NO. [redacted] JEFFERSON CIRCUIT COURT

DIVISION

JUDGE

COMMONWEALTH OF KENTUCKY PLAINTIFF

v.

[redacted] DEFENDANT

MOTION FOR SUPPRESSION HEARING

TO: Tom Van De Rostyne
Assistant Commonwealth's Atty
514 West Liberty Street
Louisville, Kentucky 40202

* * * * *

Comes now the Defendant, [redacted], through undersigned counsel, pursuant to RCr 9.78 and the Fifth Amendment to the U.S. Constitution, and moves this Court to grant an evidentiary hearing, and in support of this motion Defendant states as follows:

STATEMENT OF THE ISSUE

Defendant's Fifth Amendment federal Constitutional rights were violated when, upon being asked to sign a waiver of his *Miranda* rights, Defendant asked the interrogating officer, "Can I talk to my lawyer before I sign anything?" and the interrogating officer refused to either stop questioning Defendant or to answer Defendant's question. Defendant's question (1) was an unambiguous invocation of his right to counsel, thus requiring that interrogation cease, or (2) Defendant's question reasonably indicated that Defendant did not understand his right to have counsel present, and thus he could not knowingly and intelligently waive that right. Defendant now asks the Court to grant an order suppressing Defendant's statements made after Defendant's request to speak to his lawyer.

FACTUAL BACKGROUND

Defendant is charged with several counts of burglary and other similar offenses. In late 2008, Defendant was ordered to be confined to his home under the Home Incarceration Program (H.I.P.). On December 17, 2008, while still under house arrest under the H.I.P., Defendant was taken into custody on suspicion of having taken several items from neighboring trailer homes.

Defendant was questioned by Officer [Officer] of the LMPD at the third division prison. The recorded interrogation reads as follows from the beginning of the recording to the point when Defendant signed the waiver:

> **[Defendant] (DO):** So, you telling me these people actually seen my face? Is that what you're telling me?
>
> **[Officer] (OC):** Hang on. Okay. I'm gonna read you your rights, okay?
>
> **DO:** Yes, sir.
>
> **OC:** Before we ask any questions you must understand your rights. You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have a right to talk to a lawyer prior to any questioning, or the making of any statements, and to have him present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed by the court to represent you before any questioning, if you so desire. You may stop the questioning or making of any statements at any time by refusing to answer, uh, to answer further, or by requesting to consult with an attorney prior to continuing with the questioning or the making of any statement. Do you understand your rights?
>
> **DO:** Yes, sir.
>
> **OC:** Okay. If you understand your rights, I need you to sign right there.
>
> **DO:** Uh, can I talk…I mean…uh…Can I talk to my lawyer before I sign anything? It's just what my dad told me to do because, last time, they got me good on the whole (inaudible) thing.
>
> **OC:** Okay, well--
>
> **DO:** They got me with a lie, but it was…

OC: If you want to talk to us -- I'm not gonna ask you to lie. I'm not gonna ask you to lie at all, I'm gonna ask you to be honest with me, I'm gonna ask you to be a man about it. Okay. There's got, there's several people around, that, that had their, their stuff broke into, and they had stuff missing, okay? And you know, you know about it…

DO: It ended up in my house…

OC: It ended up in your house. I'm not, I'm not gonna ask you to lie, I'm gonna ask you to be honest with me, okay? And I'm gonna ask you to tell me what happened. Now, if you don't want to make any statements, that's fine, we won't make any statements, you'll just go on to jail, and, uh, we'll just put you in jail now.

DO: Can I ask you a question?

OC: Um-hmm. [affirmative]

DO: Since you're an officer, okay? If this happened by myself, did by myself, (inaudible) by myself, when, I mean, well when'll I get out, just for the fact, it was just me, and, I can't do no probation or nothing?

OC: It, it's a possibility you could get out. I, I can't guarantee you that.

DO: Look, what I wanna know from you is if I can get outta jail quick, before Christmas.

OC: Right, I understand that, I understand that, because you wanna spend time with your nephew.

DO: Yeah.

OC: Okay. I totally understand that, okay? But I can't make that guarantee to you. Okay? I can't tell you, yes, you're gonna get out, tomorrow, or yes, you gonna get out next week, I can't tell you that. That's not my decision to make. That's a judge's decision. And whatever decision the judge makes, is, is what you're gonna have to stand by. Okay?

DO: Okay, do I get my phone call?

OC: Yeah, you'll get your phone call when we get downtown in jail. That's where you'll make your phone call at, down there. Now, we may be able to let you make one here before we leave, okay? We'll see what's going on, and stuff, and see our time constraints and all that, we may be able to let you make one here. Okay? Now, if you wanna talk to me, I'll get you to sign this, and we'll witness it and the time and stuff, and we'll go from there.

DO: (inaudible)

OC: Okay. It's not gonna take (inaudible)

DO: What's this, "[redacted] [Defendant]"?

OC: Yeah. Put your name.

At that point, Defendant signed the waiver, [Officer] resumed interrogation, and Defendant made several incriminating statements regarding the burglaries.

