

STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN

Court of Appeals No. 208006

Plaintiff-Appellee,

Lower Court No. 97-150765-FC

-vs-

MCCONNELL ADAMS, JR.

Defendant-Appellant.

_____/

OAKLAND COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

DAVID A. MORAN (P45353)
Attorney for Defendant-Appellant

DEFENDANT-APPELLANT'S BRIEF ON APPEAL
(ORAL ARGUMENT REQUESTED)

PROOF OF SERVICE

STATE APPELLATE DEFENDER OFFICE

BY: DAVID A. MORAN (P45353)
Assistant Defender
Suite 3300 Penobscot
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

TABLE OF CONTENTS

INDEX OF AUTHORITIES i

STATEMENT OF APPELLATE JURISDICTION iii

STATEMENT OF QUESTIONS PRESENTED iv

STATEMENT OF FACTS 1

ARGUMENTS:

I. **THE ADMISSION OF THE VIDEOTAPED STATEMENT VIOLATED THE FIFTH AMENDMENT BECAUSE MR. ADAMS PARTIALLY INVOKED HIS MIRANDA RIGHTS BY REFUSING TO DISCUSS CERTAIN SUBJECTS WITHOUT AN ATTORNEY AND BECAUSE THE DETECTIVE, BY CONTINUING TO QUESTION MR. ADAMS ON THOSE SUBJECTS, FAILED TO "SCRUPULOUSLY HONOR" THAT PARTIAL INVOCATION.....** 15

A. **THE U.S. SUPREME COURT HAS RECOGNIZED THAT A DEFENDANT MAY PARTIALLY INVOKE HIS MIRANDA RIGHTS SO AS TO PUT CERTAIN SUBJECTS OFF LIMITS.**
17

B. **SINCE DETECTIVE HARVEY DID NOT "SCRUPULOUSLY HONOR" MR. ADAMS' LIMITED INVOCATIONS OF HIS MIRANDA RIGHTS, THE RESULTING STATEMENT SHOULD HAVE BEEN SUPPRESSED.....** 23

C. **THE ERRONEOUS ADMISSION OF THE VIDEOTAPED STATEMENT WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.....** 28

II. **THE ADMISSION OF THE VIDEOTAPED STATEMENT VIOLATED THE FIFTH AMENDMENT BECAUSE THE DETECTIVE FAILED TO STOP THE INTERROGATION WHEN MR. ADAMS ASKED FOR AN ATTORNEY "RIGHT NOW."** 31

A. **MR. ADAMS' CLEARLY INVOKED HIS MIRANDA RIGHT TO COUNSEL BY ASKING IF HE COULD HAVE AN**

ATTORNEY "RIGHT NOW."	33
B. UNDER <u>SMITH</u> v <u>ILLINOIS</u> , MR. ADAMS' POST-INVOCATION RESPONSES TO DETECTIVE HARVEY'S CONTINUED INTERROGATION CANNOT BE CONSIDERED TO RENDER MR. ADAMS' INVOCATION "AMBIGUOUS."	35
C. THE ADMISSION OF THE VIDEOTAPED STATEMENT WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.	38
III. THE TRIAL COURT VIOLATED THE DOUBLE JEOPARDY CLAUSE BY: (1) IMPOSING SEPARATE SENTENCES FOR FELONY MURDER AND PREMEDITATED MURDER; AND (2) IMPOSING SEPARATE SENTENCES FOR FELONY MURDER AND AN UNDERLYING FELONY.	39
SUMMARY AND RELIEF	41
APPENDIX A (Transcript of Videotaped Statement)	
APPENDIX B (Judgment of Sentence)	

dam*da16051.bra*04-12-99
Adams, McConnell

INDEX OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

<u>Arizona v Fulminante</u> , 499 US 279; 111 S Ct 1246; 113 L Ed 2d 302 (1991).....	29, 38
<u>Chapman v California</u> , 386 US 18; 87 S Ct 824; 17 L Ed 2d 705 (1967)	28, 38
<u>Connecticut v Barrett</u> , 479 US 523; 107 S Ct 828; 93 L Ed 2d 920 (1987)	<u>passim</u>
<u>Davis v United States</u> , 512 US 452; 114 S Ct 2350; 129 L Ed 2d 362 (1994).....	31, 33, 34
<u>Edwards v Arizona</u> , 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981)	20, 33
<u>Michigan v Mosley</u> , 423 US 96; 96 S Ct 321; 46 L Ed 2d 313 (1975)	<u>passim</u>
<u>Miller v Fenton</u> , 474 US 104; 106 S Ct 445; 88 L Ed 2d 405 (1985)	16, 32
<u>Miranda v Arizona</u> , 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).....	<u>passim</u>
<u>Smith v Illinois</u> , 469 US 91; 105 S Ct 490; 83 L Ed 2d 488 (1984).....	32, 35, 36, 37, 38

MICHIGAN CASES

<u>People v Bigelow</u> , 229 Mich App 218; 581 NW2d 744 (1998)	39, 40
<u>People v Dunn</u> , 446 Mich 409; 521 NW2d 255 (1994)	29, 38
<u>People v Fisher</u> , 449 Mich 441; 537 NW2d 577 (1995)	17
<u>People v Granderson</u> , 212 Mich 673; 538 NW2d 471 (1995)	33
<u>People v Harding</u> , 443 Mich 693; 506 NW2d 482 (1993)	39
<u>People v Kowalski</u> , 230 Mich App 464; 584 NW2d 613 (1998)	16, 32
<u>People v Passeno</u> , 195 Mich App 91; 489 NW2d 152 (1992).....	39, 40
<u>People v Pitts</u> , 222 Mich App 260; 564 NW2d 93 (1997)	39

People v Wilder, 411 Mich 328; 308 NW2d 112 (1981).....39, 40

OTHER CASES

Anderson v Smith, 751 F2d 96 (CA2, 1984)25, 27

Jones v State, 461 So2d 686 (Miss, 1984)22, 23, 28

United States v Barone, 968 F2d 1378 (CA1, 1992).....21, 22, 28

United States v Boyer, 914 F2d 144 (CA8, 1990).....22, 23

United States v Lopez-Diaz, 630 F2d 661 (CA9, 1980).....22, 23, 28

United States v Quiroz, 13 F3d 505 (CA2, 1993).....22, 23

United States v Soliz, 129 F3d 499 (CA9, 1997).....21

CONSTITUTIONAL PROVISION

US Const, Amend V..... passim

STATEMENT OF APPELLATE JURISDICTION

The defendant-appellant, McConnell Adams, appeals as of right, MCR 7.203(A); Const 1963, Art 1, §20, from his October 27, 1997, conviction of first degree premeditated murder, first degree felony murder, and kidnapping, entered after a jury trial before the Honorable Rudy J. Nichols of the Oakland County Circuit Court. Mr. Adams was sentenced on November 7, 1997.

