No. 10-1540

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID BOBBY, WARDEN,
PETITIONER,

-vs-

ARCHIE DIXON,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SIXTH CIRCUIT COURT OF APPEALS

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, Archie Dixon, through undersigned counsel, respectfully requests leave to file his Brief in Opposition to Petition for Writ of Certiorari to the Sixth Circuit District Court of Appeals without prepayment of costs or fees and to proceed *in forma pauperis* pursuant to Rule 39. Mr. Dixon has proceeded *in forma pauperis* status since his arrest by the State of Ohio. Petitioner's affidavit in support of this motion is attached hereto.

Respectfully Submitted,

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July 21, 2011

No. 10-1540

In the United States of the Supreme Court

DAVID BOBBY, Warden,
Petitioner,

v.

ARCHIE DIXON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDINGS

The petition accurately lists the parties to the proceeding.

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STATEMENT OF THE CASE

The sequences of interrogations and court decisions are essential to an understanding and review of the admitted misconduct by the police and the ultimate failure of the Ohio Supreme Court to correct the errors in this case. The police set out to deliberately, intentionally violate Mr. Dixon's Constitutional rights. They conspired to withhold giving the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966) and the Fifth Amendment. The police deliberately used a two-step interrogation process to break Mr. Dixon's known intent to invoke his right to counsel. The best and most direct statement of the facts comes from the Trial Court Opinion (Apx. 1b-39b) as the Trial Court heard the testimony, made credibility and factual determinations based on hearing and seeing the demeanor of the witness rather than from a cold transcript.[1]

The Interrogations

The first interrogation occurred on November 4, 1993. Toledo Detectives Scanlon and Snow interrogated Mr. Dixon. Mr. Dixon was not in custody at this time. However, the detectives advised Mr. Dixon of his rights under *Miranda* and the Fifth Amendment. Apx. 6b (Trial Court Opinion at 6). Mr. Dixon invoked his right to counsel and he told the detectives that he would talk with them after talking with his attorney. The interrogation immediately ceased and Mr. Dixon was allowed to leave the police station.

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[1] The Trial Court opinion is noticeably absent from Petitioner's Petition for Writ of Certiorari.

On November 7 or 8, 1993, Detective Scanlon called Mr. Dixon's attorney and asked about questioning Mr. Dixon. The attorney advised Detective Scanlon that he had not spoken with Mr. Dixon. Detective Scanlon advised Mr. Dixon's attorney that he wanted to talk to Mr. Dixon about the disappearance of the victim. Apx. 7b (Trial Court Opinion at 7).

The second interrogation occurred on November 9, 1993. It is clear that Mr. Dixon was in custody and subject to interrogation and that the police were under the full obligations of *Miranda* and the Fifth Amendment. It was at this point that the Detectives left the path of lawful and Constitutional interrogation and deliberately violated the Constitution.

Detectives Snow and Kulakoski took over the interrogation of Mr. Dixon. Kulakoski was a detective in the Toledo Police Department Homicide Unit. Apx. 1b (Trial Court Opinion at 8). The detectives discussed whether to advise Mr. Dixon of his rights. Detective Snow told Kulakoski that Mr. Dixon could be difficult if given warnings and they agreed not to give warnings out of fear that Mr. Dixon would invoke his rights. Snow specifically decided that warnings should not be given because he knew Mr. Dixon had invoked just five days earlier. Apx. 10b (Trial Court Opinion at 10).

Kulakoski and Snow interrogated Mr. Dixon over the course of four hours (from 11:30 a.m. until 3:30 p.m.) and never once advised him of his rights. Although the Ohio Supreme Court stated that this interrogation lasted only 45 minutes, *State v. Dixon*, 101 Ohio St.3d 328, 331 (2004), there was no explanation offered by the

state about what happened during the other 3 hours and 15 minutes nor did the Trial Court make any finding regarding this issue.

The interrogation continued even after Mr. Dixon told the detectives "I didn't even want to speak with you guys unless I had an attorney present, because ... I have no faith in the system anymore." *Dixon*, 101 Ohio St.3d at 331. The Trial Court specifically found that both detectives knew that Mr. Dixon was referring to his November 4 invocation of his right to counsel. Apx. 12b (Trial Court Opinion at 12). Both detectives simply ignored this statement and continued to interrogate Mr. Dixon. Apx. 13b (Trial Court Opinion at 13).

The focus of the interrogation at that time was on the disappearance of the victim, not on the auto title forgery charge for which Mr. Dixon had been arrested. Apx. 11b (Trial Court Opinion at 11). Mr. Dixon then made incriminating statements. Apx. 11b (Trial Court Opinion at 11). After receiving statements implicating Mr. Dixon in the theft of the victim's car and the forgery of the auto title, the detectives turned directly to the disappearance of the victim. Apx. 11b (Trial Court Opinion at 11). It is clear that the homicide detectives were investigating a murder not a simple auto theft or forgery. Apx. 9b (Trial Court Opinion at 9).

During this interview Kulakoski promised benefits to Mr. Dixon if he made statements regarding the disappearance of the victim. Apx. 13b (Trial Court Opinion at 13). Kulakoski told Mr. Dixon:

> Arch, there's one thing I want to stress with you. If something happened to Chris and you had any involvement, even though it may not have been a major role in what happened to Chris, you had any involvement now is the time to say so because if Tim starts cutting a deal over there, this is kinda like a bus leaving. The first one that gets on it is the only one that's gonna get on. I'm just letting you know right now.

Apx. 13b (Trial Court Opinion at 13). Shortly after this the detectives returned Mr. Dixon to jail, booked him on the forgery charge and returned him to his cell.

The third interrogation occurred on November 9, 1993 from 7:30 to 8:00 p.m. Detectives Kulakoski and Leiter conducted the interrogation. Leiter, like Kulakoski, was a detective in the Toledo Police Department Homicide Unit. Apx. 8b (Trial Court Opinion at 8). At this time *Miranda* warnings were given. Although a tape recorder was on the table it was not turned on because "we had no idea what he was going to say until we talked to him." Apx. 40b (Testimony of Detective Leiter). Mr. Dixon again made incriminating statements.

The fourth interrogation occurred on November 9, 1993 starting at 8:00 p.m. Detectives Kulakoski and Leiter conducted this interrogation. At this point the tape recorder was turned on and *Miranda* warnings were given. There was no statement that the prior, unconstitutional statement could and would not be used in court. Rather Leiter began the interrogation specifically invoking the prior statements. "Leiter: We talked a little bit ago. Dixon: Yes. Leiter: And you gave us a statement. Is that correct. Dixon: Yes. Leiter: Everything you told us then the truth. Dixon:

Yes." Pet. Apx. 192-193 (Transcript of Taped Statement of Archie Dixon, Apx. 1609). Mr. Dixon then made further incriminating statements.

B. Procedural History

Once it was revealed that the detectives deliberately and intentionally violated Mr. Dixon's rights the trial court suppressed all statements. Apx. 1b-39b (Trial Court opinion at 1-39.) In a remarkably prescient opinion the Trial Court specifically rejected the state's arguments that *Oregon v. Elstad*, 470 U.S. 298 (1985), authorized the interrogation strategy used by the police. Apx. 30b-37b. (Trial Court opinion at 30-37). In so holding the Trial Court specifically found that "the decision of Kulakoski and Snow to dispense with *Miranda* warnings was deliberate and tactical. They did so because they feared the warnings would prompt Dixon to refuse to talk and invoke his right to counsel. In making this deliberate and tactical decision, one of the detectives (i.e., Snow), had very recently seen Dixon refuse to talk; and, that same officer not only knew Dixon had a lawyer, he knew the lawyer's name. Moreover, it is beyond cavil that both Kulakoski and Snow knew Dixon was in custody and under arrest, as they had helped serve the arrest warrant earlier that morning. Thus, this Court finds the actions of Kulakoski and Snow (in deliberately failing to administer the *Miranda* warnings prior to the midday interrogation) were tactical and willful. This court also finds those actions to have been egregious, and a gross departure from accepted police procedure. Their actions worked to render the *Miranda* protections a nullity." Apx. 32b-33b (Trial Court opinion at 32-33) (emphasis in original).

The state sought an interlocutory appeal to court of appeals. On appeal the court of appeals reversed the suppression. In so doing the court of appeals unreasonably determined that "We do not believe that the effect of this particular misconduct, absent other evidence of coercive activity on the part of the police reaches so far as to taint the later Mirandized statements of Dixon." *State v. Dixon*, 101 Ohio App. 3d 552, 558 (Sixth Dist. 1995). The court of appeals then proceeded to evaluate the voluntariness of the fourth interrogation without any consideration of the totality of interrogations. *Id.*

The Supreme Court of Ohio denied Mr. Dixon's petition for discretionary review. *State v. Dixon*, 73 Ohio St.3d 1410 (1995).

The matter returned to the trial court where a different trial judge presided over the trial. The state used Mr. Dixon's statements as the primary evidence against him at both trial and sentencing. The jury convicted Mr. Dixon and recommended a death sentence. The trial court accepted that recommendation.

On appeal the court of appeals refused to address this issue. *State v. Dixon*, 2000 Ohio App. Lexis 5310, 17 (Sixth Dist. 2000).

The Ohio Supreme Court considered this issue on Mr. Dixon's appeal of right. The Ohio Supreme Court affirmed the use of Mr. Dixon's statement on the basis of *Oregon v. Elstad*. *State v. Dixon*, 101 Ohio St.3d 328 (2004). In so doing the Ohio Supreme Court relied on the absence of physical or verbal abuse and the fact that Mr. Dixon failed to prove how the intentional violation was greater coercion than an

inadvertent *Miranda* violation. *Id.*, at 332, failing to recognize the perverse disregard of the Constitution that the trial judge noted.