LEGAL ARGUMENTS

I. PRELIMINARY NOTE: TWO REASONABLE INTERPRETATIONS

Because Defendant's statement concerning counsel ("Can I talk to my lawyer before I sign anything?") is a question, there are two legitimate, ordinary interpretations of its meaning that would be reasonably clear to any interrogating officer.

First, Defendant's question, "Can I talk to my lawyer before I sign anything?" was a polite assertion of his right to consult with an attorney before custodial interrogation continued. There is no ambiguity in Defendant's use of the word "lawyer" here: he wants to call his lawyer. A suspect's request to consult an attorney requires the immediate cessation of questioning under *Edwards v. Arizona*, 451 U.S. 477 (1981) (*argued in II, below*).

Alternatively, despite having been told by [Officer] that "[y]ou have a right to talk to a lawyer prior to any questioning…and to have him present with you while you are being questioned," Defendant's question indicated that he simply did not in fact understand this right, thus his waiver could not be knowing and intelligent (*argued in III, below*).

II. DEFENDANT UNAMBIGUOUSLY ASSERTED HIS RIGHT TO HAVE COUNSEL PRESENT DURING CUSTODIAL INTERROGATION, THUS POLICE QUESTIONING SHOULD HAVE CEASED UNTIL DEFENDANT'S ATTORNEY WAS PRESENT.

A. Legal Standards for Cessation of Police Questioning

Under the "*Edwards* rule," law enforcement officers must immediately cease questioning a suspect who has clearly asserted his right to have counsel present during custodial interrogation. *Edwards v. Arizona*, 451 U.S. 477 (1981). "[W]hen counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney." *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990) (clarifying *Edwards*).

The Kentucky Supreme Court has ruled that "custodial interrogation must cease when an accused who has received *Miranda* warnings and has begun responding to questions 'has *clearly* asserted his right to counsel.'" *Dean v. Commonwealth*, 844 S.W.2d 417, 420 (Ky.1992), *citing Edwards*, 451 U.S. at 485 (emphasis added by *Dean* court). The United States Supreme Court has cited *Dean* as representing the "threshold standard" for determining whether the *Edwards* rule concerning cessation of questioning applies, *i.e.*, requests for counsel must meet a "threshold standard of clarity," and "requests falling below this threshold do not trigger the right to counsel." *Mueller v. Virginia***,** 507 U.S. 1043 (1993) (dissent to denial of certiorari).

B. Defendant clearly asserted his right to counsel under the federal standard

The bar for ascertaining the invocation of the *Miranda* right to counsel is low: "Invocation of the *Miranda* right to counsel 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.'" *Davis v. U.S.*, 512 U.S. 452, 459 (1994), *citing McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991). In the present case, Defendant asserted his right to counsel in the form of a polite question: "Can I talk to my lawyer

before I sign anything?" Defendant's question is not ambiguous and is phrased in a way that any reasonable officer would understand as "an expression of a desire for the assistance of an attorney." *Id.* [Officer] should thus have been alerted to cease questioning.

C. Defendant clearly asserted his right to counsel under the Kentucky standard

Defendant's question also satisfies the Kentucky Supreme Court's threshold standard for clarity as announced in *Dean v. Commonwealth*, 844 S.W.2d 417 (Ky.1992). In *Dean*, the defendant did not specifically request an attorney. Instead, the *Dean* defendant, after being asked whether he understood his *Miranda* rights, merely asked, "Should, should I, should I have somebody here? I don't know." *Dean*, 844 S.W.2d, at 419. The Kentucky Supreme Court agreed with the trial court that this statement need not be construed as a request for counsel. *Id*. at 420. The *Dean* court made a special note that the defendant "never *once* spoke of a 'lawyer,' 'attorney,' or 'counsel' during his interrogation." *Id*. at 419 (emphasis in original).

The facts of *Dean* contrast sharply with those of the present case. Here, Defendant specifically asked, "Can I talk to my lawyer before I sign anything?" after being asked to sign a waiver of his *Miranda* rights. Defendant's use of the word "lawyer" is clear and unambiguous.

"Can I talk to my lawyer before I sign anything?" easily meets both the U.S. Supreme Court's *Davis* standard and the Kentucky Supreme Court's *Dean* standard for clarity. This clear invocation of the *Miranda* right to counsel was sufficient to notify any reasonable interrogating officer that interrogation should cease.

D. [Officer], not Defendant, re-initiated conversation after Defendant's invocation of his right to counsel.

Under *Edwards*, an officer may not interrogate a suspect who has requested a lawyer "*unless the accused himself initiates* further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 485 (1981) (emphasis added).

Here, once Defendant had clearly invoked his right to counsel, it was [Officer]'s duty to cease interrogation. Interrogation consists of express questioning or its functional equivalent. *Rhode Island v. Innis,* 446 U.S. 291, 300-01 (1980). The functional equivalent of express questioning consists of words or actions by the police which they should know are "reasonably likely to elicit an incriminating response from the suspect." *Id*. at 301.

