

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**  
**IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE,	)	
	)	I.D. No. 1112006547A
v.	)	
	)	
MARKEVUS PULLIAM	)	
	)	
Defendant	)	

Submitted: October 15, 2012  
Decided: December 13, 2012

Upon Defendant’s “Final Amended Motion to Suppress Statements.”  
**GRANTED IN PART AND DENIED IN PART.**

**MEMORANDUM OPINION**

Steven P. Wood, Esquire and Stephen G. McDonald, Esquire, Deputy Attorneys General, Department of Justice, Wilmington, Delaware, Attorneys for State of Delaware

Patrick J. Collins, Esquire, Collins & Roop, Wilmington, Delaware, Attorney for Defendant

COOCH, R. J.

## **I. INTRODUCTION**

Defendant seeks to suppress two custodial statements offered two days apart during separate interrogations regarding a murder and robbery for which he is presently charged. Defendant claims his federal and state constitutional rights were violated because his interrogator failed to clarify Defendant's intent when Defendant ambiguously invoked his right to remain silent during his first statement. Defendant contends he ambiguously invoked his right to silence when he requested his mother. The State argues that under the particular circumstances of this case, Defendant's request is distinguishable from relevant Delaware Supreme Court precedent and did not constitute an ambiguous invocation.

Defendant argues his second statement should be suppressed because the first statement's impropriety tainted it. The State contends that both of Defendant's statements were voluntary and not coerced, and therefore, the second statement was not tainted.

This Court concludes that Delaware Supreme Court precedent provides that the interrogating police detective was required to clarify Defendant's intent when Defendant requested his mother. Accordingly, the first statement requires partial suppression, beginning when Defendant initially requested his mother.

To determine whether the second statement was tainted by the first statement's unclarified invocation, which this Court finds to have been ambiguous, this Court must analyze an issue of apparent first impression in Delaware: Delaware courts have apparently never considered the effect that an unclarified ambiguous invocation has upon a subsequent statement's admissibility.

This Court concludes that the unclarified ambiguous invocation of the right to remain silent violated only *Miranda's* prophylactic requirements and did not violate Defendant's constitutional rights. Therefore, despite the unclarified ambiguous invocation in the first statement, the second statement is admissible because both statements were nevertheless voluntary and not coerced. For those reasons, Defendant's Final Amended Motion to Suppress Statements is **GRANTED IN PART** and **DENIED IN PART** as to the first statement and **DENIED** as to the second statement.

## **II. FACTUAL HISTORY**

On June 21, 2011, Phillip Costango was shot and killed in Northeast Wilmington during a drug-related robbery. Police identified Defendant Markevus Pulliam as a suspect through cell phone records linking Defendant to Costango at the time of his death.

On December 7, 2011, Defendant was transported to the Wilmington Police station for an interview with Detective Gary Tabor. Detective Tabor administered *Miranda* warnings, advising Defendant of his constitutional rights.<sup>1</sup> Defendant responded that he understood and asserted his willingness to speak with Tabor.<sup>2</sup> Shortly after questioning began, Tabor informed Defendant that he was a suspect in Costango's murder.<sup>3</sup>

After a two hour break, the following discourse occurred:

Detective: Um. You know? I've done nothing. I was nothing but respectful to them. Um. You know? I'm not. I'm not going to f[---] you over. You know what I mean? I'm not that kind of person. I wouldn't do it. Ah. And I know it's a hard step to – that you're – that you're going to take. Um. Believe me, I've sat in this room many times, with many other people who have been in the same position that you're in and I know that it's a very hard task to take that step. Okay? So don't think that I don't. Don't think that I'm ignoring that fact. Okay? I'm not. But um, it's a step that you have to take. You understand? For your – for yourself you have to do it. Okay? For Phil you have to do it. Um. All the other issues that you're thinking about are all things we can work out. Okay? So I mean I've moved people to South Carolina and, you know? For their protection so, um, at their request. So that's something, you know, depending on what you tell me, you know? We can maybe work that out. Okay? But you have to be willing to tell me everything truthfully. Okay? So tell me what happened.

Defendant: I didn't . . . one more thing. I want like, can you like bring my mom here?

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<sup>1</sup> Def's Interview Tr. 1:05:11.2 (December 7, 2011).

<sup>2</sup> *Id.* at 1:05:27.1 - 1:06:05.6.

<sup>3</sup> *Id.* at 1:15:48.5.

Detective: You want your mom here? Okay. You want to talk to her?  
How old are you now?

Defendant: Nineteen.

Detective: Nineteen, okay.

Defendant: I mean, I just want to talk to-, I just want to feel safe in here  
talking to you . . . with somebody that I know.

Detective: Okay.

Defendant: All right.

Detective: I'll tell you what, let's trade. Okay? Let's trade a little bit  
first so that I'm not wasting my time. That I know you're  
being truthful with me. Give me some details about what  
happened to Phil, that I can look at the evidence I have and  
say, "Okay, he's telling me the truth. He's not jerking me  
around. Let me go call his mom in and make  
arrangements." All right?

Defendant: Yeah. I didn't do it.

Detective: I don't think you did it. Who was with? Who was with  
you that night?

Defendant: I didn't. I didn't never leave the house, but I did let  
somebody use my phone.

Detective: Okay. Who used your phone?<sup>4</sup>

Questioning continued and Defendant provided a somewhat exculpatory story  
in which Defendant implicated his codefendant, Pierre Bailey, but denied knowing  
about the robbery in advance or being present at the scene.<sup>5</sup> Detective Tabor then

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<sup>4</sup> *Id.* at 4:02:23.2 - 4:03:26.0.

<sup>5</sup> *Id.* at 4:03:15.5 - 4:04:07.4.

left the interview room and called Defendant's mother.<sup>6</sup> Tabor returned and told Defendant that his mother was "on her way."<sup>7</sup> After additional questioning, Defendant admitted being present, but denied any role in the crime.<sup>8</sup>

Tabor then indicated that Defendant's mother would be arriving soon.

Detective: Okay. All right. Give me just a second. Okay? Your mom should be here any minute. I called. Um. I talked to her. She said fifteen minutes, so she should be in just a couple more.

Defendant: Which one you called?

Detective: Huh?

Defendant: Who you called?

Detective: Jacqueline.

Defendant: Oh.

Detective: Because she's closest. I figured you'd want her here faster. You know? Is that okay?

Defendant: Yeah.<sup>9</sup>

Approximately twenty-five minutes later, Defendant asked if his mother had arrived.<sup>10</sup>

Defendant: Where's my mom?

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<sup>6</sup> *Id.* at 4:12:44.5.

<sup>7</sup> *Id.* at 4:25:10.1.

<sup>8</sup> *Id.* at 4:36:40.0.

<sup>9</sup> *Id.* at 4:45:33.2 - 4:45:51.8.