The Ohio Supreme Court found, contrary to the factual finding by the Trial Court, that Kulakoski's statement about only one suspect "getting on the bus" was not a promise of possible benefits but rather "akin to an admonition to tell the truth." *Id.*, at 333.

Finally the Ohio Supreme Court found no "nexus" between the clearly unconstitutional interrogation and the final interrogation because Mr. Dixon did not confess to the murder. *Id.*, at 333. The Court ignored the fact that Mr. Dixon clearly made a confession to stealing the victim's car, and selling it through forged documents. This confession is a confession to the murder and more importantly capital murder as it directly connects Mr. Dixon to the victim, puts him possession of his property, and was a confession to the aggravating circumstance of robbery.

Mr. Dixon presented this issue to this Court in a petition for a writ of certiorari. This Court denied Mr. Dixon's petition. *Dixon v. Ohio*, 543 U.S. 1060 (2005).

REASONS FOR DENYING THE WRIT

A. The Sixth Circuit Decision Properly Applied Both AEDPA Standards and this Court's Precedents to the *Miranda* violation.

Petitioner's characterization of the Sixth Circuit's decision bears no relationship to the actual decision. The Sixth Circuit's decision making process fully comports with established *habeas* law and AEDPA and there is no conflict among the circuits applying such well-established principles. The Sixth Circuit properly reviewed this case under clearly established Constitutional law, *Miranda v. Arizona*, and determined that the Ohio Supreme Court's decision was an unreasonable application of *Miranda* and was predicated on an unreasonable determination of facts. *Dixon v. Houk*, 627 F.3d 553, 556, 558 (6th Cir. 2010).[2]

First, contrary to Petitioner's misrepresentation, the Sixth Circuit did not reverse this case based on *Edwards v. Arizona*, 451 U.S. 477 (1981). Rather, as the Sixth Circuit's opinion clearly states: reversal was mandated by *Miranda*. *Dixon*, 627 F.3d at 555, 558. In fact, the only citation to *Edwards* occurs after a quotation from *Miranda* as an "e.g." citation. *Dixon*, 627 F.3d at 557. The Sixth Circuit opinion is based upon fundamental principles of *Miranda*.

The Sixth Circuit clearly and directly reviewed both the Trial Court decision and the Ohio Supreme Court decision. Ohio's misuse of *Elstad* was the same as Missouri's in *Seibert* leading the Court to declare that the decision "disfigures that

[2] As Petitioner is fully aware, the Sixth Circuit's order granting *en banc* review was vacated when Mr. Dixon advised the Court that a circuit judge had improperly voted on the petition for *en banc* review.

case." *Seibert*, 542 U.S. at 614. Whatever "unreasonable application" means, it must encompass an application that "disfigures" Supreme Court precedent. The Sixth Circuit properly reviewed this case and ordered the Writ.

Second, the Sixth properly considered the deliberate nature of the police misconduct. In fact, contrary to Petitioner's assertions, the Circuits are uniform in this consideration. Intentional violations of *Miranda* distinguish the case from *Elstad*. *United States v. Stewart*, 388 F.3d 1079 (7th Cir. 2004); *United States v. Carter*, 489 F.3d 528, 535 (2nd Cir. 2007); *United States v. Mashburn*, 406 F.3d 303, 309 (4th Cir. 2005). Petitioner's attempt to fabricate a circuit split instead shows the unreasonableness of the Ohio Supreme Court decision. Every court considers whether the violation of *Miranda* was deliberate or not. *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring). Since Petitioner accepts that *Seibert* is available to give context to *Miranda* and *Elstad*, the Circuit was correct to consider the deliberate nature of the violation in its review. *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring).

Elstad involved an "oversight" in the application of *Miranda* to a situation that "may have been the result of confusion as to whether the brief exchange qualified as 'custodial interrogation'." *Siebert*, 542 U.S. at 614, quoting *Elstad*, 470 U.S. at 315-16. *Elstad* itself limited its reach to "arguably innocent neglect of *Miranda*." *Siebert*, 542 U.S. at 615, quoting *Elstad*, 470 U.S. at 311-14. See *Elstad*, 470 U.S. at 314 ("We must conclude that, absent deliberately coercive or improper tactics in obtaining the initial statement...") *Elstad* specifically rejected Justice

Brennan's concern that police would adopt a "question first" policy as distorting the "reasoning and holding of our decision." *Elstad*, 542 U.S. at 318, n. 5. "Strategists dedicated to draining the substance out of *Miranda* cannot accomplish by training instructions what *Dickerson* [*v. United States*, 530 U.S. 428 (2000),] held Congress could not do by statute." *Seibert*, 542 U.S. at 617. Kulakoski and Snow epitomize a dedication to draining the substance out of *Miranda*.

Miranda "encompasses all interrogation practices which are likely to exert such pressure upon an individual as to disable him from making a free and rationale choice." *Miranda*, 384 U.S. at 464-465. Here the police deliberately withheld giving warnings because they knew Mr. Dixon would invoke his right to counsel. The police knew he had a lawyer and knew who that lawyer was. The police ignored Mr. Dixon's clear statement that he had already requested a lawyer and pressed forward with the interrogation. Only after getting incriminating statements from Mr. Dixon did the police turn on the tape recorder and give basic *Miranda* warnings. There was no effort to explain to Mr. Dixon that his earlier statements could not be used against him. As the Trial Court found, the police "actions worked to render the *Miranda* protections a nullity." Apx. 33b (Trial Court Opinion at 33).

Petitioner's repeated assertions that Mr. Dixon did not make incriminating statements during the first November 9 interrogation were determined to be "disingenuous" by the Trial Court. Apx. 11b (Trial Court Opinion at 11). It is only by making this assertion that Petitioner attempts to create an issue. Of course

Petitioner ignores the reality of the interrogations. Mr. Dixon gave confessions to the theft of the victim's car, forgery of the title documents, and other property crimes involving the victim. The homicide detectives conducting the interrogation got a confession beyond those charges because Mr. Dixon's confession was a confession to the murder and more importantly capital murder as it directly connects Mr. Dixon to the victim, puts him possession of his property, and was a confession to the aggravating circumstance of robbery. "When an interrogator uses this deliberate, two-step strategy, predicated upon violating *Miranda* during an extended interview, postwarning statements that are related to the *substance* of prewarning statements must be excluded absent specific, curative steps." *Seibert*, 542 U.S. at 621 (Kennedy, J., concurring) (emphasis added). This Court has never imposed an issue specific limitation on *Miranda*. *Miranda* covers all aspects of any interrogation regardless of the specific topic. *Colorado v. Spring*, 479 U.S. 564 (1987). The homicide detectives in this case went after, and got, a confession in clear, deliberate, and direct violation of *Miranda*.

Third, the Sixth Circuit properly evaluated the totality of the circumstances and the state court opinions in deciding that Mr. Dixon's statement was involuntary. The state trial court, the court that heard the live evidence, observed the witnesses, and made credibility determinations, found that "Kulakoski's employment of his self-designed, factually and legally erroneous bus analogy; the scant record of the interrogation; and the State's failure to demonstrate that Dixon's knowledge of the criminal justice system enabled him to independently ascertain

his rights and the true consequences of 'getting on the bus'; the Court finds that the statements made by Dixon during the midday November 9th interrogation were involuntarily made." Apx. 37b-38b (Trial Court Opinion at 37-38). Without any explanation the Ohio Supreme Court determined that this "analogy is more akin to an admonition to tell the truth than a promise of possible benefits." *State v. Dixon*, 101 Ohio St.3d at 333. This is patently unreasonable and ignores the facts: Timothy Hoffner, the one who decided to kill the victim and involved Mr. Dixon in his scheme, had been arrested, confessed to the crime, led the police to the body, and was released by the police. Apx. 14b (Trial Court Opinion at 14). The police told Mr. Dixon of these facts. Snow testified that "Kulakoski's statement was aimed at encouraging Dixon to talk about Hammer's disappearance." Apx. 13b (Trial Court Opinion at 13). The only meaning that can be derived from Kulakoski's statement is that the first one to confess will not get the electric chair. There can be no more inherently coercive tactic than "confess or die."

Finally, the Sixth Circuit recognized that the Ohio Supreme Court improperly imposed the burden on Mr. Dixon to prove that his confession was coerced rather than placing the burden on the state. "Dixon has failed to explain how the detective's subjective intent coerced him to a greater extent than if the *Miranda* violation had been inadvertent." *Dixon*, 101 Ohio St.3d at 332. This was the only mention of the burden of proof. Since the burden squarely lies on the government to prove voluntariness, *Colorado v. Connelly*, 479 U.S. 157, 164 (1986), the shifting of the burden is clearly contrary to and/or an unreasonable application

of clearly established law. The Ohio Supreme Court denied relief not because it determine that the state proved voluntariness but because Mr. Dixon failed to prove coercion.

It is clear when reviewing the case in total, including the Trial Court opinion and record, that the Sixth Circuit broke no new ground or breached the clear mandates of the law. As such the Petition for Writ of Certiorari must be denied.

