NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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June 30, 2023

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Re: *Commonwealth v. Rishav Bhattacharya*
Case No. FE-2022-121; -122

Dear Counsel:

The Commonwealth indicted Rishav Bhattacharya ("Defendant") for Distribution of Schedule II and III Drugs after he made inculpatory statements during a police interrogation. He filed a motion to suppress those statements. The distilled issue before the Court is whether the police may induce a defendant to waive his right to have a lawyer present at an interrogation by threatening a negative consequence or offering a benefit. The legal issues are: (1) whether police effectively advised Defendant of his *Miranda v. Arizona*[1] rights and (2) whether Defendant voluntarily waived his *Miranda* rights.

The Court holds the police misadvised Defendant of his *Miranda* rights when a detective both promised him cooperation credit if he waived his right to have a lawyer present and threatened him with extra charges if he asserted that right, along with potentially not having the

[1] 384 U.S. 436 (1966).

OPINION LETTER

opportunity to cooperate later. Alternatively, the Court finds Defendant's interrogation statements to be involuntary. The Court will grant the Defendant's Motion to Suppress.

I. FACTUAL BACKGROUND.

The Commonwealth indicted Defendant with Distribution of a Schedule II drug in FE-2022-121, and with Distribution of a Schedule III drug in FE-2022-122. Prior to indictment, police arrested Defendant on May 20, 2021, and interrogated him. It is undisputed that the interrogation was custodial and that *Miranda* mandated that police advise Defendant of his right to have a lawyer present during the interrogation.

After a detective advised Defendant of the standard *Miranda* warnings, the following exchange ensued:

> **Bhattacharya (BHA):** Would it help me to have a lawyer throughout this process?
>
> **Detective: (DET):** I mean, that's your choice. I can't answer that at all. Basically, right now I'm trying to (tap, tap,) interview you to help yourself to see if you're willing to give me some information that will help you when we go to court.
>
> **BHA:** I understand.
>
> **DET:** If we go to court and you don't want to talk to me right now that's your choice, okay, but then I don't have, I'm not going to have any leeway. I'm not going to say he was cooperative. Or look, he pointed me to this, this, this, and this, let's do this. But, then you don't give me any options, see what I'm saying?
>
> **BHA:** Yeah.
>
> **DET:** We're just gonna charge everything and go as high as we can. Okay, if you're cooperative, if you're working with me, okay, just you and me ....
>
> **BHA:** Yeah.
>
> **DET:** ... then we're gonna go to bat for you when it comes to court. We're gonna try and do what we can as long as you're cooperative.
>
> **BHA:** Alright.
>
> **DET:** Okay, so those are your options.
>
> **BHA:** And then what does bringing a lawyer unto this mix do right now?

DET: A lawyer, then means you probably won't we probably wouldn't be able to do what I just said.

BHA: Okay, so like we go to trial …

DET: So we would go all the way to the top, yeah, charge everything.

BHA: Which is … can you tell me the charges?

DET: Three Distributions … possibly more, I don't know.

BHA: You're saying more than this, uh, like …

DET: Yeah, suboxone, the fentanyl, then I think there was Xanax or something.

BHA: Okay.

Following this conversation Defendant made the statements he now seeks to suppress.

II. ANALYSIS.

"We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." *Miranda,* 384 U.S. at 467.

Before the Court are two issues: (1) whether an interrogating detective's post *Miranda* statements negated the *Miranda* warnings he previously read to Defendant; and (2) if the detective properly advised Defendant of his *Miranda* rights, whether police coercion rendered Defendant's statements involuntary.

A. The Interrogating Detective Negated the *Miranda* Warnings he Administered to the Degree that he Improperly Advised Defendant of his Rights.

1. *Negated Miranda Warnings are Deficient.*

Undisputedly, the detective literally read Defendant the familiar *Miranda* warnings prior to the start of the interrogation. The question is whether the detective's prefatory and subsequent statements in advance of Defendant's statements that he seeks to suppress effectively negated the otherwise proper warnings.