<sup>10</sup> *Id.* at 5:01:09.9.

Detective: I think she just got here. Hang on one sec. [Detective exits and reenters the room] All right, Markevus. We got your mom here, okay? She's going to come in just a couple of minutes. I want you to look at these pictures real quick [Places photographs on table for interviewee to look at] They're hard to see, if you need bigger ones, just tell me, okay? But obviously we're trying to figure out who Pierre is, all right? I need you to point him out to me . . . if you see him.

Defendant: That kind of looks like him, but I'm not sure.<sup>11</sup>

After fifteen more minutes, Defendant again stated he wanted to know if his mother was present.<sup>12</sup> Detective Tabor responded with more questions about the codefendant Bailey.

Defendant: Did you call my mom?

Detective: She's here.

Defendant: I want to speak with her.

Detective: As soon as you tell me who Pierre is.

Defendant: Number two.

Detective: Number two? Circle that for me.<sup>13</sup>

Defendant's mother entered the room seventeen minutes later.<sup>14</sup>

Detective: Miss Pulliam?

Mother: Yeah? You want to see Alexis?

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<sup>11</sup> *Id.* at 5:01:00:1 - 5:35:29.4.

<sup>12</sup> *Id.* at 5:50:26.7.

<sup>13</sup> *Id.* at 5:50:26.7 - 5:50:38.1.

<sup>14</sup> *Id.* at 6:07:58.8.

Detective: I'm not. I'm actually done. I'm not going to bring Alexis in here right now. Okay?

Mother: Okay.

Detective: He wanted to talk to - to you and I honored that. Okay? Which I don't ever do, so you know, you're fortunate I let you do that. Okay? You're an adult now. All right?

Defendant: So where I'm going?<sup>15</sup>

The interview resumed thirty minutes later.<sup>16</sup> Defendant continually denied having a gun during the crime. The interview concluded about ninety minutes later.<sup>17</sup> Defendant never explicitly invoked his right to silence, refused to answer questions, or indicated he did not wish to be questioned.

Two days later, on December 9, 2011, Detective Tabor conducted a second interrogation with Defendant, this time at the Howard R. Young Correctional Institution. *Miranda* warnings were again administered to begin the interview, advising Defendant of his rights to silence and counsel.<sup>18</sup>

Detective: Okay. Alright, um, I'm just going to read you your rights again, just like the other day. Okay? Basically we'll just talk about the same thing, but let's read you your rights anyway, okay? You have the right to remain silent, anything you say can be used against you in a court of law. You have the right to an attorney. If you can't afford an attorney one will be appointed to represent you. You have the right to stop answering questions at any time. You have

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<sup>15</sup> *Id.* at 6:18:15.5 - 6:18:36.8.

<sup>16</sup> *Id.* at 0:01:20.4.

<sup>17</sup> *Id.* at 3:02:35.5.

<sup>18</sup> Def's Interview Tr. 0:02:54.5 (December 9, 2011).



the right to have a lawyer present during your questioning. Do you understand that? Okay. Having those rights in mind, is it alright if we talk about the things you haven't told me? And you know, how they're different from the things that you've already told me? Yes?

Defendant: Mm-hmm.

Detective: You got to say yes or no.

Defendant: Yeah.<sup>19</sup>

Questioning continued and the interrogation addressed some of the same topics from the prior statement in more detail.

Detective: Okay. Who drove that car?

Defendant: Me.

Detective: Okay. And who was in the passenger seat of that car?

Defendant: Nobody.

Detective: Nobody? Was Yeyo there?

Defendant: Hm-mm.

Detective: You sure? Okay. Who was in the back seat of the car?

Defendant: P.

Detective: And P is?

Defendant: Pierre.

Detective: Pierre. Okay. Pierre's the one you picked out of that lineup yesterday right? Okay, so why did you tell me that she drove the car. Were you afraid to tell me that you drove the car?

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<sup>19</sup> *Id.* at 0:02:54.5 - 0:03:28.8.

Defendant: No, 'cause I know that she knew who shot the bullet and... I didn't want to get charged with murder or something and be in jail.

Detective: So you knew that she knew, how did she know that Pierre did the shooting?

Defendant: Because Pierre came back to my house and told us.

Detective: And what happened when Pierre came back to the house?

Defendant: I told you, he . . .<sup>20</sup>

. . .

Detective: Okay. Alright, we'll work on that. So P asked you for your phone, you knew he was ordering up so you guys could go rob him. Right? Obviously you knew that Pierre had a gun, we talked about that yesterday. Right?<sup>21</sup>

. . .

Defendant: So Phil tried to take off and then P just hopped out and tried to run after him, and then that's when I took off.

Detective: Okay. And you heard 5 to 7 shots you said yesterday, I think?

Defendant: Yeah, like 5, 6, yeah.<sup>22</sup>

Defendant admitted Bailey gave him fifty dollars after the robbery.<sup>23</sup>

Defendant never invoked his rights to silence or counsel nor did he ask to see his mother.

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<sup>20</sup> *Id.* at 0:06:01.8 - 0:06:51.8.

<sup>21</sup> *Id.* at 0:10:50.5.

<sup>22</sup> *Id.* at 0:16:04.2 - 0:16:14.0.

<sup>23</sup> *Id.* at 0:16:38.5.

Defendant was subsequently indicted on charges of Murder First Degree (being prosecuted as a non-capital case), two counts of Possession of a Firearm During the Commission of a Felony, Robbery First Degree, Conspiracy Second Degree, and Possession of a Firearm or Ammunition by a Person Prohibited.

### **III. THE PARTIES' CONTENTIONS**<sup>24</sup>

#### **A. Defendant's Contentions**

Defendant seeks to suppress both statements, contending they violated his Fifth Amendment right to remain silent and to counsel under *Miranda v. Arizona*.<sup>25</sup> Defendant contends that his December 7 statement requires suppression because he requested his mother, thereby equivocally invoking his right to remain silent, pursuant to *Draper v. State*.<sup>26</sup> Defendant asserts that under Delaware law, this ambiguity required that Detective Tabor have sought to clarify Defendant's request. Defendant asserts that because the detective never clarified the equivocal invocation, Defendant's entire December 7 statement requires suppression.

Furthermore, Defendant contends the December 9 statement requires suppression because it was tainted by the detective's failure to clarify the December 7 statement's ambiguous invocation. Defendant argues the second interrogation was

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<sup>24</sup> The parties stipulated that Defendant's Motion to Suppress could be resolved on a paper/video record without an evidentiary hearing. Letter to Counsel from Ct. (Sept., 20, 2012).

<sup>25</sup> 384 U.S. 436 (1966).