One final issue raised in a cursory fashion by Petitioner is the limitation on the use of *Missouri v. Seibert*, 542 U.S. 600 (2004). As the Sixth Circuit noted in both the majority and dissenting opinion, *Seibert* is useful in evaluating the context of *Miranda* and *Elstad*. *Dixon*, 627 F.3d at 569 (Siler, J., dissenting). As such, the use of *Seibert* is entirely consistent with the AEDPA. Petitioner agrees with this position. Petition at 19, n. 5.

In a related context interpreting the phrase "clearly established law" the Court held that "[T]o be established clearly, however, there is no need that 'the very action in question [have] previously been held unlawful.'" *Safford Unified School District #1 v. Redding*, 129 S.Ct. 2633, 2643 (2009) quoting *Wilson v. Lane*, 526 U.S. 603, 615 (1999) (addressing the question of qualified immunity of state actors). Rather, the issue is whether the Court's statements were sufficiently clear to put officials on notice. *Hope v. Pelzer*, 536 U.S. 730, 41 (2002). Even the fact that there are "disuniform views of the law" does not render the law unclear. *Redding*, 129 S.Ct. at 2644. The development of the law is clear: intentional violations of *Miranda*

and the Fifth Amendment rights of a defendant mandate suppression of any statements obtained. See *Arizona v. Fulminante*, 499 U.S. 279 (1991).

Although not necessary to reject the Petition, Mr. Dixon also asserts that the restricted level of review imposed by the AEDPA does not apply to this claim. The Ohio Supreme Court reviewed and rejected Mr. Dixon's claim on April 14, 2004. *State v. Dixon*, 101 Ohio St.3d 328 (2004). However, Mr. Dixon's direct appeal of right was not complete until the Supreme Court of the United States denied his petition for a writ of certiorari on January 10, 2005. *Dixon v. Ohio*, 543 U.S. 1060 (2005). Therefore, cases applicable to Dixon's case are those decided by the Supreme Court of the United States by January 10, 2005. *Missouri v. Seibert*, 542 U.S. 600 (2004), was decided on June 28, 2004 and is therefore controlling authority and applicable to this issue. *Teague v. Lane*, 489 U.S. 288 (1989).

The Court recently agreed to review this issue. *Greene v. Fisher*, 131 S.Ct. 1813 (2011). The Court previously determined that the controlling law under AEDPA is determined by *Teague*. *Williams v. Taylor*, 529 U.S. 362, 429-30 (2000) (O'Connor, J., majority opinion).

> Throughout this discussion the meaning of the phrase "clearly established Federal law, as determined by the Supreme Court of the United States" has been put to the side. That statutory phrase refers to the holdings, as opposed to the dicta of this Court's decisions as of the time of the relevant state-court decision. In this respect "clearly established Federal law" phrase bears only a slight connection to our *Teague* jurisprudence. With one caveat, whatever would qualify as an old rule under *Teague* jurisprudence will constitute "clearly established Federal law, as determined by the Supreme Court of the United States" under § 2254(d)(1).

Because *Seibert* is controlling authority, and the Supreme Court of Ohio did not, and could not, apply *Seibert* there was no "decision on the merits" of this claim. Therefore, Mr. Dixon is entitled to *de novo* review. *Wiggins v. Smith*, 539 U.S. 510, 534-38 (2003); *Webb v. Mitchell*, 586 F.3d 383, 389, 393 (6th Cir. 2009) (Warden conceded that AEDPA did not apply and that *de novo* review was proper). *Harris v. Stovall*, 212 F.3d. 940, 942 (6th Cir. 2000); *Clinkscale v. Carter*, 375 F.3d 430, 436 (6th Cir. 2004); *Higgins v. Renico*, 470 F.3d 624, 631 (6th Cir. 2006). See also *Williams v. Taylor*, 529 U.S. 420 (2000).

The Ohio Supreme Court was apprised of *Seibert* and the application to Mr. Dixon's case. The Supreme Court of Ohio issued its opinion aware that *Seibert* was pending with a similar question posed by Dixon's case. The state court was given the opportunity to address the impact of *Seibert* on Dixon's case but chose not to. No issue of comity, federalism, or AEDPA policy rationale, requires the federal courts to ignore binding, applicable law that the state courts chose to ignore. A claim is fairly presented if the state courts were given sufficient notice of the nature of the federal claim. *Picard v. Connor*, 404 U.S. 270, 277-78 (1971). Even if the legal predicate is expanded the claim is still fairly presented so long as the underlying ground for the claim remains unchanged. The scope of the ground is to be liberally interpreted. "By 'ground,' we mean simply a sufficient legal basis for granting the relief sought by the applicant. For example, the contention that an involuntary confession was admitted in evidence against him is a distinct ground for federal collateral relief. But a claim of involuntary confession predicated on alleged

psychological coercion does not raise a different "ground" than does one predicated on alleged physical coercion. In other words, identical grounds may often be proved by different factual allegations." *Sanders v. United States*, 373 U.S. 1, 16 (1963). See also *Vasquez* v. *Hillery*, 474 U.S. 254, 258 (1986); *Boumediene* v. *Bush*, 128 S.Ct. 2229, 2270 (2008); *Lonchar* v. *Thomas,* 517 U.S. 314, 327 (1996); *Schlup* v. *Delo*, 513 U.S. 298, 308-10 & n.18 (1995); *Herrera*, 506 U.S. at 445 (Blackmun, J., dissenting on other grounds); *Keeney* v. *Tamayo-Reyes*, 504 U.S. 1, 14 (1992) (O'Connor, J., dissenting).

> The Suspension Clause of the Constitution, which carefully circumscribes the conditions under which the writ can be withheld, would be a sham if it could be evaded by congressional prescription of requirements *other than the common-law requirement of committal for criminal prosecution* that render the writ, though available, **unavailing.** If the Suspension Clause does not guarantee the citizen that he will either be tried or released, unless the conditions for suspending the writ exist and the grave action of suspending the writ has been taken; if it merely guarantees the citizen that he will not be detained unless Congress by ordinary legislation says he can be detained; it guarantees him very little indeed.

Hamdi v. Rumsfeld, 542 U.S. 507, 574 (2004) (Scalia, J., dissenting). This is especially so when the evidence before the state courts clearly demonstrated the scope, intentionality, and impact of the blatant Constitutional violation in this case. Given the beleaguered history of AEDPA, "All we can say is that in a world of silk purses and pigs' ears, the Act is not a silk purse of the art of statutory drafting." *Lindh v. Murphy*, 521 U.S. 320, 336 (1997), if AEDPA prevents federal review and relief in this matter then it suspends the Writ.

CONCLUSION

Homicide detectives Kulakoski and Snow set out to intentionally, deliberately, and blatantly violate Mr. Dixon's Constitutional rights. They conspired and agreed to interrogate Mr. Dixon without giving him the warnings required under *Miranda* because they knew if they did he would invoke his right to counsel. After multiple hours of interrogation Mr. Dixon made statements incriminating him in the death of the victim. Only then did the detectives give cursory lip service to the Constitution and give basic *Miranda* warnings. For the above stated reasons, Mr. Dixon requests the Court deny Petitioner Warden's petition for *certiorari*. The Warden's petition misrepresents the scope and analysis of the Sixth Circuit's decision and opinions. The Sixth Circuit's decisions create no conflict of law, nor will it create any sort of confusion in this Court's jurisprudence. Petitioner does not provide any other reason to warrant revisiting these well and clearly-established areas of the law. Therefore, Petitioner Warden's petition should be denied.

Respectfully Submitted,

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APPENDIX

FILED LUCAS CO
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IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

State of Ohio,	*	
Plaintiff,	*	Case No. CR93-7212B
vs.	*	OPINION AND JOURNAL ENTRY
Archie J. Dixon,	*	
Defendant.	*	
	*	

This cause is before the Court on the motion to suppress certain statements made by defendant Archie J. Dixon ("Dixon") to law enforcement officers during two custodial interrogations following his arrest November 9, 1993, on a forgery charge. These statements, Dixon alleges, led to his indictment for aggravated murder with felony murder specifications. Hearing was held on the motion to suppress on March 18, 1994, on March 23, 1994, and on March 30, 1994, following which the Court granted leave to the state and the defendant to file post-hearing briefs, and the matter was taken under advisement. In view of the evidence adduced at trial, the memoranda of counsel, and the applicable law, this Court grants Dixon's motion to suppress both statements made to law

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enforcement officials at police headquarters on November 9, 1993.

I.

It is possible to recite the facts bearing directly on Dixon's two statements of November 9, 1993 briefly. A more detailed recitation is given here, however, because of the Court's view that understanding of the earlier events is necessary to place those statements in proper context. That recitation follows.

This case arises from an investigation of the disappearance of Christopher Hammer ("Hammer"). That investigation took place in late September, October, and early November 1993, and culminated in the discovery of Hammer's body in a homemade grave in a remote wooded sector of Sylvania Township, Lucas County, Ohio. That investigation also produced the indictments of Dixon, Timothy Hoffner ("Hoffner"), and Kirsten Wilkerson ("Wilkerson") for aggravated murder, kidnapping, aggravated robbery, and forgery - Dixon and Hoffner being charged with aggravated murder in the tripartite alternative, each with capital specifications for (a) prior calculation and design; (b) felony-murder/kidnapping; and (c) felony-murder/aggravated robbery.

On the evening of September 23, 1993, Mrs. Barbara Hammer contacted the Toledo Police Department to report the disappearance of her 22-year-old son, Christopher. She noted that he had failed to show up for work the previous evening at Nick & Jimmy's, a restaurant-tavern in west Toledo. She stressed that Christopher

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was very conscientious about his job and she was fearful that something had happened because he missed work, and because he had not contacted his parents in the interim. At the time of his disappearance, Hammer was living at 3624 McGregor Lane, Toledo, a single-family residence he shared with Dixon, Hoffner, Wilkerson (Dixon's erstwhile girlfriend), and Wilkerson's minor children.