In the facts here, [Officer] chose to re-initiate the interrogation ("I'm gonna ask you to be honest with me, I'm gonna ask you to be a man about it"… "I'm gonna ask you to tell me what happened") immediately after Defendant requested to speak with counsel. These statements by [Officer] were all reasonably likely to elicit incriminating responses.

Although Defendant did ask [Officer] two questions after having invoked his right to counsel, these questions were prompted both *after* and *precisely because* [Officer] had re-initiated conversation with Defendant. By ignoring Defendant's request to call his lawyer, and by re-initiating questioning after Defendant's invocation of his *Miranda* right to counsel, [Officer] not only impermissibly re-initiated conversation, but also failed to take Defendant's Fifth Amendment rights seriously. For all these reasons, the statements made after Defendant invoked his right to counsel and after [Officer] re-initiated interrogation do not constitute re-initiation of conversation by Defendant and should be suppressed.

III. DEFENDANT'S QUESTION CONCERNING WHETHER HE COULD TALK TO HIS LAWYER, AFTER HE HAD JUST BEEN TOLD THAT HE COULD TALK TO HIS LAWYER, INDICATED THAT HE DID NOT UNDERSTAND HIS RIGHTS, THUS HE COULD NOT KNOWINGLY AND INTELLIGENTLY WAIVE THOSE RIGHTS.

A. Legal standards for "knowing and intelligent" waiver

A suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning, and the police must explain this right to the suspect

before questioning begins. *Miranda v. Arizona*, 384 U.S. 436, 469-473 (1966). The right to counsel recognized in *Miranda* is sufficiently important to suspects in criminal investigations that it "requir[es] the special protection of the knowing and intelligent waiver standard." *Edwards v. Arizona*, 451 U.S. 477, 483 (1981). Only if the "totality of the circumstances surrounding the interrogation" reveal both (1) an uncoerced choice and (2) the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. *Fare v. Michael C.*, 442 U.S. 707, 725 (1979). "[T]he totality of the circumstances surrounding the interrogation" must demonstrate a defendant waived his rights with a "requisite level of comprehension." *Moran v. Burbine*, 475 U.S. 412, 421 (1986). For a waiver to be knowing and intelligent, it "must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.*

B. Defendant's question indicated that he did not have the requisite level of comprehension of his rights to waive them knowingly and intelligently

Upon being asked whether he understood his *Miranda* rights, Defendant replied, "Yes, sir." However, upon being asked to sign a waiver of his rights, Defendant asked the interrogating officer, "Can I talk to my lawyer before I sign anything?"

As argued above, Defendant's question most strongly suggests that Defendant was invoking his right to consult his attorney prior to questioning. Nevertheless, another common-sense interpretation of the question is that Defendant did not in fact understand that he had a right to consult with his lawyer before he signed any waiver of his rights. If he did not understand this right, then his waiver of it could not be knowing and intelligent, as required by *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

[Officer] did not answer Defendant's question about a lawyer. Instead, [Officer] chose to respond to Defendant's question by continuing the interrogation, telling Defendant to "be honest

with me," to "be a man about it," that if Defendant "[didn't] want to make any statements, that's fine…you'll just go on to jail."

Defendant's question about his rights, "Can I talk to my lawyer before I sign anything?" posed right after Defendant had been read this very right by [Officer], suggests at the very least that Defendant was confused about his rights and did not in fact understand them. [Officer] chose to increase Defendant's confusion about his right to speak to his lawyer by ignoring Defendant's question and telling Defendant that if Defendant "[didn't] want to make any statements, that's fine…you'll just go on to jail, and, uh, we'll just put you in jail now." Further, [Officer] fostered the illusion that Defendant had no choice about consulting his lawyer prior to questioning by telling Defendant that "you'll get your phone call when we get downtown in jail." This statement, coupled with the interrogating officer's ignoring of Defendant's question about his lawyer, appears calculated to mislead defendant into believing that he could not consult his attorney until after custodial interrogation had been completed at the third district prison and Defendant had been transported downtown.

The cascade of interrogating statements from [Officer] following Defendant's request to call his lawyer again suggests that [Officer] did not take Defendant's question about calling his attorney seriously, whether that question was an invocation of Defendant's Miranda right to counsel or an indication that Defendant did not have a knowing and intelligent understanding of the right he was being asked to waive.

CONCLUSION

The law does not require that a suspect request his lawyer more than once before the interrogating officer takes the request seriously. Nor does the law require that a suspect assert his right to have counsel as a declarative sentence rather than as a question, or that a suspect

"speak with the discrimination of an Oxford don." *Davis v. U.S.*, 512 U.S. 452, 459 (1994). Instead, the Defendant need only have made a "statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." *Id*. Because interrogation did not cease, the statements made following Defendant's invocation of his right to counsel should be suppressed.

WHEREFORE, for all the reasons argued above, Defendant requests that this honorable Court grant a hearing under RCr 9.78, wherein defendant will move to suppress any statements that followed his invocation of his right to counsel.

Respectfully submitted,

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[redacted]

Counsel for Defendant