<sup>26</sup> 49 A.3d 807 (Del. 2002).

tainted because (1) there was a “minimal break in interrogation,” (2) Defendant remained in custody, and (3) the interrogations involved the same information.<sup>27</sup>

### **B. The State’s Contentions**

The State contends that both statements should be admissible because Defendant knowingly and voluntarily offered them. Regarding the December 7 statement, the State asserts that the facts are distinguishable from Delaware jurisprudence, including especially *Draper’s* holding that, under the facts of *Draper*, a request for one’s mother constitutes an equivocal invocation. The State argues that Defendant’s request did not constitute an equivocal invocation because it was not immediately after *Miranda* warnings and it was not repeated. The State further asserts that “[a] request to see a parent is not inexorably an invocation of one’s right to silence, and a suspect must do or say something more before one can fairly argue that such is, at least, an ambiguous invocation of the right.”<sup>28</sup> The State contends that all these “distinguishing” factors indicate Defendant’s statement was “entirely voluntary.” The State also argues that Defendant did not make an ambiguous

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<sup>27</sup> Defendant appears to contend that his cognitive limitations left him unusually susceptible to the detective’s coercion. The State has not addressed this additional matter. However, before briefing began, the parties stipulated that the Motion could be resolved on a the record without an evidentiary hearing. On the limited paper record, no definitive determination can be made about Defendant’s alleged cognitive difficulties. Although the Court does not reach that issue, the Court notes that it does not appear that the detective exploited Defendant’s alleged cognitive limitations sufficient to establish coercion.

<sup>28</sup> State’s Br. at p. 5.

invocation of his right to silence because Defendant never stopped answering questions and Defendant resumed the interview after speaking with his mother.

The State asserts Defendant was not coerced during either statement, so that both statements were voluntary. The State asserts that even if the detective erred by not clarifying Defendant's request for his mother in the first interview, both statements were "incontrovertibly" voluntary and not coerced, and therefore admissible.

#### IV. DISCUSSION

##### **A. Defendant's December 7 Statement Requires Suppression Beginning with Defendant's First Request for his Mother.**

The police may not conduct a custodial interrogation without the defendant first knowingly and voluntarily waiving the right to remain silent and the right to counsel.<sup>29</sup> If, after knowingly and voluntarily waiving *Miranda* rights, a suspect unambiguously states he no longer wishes to speak with the police, questioning must cease.<sup>30</sup> The right to remain silent is guaranteed under the Fifth Amendment of the United States Constitution and Article I, § 7 of the Delaware Constitution. The right to silence may be invoked, in any manner, at any time before or during a custodial interrogation.<sup>31</sup> A court will suppress statements gathered during an

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<sup>29</sup> *Miranda*, 384 U.S. at 468-71.

<sup>30</sup> *Id.* at 473-74; *DeJesus v. State*, 655 A.2d 1180, 1194 (Del. 1995).

<sup>31</sup> *Miranda*, 384 U.S. at 472.

interrogation that is continued despite a defendant invoking the right to silence.<sup>32</sup>

The right to remain silent is subject to the same protection as the right to counsel.<sup>33</sup>

If a defendant's invocation of the right to remain silent is ambiguous, the Delaware Constitution has been held to provide additional protection. While federal law allows the police to continue the interrogations,<sup>34</sup> *Crawford v. State*<sup>35</sup> requires as a matter of state constitutional law that the police clarify a suspect's ambiguous request for counsel (not an issue in this case) before resuming an interrogation.<sup>36</sup>

Whether a statement is an ambiguous invocation of the right to silence is determined on a case-by-case basis, analyzing the totality of the circumstances.<sup>37</sup>

An interviewer may clarify a defendant's intention through various means, including by repeating *Miranda* warnings; however, the attempts must not be coercive.<sup>38</sup>

“The clarification approach requires the interrogating officer to limit his questions to

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<sup>32</sup> See *Dodson v. State*, 513 A.2d 761, 763 (Del. 1986) (“The right to remain silent is a constitutional right . . . [c]onsequently, when a defendant invokes his right to silence, the police may not initiate continued interrogation on the crimes at issue.”) (citing *Edwards v. Arizona*, 451 U.S. 477, 484 (1981)).

<sup>33</sup> *Id.* at 763.

<sup>34</sup> *Davis v. United States*, 512 U.S. 452, 461-62 (1994) (holding that the “need for effective law enforcement” requires that when a suspect ambiguously requests an attorney, questioning may continue unless a suspect unambiguously requests counsel.)

<sup>35</sup> 580 A.2d 571, 577 (1990).

<sup>36</sup> Del. Const. art. I, § 7.

<sup>37</sup> *Garvey v. State*, 873 2d. 291, 297 (Del. 2005).

<sup>38</sup> *Crawford*, 580 A.2d at 577.

those designed to elicit definitive indications of intent when a suspect makes an ambiguous request for counsel.”<sup>39</sup>

Pertinent to this case, in *Draper v. State*, the Delaware Supreme Court has held that a defendant’s right to remain silent was ambiguously invoked when a defendant articulated that he did not wish to be interrogated until speaking with his mother.<sup>40</sup> In that case, the thirty-one year old defendant stated to the officer early in the interview, “I want to see my mom.”<sup>41</sup> When the officer pressed further, the defendant explained a willingness to speak with the officer, but only “[a]fter I talk to my mother.”<sup>42</sup> The *Draper* Court determined that the officer violated the defendant’s Delaware constitutional rights when the officer did not immediately cease the substantive interview and clarify whether the defendant intended to invoke his *Miranda* rights.<sup>43</sup> The Court suppressed the entire interview because the defendant requested his mother immediately after questioning began.<sup>44</sup> Thus, to resolve this motion, this Court must first determine whether Defendant’s request to

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<sup>39</sup> *Id.* at 575.

<sup>40</sup> 49 A.3d 807 (Del. 2002).

<sup>41</sup> *Id.* at 808. The recorded video of the interview in *Draper* did not capture the first few minutes of interrogation. However, evidence demonstrated that Draper insisted he speak with his mother “right off the bat.” *Id.*

<sup>42</sup> *Id.* at 809.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

see his mother constituted an invocation, or at least an ambiguous invocation, of Defendant's right to remain silent.

Defendant's invocation was at best, ambiguous, and requires a totality of the circumstances analysis. When Defendant requested his mother, he had been interrogated intermittently for three hours about his involvement in a murder. At the time of his interview, Defendant was nineteen years old. Defendant requested that his mother be brought to the interview, and explained that he would feel "safer" talking to the officer with her present.

Defendant's statements requesting his mother's presence are more ambiguous than the defendant's in *Draper*. Through further questioning, the defendant in *Draper* explicitly conditioned his willingness to continue the interrogation upon first speaking with his mother. The defendant in *Draper* expounded on his initial request to speak with his mother by answering "follow-up" questions about his willingness to continue the interrogation.<sup>45</sup>

Conversely, in this case, Defendant did not expound on his request, at least partially because follow-up clarification questions were never asked. Notably, if Defendant's statements regarding his mother are less clear than those of the defendant in *Draper*, it is at least partially because Detective Tabor never clarified Defendant's request.