There were few developments for several weeks after the missing persons report was first made. Detective Ron Scanlon ("Scanlon") assumed control of the investigation for the Toledo Police Department, Youth Services Section, and he conducted a number of other interviews during this period in person and by phone, all the while maintaining contact with Mrs. Hammer. He also talked to a number of Hammer's associates and acquaintances (including Dixon, Hoffner, and Wilkerson). None of these individuals expressed any notion of where Hammer might have gone; none had seen him since he failed to show up for work on September 21, 1993; although several (including Dixon) noted that Hammer had talked previously, if vaguely, about leaving Toledo for Colorado or Tennessee.

Almost exactly a month after Hammer's disappearance two friends of his (John Carmen and James Felt) spotted what appeared to be Hammer's red 1987 Dodge Daytona automobile on the lot of the Central Auto Mart, marked for sale for $5,190. That lot was located at 6200 W. Central Avenue, in Sylvania Township, in western Lucas County. It was, and is, a small operation dealing exclusively in used cars.

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One of these young men passed this information on to Mrs. Hammer, who, in turn, relayed it to Scanlon on October 25, 1993. On October 28, 1993, Mr. and Mrs. Hammer went to the Central Auto Mart and confirmed that the vehicle was their son's, titled in his name and under his control just prior to his disappearance. They inquired as to when and how the car had been acquired by the dealer. Ronald Parker ("Parker"), the manager of the Central Auto Mart, indicated that, on September 30, 1993, he had purchased the vehicle for $2,800 from a young man who had identification and a duplicate auto title in the name of Christopher Hammer. Mrs. Hammer showed Parker a picture of her son, and he indicated this was <u>not</u> the individual who sold him the car the previous month. That same day, Mrs. Hammer called the Auto Title Bureau, and they compared the "Christopher Hammer" signatures on the title and the application for duplicate title. A clerk at the bureau indicated that the signatures appeared to be "different."

All of this information was relayed to Scanlon by Mrs. Hammer in a phone call on October 29, 1993. Scanlon stopped by the Central Auto Mart that same day and talked to Parker. Scanlon confirmed that the individual who sold the car to the dealer had papers indicating he was Christopher Hammer. Parker told Scanlon that he gave the individual a business check for $2800 on September 30, 1993, and that the check had been negotiated the same day at Fifth Third Bank in Sylvania. Parker also told Scanlon that the individual selling the car left the lot in another car with two individuals he could not identify.

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Scanlon returned to Central Auto Mart on November 4, 1993. He spoke again to Parker, but also to Central Auto Mart salesmen Mark Fangman and Henry Strong. Scanlon also got a description from Parker of the individual who had sold them the car on September 30, 1993. While talking to salesmen Fangman and Strong - and out of the presence of Parker - Scanlon inadvertently displayed a photograph of defendant Dixon in such a manner that it was seen by both men. They immediately said that this was the very individual who had sold them the car on September 30, 1993 (both Fangman and Strong were present on September 30 at the lot, and both saw the seller for a brief period; the actual transaction, however, took place over about 30 minutes, and the face-to-face dealing and test driving was done by Parker). This occurred during the late morning hours of November 4, 1993, and gave Scanlon a curious, even accidental identification of Dixon as the seller of the car from the two salesmen; and, Parker described an individual who matched Dixon's description.

Upon leaving the dealership, Scanlon went directly to 3624 McGregor Lane. He did not confront or brace Dixon at the residence, though he did talk to him briefly through the door. Dixon essentially repeated his earlier comments that he did not know Hammer's whereabouts.

Sometime around 1:00 p.m. on November 4, 1993, Scanlon went to the Sylvania Township Police Department and spoke to Detective Vern Snow ("Snow") in Snow's office. Remarkably, while the two detectives were talking, they heard a voice at the front desk say,

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"I'm Archie Dixon, and I'm here to pick up my car." As it happened, Dixon's car had been impounded by the Sylvania Township Police for reasons having nothing to do with this case; thus, the second contact between Scanlon and Dixon on November 4, 1993, was entirely coincidental.

Regardless, Scanlon invited Dixon back to Snow's office, where he told him, "You know, we're investigating the disappearance of Chris Hammer, and we'd like to ask you some questions," or words to that effect. Then, in Snow's presence, Scanlon read Dixon his Miranda rights (this is ironic in light of the later developments in this case, since the November 4th Mirandizing was gratuitous: i.e., Dixon was not in custody, and not under arrest). Dixon declined to answer questions without counsel present, explaining that he had recently completed a six month sentence at the Correctional Center of Northwest Ohio for a misdemeanor offense which he did not commit. He added that he had spoken to police without counsel in that case, and didn't want to make the same mistake. Dixon then departed Sylvania Township headquarters without answering questions. He did provide Scanlon and Snow, however, with the name of his lawyer (Joe Scalzo), and he tentatively agreed to stop down at Toledo Police Headquarters (aka the Safety Building) the following day to discuss the Hammer disappearance.

As it developed, Dixon did not appear at the Safety Building on November 5, 1993. Several days later (on either November 7, 1993 or November 8, 1993), Scanlon made telephonic contact with

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attorney Scalzo ("Scalzo"), and advised him that Dixon had missed an appointment on November 5, 1993. Scalzo indicated to Scanlon that he had not been in touch with Dixon, and that Dixon was sometimes difficult to contact. Scalzo said he would try and reach Dixon, and would see what he could do about arranging an interview. He did not give Scanlon permission to speak with Dixon, however, outside Scalzo's presence. Scanlon informed Scalzo generally about the nature of the investigation into Hammer's disappearance, and it was clear to Scanlon that this was the first Scalzo had heard about the case.

On November 8, 1993, Scanlon returned to the Central Auto Mart with a photo array packet of eight pictures (this array included the very picture salesmen Fangman and Strong had been inadvertently shown on November 4, 1993, resulting in their assertions that "this" was the individual who had sold the dealership the red 1987 Dodge Daytona). Strong and Parker both separately chose Dixon's photograph, identifying him as the one who sold them the car. Parenthetically, it is noted that the Court previously suppressed the Strong identification of November 8, 1993 as being unduly suggestive; the Parker photo array, however, was deemed proper, and the motion to suppress was denied as to him. Parker testified at hearing that the only photo he ever saw prior to the photo array was the photo the Hammers had of their son. Further, Scanlon testified that he never showed Parker a photo until the November 8th array, and that Parker was not present during the Strong array on November 8th.

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Thus, by the evening of November 8, 1993, the police had located the Hammer car and confirmed its sale on September 30, 1993. They knew that someone other than Hammer had sold the car and had signed the title transfer and odometer certification as if they were Christopher Hammer. They had copies of these documents, and they had a copy of the cancelled Central Auto Mart check for $2,800, endorsed by someone other than Christopher Hammer as Christopher Hammer. Plus, as of November 8, 1993, they also had specific identifications of Dixon as the prime actor in the vehicle transaction.

Early on the morning of November 9, 1993, armed with all of this information, Snow secured an arrest warrant for Dixon charging Forgery, and Scanlon secured a search warrant for the premises at 3624 McGregor Lane. These warrants were served by a number of law enforcement officers. This group included Scanlon and Snow, of the Toledo Police Department ("TPD") and the Sylvania Township Police Department ("STPD"), respectively, as well as the following: Captain Ray Carroll, head of TPD's Crimes Against Persons Section (which includes the Homicide Unit); Lieutenant Charles Hunt ("Hunt") of TPD's Crimes Against Persons Section; Detective Larry Scoble of TPD's Youth Services Section, Missing Persons (the same unit as Scanlon); Detective Chad Culpert of TPD's Scientific Investigation Unit; Detective Dan Deeter of TPD's Scientific Investigation Unit; Sergeant Robert Maxwell, head of TPD's Homicide Unit; and Detectives Philip Kulakoski ("Kulakoski") and Robert Leiter ("Leiter"), both of TPD's Homicide Unit. Also assisting

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were uniformed officers Cherrie Bryce and Gary Bowsher, both of whom testified at the motion to suppress hearing.

At the risk of understatement, it is unusual for the head of the Homicide Unit, two of his detectives, and two command officers from the Crimes Against Persons Section to be actively involved in serving a Forgery arrest warrant. Yet that is precisely what happened during the mid-morning hours of November 9, 1993 at 3624 McGregor Lane. Nonetheless, both Leiter and Kulakoski (as well as Scanlon) testified that - as of November 9, 1993 when the warrant was served - they had no evidentiary basis for suspecting foul play in the disappearance of Hammer.

On the morning of November 9th, the participants in the upcoming arrest/search at 3624 McGregor Lane met at an outdoor location near the residence in question and reviewed positioning and strategy for serving the warrants. The warrants were then served when Kirsten Wilkerson opened the door and permitted the officers to enter the premises. As it happened, Wilkerson, Dixon and Hoffner were all present at that time. These individuals were separated within the residence, and a search of the premises and curtilage began. As is relevant to this particular motion to suppress, it is stressed that Dixon was in the hallway upon entry and was immediately and unequivocally placed under arrest for Forgery by Scanlon. It is also clear that, at the time of the arrest, Dixon was <u>not</u> <u>Mirandized</u>. Shortly thereafter - and before the search was completed - Dixon was taken downtown to the police headquarters where, while under arrest and in custody, he was

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questioned by Kulakoski and Snow.