Mr. Adams filed a timely request for appointment of counsel on November 14, 1997, and Nichols filed the Claim of Appeal on December 4, 1997.

On December 22, 1998, the trial court appointed the State Appellate Defender Office (SADO) as Mr. Adams' substitute appellate counsel. SADO immediately discovered that prior appellate counsel had failed to order the transcripts of pretrial motion hearings and, on January 6, 1999, SADO ordered those missing transcripts. On January 8, 1999, the trial court ordered that the missing transcripts be produced.

On February 8, 1999, undersigned counsel filed a motion in this Court to order the missing transcripts. On February 26, 1999, this Court denied the motion to order the missing transcripts, but ordered "that the time for filing appellant's brief is extended until April 30, 1999."

On March 8, 1999, the missing transcripts were filed. On March 11, 1999, undersigned counsel filed a motion for rehearing of this Court's denial of Mr. Adams' motion to file the missing transcripts. That motion for rehearing is still pending. If the motion for rehearing is granted, Mr. Adams' Brief on Appeal would be due May 3, 1999. If the motion is denied, Mr. Adams' Brief on Appeal would be due April 30, 1999 (pursuant to this Court's order of February 26, 1999).

Accordingly, this Brief on Appeal is timely filed regardless of whether the motion for rehearing is granted, and Mr. Adams has thereby preserved his right to oral argument.

STATEMENT OF QUESTIONS PRESENTED

- I. **DID THE ADMISSION OF THE VIDEOTAPED STATEMENT VIOLATE THE FIFTH AMENDMENT WHERE MR. ADAMS PARTIALLY INVOKED HIS MIRANDA RIGHTS BY REFUSING TO DISCUSS CERTAIN SUBJECTS WITHOUT AN ATTORNEY AND WHERE THE DETECTIVE, BY CONTINUING TO QUESTION MR. ADAMS ON THOSE SUBJECTS, FAILED TO "SCRUPULOUSLY HONOR" THAT PARTIAL INVOCATION?**

Trial Court answered, "No."

Defendant-Appellant answers, "Yes."

- II. **DID THE ADMISSION OF THE VIDEOTAPED STATEMENT VIOLATE THE FIFTH AMENDMENT WHERE THE DETECTIVE FAILED TO STOP THE INTERROGATION WHEN MR. ADAMS ASKED FOR AN ATTORNEY "RIGHT NOW?"**

Trial Court answered, "No."

Defendant-Appellant answers, "Yes."

- III. **DID THE TRIAL COURT VIOLATE THE DOUBLE JEOPARDY CLAUSE BY: (1) IMPOSING SEPARATE SENTENCES FOR FELONY MURDER AND PREMEDITATED MURDER; AND (2) IMPOSING SEPARATE SENTENCES FOR FELONY MURDER AND AN UNDERLYING FELONY?**

Trial Court answered, "No," as to (1), and made no answer as to (2)

Defendant-Appellant answers, "Yes."

STATEMENT OF FACTS

The defendant-appellant, McConnell Adams, was convicted of first-degree premeditated murder, first-degree felony murder, and kidnapping after a jury trial before the Honorable Rudy J. Nichols of the Oakland County Circuit Court. On November 7, 1997, Judge Nichols sentenced Mr. Adams to two concurrent sentences of life imprisonment without parole and a concurrent sentence of 25 to 60 years. Mr. Adams appeals of right.

Overview of Material Facts

The charges against Mr. Adams and his co-defendant, Anitra Coomer, arose from the well-publicized kidnapping and murder of Dr. Deborah Iverson. Dr. Iverson disappeared on the morning of May 16, 1996, shortly after she left the office of her psychiatrist in Birmingham. The next day, a motorist spotted Dr. Iverson's sport utility vehicle parked in a rural area of Macomb County. Dr. Iverson's body was found inside the vehicle, and an autopsy established that she had been strangled. Further investigation revealed that two of Dr. Iverson's checks totalling \$1300 had been cashed in the drive-through lanes of two banks on the morning of her disappearance.

The police made little progress in the case until late December 1996 when a friend of Anitra Coomer informed the police that Ms. Coomer had admitted her involvement in the murder of Dr. Iverson. After the police arrested Ms. Coomer, she made a series of incriminating statements in which she also implicated Mr. Adams, who lived with her and had fathered her child.

At the time Ms. Coomer made her statements, Mr. Adams was in the Oakland County Jail on unrelated charges. On December 31, 1996, at 3:40 a.m., Detective

William Harvey of the Oakland County Sheriff's Department retrieved Mr. Adams from a holding cell, took him to an interrogation room, and began a videotaped interrogation that lasted some two hours.

During the interrogation, Mr. Adams waived his Miranda rights but repeatedly declined to answer particular questions relating to the Iverson case. At one point, Mr. Adams stated that he would not answer a particular question about the Iverson case without an attorney, but he was willing to answer other questions. A few minutes later, Mr. Adams asked if he could talk to an attorney "right now." Detective Harvey persisted and eventually obtained a detailed statement in which Mr. Adams admitted to participating in the murder of Dr. Iverson.

The trial court held a Walker hearing and rejected Mr. Adams' pre-trial motion to exclude his videotaped statement on the ground Mr. Adams had not unambiguously invoked his Miranda rights. The videotaped statement was therefore admitted into evidence and shown to the jury during the trial.