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<sup>45</sup> *Garvey*, 873 A.2d at 295.



The circumstances demonstrate that Defendant's request constituted an ambiguous invocation of his right to silence. The interrogation's length, the crime for which Defendant was a suspect, his age, and Defendant's recorded statements all indicate that Defendant's request required clarification. Defendant's request could not reasonably be interpreted otherwise considering the totality of the circumstances. The detective should have immediately ceased the substantive interview and have sought to clarify Defendant's intent. Instead, by shifting to bargaining, the detective failed to "limit his questions to those designed to elicit definitive indications of intent."<sup>46</sup>

The State argues that *Draper* was limited to its facts and did not establish a *per se* rule that a request for one's mother constituted an ambiguous invocation of the right to remain silent. The State attempts to distinguish *Draper* because the defendant's request for his mother in *Draper* immediately followed his *Miranda* waiver, whereas Defendant's request in this case occurred three hours into the interrogation process. Also, unlike *Draper*, Defendant did not repeat his request. Rather, Defendant answered the detective's unrelated questions.

The State also contends that *Draper* is inapposite because Defendant never once linked his desire for his mother with an unwillingness to continue the interrogation. The State asserts that "[a] request to see a parent is not inexorably an

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<sup>46</sup> *Crawford*, 580 A.2d at 575.

invocation of one's right to silence, and a suspect must do or say something more before one can fairly argue that such is, at least, an ambiguous invocation of the right."<sup>47</sup>

The State's contention is that because Defendant did not steadfastly and repeatedly request his mother, that the detective was not obligated to cease questioning under *Draper*. However, that contention misreads the broad language in *Draper*. If that were *Draper's* proper reading, the exception would inevitably swallow the rule. The State's proposed interpretation would empower officers to bargain in response to ambiguous invocations to remain silent, or ignore them altogether, and hope the defendant did not repeat the request.

The State's attempt to distinguish Defendant's statement from the defendant's in *Draper* is unpersuasive. An invocation of the right to silence need not immediately follow a *Miranda* waiver; an invocation may be made in any manner and at any time during a custodial interview.<sup>48</sup> Whether Defendant requested his mother immediately following *Miranda* warnings or at any time until the last interview question would not impact its effectiveness. Defendant was not required to repeat his request or explicitly link his desire for his mother with an unwillingness to continue the interview. To hold a defendant to such a standard would undermine

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<sup>47</sup> State's Br. at p. 5.

<sup>48</sup> *Miranda*, 384 U.S. at 472.

*Crawford* by essentially eliminating the possibility of ambiguously invoking the right to silence by requesting one's mother.<sup>49</sup> This burden shifting directly contradicts the Delaware Supreme Court's broad holding in *Draper*.

The State's argument that a defendant "must do or say something more" than merely request a parent to constitute an ambiguous invocation, albeit technically true, is misleading. The initial burden under *Crawford* and *Draper* remains on the interviewer to clarify the suspect's intention. When an interviewer properly asks clarifying questions "designed to elicit definitive indications of intent," through responses, the defendant must "do or say something more" to indicate that his request is actually unambiguous. If an interviewer fails to ask clarifying questions after a defendant ambiguously invokes the right to silence, the defendant has no further duty.<sup>50</sup>

Therefore Defendant's Final Amended Motion to Suppress Defendant's December 7 Statement is **GRANTED IN PART** and **DENIED IN PART**. Defendant's December 7 statement is suppressed beginning with Defendant's initial request for his mother.<sup>51</sup>

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<sup>49</sup> See *Crawford*, n.34, *supra*.

<sup>50</sup> "While police often carry printed cards to ensure precise *Miranda* warnings, the public is not required to carry similar cards so they can give similarly precise responses." *In re H.V.*, 252 S.W. 3d 319, 326 (Tex. 2008) (citations omitted).

<sup>51</sup> It is important to clarify that a defendant cannot invoke the right to remain silent merely by requesting to see or speak with one's mother. That is not the proper conclusion to be drawn from

## **B. Defendant's December 9 Statement Was Not Tainted By the December 7 Statement.**

To determine whether the December 9 statement was tainted by the detective's failure to clarify Defendant's intention, this Court must analyze an issue of apparent first impression in Delaware. Delaware Courts have analyzed whether the "taint" of a prior *Miranda* violation spoils a subsequent statement. However, whether a subsequent statement can be tainted by the first statement's unclarified ambiguous invocation of the right to remain silent appears to be a novel issue. This Court concludes that any taint of an unclarified ambiguous invocation does not automatically render inadmissible a subsequent statement that was voluntary, not coerced, and no longer subject to the ambiguous invocation. Therefore, for the reasons that follow, Defendant's Motion to Suppress Defendant's December 9 Statement is **DENIED**.

### **1. The United States Constitution's Protection**

When a defendant invokes the Fifth Amendment right to remain silent, the invocation must be "scrupulously honored."<sup>52</sup> When an invocation is not

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this case or from *Draper*. If that were the case, the "slippery slope" of possible requests would be potentially never-ending. There is no Delaware constitutional right to see or speak with one's mother (or anyone other than counsel) during an interrogation. The defendant's request for his mother did not invoke the right to remain silent. Rather, it was that Defendant's request for the mother was never clarified to determine whether Defendant was invoking the right to remain silent that requires the partial suppression.

<sup>52</sup>*Miranda*, 384 U.S. at 479 (1966); *Michigan v. Mosley*, 423 U.S. 96, 103, (1975).

scrupulously honored, the Fifth Amendment is substantively violated and all statements after the invocation are inadmissible.<sup>53</sup> A different analysis is required, however, where a statement is inadmissible because the statement violated *Miranda*'s "prophylactic" requirements.<sup>54</sup> "Prophylactic" *Miranda* warnings are "not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected."<sup>55</sup>

In the seminal United States Supreme Court case of *Oregon v. Elstad*,<sup>56</sup> two officers initially questioned a defendant at home without first administering *Miranda* warnings.<sup>57</sup> The defendant immediately admitted being present at a

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<sup>53</sup> *Id.*

<sup>54</sup> "[A] prophylactic rule is designed to operate as a preventative measure; its purpose is to safeguard against a potential constitutional violation, rather than to identify what constitutes a constitutional violation." 1 W. LaFare Crim. Proc. § 2.9(h) (3d ed. 2007) (citations omitted).