This initial, unwarned custodial interrogation of Dixon took place over an approximate four-hour period from 11:30 a.m. to 3:30 p.m. It was conducted mainly by Kulakoski, though Snow was present throughout. There were a number of breaks taken in the questioning; Dixon was given soft drinks, was offered food, and was given the opportunity to use rest room facilities during the questioning. The questioning was taped, though it yielded but an eighteen-page transcript; obviously, then, there were frequent breaks.

Prior to beginning the interrogation, Kulakoski and Snow spoke out of Dixon's presence. During that preliminary discussion, Snow indicated to Kulakoski that the STPD had had some prior contacts with Dixon; that Dixon was flighty or high strung; and that Mirandizing him at this time might cause him not to talk to the two detectives. Both Snow and Kulakoski assert that Snow did not tell Kulakoski that Dixon had asserted his right to counsel in response to Miranda warnings only five days previously at Sylvania Township headquarters, and that he had done so in Snow's presence. But it is clear that Snow recalled the incident; indeed, it is clear Dixon's earlier invocation at his right to counsel was Snow's reason for suggesting the Miranda rights/warnings be foregone. [March 18, 1993 hearing transcript ("TR") 239-41]. Snow was present throughout the interrogation although Kulakoski took a much more active role.

The joint decision of Kulakoski and Snow to dispense with

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Miranda warnings for Dixon, notwithstanding his arrest and the fact he was in custody, was deliberate and strategic:

> "Prior to starting of the interview Detective Snow and I had discussed it. Detective Snow had given me information that Mr. Dixon at times could be a difficult party to talk to, to get to say anything at all, and it was decided between the two of us that if he was Mirandized first he may not talk to us at all." [TR 116-7). (Emphasis supplied).

Kulakoski conceded at hearing that this conscious choice not to Mirandize Dixon violated the policies of the Toledo Police Detective Bureau (TR 134-5). Snow attempted to justify this remarkable and inexcusable decision by testifying that the real focus of the questioning was not the forgeries for which Dixon was arrested, but the disappearance of Hammer. (TR 238-9).

A review of the entire transcript of the initial November 9th Dixon statement ("Tr.#1"), discloses that the focus of the interrogation was the disappearance of Chris Hammer, and not the auto title forgery for which Dixon had been arrested minutes before at 3624 McGregor Lane by a phalanx of officers. Yet, it is clear that questions were asked relative to the disposition of the Dodge Daytona (Tr.#1, 7 and 10-12). And - contrary to the disingenuous suggestion in the State's memorandum of May 2, 1994 that this initial statement did not produce incriminating statements from Dixon - the defendant admitted selling the car by means of a false State I.D. card and a false duplicate title, and he told of receiving the proceeds. (Tr. #1, 10-12).

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In that interrogation, Kulakoski soon returned to the Hammer disappearance. Kulakoski said, "* * * So I think something else happened to him". Dixon responded:

> "This is understandable, but everything I know I've already told you. I've been more than welcome to tell you. I mean usually, like I told you, you can ask this gentlemen right here cause (inaudible), I didn't even want to speak with you guys unless I had an attorney present because that eight months I did I talked to an attorney; told my side, I spent eight months for something I never did so I had no faith in the system anymore. But yet I still, like just now told you everything I know, admitted to the forgery and yet still * * * ." (See transcript of the first November 9th interrogation (Tr. #1) 15 and TR 137-8).

Shortly after this exchange, Kulakoski directly asked Dixon, "Did you have anything to do with the anything that might have happened to Chris?" Dixon then responded, "I don't know anything." (Id.)

In reference to Dixon's above comment, "...you can ask this gentlemen right here * * *," both Kulakoski (TR 137-8) and Snow (TR 242) admit that Dixon was referring to his November 4th assertion of his right to counsel when Mirandized at Sylvania Township headquarters by Scanlon. Even though Dixon had made this comment, Kulakoski neither stopped the interrogation to ask Snow what Dixon meant by his reference to Snow, nor did he attempt to clarify whether Dixon did, in fact, wish to have counsel present before continuing with the interview. Nor, perhaps more to the point, did Snow interrupt at this point with a reference to or description of

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the November 4, 1993 incident. And, of course, Snow had personal knowledge of the earlier invocation of Dixon's right to counsel, knew counsel's name, and knew precisely to what Dixon made reference in his answer above.

Finally, near the end of the first interview on November 9th, Kulakoski made the following statement to Dixon:

> "Arch, there's one thing I want to stress with you. If something happened to Chris and you had any involvement, even though it may not have been a major role in what happened to Chris, you had any involvement now is the time to say so because if Tim starts cutting a deal over there, this is kinda like a bus leaving. The first one that gets on it is the only one that's gonna get on. I'm just letting you know right now." (Tr #1, 16).

When questioned about this statement, Snow testified that Kulakoski's statement was aimed at encouraging Dixon to talk about Hammer's disappearance. (TR 245). Snow also indicated that the statement could be perceived as a promise of possible benefits if Dixon revealed information regarding Hammer's disappearance. (TR 245-6).

After they wound up the interrogation process with Dixon at the Safety Building around 3:30 p.m., Kulakoski and Snow escorted Dixon to the Lucas County Correction Center, where he was booked on the Forgery offense. Shortly thereafter, Kulakoski was advised by someone that Hammer's body had been discovered in a jerry-dug grave in a wooded area off Alexis Road in Sylvania Township. Kulakoski visited the scene of the excavated grave briefly and then returned

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to the Safety Building, where Leiter was questioning Timothy Hoffner. Hoffner had led Leiter and Hunt to that site earlier in the afternoon, explaining that Dixon had told Hoffner several days after Hammer's disappearance that he (Dixon) had "put Chris in a hole." Hoffner told Leiter and Hunt that Dixon had then showed him where Hammer was buried. It is clear at this juncture, by the way, that Hoffner was not under arrest, nor was he in custody. Hoffner was taken to police headquarters after the body was unearthed, where at 3:30 p.m., he was interviewed (on tape) by Leiter and Scanlon.

Kulakoski and Leiter then drove Hoffner back to 3624 McGregor Lane and dropped him off. It was then close to 6:00 p.m. Hoffner indicated that he was going to gather his belongings and drive to Perrysburg, Ohio to stay with his mother. While at the McGregor Road residence, Leiter and Kulakoski spoke briefly to Wilkerson. The two homicide detectives then returned to the Safety Building, where they decided to interrogate Dixon a second time. At about 7:30 p.m., or four hours after the conclusion of the first interrogation, Dixon was brought to police headquarters at the instance of Kulakoski and Leiter. This reunion marked the second interrogation on November 9th, and it represents the central target of defendant's motion to suppress.

There is a transcript of this second interrogation of Dixon on November 9, 1993 ("Tr.#2). Kulakoski and Leiter were the officers present during the questioning. The taped statement commenced at 8:00 p.m., although Dixon arrived at the Homicide Unit at about

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7:30 p.m. This half-hour period preceding transcription began with Dixon stating to the officers, "I understand you dug up a body this afternoon," or words to that effect. It is, of course, intriguing as to how Dixon would have come by this information since he was lodged at the Lucas County Jail prior to Kulakoski's learning of the gravesite discovery, and there is no indication he spoke with anyone connected to this case between 3:30 and 7:30 p.m. Regardless, the detectives confirmed that a body had been unearthed. Further, during this period, Dixon inquired of the detectives as to whether Hoffner was in custody, and the detectives replied "no", and that, in fact, they had only recently dropped him off at 3624 McGregor Lane. Also, Dixon (according to the detectives) then volunteered the news that he (Dixon) had spoken with his lawyer (since 3:30 p.m., presumably), and the lawyer had instructed him to tell the detectives everything. In fact, Scalzo was prepared to take the witness stand at the suppression hearing to indicate that he did not speak to Dixon that afternoon; he demurred when he was advised he might then be disqualified as trial counsel (this, after a prosecution objection in chambers). It is likely academic whether, in fact, Dixon actually talked to Scalzo (or some other lawyer that afternoon), although it is hard to imagine any attorney advising a client in Dixon's circumstances to walk into an interrogation without counsel and simply give a statement to the police. In all actuality, while the Court is satisfied that Dixon made such a claim, the statement was more likely fiction than fact.

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During the thirty minute untapped session (among Dixon, Kulakoski, and Leiter), Kulakoski read Dixon his Miranda rights and warnings, and had Dixon sign the standard written waiver form. (TR 124-7, 197, 209; State's Exhibit 6). Dixon indicated to Kulakoski on a paragraph-by-paragraph basis that he understood the import of the form (although he did not initial each paragraph). Following this, and prior to the taping, Kulakoski then led Dixon through a brief synopsis of what he was going to say on tape. No record exists as to any statements or comments made between 7:30 and 8:00 p.m.

At 8:00 p.m., the tape machine was turned on and Dixon gave a thirty minute statement, which translated to fifteen pages transcribed. The formal statement began with a verbal rehashing of the Miranda rights and warnings, and Dixon reiterated his written waiver from thirty minutes ago. During the taped verbalization of the Miranda warnings, however, no further mention was made of Dixon's earlier comment that he had talked with unnamed counsel and had been encouraged to tell the police what he knew. Kulakoski conceded at hearing that the waiver would have been more persuasive had this been done on tape, and were there more detail concerning actual counsel and the basis of Dixon's purported conversation with him.