Mr. Adams and Ms. Coomer were tried jointly before separate juries. Since there was no physical evidence linking Mr. Adams to the crime,¹ the centerpiece of the prosecution's case against Mr. Adams was his videotaped statement. Mr. Adams' defense at trial was that he was not involved in the kidnapping and murder and that he had falsely confessed to Detective Harvey in order to protect Ms. Coomer. Ms. Coomer and Mr. Adams were convicted on all counts.

The Videotaped Statement and the Walker Hearing

¹ By contrast, Ms. Coomer's fingerprints were on Dr. Iverson's checks that had been cashed shortly after her disappearance.

The trial court conducted a Walker Hearing on June 4, 1997, on the admissibility of the videotaped statement. The only witness to testify at the hearing was Detective Harvey. The prosecution admitted into evidence at the hearing a copy of the videotape and a transcript of the interrogation. The transcript of the interrogation is attached to this brief as Appendix A.

At approximately 3:40 a.m. on December 31, 1996, Detective Harvey and another officer retrieved Mr. Adams from a holding cell in the Oakland County Jail and led him into an interview room in the Detective Bureau (T 6/4/97 34-36).² Shortly after Mr. Adams stepped into the interview room, a videotape system was activated and the entire interrogation was recorded (T 6/4/97 37-38).

The Videotaped Statement

Detective Harvey did not advise Mr. Adams of his Miranda rights until approximately 15 minutes into the interview (VS 14). Before that point, Detective Harvey told Mr. Adams that "what we're going to ask you basically is going to change your life[.]" (VS 3). Shortly after this announcement the following exchange occurred:

MA: Do I need a lawyer or something like that or anything like that?

WH: Well, that is something that you will have to decide after you find out what we're talking about, okay?

MA: Okay. (VS 3).

Before delivering the Miranda warnings, Detective Harvey proceeded to tell Mr.

² Transcript references are to the pretrial hearings of June 4 and July 7, 1997, to the ten volumes of the trial transcript (T1 to T10), and to the sentencing transcript (ST). In addition, this Brief on Appeal shall refer to the transcript of Mr. Adams' videotaped statement, which is attached as Appendix A, as "VS."

Adams that the subject of the interrogation was the murder of Dr. Iverson (VS 11), that the police had already taken a statement from Anitra Coomer (VS 4, 5), and that:

I already have all of it, as to how things occurred, where they occurred everything else. What I really need to get from you is the whys and an explanation so that the world knows that McConnell isn't a cold hearted stone killer. You're not an assassin, you're not a serial killer, something happened that went wrong that day, 'cause I know murder wasn't an intention. I know that wasn't [sic] when you left the house. I even know what time you left the house. (VS 14).

Detective Harvey then advised Mr. Adams of his Miranda rights, and Mr. Adams signed a waiver at 4:04 a.m. (VS 14-16). Immediately after the waiver, Mr. Adams asked to speak with Ms. Coomer and to hear her statement (VS 16-17). Detective Harvey responded that Mr. Adams could see Ms. Coomer but that he would not be allowed to speak with her about the case (VS 16). Detective Harvey also showed Ms. Coomer's written statement to Mr. Adams but held it at a distance so that Mr. Adams could not read it (VS 17).

Detective Harvey then described at length how it was important to determine why the murder occurred and he reiterated that he knew from Ms. Coomer's statement that Mr. Adams was the murderer (VS 18-20). Detective Harvey next told Mr. Adams that there was "some physical evidence," but did not mention that the police had no physical evidence linking Mr. Adams to the crime (VS 20-21).

When Detective Harvey asked Mr. Adams if he felt remorse for Dr. Iverson, Mr. Adams responded that he felt sorry for Dr. Iverson and all other murder victims (VS 21-22). Detective Harvey then directly attempted to get Mr. Adams to admit involvement in the crime:

WH: Okay. Did you get any enjoyment from this at all?
Any sexual gratification from this?

MA: No.

WH: Okay. **Was the motive for this pay your bills, take care of your baby? Take care of Anitra . . .**

MA: **I'm not going to answer that question.**

WH: **Okay, you don't have to, but that's an important why.**

MA: **That's an important why, but I'm not going to answer that question, 'till I have a lawyer present.**

WH: Okay . . .

MA: **But I'll answer--you can keep asking me questions and I'll answer the ones I feel I can answer for you.**

WH: Okay. Let me ask you another question. **Was the intention that day to commit murder or was it just to do a robbery, even though you weren't armed, it was a--it could be construed to be an armed robbery. I'll put it this way. Was the intention to murder or just get money. We'll avoid the robbery altogether.**

MA: **I can't answer that one either.**

WH: Well . . .

MA: **I mean, I really can't . . .**

WH: **McConnell, how am I going to get anything as to whys, if you're not going to answer any questions. (VS 22; emphasis added).'**

Mr. Adams responded to this remark by describing his love for Anitra Coomer, but refused to admit having any knowledge of the murder beyond what he had learned from watching television (VS 22-24).

Detective Harvey then told Mr. Adams that it was useless for him to refuse to

talk:

WH: I-I can understand your hesitancy to talk with us.

MA: Okay.

WH: Okay? For lack of a better word, the gig is up . . .

MA: Um-hmm.

WH: It's done. It's done. All right.

MA: Okay.

WH: Uhm, the interview tonight . . .

MA: Um-hmm.

WH: Was to explain. Okay? You're avoiding it. And I can understand your fear. (VS 25).

Mr. Adams explained that he was trying to protect the person he loved, but Detective Harvey responded that Ms. Coomer's situation was a "done deal." (VS 25).

Detective Harvey then delivered a lengthy speech about the importance of Mr. Adams informing the world that he was not a cold-blooded killer (VS 25-26). Detective Harvey then returned to the question of motive that Mr. Adams had earlier refused to answer:

WH: . . . Now is the time to let the world know that you're not a cold killer, that you have remorse for what happened and to give me the reason why this occurred. That this didn't start out as a murder, okay? That you didn't sit down and discuss killing somebody. The discussion was something else. The discussion was you needed money. I know that. Okay?