Delaware courts have recognized the distinction between prophylactic and substantive *Miranda* violations. See *Brank v. State*, 528 A.2d 1185, 1187 (Del. 1987) (recognizing prophylactic distinction enunciated in *Edwards*, 451 U.S. at 484-85); see also *Fleming v. State*, 1992 WL 135159, at \*2, 609 A.2d 668 (Del. 1992) (TABLE); *State v. Bryan*, 551 A.2d 807, 813 (Del. Super. 1988), *rev'd*, 571 A.2d 170 (Del. 1990); *Wainwright v. State*, 504 A.2d 1096, 1101 (Del. 1986); *State v. Cabrera*, 2000 WL 33113956, at \*13, 19 (Del. Super. Dec. 19, 2000); *State v. Siple*, 1996 WL 528405, at \*21 (Del. Super. July 19, 1996); *State v. Brotman*, 1991 WL 138421, at \*6, 8 (Del. Super. July 11, 1991) (holding that prophylactic distinction should "not be utilized . . . to bar an otherwise freely given statement made immediately following the recitation of *Miranda* warnings."); *State v. Flamer*, 1989 WL 70893, at \*10 (Del. Super. June 16, 1989) (refusing to retroactively apply prophylactic distinction).

<sup>55</sup> *Michigan v. Tucker*, 417 U.S. 433, 444 (1974); see also *Edwards v. Arizona*, 451 U.S. 477, 492 (1981) (POWELL, J., concurring). Requiring *Miranda* warnings before custodial interrogation provides "practical reinforcement" for the Fifth Amendment right. *Michigan v. Tucker*, *supra*, 417 U.S. at 444.

<sup>56</sup> 470 U.S. 298 (1985).

<sup>57</sup> *Id.* at 301.

robbery scene and was then taken to the police station.<sup>58</sup> When again questioned after receiving *Miranda* warnings and waiving his rights, the defendant offered a detailed confession.<sup>59</sup>

While the Court found the initial brief statement inadmissible because the police failed to administer *Miranda* warnings,<sup>60</sup> the Court nevertheless held that *Miranda* did not bar subsequent statements obtained in compliance with *Miranda*.<sup>61</sup> The Court explicitly rejected the “fruits of the poisonous tree” doctrine as to the particular facts in that case because, while the doctrine applies to searches and seizures under the Fourth Amendment, it did not apply where *Miranda* warnings were not administered.<sup>62</sup>

One prominent authority has stated that “[v]iolation of *Miranda*’s prophylactic safeguards does not in itself create a coercive atmosphere that renders involuntary any subsequent, properly warned, statement.”<sup>63</sup> Rather, the inquiry is “whether, in fact, the second statement was also voluntarily made,” considering the

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 301-302.

<sup>60</sup> *Id.* at 317.

<sup>61</sup> *Id.* at 318.

<sup>62</sup> *Id.* at 303-04 (The fruits of the poisonous tree doctrine “should not be used to obscure fundamental differences between the role of the Fourth Amendment exclusionary rule and the function of *Miranda* in guarding against the prosecutorial use of compelled statements as prohibited by the Fifth Amendment.”)

<sup>63</sup> 3 W. LaFave *Crim. Proc.* § 9.5(a) (3d ed. 2007).

“surrounding circumstances and the entire course of police conduct with respect to the suspect.”<sup>64</sup>

The *Elstad* approach often looks to similar “fruits of the poisonous tree” factors, including temporal attenuation, intervening circumstances, and the “flagrancy” of the coercive practices that rendered the initial confession involuntary,<sup>65</sup> but focuses less on the suspect’s willingness to make a second statement, than a “fruits analysis.”<sup>66</sup>

The United States Supreme Court has thus explained the test for analyzing whether a prior unwarned statement (a mere prophylactic *Miranda* violation) taints a subsequent statement.

## **2. Analysis of Authorities from Other Jurisdictions**

Some states have rejected *Elstad* and ruled to the contrary as a matter of state law that a prior unwarned statement automatically taints a second statement, in effect affording defendants greater protection than required by the Fifth Amendment of the United States Constitution.<sup>67</sup> Other states interpreting *Elstad* have limited its

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<sup>64</sup> *Elstad*, 470 U.S. at 318.

<sup>65</sup> See, e.g., *United States v. Lopez*, 437 F.3d 1059 (10<sup>th</sup> Cir. 2006); *Holland v. McGinnis*, 963 F.2d 1044 (7<sup>th</sup> Cir. 1992); *Leon v. Wainwright*, 734 F.2d 770 (11<sup>th</sup> Cir. 1984); *People v. Medina*, 25 P.3d 1216 (Colo. 2001); *State v. Schroff*, 206 Conn. 182, 536 A.2d 952 (1988); *Commonwealth v. Meehan*, 377 Mass. 552, 387 N.E.2d 527 (1979).

<sup>66</sup> 3 W. LaFave Crim. Proc. § 9.5(c) (3d ed. 2007).

<sup>67</sup> See, e.g., *Commonwealth v. Smith*, 412 Mass. 823 (1992); *People v. Bethea*, 67 N.Y. 2d 364 (1986).

holding strictly to its essential facts because *Elstad* addressed only a “simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect’s ability to exercise his free will...”<sup>68</sup>

Specifically, and even assuming the first confession’s voluntariness, some courts have distinguished *Elstad* and applied a “fruits analysis” where the police failed to honor the defendant’s invocation of his right to silence.<sup>69</sup> The Supreme Court foreshadowed this future distinguishing in *Elstad* when the majority wrote that “inapposite are the cases the dissent cites concerning suspects whose invocation of their rights to remain silent and to have counsel present were flatly ignored while police subjected them to continued interrogation.”<sup>70</sup>

Since *Elstad*, the United States Supreme Court has apparently not explicitly addressed whether the analysis differs when an invocation of the right to silence in the first statement is not honored. However, in some state courts addressing the issue, the analysis has differed. In *State v. Hartley*,<sup>71</sup> the New Jersey Supreme Court analyzed an interrogation where the interviewers did not scrupulously honor a

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<sup>68</sup> *Elstad*, 470 U.S. at 309.

<sup>69</sup> *State v. Hartley*, 103 N.J. 252, 511 A.2d 80 (1986); *State v. Crump*, 834 S.W. 2d 265 (Tenn.1992); *Osburn v. State*, 2009 Ark. 390, 326 S.W. 3d 771 (2009).

<sup>70</sup> *Elstad*, 470 U.S. at 312 n.3.