"Just as 'no talismanic incantation [is] required to satisfy [*Miranda*'s] strictures,' it would be absurd to think that mere recitation of the litany suffices to satisfy *Miranda* in every conceivable circumstance. 'The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.'" *Missouri v. Seibert*, 542 US 600, 611 (2004) (internal citations omitted). Where police advise a person of his *Miranda* rights but make statements immediately before or after the advisement that undercut those warnings, the warnings are inherently inadequate. The logic of this is unassailable. "Certainly, if the *Miranda* warnings were preceded by statement that were *directly* contrary to those warnings (e.g., you are required to answer our questions; your statements will be used to help you; you are not entitled to a lawyer) there would be no need to examine the totality of the circumstances to determine if a *Miranda* waiver was knowing, voluntary, and intelligent." *People v. Dunbar*, 24 N.Y.3d 304, 316 (2014) (emphasis in original). If police effectively do the same thing in a more subtle way, it is a distinction without a difference. *Id.*

In *Dunbar*, New York's highest court directly considered this issue. There, the prosecutor set up a program where, immediately prior to a *Miranda* rights advisement, an assistant prosecutor would read a script stating, in part: "'this is your opportunity to tell us your story' and 'your only opportunity' to do so before going before a judge." *Id.* at 308. Immediately after this preamble and the subsequent *Miranda* warnings, the defendants made incriminating statements that they then sought to suppress. The court held the preamble "effectively vitiated or at least neutralized the effect of the subsequently delivered *Miranda* warnings." *Id.* at 316. It reasoned the defendants "were warned, for all intents and purposes, that remaining silent or invoking the right to counsel would come at a price—they would be giving up a valuable opportunity to speak with an assistant district attorney, to have their cases investigated, or to assert alibi defenses." *Id.* The preamble undercut the subsequent *Miranda* warnings to the degree that law enforcement failed to clearly inform defendants of their *Miranda* rights in the first place, as is constitutionally required. *Id.*

Dunbar was later discussed in *Murphy v. Warden of Attica*, 2022 WL 1145050 (S.D.N.Y. Apr. 19, 2022), where a habeas petitioner argued that his lawyer should have asked the trial court to suppress his post-*Miranda* statements under *Dunbar*. During the petitioner's interrogation, and immediately after the *Miranda* advisement, the petitioner asked if requesting a lawyer would end the conversation for the day. The prosecutor stated: "[i]f you ask, if you ask for a lawyer right now, we probably won't continue speaking. Okay? So knowing that, do you still want to speak to me?" *Id.* at *3 (*sic*). The court found that "[g]iven the significant differences between what occurred in Murphy's case and what occurred in *Dunbar*, it was not objectively unreasonable for counsel to have not relied specifically on *Dunbar* in seeking suppression." *Id.* at *9. Specifically, the court distinguished the statement in *Murphy* from that in *Dunbar* because in *Dunbar* the defendant was led to believe he would not have another chance to explain his side before he was arraigned. *Id.* In contrast, a prosecutor simply told Murphy that if he requested an attorney, it would just delay his opportunity to speak to the prosecutor. *Id.*

Admittedly, New York's approach to considering whether certain police statements can effectively negate *Miranda* warnings without conducting a full voluntariness analysis is unique.

But other courts effectively do the same thing—they just do so under a voluntariness analysis.[2] In *United States v. Giddins*, 858 F.3d 870, 883 (4th Cir. 2017), the court took this latter approach and held that police improperly coerced a defendant to waive *Miranda* by conditioning the return of his impounded car on his waiver. It cited with approval the statement that "there are rights of constitutional stature whose exercise a State may not condition by the extraction of a price . . . We now hold the protection of the individual . . . against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of [something important to the defendant]." *Id.* at 882 (ellipses in original, bracket supplied) (quoting *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) and citing *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977)).

However, despite its novelty, New York's dual approach has critical merit. Courts in most cases will suppress statements when law enforcement misadvises interrogees of their *Miranda* rights under a voluntariness balancing test. However, there are conceivable circumstances where a court would offset the negation with the other voluntariness factors. For example, if a detective negates the *Miranda* warnings before interrogating a prolific felon who was recently a criminal defense attorney, a court might weigh the defendant's experience with the criminal justice system heavily, and the misstated *Miranda* warnings lightly, to deny suppression. It does not matter if this balancing would be reasonable or not. It directly contradicts the Supreme Court's directive in *Miranda* to mitigate the "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda,* 384 U.S. at 467.

New York's approach is also logical and most faithful to *Miranda*, as one judge on the D.C. Court of Appeals persuasively pointed out in a concurring opinion. *In re S.W.*, 124 A.3d 89, 105 (D.C. 2015) (Easterly, J, concurring). Since *Miranda* did not mandate a particular "script," it is up to courts to determine whether the warnings "adhered to the dictates of *Miranda* and were effectively delivered." *Id.* at 110 (cleaned up). Effective delivery must be more than a rote reading of "correct" warnings with a deaf ear to "incorrect" negations of those warnings. Otherwise, a court would tacitly pass on a nonsensical rendition of *Miranda* that "you have the right to a lawyer, but if you ask for a lawyer bad things will happen and, if you waive the presence of a lawyer, I'll try to pull some strings for you." Courts should summarily blow the whistle on statements that effectively negate the effectiveness of the *Miranda* advisement and not defer only to the voluntariness analysis. They may simply summarily suppress such statements.