MA: Uh-hmm.

WH: But it's gotta come from you. Not from me. I wasn't there. I was there later on (VS 26-27).

After a discussion about whether Mr. Adams' phone had been tapped, Detective Harvey asked Mr. Adams if he had information on the murder of Dr. Iverson, and Mr. Adams responded, "Yes." (VS 29). Detective Harvey then told Mr. Adams "Any avoidance on your part, I don't think looks good, do you?" (VS 29). The following exchange then occurred:

WH: Okay? Your concern should be that anybody down the line has a total understanding of what occurred that day.

MA: Well, from what I know, personally, that it was supposed to be a robbery. I'll give you that.

WH: Okay. **Who did the robbery?**

MA: **Who did the robbery? I'll have to withhold that.**

WH: **For what reasons?**

MA: For what reasons? Personal reasons. Uh, like I said, I'm not trying--I'm not trying to string anybody up. I know in a court of law, a spouse doesn't have to testify against another spouse. (VS 30; emphasis added).

Mr. Adams again reiterated that he was only "a person who knew information about this [the Iverson murder]." (VS 31), and that he was worried he could be seen as an accessory after the fact (VS 31). The following exchange then occurred:

MA: **So when would I be able to talk to a lawyer if I wanted to talk to a lawyer?**

WH: We can stop the interview right now.

MA: **Can I talk to him right now?**

WH: Sure. We'll stop the interview. Once you say you want to talk to a lawyer, by law, I stop the interview.

Okay? And will not continue. All right.

MA: Can you give me about five minutes just to sit here and think?

WH: Certainly can. We'll pull everything out. Can we sit in here with you? You want uh . . .

MA: That's your decision, it doesn't matter if you're in here or not.

WH: **Okay. Just consider one thing.**

MA: What's that?

WH: **That once you say you want a lawyer, our interview is done. And quite possibly the chances for an explanation as to what went wrong that day goes out the tubes. Possibly. Very probably. Okay? As I told you before, this is your one shot.**

MA: What is this my one shot to?

WH: **This is your one shot to help yourself. After this, and if you want a lawyer, that's full within your rights, and I'm not going to impede that, slow that down, stop that or sway you one way or another . . .**

MA: Well what I know--what went wrong that day--from what I know, okay? What I know. (VS 32; emphasis added).

Mr. Adams then asked whether "one person could take the fall for another person," and stated that "I'd rather my son at least have one parent." (VS 33). Detective Harvey responded by telling Mr. Adams that he would not have to answer questions about Ms. Coomer if he preferred not to (VS 33-34). Detective Harvey then asked Mr. Adams if he was still willing to answer questions in light of his earlier remark about a lawyer (VS 34-35). Mr. Adams agreed to answer "some of your questions right now"

but said he still wanted a lawyer later (VS 35).

Mr. Adams next stated that from "what I know," the incident started out as a robbery and that the doctor was killed because she knew too much (VS 35). After Detective Harvey expressed frustration that Mr. Adams had still not admitted any role in the incident, Mr. Adams agreed to answer specific questions (VS 35-37). Mr. Adams then answered Detective Harvey's next question with an incriminating response:

WH: Okay. Were you part of the robbery plan of Doctor Iverson?

MA: Yes I was (VS 37).

Mr. Adams proceeded to give a detailed statement in which he admitted forcing Dr. Iverson into the back seat of her Toyota Land Cruiser after she opened the door of her vehicle in a Birmingham parking lot and having her write checks which were cashed in drive-through lanes of banks (VS 37-50). Mr. Adams explained that he committed the robbery to take care of bills, including day care expenses, and to pay the rent (VS 50-52). Mr. Adams further stated that he, and not the person who was driving the vehicle, made the decision to strangle Dr. Iverson with an unidentified piece of clothing (VS 54-57). After the strangulation was complete, the driver went into a store to buy cleaning products to clean up the vehicle and, particularly, to remove some blood that had come from Mr. Adams' hand (VS 56-58). After cleaning the car and ripping out a blood-stained patch of Dr. Iverson's jacket (VS 58-60), Mr. Adams stated that he and the other person dropped Dr. Iverson's vehicle off, with her body inside, along a dirt road (VS 64-67). Mr. Adams next stated that he returned to the parking lot in Birmingham and found a parking ticket on his vehicle there (VS 71).

The Trial Court's Ruling

On July 7, 1997, the trial court held Mr. Adams' videotaped statement admissible in its entirety (T 7/7/97 7-13). The trial court first found that there was no evidence of abuse, threats, or coercion and that Mr. Adams had waived his Miranda rights voluntarily (T 7/7/97 10-11).

On the question of whether Mr. Adams had invoked his right to silence and/or to an attorney at any point during the interrogation, the trial court stated that "there must be an unequivocal invocation of the right to remain silent," and "Defendant did not unequivocally assert a right to counsel and/or remain silent." (T 7/7/97 11-12). The court continued:

To the contrary, he freely and voluntarily continued his statements after asking about an attorney. Moreover, his refusal to answer certain questions appear not so much as a desire to remain silent as it was to selectively provide information yet conceal the method of death employed and/or the identity of other persons. Though "Defendant refused--" and I'm quoting, ". . . refused to answer that one" or stated, "I withhold that", he nevertheless continued discussing other facts of the incident while resolutely asserting he would not answer some of the questions, which refusals were honored by detectives, at no time did Defendant Adams ever make a clear, unequivocal request for either counsel or the right to remain silent. Instead, he indicated he knew he had those rights yet made a conscious choice to proceed and answer other questions. Under these circumstances, this Court rules that McConnell Adams' refusal to answer certain questions was not sufficient to have required detectives to halt the interview. In other words, Defendant's statements were freely and voluntarily rendered. (T 7/7/97 12).