<sup>71</sup> 103 N.J. 252 (1986).



defendant's invocation of his right to silence.<sup>72</sup> After not honoring the defendant's invocation, the interrogator failed to readminister *Miranda* warnings before resuming the interrogation.<sup>73</sup> The Court held that the failure to "scrupulously honor" the defendant's invocation was a constitutional violation and that all subsequent statements were "inextricably entwined" and also violated the defendant's rights.<sup>74</sup>

The *Hartley* court reasoned that the distinguishing factor was that the *Miranda* flaw in *Elstad* was merely a failure to administer warnings, which was a prophylactic violation, whereas ignoring the defendant's invocation was a substantive constitutional violation.<sup>75</sup> By determining that not scrupulously honoring the previously invoked right to silence was a constitutional violation, the court reasoned the "fruit of the poisonous tree" doctrine was compelled.<sup>76</sup> *Hartley* concluded:

[T]he second statement, coming as it did on the heels of—if not in tandem with—the first, unconstitutionally-obtained, compelled statement, was unavoidably tainted. The most generous and indulgent view of the record cannot generate a conclusion of sufficient attenuation between the first and second interrogations to dissipate the taint. The second

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<sup>72</sup> *Hartley*, 103 N.J. at 267.

<sup>73</sup> *Id.* at 258-59.

<sup>74</sup> *Id.* at 279.

<sup>75</sup> *Id.* at 283-84.

<sup>76</sup> *Id.*

statement, chameleon-like, retains the coloration of the first as a matter of law, and hence must itself be deemed to have been unconstitutionally compelled.<sup>77</sup>

Other state courts have made the same distinction between mere prophylactic *Miranda* violations and constitutional violations of the right to remain silent. In *State v. Crump*,<sup>78</sup> the Supreme Court of Tennessee reasoned that because a defendant's right to silence had not been scrupulously honored, it tainted a subsequent confession.<sup>79</sup> There, a defendant was administered *Miranda* warnings and then questioned about his escape from confinement and subsequent crime spree.<sup>80</sup> The defendant invoked his right to remain silent and was then driven around by police and interrogated for an additional forty-five minutes, during which the car retraced the defendant's escape route.<sup>81</sup> During the drive, the defendant incriminated himself.<sup>82</sup> After returning to the station and receiving renewed *Miranda* warnings, the defendant gave a taped confession.<sup>83</sup>

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<sup>77</sup> *Id.* at 284.

<sup>78</sup> 834 S.W.2d 265 (1992).

<sup>79</sup> *Id.* at 270.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 266.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

The Tennessee Supreme Court found that the defendant’s constitutional right to silence in his first statement was violated because his invocation was not scrupulously honored and that the violation was of a “constitutional magnitude.”<sup>84</sup> Therefore, the court conducted a “fruits analysis,”<sup>85</sup> and found the second taped confession inadmissible.<sup>86</sup> The Arkansas Supreme Court has also recently embraced similar reasoning.<sup>87</sup>

While the reasoning of these jurisdictions is not binding upon this Court’s determination, they are instructive considering the lack of relevant Delaware precedent.

### **3. The Unique Framework of this case and Delaware Law**

This case is uniquely positioned because of *Crawford’s* clarification requirement and its application to an ambiguous invocation of the right to remain silent in *Draper*. The clarification approach to ambiguous invocations of the right to

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<sup>84</sup> *Id.* at 270 (citing *Hartley*, 103 N.J. 252 at 273; *See also Wainwright v. Greenfield*, 474 U.S. 284, 293 (1986) (invocation of the right to silence after *Miranda* warnings is of “constitutional dimension”).

<sup>85</sup> *Crump*, 834 S.W.2d at 271.

<sup>86</sup> *Id.* at 272.

<sup>87</sup> *Osburn v. State*, 2009 Ark. 390 (2009) (finding that a police failure to honor *Miranda* right to counsel invocation, during a first statement, required a “fruits analysis” to determine whether a subsequent statement was tainted. The court found that because the prior statement was constitutionally flawed, the subsequent confession was a “fruit” of the earlier statement and required suppression.).

remain silent or the right to counsel is the law in a minority of jurisdictions.<sup>88</sup> It is unclear if any jurisdiction has addressed whether an unclarified ambiguous invocation taints a subsequent statement. To resolve this question, the Court must seek guidance from related Delaware precedent.

#### 4. Relevant Delaware Jurisprudence

As stated earlier, this case presents an issue of apparent first impression in Delaware, namely, whether a subsequent statement is tainted when it follows an earlier statement's unclarified ambiguous invocation of the right to silence. While Delaware courts have addressed whether subsequent statements are tainted by flawed prior statements, Delaware courts have apparently not analyzed a taint following an unclarified ambiguous invocation.

In *Laury v. State*,<sup>89</sup> the Delaware Supreme Court held that a subsequent identical statement made at a police station with a valid *Miranda* waiver was

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<sup>88</sup> 3 W. LaFave Crim. Proc. § 9.5. (c) (3d ed. 2007); see, e.g., *Martin v. Wainwright*, 770 F.2d 918 (11th Cir. 1985). See also *United States v. Pena*, 897 F.2d 1075 (11th Cir. 1990); *Delap v. Dugger*, 890 F.2d 285 (11th Cir. 1989); *Lightbourne v. Dugger*, 829 F.2d 1012 (11th Cir. 1987); *State v. Flower*, 161 Ariz. 283, 286 (1989) (defendant's "silence, after being advised of his rights and asked if he wanted to answer questions, created an ambiguity," so officer's "clear duty was either to cease all interrogation or to clarify whether Flower was exercising his right to silence"); *Sanders v. United States*, 567 A.2d 55 (D.C. App. 1989); *Owen v. State*, 560 So.2d 207 (Fla. 1990); "The rule, however, permits 'clarification,' not questions that, though clothed in the guise of 'clarification,' are designed to, or operate to, delay, confuse, or burden the suspect in his assertion of his rights." *Christopher v. Florida*, 824 F.2d 836, 842 (11th Cir. 1987).

<sup>89</sup> 260 A.2d 907 (Del. 1969).

admissible despite following a prior statement devoid of *Miranda* warnings.<sup>90</sup> The Court reasoned that a “fruits” analysis, while otherwise applicable, was inapposite because the initial statement was not custodial.<sup>91</sup>

In *Brinkley v. State*,<sup>92</sup> the Delaware Supreme Court analyzed a defendant’s argument that a second statement required suppression because it was tainted by a prior statement’s *Miranda* violation under the “fruits of the poisonous tree” doctrine. The Court reasoned that a second statement was not tainted by the *Miranda* violation,<sup>93</sup> and noted that the argument that the “fruits of the poisonous tree” made the subsequent statement inadmissible was “foreclosed by” *Elstad*.<sup>94</sup> Despite reaching the issue, the Court did not continue to analyze whether the subsequent statement was independently voluntary. However, the conclusion that the second statement was voluntary seems implied by the Court’s holding that it was harmless error for the trial court to have admitted the subsequent statement.<sup>95</sup>

Despite *Brinkley*’s reasoning that the “fruits analysis” was foreclosed by *Elstad* in this context, this court has applied the “fruits analysis” to analyze whether

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<sup>90</sup> *Id.* at 909.

<sup>91</sup> *Id.*

<sup>92</sup> *Brinkley v. State*, 518 A.2d 91, 1986 WL 17992 (Del. Oct. 30, 1986) (TABLE).