The balance of the tape sets forth Dixon's version of the events of September 21st and 22nd, and is inculpatory in the extreme as it involves himself in the earlier assault on Hammer, the restraint of Hammer, the digging of the grave, and finally, the

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forced burial of Hammer while he was still alive. The statement, not surprisingly, places the onus more on Hoffner than on Dixon, but it was and is clearly inculpatory.

The inadmissibility of the initial statement made on November 9, 1993, is virtually conceded by the State. There can be no question but that Dixon, when he made the statement, was both under arrest and in custody; that the statement was elicited in response to interrogation; and that Kulakoski and Snow made a deliberate, strategic decision not to give Dixon his Miranda rights and warnings.

As to the second statement made on November 9, 1993, Dixon first challenges the procedures used in gaining the waiver. He points out that Kulakoski did not have him initial each paragraph of the waiver form as was his custom when advising persons of their Miranda rights. (TR 159-60). Also, Dixon indicates that, although he purportedly signed the waiver form at 7:30 p.m. (as virtually the first order of business at the evening interrogation), the tape recorder was not turned on until 8:00 p.m. (TR 148-9, 156-7, 204-5). Thus, no record exists of the conversation that took place during that half-hour span.

Dixon also argues for suppression on the grounds that his statements were taken in violation of his expressed desire to have counsel present (reading much into the text of the first interrogation on November 9, 1993). Dixon contends that both the statements he made on November 9, 1993, should be suppressed because they were obtained under an intentional plan to violate his

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constitutional rights. Finally, Dixon maintains that suppression is appropriate since the State failed to show that the statements were voluntarily made.

II.

A. Miranda rights

In Miranda v. Arizona, supra, the United States Supreme Court adopted a rule to protect the Fifth Amendment privilege against self-incrimination from the inherently coercive pressures arising during custodial interrogation. The Court held:

> "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of [a] defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.

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> The mere fact that he may have answered some questions or volunteered some statements of his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned." Id. at 444-445.

This multifaceted rule has been, for decades, the subject of much litigation involving application of the rule to various factual scenarios, each with a unique twist. All along, however, the consistent premise behind the Miranda rule has been:

> "to ensure that the police do not coerce or trick captive suspects into confessing, to relieve the 'inherently compelling pressures' generated by the custodial setting itself, 'which work to undermine the individual's will to resist,' and as much as possible to free courts from the task of scrutinizing individual cases to try to determine, after the fact, whether particular confessions were voluntary." (Footnotes omitted). Berkemer v. McCarty (1984), 468 U.S. 420, 433-34.

Dixon first contends that all statements he made during his initial November 9th interview must be suppressed because he was subjected to custodial interrogation without the benefit of Miranda warnings. The facts clearly show that Dixon was in custody on November 9, 1993, when he was arrested and taken to the Toledo Police Homicide Office.

Also, the police undeniably interrogated Dixon on that date. "When a statement question or remark by a police officer is reasonably likely to elicit an incriminating response from a suspect, it is an interrogation." State v. Knuckles (1992), 65 Ohio St.3d 494, paragraph two of the syllabus. Snow admits that neither he nor Kulakoski gave Dixon his Miranda warnings prior to

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this midday session at the Safety Building. They determined not to warn Dixon precisely because they feared Dixon, if warned, might not provide them with information as to the disappearance, and as to the forgery. Thus, the decision not to warn was a specific tactic adopted by these detectives in private conference just prior to the interrogation - a tactic adopted in contravention of standard police procedures, in ignorance of thirty years of case law, and in disregard of public policy and concepts of fairness which have embedded Miranda in our national consciousness and conscience. And here it must be stressed that, as to Snow at least, it was a tactic adopted in part because of Dixon's reticence and invocation of his right to counsel on November 4th (Snow, after all knew Dixon was reticent, he knew he had invoked his right to counsel, he knew Dixon had a lawyer, and he even knew the lawyer's name!).

This Court is satisfied that the detective's questioning and comments during this midday session on November 9th were aimed at eliciting some sort of incriminating response. Also, a review of the transcript and the evidence shows that their interrogation of Dixon was reasonably likely to evoke an incriminating response. Indeed, such incriminating responses were elicited as to the forgery charge. The Snow-Kulakoski tactic of deliberately failing to warn under Miranda and the nature of the questioning elicited Dixon's halting narrative in which he describes securing the phony state I.D. card and the sham duplicate auto title, and in which he tells of receiving and spending the proceeds of the fraudulent

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sale. Such an admission, coupled with the evidence already compiled by Scanlon, thus provided a strong circumstantial link to Hammer's disappearance, and stood as a significant prelude to the later, second interrogation of Dixon on November 9th.

In any event, Kulakoski pressed onward in this initial interrogation, telling Dixon that he thought "* * * something else happened to (Hammer);" and then he asked Dixon point blank, "Did you have anything to do with anything that might of [sic] happened to Chris?" (Tr. #1, 15). Finally Kulakoski attempted to elicit an incriminating response from Dixon when he shared the clumsy and ultimately false "bus metaphor" with him. See p.13, ante. When he "got on the bus" a few hours later, it lead inexorably to the most serious criminal charges one can face in this State.

Regardless, it is the conclusion of this Court that this initial midday session on November 9th was a custodial interrogation. The questions and comments of the officers were designed to elicit incriminating information, and they succeeded to some extent in that purpose.

Since the first November 9th session was a custodial interrogation, Dixon was entitled to Miranda warnings before such questioning. See Miranda at 444. Because Dixon was not given the requisite Miranda warnings at any time prior to or during the first November 9th interview, all statements made by him at that interview must be suppressed.

Dixon also contends that all the statements he made on November 9th, including those he made after he was read and waived

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his Miranda rights, must be suppressed because they were taken after he invoked his Miranda right to counsel. Dixon argues that he invoked his right to counsel on two occasions: first, on November 4th when he was questioned by Scanlon and Snow at the Sylvania Township Police Department (TR 28, 45), and second, during the first November 9th interview when he said, "I mean usually like I told you, you can ask this gentleman right here cause (inaudible), I didn't even want to speak with you guys unless I had an attorney present * * *." (Tr.#1 15; TR 137-38).

Under Miranda, "if an individual indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." Miranda at 445. Moreover, once a suspect has asserted his or her Miranda right to counsel, not only must the instant interrogation stop, but also the authorities may not approach the suspect for further interrogation until counsel has been made available to him or her. See Edwards v. Arizona (1981), 451 U.S. 477, 484-85 ("an accused, * * * having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him unless the accused himself initiates further communication exchanges or conversations with the police"); Minnick v. Mississippi (1990), 498 U.S. 146, 153 ("when counsel is requested, interrogation must cease and officials may not re-initiate interrogation without counsel present, whether or not the accused has consulted with his attorney"). This rule was adopted to prevent police from badgering

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a suspect into waiving his or her previously asserted Miranda rights. Michigan v. Harvey (1990), 494 U.S. 344, 350; McNeil v. Wisconsin (1991), 501 U.S. 171, 177. Despite the existence of these rules, Dixon's November 4th refusal to speak without counsel and his November 9th statements did not legally preclude the police from questioning him further.

Dixon's November 4th refusal to discuss Hammer's disappearance with Scanlon and Snow without his attorney present did not amount to an invocation of his Miranda right to counsel for several reasons. First, on November 4th, Dixon was not "in custody" so as to trigger his Miranda rights. The Miranda Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (Footnote omitted). Miranda at 444. In addition, the McNeil Court stated that "[w]e have in fact never held that a person can invoke his Miranda rights anticipatorily in a context other than 'custodial interrogation.'" (Citation omitted). McNeil, supra, at 182, n.3.

The undisputed evidence shows that Dixon was not in custody on November 4th. He appeared at the Sylvania Township Police Department of his own volition and for a reason not associated with Hammer's disappearance. (TR 25-26, 44, 222). The evidence also demonstrates that Scanlon and Snow, when they heard Dixon's name and recognized him as Hammer's roommate, merely invited Dixon to answer some questions about Hammer's disappearance. (TR 25-27, 44). Dixon, while he was being Mirandized, expressed his intent

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not to speak with the detectives without his counsel. Moreover, Dixon was free to leave at any time and, in fact, did leave after deciding not to speak with Scanlon and Snow. (TR 27-28, 45). Since Dixon was not in custody on November 4th, he could not anticipatorily invoke his Miranda right to counsel to preclude police-initiated questioning at a later date. See McNeil, supra, at 182, n.3.

Second, the Edwards and Minnick rules preventing police-initiated questioning of a suspect without the presence of his or her counsel apply only when there is no break in custody between the invocation of the right to counsel and the later questioning. See McNeil at 177; Arizona v. Roberson (1988), 486 U.S. 675 (suspect arrested at burglary scene, Mirandized, invoked right to counsel, and three days later, while still in custody, questioned by officer about a different offense - statements gleaned from later questioning inadmissible, no break in custody). The Eleventh Circuit Court of Appeals stated that:

> "a break in custody dissolves a defendant's Edwards claim. If the police release the defendant, and if the defendant has a reasonable opportunity to contact his attorney, then we see no reason why Edwards should bar the admission of any subsequent statements. A break in custody after the invocation of Fifth Amendment rights ends the need for the Edwards rule." Dunkins v. Thigpen (C.A.11, 1988), 854 F.2d 394, 397.

Consequently, even if Dixon was in custody on November 4th, he was subsequently released and had a reasonable opportunity to contact counsel before his November 9th arrest and interrogation.