The trial court summed up its holding: "Adams' questions about an attorney and his refusal to answer only certain questions was not a clear indication of those rights [the

right to counsel and to silence] as defined under those cases cited above." (T 7/7/97 at 13).³

The Trial

The trial of Mr. Adams and Ms. Coomer lasted ten days, though much of the testimony was presented only to Ms. Coomer's jury. The prosecution presented 19 witnesses before Mr. Adams' jury. Mr. Adams' theory, as articulated in his opening statement, was that Mr. Adams falsely took the blame for a murder committed by Ms. Coomer (T4 31).

Evelyn Watson, Dr. Iverson's babysitter, realized that Dr. Iverson was missing when she failed to return home around 10 a.m. on May 16, 1996 (T4 183-184). After Dr. Iverson's husband returned home, the police were called (T4 185-186).

Dr. Lionel Finkelstein, Dr. Iverson's psychiatrist, confirmed that Dr. Iverson left his Birmingham office in Birmingham around 9:45 a.m. (T5 41). At 11:09 a.m., a Birmingham parking enforcement officer issued a parking ticket to Anitra Coomer's car, which was parked in the lot near Dr. Finkelstein's office (T5 160-162, 171).

After hearing a radio report about Dr. Iverson's disappearance, Ernest Sampson spotted her Toyota Land Cruiser on the side of the road in a remote area of Macomb County on the morning of May 17, 1996 (T5 59-61). Mr. Sampson peered into the

³ Mr. Adams filed an interlocutory application for leave to appeal in this Court from the trial court's order denying the motion to suppress the statement. On October 9, 1997, this Court denied the application for leave to appeal "for failure to persuade the Court of the need for immediate appellate review." People v Adams, No. 205054 (10/9/1997). Thus, this Court did not rule on the merits of Mr. Adams' appeal.

vehicle and saw Dr. Iverson's body (T5 62). Deputy Vincent Powierski later arrived at the scene, where he found Dr. Iverson's body on the floor of the vehicle's back seat (T4 153-155). Two evidence technicians found several torn and wadded pieces of paper towel in the vehicle (T4 191-192, 203, T5 82). One of the officers also noticed tire tracks and footprints outside the car, but no comparisons were made with suspect vehicles or shoes (T4 190, T5 25-27).

Forensic pathologist Dr. Ljubisa Dragovic established that Dr. Iverson's injuries were consistent with strangulation by a smooth ligature and that she was wearing a jacket from which a strip had been ripped out (T4 74, 78-83, 85-86, 88). Contrary to Mr. Adams' statement, Dr. Dragovic opined that Dr. Iverson had been strangled with an open ligature, a ligature that was not tied before the strangulation was complete (T4 84, 93, 115-117).

The parties stipulated that blood found on Dr. Iverson's jacket did not match blood taken from either Mr. Adams or Ms. Coomer, but may have come from Dr. Iverson (T8 15-16). The parties also stipulated that hair found inside Dr. Iverson's vehicle was not consistent with either Mr. Adams or Ms. Coomer, but was consistent with Dr. Iverson (T8 17-18).

Dr. Robert Iverson identified two of his wife's checks, for \$1000 and \$300, that were cashed on May 16, 1996, both of which bore her signature on the front, but he opined that the signature on the back of the \$1000 check was not hers (T4 142-145). The drive-through teller at the MNB branch in Southfield where the \$1000 check was cashed at 10:08 a.m. testified that when the check came through the tube, she sent it back out because the back had not been signed (T5 47-49, 141). That teller later told the police that the driver of the car was a white woman with blond hair (T5 52-53). The drive-through teller at an MNB branch in Rochester Hills identified the \$300 check that she

cashed at 11:04 a.m. (T5 138-140, 141).

Anitra Coomer's fingerprints were later found on both of Dr. Iverson's checks that were cashed that morning (T5 115-117). The parties stipulated that the signature of Dr. Iverson on the back of the \$1000 check matched Anitra Coomer's handwriting (T8 16-17). Mr. Adams' fingerprints were not found on either check (T5 119-120).

Store records from an Arbor Drugs in Rochester Hills established that someone purchased paper towels and a spray cleaner with bleach at 11:43 a.m. on May 16, 1996 (T5 125-131, 151-153). The parties stipulated that the pieces of paper towel found in Dr. Iverson's vehicle had the same pattern as the brand of paper towel purchased from Arbor Drugs that day (T8 18-19) Some eight months after the murder, a police search of the apartment that Ms. Coomer and Mr. Adams shared in Clawson turned up a bottle of the same brand of spray cleaner with bleach that had been purchased at Arbor Drugs (T5 175-177). An earlier search of that apartment had also turned up a woman's leather coat with belt loops but no belt (T5 153-156, 175-176).

A records custodian from the company that owned the apartment building where Ms. Coomer and Mr. Adams lived testified that \$615 in overdue rent was paid in full on May 18, 1996 (T5 144-147). The company had earlier sent the couple an eviction notice (T5 147-148).

Sherry Smith, a day care provider, testified that Ms. Coomer and Mr. Adams dropped off their son at her home in Madison Heights around 9:30 a.m. on May 16, 1996 (T5 188-189). The next day, Mr. Adams paid their overdue day care bill in cash (T5 196-199). Ms. Smith claimed that she noticed Mr. Adams' left hand was bandaged and, when she asked about the injury, Mr. Adams said that he had been assaulted by a doctor (T5 199-202). Ms. Smith agreed that she had not told the police about the bandage or the alleged remark, explaining that she had just remembered the incident a

week before the trial began (T5 202-207, 210).

The final witness against Mr. Adams was Detective Harvey, who explained the circumstances leading up to the videotaped interrogation in the early morning hours of December 31, 1996 (T7 7-14). Detective Harvey testified that Mr. Adams' statement revealed certain facts concerning the Iverson murder that had not been released to the public (T7 22-35, 40-41). However, Mr. Adams did not have answers to many other facts, such as what happened to Dr. Iverson's purse, keys, and credit cards, or what implement had been used to strangle Dr. Iverson (T7 71-76). Detective Harvey also confirmed that Mr. Adams repeatedly expressed concern for Ms. Coomer's fate, that he stated that he would do anything to protect her, that he tried to avoid implicating her, and that he asked whether he could take the fall for her (T7 83-89, 90). After Detective Harvey's testimony, the videotaped interrogation was played for the jury (T7 94).