<sup>93</sup> *Id.* at \*3.

<sup>94</sup> *Id.* at \*1 n.1.

<sup>95</sup> *Id.* at \*3.

a subsequent statement was tainted and has suppressed statements through that reasoning.<sup>96</sup> There, the Court held that factors such as the “temporal disconnect,” and lack of independence of the prior statement compelled suppression.<sup>97</sup>

In *DeShields v. State*,<sup>98</sup> the defendant argued that under *Elstad*, his fourth statement during one day of interrogation was tainted by the inadmissibility of the three prior statements, which the trial court had ordered suppressed under *Miranda*. The trial court had determined that the defendant’s *Miranda* rights were violated when his interrogators ignored the defendant’s request to postpone the questioning.<sup>99</sup> The Delaware Supreme Court did not apply *Elstad*. Rather, the Court found the fourth statement was barred because the invocation of the right to remain silent was not scrupulously honored.<sup>100</sup>

Additionally, this court has suppressed statements offered through a “two-step questioning process” where interviewers gave *Miranda* warnings after eliciting unwarned statements.<sup>101</sup> In another case, incomplete *Miranda* warnings that caused

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<sup>96</sup> See *State v. Dorsey*, 2001 WL 1079013, at \*4-5. (Del. Super. Aug. 28, 2001).

<sup>97</sup> *Id.* at \*5.

<sup>98</sup> 534 A.2d 630 (Del. 1987).

<sup>99</sup> *Id.* at 650-51.

<sup>100</sup> *Id.* (citing *Michigan v. Mosley*, 423 U.S. 96 (1975)).

<sup>101</sup> *State v. Mattison*, 2005 WL 406342 (Del. Super. Feb. 4, 2005) (holding that because the defendant received no “sufficient break” in questioning, the mid-interrogation *Miranda* warnings could not cure the coercion of the initial unwarned statement).

a first statement's suppression did not bar a subsequent statement that included complete *Miranda* warnings.<sup>102</sup>

While none of these Delaware cases are directly applicable to the analysis in our case, they are instructive through analogy.

### **5. Admissibility Depends Upon Whether Both Statements Were Voluntary.**

The critical consideration is whether the failure to clarify a defendant's equivocal invocation of the right to silence abridges the defendant's Fifth Amendment right of freedom from self-incrimination, or whether it merely violated *Miranda*'s prophylactic requirements. If a Delaware court finds that the failure to clarify is of a "constitutional magnitude" and constituted a failure to "scrupulously honor" a defendant's right to remain silent, the Court would seemingly be required to conduct a "fruits of the poisonous tree analysis" to determine admissibility. In contrast, if the Court finds the failure to clarify merely shirked the prophylactic *Miranda* requirements, the *Elstad* independent voluntariness analysis would follow.

Although not previously addressed, guidance is provided by relevant Delaware cases. In *DeShields*, the Delaware Supreme Court affirmed the trial court's finding that a defendant's right to remain silent was not scrupulously

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<sup>102</sup> *State v. Sayles*, 1997 WL 528080 (Del. Super. July 28, 1997) (holding that because incomplete *Miranda* warnings were administered, the statement was inadmissible until there was a complete *Miranda* administration.)

honored because the interviewer ignored the defendant's unambiguous invocation and continued the interrogation.<sup>103</sup> There, the defendant invoked his rights by requesting to postpone the questioning early in the interview.<sup>104</sup>

In *Dodson v. State*, the Delaware Supreme Court found that the police officer did not scrupulously honor a defendant's invocation where the defendant invoked by stating early into questioning about a murder that he would not make a statement until later.<sup>105</sup> Despite that request, the defendant was questioned for forty-five minutes about a different murder before the officer resumed questioning about the original murder.<sup>106</sup> In *Tucker v. State*,<sup>107</sup> the Delaware Supreme Court found an invocation was not scrupulously honored when a defendant stated he did not wish to make a statement immediately after receiving *Miranda* warnings.<sup>108</sup> Thus, in *DeShields*, *Dodson*, and *Tucker*, the defendants' invocations of the right to remain silent were early in the questioning process and found unambiguous.

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<sup>103</sup> *DeShields*, 534 A.2d at 651 n.28.

<sup>104</sup> *Id.* at 634.

<sup>105</sup> *Dodson*, 512 A.2d at 762.

<sup>106</sup> *Id.*

<sup>107</sup> 411 A.2d 603 (Del. 1980).

<sup>108</sup> *Id.* at 604-06.



## 6. The Unclarified Ambiguous Invocation Constituted Merely a Prophylactic Miranda Violation.

In this case, Defendant invoked his right to silence ambiguously and several hours into the interrogation process during his first statement. Although *Draper* held that a request for one's mother was an ambiguous invocation of the right to silence, it is distinguishable from the prompt, legally unambiguous invocations in *DeShields*, *Dodson*, and *Tucker*.<sup>109</sup>

When a police officer ignores an invocation of the right to remain silent and continues interrogations despite the defendant's invocation being early and unambiguous, presumably, that would constitute a failure to "scrupulously honor" the defendant's invocation. Conversely, when a defendant's invocation is ambiguous, in the middle of the interrogation process, and the officer does not ignore the request, but fails to clarify the defendant's intent, the circumstances are different. While the former would appear of a "constitutional magnitude" and implore the "fruits analysis," the latter does not.<sup>110</sup>

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<sup>109</sup> Although in each case the court did not explicitly address whether the invocation was ambiguous, each case predates *Crawford*. Therefore, the Delaware Supreme Court would presumably never have analyzed the invocations if it did not consider them unambiguous.

<sup>110</sup> "If errors are made by law enforcement officers in administering the prophylactic *Miranda* procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself. It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period." *Elstad*, 470 U.S. at 309.

The *Crawford* clarification requirement is a matter of Delaware constitutional law, an added protection that aims to clarify mere potential invocations of Fifth Amendment rights. There is no additional Delaware constitutional protection involved in a “taint” analysis. Whether a taint attaches to a subsequent statement is strictly a United States Constitutional analysis. It appears to this Court that to stretch *Crawford* such that its noncompliance imparts further United States Constitutional scrutiny beyond the United States Supreme Court’s own analysis is an unwarranted extension of *Crawford*’s holding.<sup>111</sup> Therefore, this Court finds that the failure to clarify an ambiguous invocation of the right to remain silent is not of a United States “constitutional magnitude” that necessitates analysis under the “fruits of the poisonous tree” doctrine, but rather is a prophylactic *Miranda* violation. This Court will analyze both statements’ voluntariness according to *Elstad*.