2. Police Negated its Miranda Warnings to the Defendant.

As he was properly advising Defendant of his right to have an attorney present if he wanted one, and his right to remain silent, the detective annotated the warnings with a carrot and a stick. If Defendant would agree to waive his right to have an attorney present, the detective would reward him by saying he was cooperative to "help [him] when we go to court." If he refused to waive, however, the detective "would" punish the Defendant by charging him with criminal allegations "all the way to the top," with "everything," "[t]hree [d]istributions …

[2] The Court discusses the voluntariness balancing factors in section B of this Opinion Letter, *infra*.

possibly more, I don't know." The detective also left Defendant with the message that having an attorney present meant that Defendant would probably no longer be able to get any credit for cooperation, and possibly would not be able to cooperate at all – leaving it vague whether cooperation is allowed after one obtains an attorney.

The Court finds that the Detective's statements surrounding his *Miranda* warnings negated the warnings. Per the detective, the Defendant did not really have the right to an attorney because the government would punish him for asking for one and would possibly reward him for waiving his right. This is the functional equivalent of saying, "you have the right to have an attorney present, but it will only hurt you." This is a misstatement of the *Miranda* warnings.

When the Defendant asked about what would happen upon "bringing a lawyer into the mix right now," the detective should have simply responded that they would then end their conversation for the day, as the prosecutor properly did in *Murphy*. *Murphy*, 2022 WL 1145050 at *9. He certainly should not have responded as he did with the message that bringing a lawyer into the mix would result in Defendant losing the ability to cooperate in the future— and that the detective was just going to "go all the way to the top, yeah, charge everything," "[t]hree distributions . . . possibly more, I don't know."

Because the detective so negated the *Miranda* warnings he gave Defendant, he never really administered the warnings at all. Thus, the Court must suppress the Defendant's ensuing statements.

B. In the Alternative, Defendant's Statements were made Involuntarily, and Must be Suppressed.

The Court holds it need not reach the issue of voluntariness because the police negated the *Miranda* warnings it did administer to the Defendant for the reasons in the prior section of this Opinion Letter. However, under a voluntariness analysis the Court reaches the same suppression decision. So, as an alternative ruling, if the detective had properly administered the *Miranda* warnings to the Defendant, the Court finds Defendant's statements were involuntary.

"Even when the suspect has made a valid waiver, a confession made later is inadmissible if it appears that it was made involuntarily." *Harrison v. Commonwealth*, 244 Va. 576, 580 (1992). "In order to determine whether a statement is voluntary, we must decide, in light of the totality of the circumstances, whether the statement is the product of an essentially free and unconstrained choice by its maker, or whether the maker's will has been overborne and his capacity for self-determination critically impaired." *Rodgers v. Commonwealth*, 227 Va. 605, 609 (1984).

In determining whether, under the totality of the circumstances, police overborne a defendant's will, "a court must consider a myriad of factors, including the defendant's age, intelligence, background and experience with the criminal justice system, the purpose and flagrancy of any police misconduct, and the length of the interview. The totality of the circumstances also includes moral and psychological pressures to confess emanating from

official sources." *Gwaltney v. Commonwealth*, 19 Va. App. 468, 472 (1995); *see Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) (an allegedly coerced confession is evaluated by an evaluation of the totality of the circumstances, including the accused's characteristics, the conditions of the interrogation, and the conduct of law enforcement). The Commonwealth has the burden of establishing by a preponderance of the evidence that a defendant waived his *Miranda* rights, and that his confession was truly the product of free choice. *See Colorado v. Connelly*, 479 U.S. 157, 168-69 (1986); *Rodgers*, 227 Va. at 608.

In *US v. Anderson*, 929 F.2d 96 (2d Cir. 1991), a defendant was arrested, advised of his *Miranda* rights, and stated that he did not want a lawyer. Shortly after reading the *Miranda* rights, the arresting law enforcement officer told the defendant that "if he asked for an attorney no federal agents would be able to speak to him further; the agent added 'this [is] the time to talk to us, because once you tell us you want an attorney we're not able to talk to you and as far as I [am] concerned, we probably would not go to the U.S. Attorney or anyone else to tell them how much [you] cooperated with us.'" *Id.* at 97 (brackets and quotations in original). The Court noted that the same "if you want a lawyer you can't cooperate" language was told to the defendant three times before the defendant then made incriminating statements.