In closing arguments, the prosecution conceded that the videotaped statement was the best evidence against Mr. Adams (T8 124, 131). The prosecutor repeatedly displayed and quoted the statement during his arguments (T8 125-127, 132, 133-135, 136, 137, 179-181, 182-183).

The defense stressed in its closing argument that, unlike Ms. Coomer, there was no physical evidence linking Mr. Adams to the crime and that there was no probative, inculpatory evidence of any kind other than the videotaped statement (T8 133, 156). As for that statement, the defense argued that Mr. Adams falsely confessed to Detective Harvey to protect Ms. Coomer, that he supplied details of the crime that he had learned from Ms. Coomer, and that he was unable to answer other questions, such as the disposition of the keys and credit cards and the nature of the ligature, because he was not present when the crime was committed (T8 165-169, 171-172). Defense counsel pointed out that certain details that Mr. Adams supplied in the statement, such as the

claim that he had left the ligature on the body, were incorrect (T8 170).

The jury convicted Mr. Adams of first-degree premeditated murder, first-degree felony murder, and kidnapping (T10 7). Ms. Coomer was convicted of the same offenses (T10 11).

On November 7, 1997, the trial court sentenced Mr. Adams to two concurrent terms of life imprisonment without parole and to a concurrent term of 25-60 years on the kidnapping count (ST 42). Mr. Adams had moved to vacate one of the first-degree murder counts on double jeopardy grounds, but the trial court declined to do so (ST 29, 40).

Mr. Adams now appeals of right.

I. **THE ADMISSION OF THE VIDEOTAPED STATEMENT VIOLATED THE FIFTH AMENDMENT BECAUSE MR. ADAMS PARTIALLY INVOKED HIS MIRANDA RIGHTS BY REFUSING TO DISCUSS CERTAIN SUBJECTS WITHOUT AN ATTORNEY AND BECAUSE THE DETECTIVE, BY CONTINUING TO QUESTION MR. ADAMS ON THOSE SUBJECTS, FAILED TO "SCRUPULOUSLY HONOR" THAT PARTIAL INVOCATION.**

Summary of Argument, Standard of Review, and Issue Preservation

The case against Mr. Adams turned on the videotaped statement that Detective William Harvey obtained from Mr. Adams in the early morning hours of December 31, 1996. The complete transcript of that videotaped statement is attached as Appendix A to this Brief.⁴

During the first half of the interrogation, before he had made any incriminating statements, Mr. Adams steadfastly declined to answer any questions about "why" he may have been involved in the Iverson case. At one point Mr. Adams stated, "**I'm not going to answer that question 'till I have a lawyer present,**" but he agreed to answer other questions (VS 22). Nonetheless, Detective Harvey repeatedly asked Mr. Adams questions about his motives (VS 22, VS 26-27), at one point complaining when Mr. Adams refused to answer another such question, "**McConnell, how am I get anything as to whys, if you're not going to answer any questions.**" (VS 22; emphasis added). Detective Harvey persisted in asking questions about Mr. Adams' motives until Mr.

⁴ The transcript was admitted as People's Exhibit 3 at the Walker hearing of June 4, 1997. In addition, Mr. Adams has submitted to this Court a copy of the videotape (which was admitted as People's Exhibit 2). Mr. Adams respectfully requests that this Court watch the videotape of the interrogation, as the trial court did.

Adams finally made an incriminating statement.

Mr. Adams also directly refused to answer a question as to who was involved in the robbery of Dr. Iverson (VS 30). Despite this refusal to answer the question, Detective Harvey persisted and directly asked Mr. Adams again if he had been involved in the robbery, to which Mr. Adams finally answered, "Yes, I was" (VS 37). This affirmative answer was the first incriminating statement that Mr. Adams made during the interrogation.

The United States Supreme Court recognized in Connecticut v Barrett, 479 US 523; 107 S Ct 828; 93 L Ed 2d 920 (1987); and Michigan v Mosley, 423 US 96, 103-104; 96 S Ct 321; 46 L Ed 2d 313 (1975), that a defendant has the right to selectively invoke his Miranda⁵ rights so as to place certain subjects off limits, and that the police must "scrupulously honor" such a selective invocation. Mr. Adams unambiguously placed certain subjects off limits by flatly refusing to answer any questions about his motives or whether he was involved in the robbery of Dr. Iverson. Detective Harvey did not honor those refusals, but instead continually returned to those lines of inquiry until Mr. Adams finally broke down and confessed.

The trial court erred by requiring Mr. Adams to have made an "all or nothing" invocation of his Miranda rights, rather than recognizing that Mr. Adams' limited invocations effectively put certain subjects off limits. It is clear that Detective Harvey did not "scrupulously honor" Mr. Adams' selective invocation of his Miranda rights and that, therefore, the resulting confession should have been suppressed.

This Court reviews de novo the trial court's decision on a motion to suppress an incriminating statement, but any factual findings are reviewed for clear error. People v

⁵ Miranda v Arizona, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Kowalski, 230 Mich App 464, 472; 584 NW2d 613 (1998); see also Miller v Fenton, 474 US 104, 112; 106 S Ct 445; 88 L Ed 2d 405 (1985) (reaffirming earlier holding that "ultimate constitutional question of the admissibility of a confession was a mixed question of fact and law subject to plenary federal review" (internal citation, quotation marks, and bracket omitted)). Since the relevant factual record in this case is completely undisputed and is preserved on a videotape, this Court's review of the trial court's decision is de novo. This issue has been fully preserved for appellate review by Mr. Adams' pre-trial motion to suppress his videotaped statement.⁶

A. **THE U.S. SUPREME COURT HAS RECOGNIZED THAT A DEFENDANT MAY PARTIALLY INVOKE HIS MIRANDA RIGHTS SO AS TO PUT CERTAIN SUBJECTS OFF LIMITS.**

