defendant's statement should have been deemed admissible. Therefore, the trial court abused its discretion in granting defendant's Motion to Suppress and, that ruling should be reversed on appeal.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the trial court's order granting defendant's Motion to Suppress be reversed.

Respectfully submitted,

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MSL/bd