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This break in custody prevents application of the Edwards and Minnick rules to bar any police-initiated interrogation of Dixon after November 4th. Still it is significant that Snow was witness to Dixon's "invocation," and he heard Dixon mention his lawyer by name. Snow took this knowledge with him into the interrogation room on November 9th, and it played a role in the tactical decision he and Kulakoski made to forego the Miranda warnings.

Similarly, on November 9th, Dixon's somewhat cryptic reference to his prior decision not to speak with Scanlon and Snow without his attorney did not amount to an invocation of his Fifth Amendment right to counsel. Until recently courts have followed three divergent paths in formulating what duty to place upon interrogating police officers when a suspect makes an equivocal or ambiguous request for counsel. See Smith v. Illinois (1984), 469 U.S. 91, 96, n.3. ([1] request for counsel, no matter how ambiguous, precludes further questioning; [2] attempt to establish a threshold standard of clarity for requests which would trigger right to counsel; [3] once suspect mentions counsel, questioning must cease but interrogators may ask narrow questions to clarify suspect's statement and desire for counsel). On June 24, 1994, however, the United States Court of Military Appeals (the United States Supreme Court) clarified the Court's position on the previously divergent approaches to this situation. See Davis v. United States (Jun. 21, 1994), 62 U.S.L.W. 4587. The Davis Court reiterated the Court's prior holding that:

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> "Invocation of the Miranda right to counsel 'requires, at minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.' McNeil v. Wisconsin, supra, at 178. But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning. See ibid." (Emphasis in original.) Davis at 4589.

The Court declined to extend the Edwards rule to require police to cease questioning upon a suspect's ambiguous or equivocal request for counsel, although they did note that it would be "good police practice" for the interviewing officer to clarify whether the suspect actually wants an attorney. Davis at 4589-90. Here was an opportunity for Snow, at least, to employ some good police procedure. He did not.

In light of the Davis decision, however, this Court cannot classify Dixon's oblique reference, made during the first November 9th interview - even with his prior unwillingness to speak with the authorities without an attorney - as a request for counsel. The combination is not sufficiently unequivocal to preclude further police-initiated questioning.

B. Tactics to prevent invocation of Miranda rights

Although the Court finds that Dixon did not invoke his right to counsel on November 9th so as to prevent later police-initiated questioning, it does find merit in Dixon's argument that his November 9th statements must be suppressed because they were

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obtained as a result of a deliberate, bad faith plan on the part of the police to violate his rights. In deciding not to Mirandize Dixon before the first November 9th interview, Detectives Kulakoski and Snow did not necessarily violate Dixon's constitutional rights.[1] The Miranda rights to silence and counsel are not constitutional rights, but prophylactic measures to insure protection of the Fifth Amendment right against compulsory self-incrimination. Oregon v. Elstad (1985), 470 U.S. 298, 305, citing Michigan v. Tucker, (1974), 417 U.S. 433, 444.

The case law is replete with discussions of constitutional violations which require suppression of statements made as a result of such wrongs. The most notable case is Wong Sun v. United States (1963), 371 U.S. 471. The Wong Sun Court suppressed evidence obtained and statements made as a result of an unlawful arrest. Such verbal and physical evidence was excluded as "fruit of the poisonous tree" because it was gleaned by exploitation of the illegality (an unlawful arrest) which violated the suspect's Fourth Amendment right to be free from illegal searches and seizures. Under Wong Sun, suppression would not be warranted if the mechanism revealing the evidence was "sufficiently an act of free will to purge the primary taint." Id. at 486.

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[1] Dixon's Sixth Amendment right to counsel did not attach on November 9th. That right arises when "prosecution is commenced, that is, 'at or after the initiation of adversary judicial criminal proceedings - whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" (Quotation omitted). McNeil, supra at 175, quoting United States v. Gouveia (1984), 467 U.S. 180, 188.

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The Wong Sun rule has repeatedly been applied to suppress statements made pursuant to illegal arrests and Fourth Amendment violations.[2] The Court in Tucker, however, indicated that, under the appropriate circumstances, the Wong Sun rationale would be equally applicable in the Fifth Amendment context to violations of the prophylactic Miranda standards. Tucker, supra, at 446-447. The essential rationales for application of the Wong Sun rule in a Fifth Amendment context are twofold. The first objective is deterrence:

> "in a search-and-seizure context, the exclusionary rule's 'prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.' United States v. Calandra, 414 U.S. 338, 347 * * * (1974). * * *
>
> '"The rule is calculated to prevent, not repair. Its purpose is to deter - to compel respect for the constitutional guaranty in the only effectively available way - by removing the incentive to disregard it." Elkins v. United States, 364 U.S. 206, 217 * * * (1960).' Ibid. [414 U.S. at 347.] * * *.
>
> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or their

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[2] See Brown v. Illinois (1975), 422 U.S. 590 (Miranda warnings alone did not purge the taint of a purposeful illegal arrest); Rawlings v. Kentucky (1980), 448 U.S. 98 (Miranda warnings are an important factor in determining whether statements are tainted by an antecedent illegal arrest).

> future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." (Footnote omitted and emphasis added.) Tucker, supra, at 446-47.

The second objective behind Wong Sun is to protect the courts from reliance on untrustworthy evidence obtained through undue police pressure causing a defendant to accuse himself falsely. Tucker at 448-49. When either of these objectives can be achieved by suppressing the "fruit" of a Miranda violation, then suppression is warranted.

The application of these precepts to the effect of an initial unwarned statement on a later warned statement has produced surprisingly little case law. Perhaps the leading case is Elstad, ante. In that case, two officers of the Polk County Sheriff's Office (Salem, Oregon) went to a private residence with a burglary arrest warrant for young Elstad. Elstad, who lived with his parents, was listening to music in his bedroom when the officers arrived. Young Elstad was told to get dressed, that he was under arrest, and that he was going to be taken to police headquarters. The young man was brought to the living room, but prior to departure, Officer McAllister asked the mother to step into the kitchen, where he briefly explained the situation. As he was doing this, Officer Burke sat with young Elstad in the living room. Burke asked Elstad if he knew why the officers were there. Elstad replied "no", he had no idea. Burke then said, "do you know a person named Gross," to which Elstad said, "yes", indicating he

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understood there had been a robbery at the Gross residence. Burke then said that he felt Elstad was involved in that incident. Young Elstad then said, "yes, I was there." Later, at the Sheriff's Office, Elstad was read his Miranda rights. He waived those rights, signed a written waiver, and made a full statement, admitting the burglary.

The trial court denied Elstad's motion to suppress. the Oregon Court of Appeals reversed and, in turn, was reversed by the U.S. Supreme Court. In doing so, the Supreme Court in Elstad agreed with the Tucker Court's reasoning that either the objective of deterrence or trustworthiness must be met to apply the rule of Wong Sun to a Miranda violation. The Elstad Court noted that "the absence of coercion or improper tactics undercuts the twin rationales - trustworthiness and deterrence - for a broader rule" requiring suppression of statements made after a reading and waiver of Miranda rights. Elstad at 308. The Elstad Court, thus, concluded that "absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion." (Emphasis added.) Id. at 314. In applying the Tucker rationale, the Court reasoned:

> "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

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> the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary informed waiver is ineffective for some indeterminate period. Though Miranda requires that the unwarned admission must be suppressed, the admissibility should turn in these circumstances solely on whether it is knowingly and voluntarily made." (Emphasis added.) Id. at 309.

The Tucker and Elstad courts declined to apply the Wong Sun rule because each of those cases involved no purposeful conduct on the part of the authorities to deprive the suspects in each case of their rights. Specifically, the Tucker case involved an attempt to suppress statements of a third party whose name was obtained from the suspect after he was incompletely advised of his rights. The Court found that the third party's statements could not be suppressed as "fruits" of the authorities' failure to properly apprise the suspect of his rights. The Elstad case similarly involved no purposeful conduct on the part of the police. In Elstad, the suspect attempted to suppress statements made after a complete reading and waiver of his Miranda rights, because he previously made inculpatory statements without the benefit of Miranda warnings. He claimed that the latter statements were the "fruit" of his prior admissions which were obtained in violation of his Miranda rights. Again, in Elstad, as in Tucker, the Court declined to exclude the latter statements because the police exercised no improper tactics in obtaining the statements from the suspect. As such, the twin Wong Sun rationales of deterrence and trustworthiness would not be served by exclusion of the statements

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obtained after full Miranda warnings and a valid waiver.

But the facts in Elstad differ markedly from the facts of this case. Officer Burke should not have spoken to young Elstad about anything having to do with the alleged burglary, without Miranda warnings and waiver. Clearly, Elstad was under arrest. Yet, it is equally clear that Officer Burke's brief conversation with Elstad - as they waited for Officer McAllister - was not part of a deliberate, tactical plan by the Oregon officers. Indeed, his questions were introductory in nature. While sufficiently improper to exclude Elstad's unwarned admission at the house, the Supreme Court properly found that the warned statement at headquarters, (an hour or more later), was not tainted. Burke's questions at the house were ill-advised but were inadvertent. In any event, Burke's questions did not amount to deliberate police misconduct.

In this case, however, the decision of Kulakoski and Snow to dispense with Miranda warnings was deliberate and tactical. They did so because they feared the warnings would prompt Dixon to refuse to talk and invoke his right to counsel. In making this deliberate and tactical decision, one of the detectives (i.e., Snow), had very recently seen Dixon refuse to talk; and, that same officer not only knew Dixon had a lawyer, he knew the lawyer's name. Moreover, it is beyond cavil that both Kulakoski and Snow knew Dixon was in custody and under arrest, as they had helped serve the arrest warrant earlier that morning. Thus, this Court finds the actions of Kulakoski and Snow (in deliberately failing to administer the Miranda warnings prior to the midday interrogation)

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were tactical and willful. This court also finds those actions to have been egregious, and a gross departure from accepted police procedure. Their actions worked to render the Miranda protections a nullity.