The trial court, in its decision denying Mr. Adams' motion to suppress, correctly recognized that Mr. Adams had "resolutely" refused to answer certain questions that Detective Harvey put to him (T 7/7/97 12-13). The trial court held, however, that because Mr. Adams "made a conscious choice to proceed and answer other questions" (T 7/7/97 12), the interrogation was entirely proper. As the trial court summed up its holding:

⁶ Mr. Adams filed an interlocutory application for leave to appeal from the trial court's denial of his motion to suppress, and this Court denied the application on October 9, 1997, "for failure to persuade the Court of the need for immediate review." People v Adams, No. 205054 (10/9/1997). Since this Court did not reach the merits of Mr. Adams' suppression argument, there is no "law of the case" on this issue. See People v Fisher, 449 Mich 441; 537 NW2d 577 (1995) (requiring explicit decision on the merits of issue to invoke law of the case doctrine)

Under these circumstances, **this Court rules that McConnell Adams' refusal to answer certain questions was not sufficient to have required detectives to halt the interview.** In other words, Defendant's statements were freely and voluntarily rendered. (T 7/7/97 12; emphasis added).

The trial court's holding was predicated on the erroneous view that an invocation of the right to silence or counsel must be "all or nothing." The trial court believed that the only question is whether Mr. Adams invoked his right to silence or counsel so as to require Detective Harvey "to halt the interview." (T 7/7/97 12). Since Mr. Adams agreed to answer some questions even as he refused to answer others, the trial court reasoned that the continued interrogation was proper.

The trial court's error was in failing to realize that while Mr. Adams agreed to answer other questions, **he had clearly exercised his Miranda right to cut off all further questioning about his motives and whether he was involved in the robbery of Dr. Iverson.** In other words, Mr. Adams, by "resolutely" refusing to answer certain questions, had **selectively invoked** his Miranda rights to silence and to counsel. Detective Harvey may have been free to accept Mr. Adams' invitation to continue the interview on other topics, but he violated Miranda by repeatedly asking Mr. Adams questions on the very same topics on which Mr. Adams had invoked his right to silence and/or to counsel.

The United States Supreme Court in Michigan v Mosley, 423 US 96; 96 S Ct 321; 46 L Ed 2d 313 (1975), recognized that a suspect may selectively invoke his or her Miranda rights so as to put certain subjects off limits for the remainder of the interrogation. In Mosley, the defendant was interrogated about two restaurant robberies. "When Mosley said he did not want to answer any questions **about the robberies**, Cowie promptly ceased the interrogation." Id., 423 US at 97 (emphasis

added). A few hours later, Mosley was interrogated by a different officer about an unrelated homicide and made an incriminating statement. Id. at 98.

The Court upheld the admissibility of Mosley's statement about the homicide because the police had "scrupulously honored" Mosley's earlier refusal to discuss the robberies:

A reasonable and faithful interpretation of the Miranda opinion must rest on the intention of the Court in that case to adopt "fully effective means to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored." The critical safeguard identified in the passage at issue is a person's "right to cut off questioning." Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, **the subjects discussed**, and the duration of the interrogation. . . .

A review of the circumstances leading to Mosley's confession reveals that his "right to cut off questioning" was fully respected in this case. . . **The subsequent questioning did not undercut Mosley's previous decision not to answer Detective Cowie's inquiries. Detective Hill did not resume the interrogation about the White Tower Restaurant robbery or inquire about the Blue Goose Bar robbery**, but instead focused exclusively on the Leroy Williams homicide, a crime different in nature and in time and place of occurrence from the robberies for which Mosley had been arrested and interrogated by Detective Cowie. . . **[Detective Hill's] questioning of Mosley about an unrelated homicide was quite consistent with a reasonable interpretation of Mosley's earlier refusal to answer any questions about the robberies.** Mosley at 103-105 (emphasis added; internal citations, ellipses, and footnotes omitted; quoting Miranda, 384 US at 474, 479).

Thus, the Court upheld the admissibility of Mosley's confession because the police "scrupulously honored" Mosley's refusal to discuss his involvement in the robberies.

The Supreme Court reaffirmed the principle of selective Miranda invocation in Connecticut v Barrett, 479 US 523; 107 S Ct 828; 93 L Ed 2d 920 (1987). After receiving his Miranda warnings, the defendant in Barrett told his interrogators that "he would not give a written statement unless his attorney was present but had 'no problem' talking about the incident." 479 US at 525. The defendant then made an incriminating oral statement. Id.

In upholding the admissibility of Barrett's oral statement, the Supreme Court repeatedly recognized that Barrett's insistence that counsel be present for a written statement amounted to a "limited invocation of his right to counsel," id. at 528, 530, but concluded that the police had respected that limited invocation by not attempting to obtain a written statement without counsel present. As the Court explained:

It is undisputed that Barrett desired the presence of counsel before making a written statement. **Had the police obtained such a statement without meeting the waiver standard of Edwards [v Arizona, 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981)], it would clearly be inadmissible.** Barrett's limited requests for counsel, however, were accompanied by affirmative announcements of his willingness to speak with the authorities. The fact that officials took the opportunity to obtain an oral confession is quite consistent with the Fifth Amendment. Barrett at 529 (emphasis added; footnote omitted).

As the Court summed up its conclusion, "Barrett made clear his intentions, **and they were honored by the police.**" Id. (emphasis added).

As discussed below in Part B of this issue, Mr. Adams, like the defendant in Barrett, clearly and repeatedly made a limited invocation of his Miranda rights to counsel and silence. Mr. Adams consistently agreed to answer some questions, but refused to discuss his motives or whether he had participated in the robbery of Dr.

Iverson (VS 22, 30). In response to one such question about his motives, Mr. Adams replied, **"I'm not going to answer that question 'till I have a lawyer present"** (VS 22; emphasis added), but he agreed to answer other questions.

Thus, as in Barrett and Mosley, Mr. Adams effectively invoked his right to counsel and his right to silence with regards to questions about his motives and whether he was involved in the robbery of Dr. Iverson. As discussed below in Part B of this argument, unlike the police in Barrett and Mosley, Detective Harvey not only failed to "scrupulously honor" Mr. Adams' refusal to answer such questions about the Iverson case, but actually kept hammering at the exact same points until Mr. Adams finally broke down and confessed (VS 22-37). Thus, unlike Barrett and Mosley, the police here did not "scrupulously honor" Mr. Adams' limited invocation of his Miranda rights.