The *Anderson* court considered the question of "whether the agent's statements – made immediately after the warnings were given – coerced the defendant into confessing." *Id.* at 98. It wrote that "a confession is not voluntary when obtained under circumstances that overbear the defendant's will at the time it is given." *Id.* Conducting the *Schneckloth* voluntariness test, the court first looked at the defendant's background and noted that he had been previously arrested 12 times and pled guilty 11 times. The court found that although the defendant had previous exposure to law enforcement, he was not intimately familiar with the "knowledge of the rules regarding the benefits of cooperating with the government in federal court." *Id.* The court did not find the conditions where the interrogation occurred (the backseat of a government vehicle) significant in determining whether the statements were voluntary. *Anderson* focused on the finding that "the agent's statements ruled out the possibility and may have created in Anderson's mind a false sense that he must confess at that moment or forfeit forever any future benefit that he might derive from cooperating with the police agents." *Id.* at 100. Ultimately, the court concluded that "[u]nder the totality of the circumstances, Agent Valentine's statements contributed to the already coercive atmosphere inherent in custodial interrogation and rendered Anderson's first confession involuntary as a matter of law." *Id.* at 102.

The present case is in many ways like that of *Anderson*. Similarly, this Court, in applying the following *Gwaltney* voluntariness considerations, finds the police coerced the Defendant's statements.[3]

[3] "Once the trial court makes a finding that the statement was voluntary, on appeal that finding is entitled to the same weight as a fact found by a jury and that finding will not be disturbed unless plainly wrong." *Rodgers*, 227 Va. at 609. Logically, a trial court finding a statement involuntary should earn the same deference.

1. Defendant's age, intelligence, background, and experience.

The Defendant proffered he was only 20 years old at the time of the interrogation. The Commonwealth admits that the Defendant had no prior experience with law enforcement.

2. The Purpose and Flagrancy of any Police Misconduct and Interview Length.

The detective conducted the interrogation in a non-threatening tone, and it lasted less than an hour.

However, the detective coerced the Defendant to waive his *Miranda* rights with both a direct threat and an offer of a direct benefit in exchange for the Defendant forgoing the presence of a lawyer. If the Defendant waived the presence of a lawyer, he would get the detective to "go to bat for [him] when it comes to court." If the Defendant requested the presence of the very lawyer that the detective had just previously said was Defendant's right to have, he would be punished. "Go to bat?" No. "We probably wouldn't be able to [go to bat for you and allow you to cooperate]. Instead, "we would go all the way to the top, yeah, charge everything," "[t]hree distributions . . . possibly more, I don't know."

3. The Totality of the Circumstances, Including Moral and Psychological Pressures.

There were no moral or psychological pressures in the present case. However, the totality of the circumstances left the Defendant with a no-choice choice. He had the right to have a lawyer present, but it would be a very expensive right to exercise. He would probably lose cooperation credit, and possibly even any future ability to cooperate, and would be facing as many charges as the police could bring.

Balancing all these factors, the Court finds that the detective's promises and threats connected to the Defendant's right to have an attorney present, combined with the Defendant's youth and inexperience with the criminal justice system, rendered his statements involuntary and his will overborne. Defendant's decision to make statements were not a product of a free choice, but of a rational response to improper promises and threats.

Looking at the totality of the circumstances the Court finds the Defendant's interrogation statements were involuntary and, therefore, the Court must suppress them.

III. CONCLUSION.

The police, after giving the *Miranda* warnings, negated the warning to the Defendant that he had the right to have a lawyer present during his interrogation, in violation of *Miranda*. The Court must suppress the statements he made during that interrogation as a result, since Defendant was improperly advised of his rights. Alternatively, had the police properly advised the Defendant of his right to have an attorney present, coercion during the interrogation rendered

Defendant's purported waiver of the lawyer and his ensuing statements involuntary. For this alternative reason the Court must suppress the Defendant's statements.

An appropriate Order is attached.

Kind regards,

[redacted]

David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia

Enclosure

OPINION LETTER

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA

v. FE-2022-121, -122

RISHAV BHATTACHARYA

ORDER

This matter came before the Court June 23, 2023, on Defendant Rishav Bhattacharya's Motion to Suppress. It is

ADJUDGED that for the reasons stated in the Opinion Letter issued this day and incorporated into this Order by reference; it is

ORDERED the Motion to Suppress is GRANTED, and inculpatory statements Mr. Bhattacharya made during his interrogation are suppressed and may not be used in the Commonwealth's case in chief.

[redacted]

Judge David A. Oblon

JUN 30 2023

Date

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.