There are two other cases with facts somewhat similar to the case now under review which this Court finds helpful to this analysis. See United States v. Carter (C.A.8, 1989), 884 F.2d 368; United States v. Anderson (E.D.N.Y.1990), 752 F.Supp. 565, affirmed (C.A.2, 1991), 929 F.2d 96. Applying the reasoning of Elstad, these two courts determined that suppression was warranted even though the authorities had read the suspects their Miranda rights and obtained a waiver of those rights. The Carter court suppressed statements made by a suspect directly on the heels of unwarned statements. See Carter at 373. The Anderson court suppressed statements that were preceded by Miranda warnings, accompanied by legal distortions that "made a mockery of the safeguards provided by Miranda." Anderson, 752 F.Supp. at 567.

The Carter court recognized the Elstad Court's distinction between "coercion resulting from the absence of Miranda warnings [and] actual coercion through the use of coercive or improper methods by the police." (Emphasis added.) Carter at 372. The Carter court noted that:

> "statements obtained in violation of Miranda, although they must be suppressed as presumptively coercive, may yet be deemed voluntary in fact. [Elstad] at 307 * * *. If the unwarned statement is voluntary, then a subsequent warned confession may be admissible if the prior statement is not the result of

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> 'deliberately coercive or improper tactics.' Id. at 314 * * *. Of course, the second statement must be voluntary as well before it may be admitted. Id. at 318 * * *." Carter at 372-73.

In other words, when a purposeful Miranda violation occurs, a subsequent warned statement is inadmissible even if it was voluntarily made. As such, if the first statements are the product of improper police tactics, then the court does not reach the voluntariness inquiry with respect to the latter statements. If the first unwarned statements were voluntary, however, then the court is charged with examining "the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements." See Elstad at 318; Carter at 373. The Carter court further noted the practicality of this rule in view of its support of Miranda's bright-line qualities:

> "If the police are permitted * * * to ignore Miranda until after they obtain a confession, the courts will once again be embroiled in the endless case-by-case voluntariness inquiries Miranda was designed to prevent, and the ease-of-application rationale enunciated by the Supreme Court will be largely nullified." Carter at 374.

See, also, Berkemer, supra, at 433-34.

In the case sub judice, the statements obtained from Dixon were not elicited as a result of police error. Dixon was unmistakably under arrest when Detectives Kulakoski and Snow deliberately decided not to advise him of his Miranda rights. Moreover, Kulakosi and Snow admitted that their conduct was

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calculated to undermine Dixon's will to refuse to speak with them without his attorney. (TR 117, 238). They purposefully decided not to advise Dixon of his Miranda rights because they thought he would not be cooperative in answering their questions. Also, in deciding not to Mirandize Dixon, the detectives willfully violated the policies of the Toledo Police Detective Bureau. (TR 134-35). This conduct plainly violated Dixon's Miranda rights and was aimed at depriving Dixon of his Fifth Amendment right against compelled self-incrimination.[3]

Under certain circumstances the primary taint of a coerced statement may be purged:

> In deciding whether a second confession has been tainted by [a] prior coerced statement, 'the time that passes between confessions, the change in place of interrogation, and the change in identity of interrogators all bear on whether the coercion has carried over into the second confession." Elstad 470 U.S. at 310* * *. Further, we must look at the 'twin rationales - trustworthiness and deterrence." [Id. at 308.]" Anderson, 929 F.2d at 102.

This Court, however, finds the circumstances in this case insufficient to dissipate the taint associated with the initial November 9th interrogation. In particular, no more than four hours passed between Dixon's initial improperly obtained confession to forgery of Hammer's auto title and Dixon's subsequent admission to involvement in Hammer's murder. Moreover, during that time Dixon was incarcerated in the Lucas County Correction Center. Finally,

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[3]The Court finds not only that the statements made by Dixon at the midday November 9th interrogation were the product of improper police tactics, but also that they were involuntarily made. See post at 38.

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when the interrogation of Dixon resumed, it was spearheaded by the same officer who had conducted most of the initial interrogation (i.e., Kulakoski); and it was conducted in the same location (i.e., police headquarters). These circumstances fail to purge the taint of Kulakoski's and Snow's wrongful conduct.

In light of the willful nature of the official misconduct in this case, the twin rationales of deterrence and trustworthiness are well-served by suppressing both of Dixon's November 9th statements. Suppression of even the statements preceded by Miranda warnings deters police from embarking on a course of conduct aimed at avoiding a suspect's invocation of his or her Miranda right to counsel, thereby precluding further interrogation absent the suspect's attorney. For example, if the detectives had commenced Dixon's first November 9th interview by reading him his Miranda rights, then arguably he might have invoked his right to counsel and prevented Kulakoski and Snow from questioning him further without his attorney. This is precisely what Snow, at least, anticipated since, on November 4th, Dixon declined to discuss Hammer's disappearance without attorney Scalzo. If Dixon had invoked his right to counsel, then the detectives would have missed the opportunity of interrogating Dixon for four hours, and they would not have obtained the comments implicating him in the forgery.

In addition, complete suppression of Dixon's November 9th statements advances the spirit of Miranda by bolstering the trustworthiness of statements obtained through custodial

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interrogation. This purpose is achieved by preventing the police from delaying Mirandizing a suspect until they interrogate that individual for a time sufficient to wear down his or her will. By eliminating such delays, it also diminishes the risk of a suspect falsely incriminating himself or herself simply to end the interrogation.

Finally, the Miranda goal of avoiding a case-by-case voluntariness determination is avoided by suppressing both Dixon's November 9th statements. For these reasons, Dixon's motion to suppress is granted.

C. Voluntariness

In general, the voluntariness of a confession is evaluated on the "totality of all the surrounding circumstances, including the accused's characteristics, the conditions of the interrogation, and the conduct of the law enforcement officials". Anderson, 929 F.2d at 99. It is the prosecution's burden to prove the voluntariness of a confession by a preponderance of the evidence. Id. Based on the totality of the circumstances in this case, including: Kulakoski's and Snow's deliberate decision to persistently interrogate Dixon for four hours, while under arrest and in an inherently coercive police atmosphere, without giving him his Miranda rights; Kulakoski's employment of his self-designed, factually and legally erroneous bus analogy; the scant record of the interrogation; and the State's failure to demonstrate that

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Dixon's knowledge of the criminal justice system enabled him to independently ascertain his rights and the true consequences of "getting on the bus"; the Court finds that the statements made by Dixon during the midday November 9th interrogation were involuntarily made.

Because the Court finds that all Dixon's November 9th statements were the product of improper police tactics, the presumption of compulsion cannot be overcome by the mere reading and waiver of his Miranda rights. As such, the egregious and purposeful disregard of Dixon's Miranda rights prevents the Court from undertaking a voluntariness inquiry with respect to the statements Dixon made during the second November 9th interview. See Carter, supra, at 372-73.

III. AFTERWORD

It is not an easy decision to suppress a warned confession in a highly publicized aggravated murder case. This is especially so when the alleged facts describe an alleged crime that is heinous in its planning and execution. But, the body of cases following Miranda remains not only good law, but good public policy. Here, the detectives' failure to follow that law and policy was deliberate, tactical and egregious. The only meaningful way of condemning such tactics, and deterring similar misconduct in the future is to exclude the statement.

It is ironic that the impact of this ruling will likely inure

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more to Hoffner's benefit than Dixon's, because if upheld, the State may have to negotiate with Hoffner for his testimony. Obviously, though, this will abide the decision of the Court of Appeals.

Looking back at the events of November 9th, it is clear that Kulakoski and Snow hoped Dixon would admit not only the forgery, but also a role in Christopher Hammer's disappearance during the midday interrogation of November 9th. In this regard, it is ironic to note that this decision would have been alot shorter and the result more inimical to the State's case had they succeeded, because, then the murder confession would have been a direct and immediate result of the willful failure to inform. And, such a result would have led to a virtually unquestioned suppression of the statement. What has emerged is a much more detailed analysis of a relatively and surprisingly sparse body of case law analyzing factual distinctions among cases when there is an earlier unwarned statement followed by a warned statement.

JOURNAL ENTRY

It is ORDERED that defendant Archie J. Dixon's motion to suppress the statements he made during custodial interrogation on November 9, 1993 is GRANTED.

August 2, 1994

William J. Skow, Judge

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A That is correct.

Q Do you recall about how long you and Detective Kulakoski interrogated Mr. Dixon before you turned on the tape recorder?

A Well, according to that it would have been about 30 minutes. It was 19:30 when we went over that the first time.

Q That being --

A The waiver form that was at 19:30 hours, and then we started the tape at a thousand hours, which is 30 minutes later.

Q Why didn't you turn on the tape as soon as you began discussing the Miranda form with Mr. Dixon?

A No particular reason. We had no idea what he was going to say until we talked to him.

Q Indeed you had no idea whether or not he was going to wave his Miranda rights; is that correct?

A Well, he waived them here, and then we talked to him for those roughly about 30 minutes, maybe even a little less by the time I got the tape and set it up, so --

Q But you did not tape record the initial discussion of his Miranda rights?

A The first time we read him his Miranda rights

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