**7. While Inadmissible after Defendant’s request for his mother, the December 7 Statement was Voluntary and Not Coerced.**

A statement’s voluntariness is determined under the totality of the circumstances,<sup>112</sup> and the query is whether “the defendant’s will was overborne

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<sup>111</sup> Notably, while *LaFave* analyzes ambiguous invocations and separately analyzes whether a subsequent statement is tainted by a first statement’s impropriety, *supra* §§ 6.9(g), 9.5, *LaFave* does not address whether a subsequent statement is tainted by an unclarified ambiguous invocation of the right to remain silent.

<sup>112</sup> *DeJesus*, 655 A.2d at 1196 (citations omitted).

when the statement was elicited.”<sup>113</sup> A court should evaluate the “specific tactics” used in the interrogation and the “characteristics of the defendant.”<sup>114</sup> In *DeJesus v. State*, the Delaware Supreme Court found that the lack of “threats” and “police coercion” did not reach the requisite level of “overreaching,” “outrageous behavior,” or “coercive government misconduct” required to make a statement involuntary.<sup>115</sup> “[T]he psychological and physical condition of the accused are significant in the voluntariness calculus only to the extent that the police exploit such characteristics to elicit incriminating statements from him.”<sup>116</sup>

Even with the detective’s failure to clarify Defendant’s intention during the December 7 statement when Defendant ambiguously invoked his right to remain silent, nothing about the detective’s actions made Defendant’s statement involuntary. Defendant’s December 7 statement has been held inadmissible on different grounds, notably, that by failing to clarify Defendant’s intention, *Miranda*’s prophylactic requirements were violated.<sup>117</sup> No evidence has been proffered suggesting Defendant’s will was overcome through overreaching,

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<sup>113</sup> *Id.* (citations omitted).

<sup>114</sup> *Id.* (citing *Baynard v. State*, 518 A.2d 682, 690 (Del. 1986))

<sup>115</sup> *Id.* at 1196-97 (quoting *Colorado v. Connelly*, 479 U.S. 157, 165 (1986)).

<sup>116</sup> *Id.* (citation and quotation marks omitted).

<sup>117</sup> “A *Miranda* violation does not constitute coercion but rather affords a bright-line, legal presumption of coercion, requiring suppression of all unwarned statements.” *Elstad*, 470 U.S. at 306 n.1.

outrageous conduct, or coercive government misconduct. Other than the failure to clarify the ambiguous invocation, nothing about the December 7 statement indicates the statement was coerced; therefore, Defendant's December 7 statement was voluntary.

### **8. The December 9 Statement Was Voluntarily Made and is Admissible.**

Having determined that *Elstad* is applicable, the inquiry for the December 9 statement is "whether, in fact, the second statement was also voluntarily made," considering the "surrounding circumstances and the entire course of police conduct with respect to the suspect."<sup>118</sup> "[W]hen seeking to use a confession tainted by an earlier involuntary confession, the State "has . . . the burden of proving . . . that the later confession . . . was not directly produced by the existence of the earlier confession."<sup>119</sup>

In assessing whether an initial inadmissible interrogation taints a subsequent interrogation, courts have considered whether:<sup>120</sup>

- (1) there was a break in the stream of events sufficient to insulate the statement from the effect of the prior coercion,

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<sup>118</sup> *Elstad*, 470 U.S. at 318.

<sup>119</sup> *State v Dorsey*, 2001 WL 1079013, at \*4 (Del. Super. Aug. 28, 2001) (citing *Darwin v. Connecticut*, 391 U.S. 346, 351 (1968)); see also *Brown*, 422 U.S. at 604 (holding that it is government's burden to prove that an initial and subsequent confession are admissible.)

<sup>120</sup> In briefing, Defendant relied proffered tests for determining whether a prior statement's taint impacts a second statement. Although not perfectly analogous because the tests assumed the first statement's coercion, rather than a mere prophylactic violation, Defendant's most instructive proffered test is distinguished herein nevertheless.

(2) it can be inferred that the coercive practices had a continuing effect that touched the subsequent statement;

(3) the passage of time, a change in the location of the interrogation, or a change in the identity of the interrogators interrupted the effect of the coercion, and

(4) the conditions that would have precluded the use of a first statement had been removed....<sup>121</sup>

The first statement does not sufficiently taint Defendant's second statement to merit suppression. Defendant was interrogated two days after his initial statement. By then, he had spoken with his mother and no longer requested her presence. This Court has already found that no coercive practices corrupted the first statement. Therefore, no lingering coercive effect could reasonably have impacted the second statement. The interrogator may have been the same, but no coercion lingered as a result. Finally, although Defendant had previously ambiguously invoked his right to silence, two days later he was administered fresh *Miranda* warnings in a new location and did not invoke his rights again.

That the second statement corrected first statement inaccuracies or referenced the first statement does not impact the analysis. The admissibility of Defendant's

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<sup>121</sup> *Williams v. Jacquez*, 2011 WL 703616, at \*25 (E.D. Cal. Feb. 18, 2011) (citing *United States v. Patterson*, 812 F.2d 1188, 1192 (9<sup>th</sup> Cir. 1987)); *see also Brown v. Illinois*, 422 U.S. 590, 603-04 (1975) (in assessing the voluntariness of a second confession following a prior involuntary confession, the court looks to (1) the temporal proximity of the coercive misconduct to the confession; (2) whether intervening circumstances attenuate and dissipate the coercive effects of the misconduct; and (3) the purpose and flagrancy of the prior misconduct.”).

December 9 statement turns on “whether it was knowingly and voluntarily made.”<sup>122</sup> “No further purpose is served by imputing taint to subsequent statements obtained pursuant to a voluntary and knowing waiver.”<sup>123</sup> Therefore, this Court finds that Defendant’s December 9 statement is admissible and Defendant’s Motion to Suppress it is **DENIED**.

### **CONCLUSION**

Defendant’s Final Amended Motion to Suppress Statements is **GRANTED IN PART** and **DENIED IN PART**. Defendant’s first Statement on December 7 is suppressed beginning with Defendant’s first request for his mother. This request constituted an ambiguous invocation of the right to remain silent and required clarification. The failure to clarify Defendant’s ambiguous request requires the statement’s suppression from that point forward. Therefore, the Motion to Suppress the December 7 Statement is **GRANTED IN PART** and **DENIED IN PART**. The State may not use the suppressed portion of the statement in the State’s case-in-chief; whether the suppressed portion may come into evidence under other circumstances will be determined at a later time.

Defendant’s Motion to Suppress the December 9 statement is **DENIED**. Although the December 7 statement is inadmissible because of its prophylactic

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<sup>122</sup> *Elstad*, 470 U.S at 309.

<sup>123</sup> *Id.* at 318 (quotation marks omitted).

*Miranda* violation, Defendant's first statement was voluntary and not coerced, therefore his second statement was not tainted by any first statement impropriety.

**IT IS SO ORDERED.**

oc: Prothonotary

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Richard R. Cooch, R.J.