This interpretation of Barrett and Mosley has been confirmed by numerous federal circuit courts. For example, in United States v Barone, 968 F2d 1378 (CA1, 1992), the defendant, who was suspected of murdering one Limoli, announced during the interrogation that "he did not want to discuss the Limoli matter until he got back to Boston." Id. at 1380. Nonetheless, the police persisted and eventually obtained a statement about the Limoli murder before the defendant was returned to Boston. Id. at 1380-1382. The First Circuit upheld the trial court's conclusion that "the officers failed to respect his right to cut off questioning about Limoli. Under Mosley, this should have ended the court's inquiry." Id. at 1384.

In United States v Soliz, 129 F3d 499, 503 (CA9, 1997), the Ninth Circuit recognized that Mosley stands for the proposition that a defendant "may selectively waive his Miranda rights by agreeing to answer some questions but not others." In Soliz, the suspect announced that he was willing to talk about his citizenship, but not

about other topics. Id. at 504. When the officer ignored that limitation and continued to question Soliz about other topics, the resulting confession became inadmissible:

After Soliz invoked his right to remain silent on all subjects, except his citizenship, the agent violated his right by proceeding to question him about other activities. **Once a person has indicated that he does not wish to talk about a particular subject, all questioning must cease.** A statement obtained after the invocation of the right to remain silent is admissible only where the individual's "right to cut off questioning" has been "scrupulously honored." Here, the Agent did not "scrupulously honor" Soliz's right to cut off questioning. **Rather, he ignored Soliz's restriction on the subject matter of questioning and proceeded to question him about matters other than his citizenship in direct contravention to that limitation.** Because Soliz's statements regarding his activities at 3142 National Avenue were obtained in violation of his Miranda rights, the district court erred in not suppressing them. Soliz, 129 F3d at 504 (emphasis added; internal citation and footnote omitted; quoting Mosley, 423 US at 104-107).

See United States v Quiroz, 13 F3d 505, 510-511 (CA2, 1993) (citing Barrett for the proposition that "if the suspect asserts his desire to deal with the authorities through counsel only in part, he may permissibly be questioned in a manner that does not intrude on that partial request for counsel"); United States v Boyer, 914 F2d 144, 146 (CA8, 1990) (Barrett "held that a limited invocation of the right to counsel does not preclude the admissibility of statements a defendant makes which fall outside the limited invocation"); United States v Lopez-Diaz, 630 F2d 661, 664 (CA9, 1980) (after defendant "said that he did not want to talk about the drugs in the van, but that he would be willing to provide other information," police interrogator violated Miranda and Mosley when, after discussing other subjects, he asked defendant about the drugs in the van); see also Jones v State, 461 So2d 686, 700-701 (Miss, 1984) (murder suspect's

answer, "I prefer not to speak on that," was an invocation of Mosley right "not to speak on the particular subject matter then under discussion," and officers violated that limited invocation by seeking to change suspect's mind).

The rules that the lower courts have applied from Barrett and Mosley are simple. If a suspect refuses to answer questions about a certain topic, the suspect has invoked his Miranda right to silence on that topic, and the police may not continue to question the suspect on that topic or attempt to get the suspect to change his mind. Mosley at 103-105; Barone at 1384; Soliz at 504; Lopez-Diaz at 664; Jones at 700-701. Similarly, if the defendant declines to answer questions about a certain topic without a lawyer present, the suspect has invoked his Miranda right to counsel on that topic, and the police may not continue to question the suspect on that topic or attempt to get the suspect to change his mind. Barrett at 529; Quiroz at 510-511; Boyer at 146.

As discussed below, Mr. Adams clearly made limited invocations of his right to counsel and his right to silence in response to Detective Harvey's questions concerning the Iverson case. Detective Harvey did not "scrupulously honor" those limited invocations, but instead convinced Mr. Adams to change his mind and repeatedly asked the same questions that Mr. Adams had refused to answer.

B. SINCE DETECTIVE HARVEY DID NOT "SCRUPULOUSLY HONOR" MR. ADAMS' LIMITED INVOCATIONS OF HIS MIRANDA RIGHTS, THE RESULTING STATEMENT SHOULD HAVE BEEN SUPPRESSED.

Shortly after Mr. Adams signed a Miranda waiver during the custodial interrogation, Detective Harvey made his first attempt to get Mr. Adams to admit involvement in the Iverson case. In response, Mr. Adams unambiguously invoked both

his right not to answer questions on that subject, and to have an attorney present before answering any questions on that subject:

WH: Okay. Did you get any enjoyment from this at all?
Any sexual gratification from this?

MA: No.

WH: Okay. **Was the motive for this pay your bills, take care of your baby? Take care of Anitra . . .**

MA: **I'm not going to answer that question.**

WH: Okay, you don't have to, but that's an important why.

MA: **That's an important why, but I'm not going to answer that question, 'till I have a lawyer present.**

WH: Okay . . .

MA: **But I'll answer--you can keep asking me questions and I'll answer the ones I feel I can answer for you.**
(VS 22; emphasis added).

Thus, Mr. Adams directly refused to answer any questions about his motivations in the Iverson case, and he directly stated that he would not answer such questions until "I have a lawyer present."

There is no possible argument that the prosecution can make that Detective Harvey "scrupulously honored" that limited invocation, Mosley at 103, because the very next words out of Detective Harvey's mouth were:

WH: Okay. Let me ask you another question. **Was the intention that day to commit murder or was it just to do a robbery**, even though you weren't armed, it was a--it could be construed to be an armed robbery. I'll put it this way. **Was the intention to murder or just**

get money. We'll avoid the robbery altogether.

MA: **I can't answer that one either.**

WH: Well . . .

MA: **I mean, I really can't . . .**

WH: **McConnell, how am I going to get anything as to whys, if you're not going to answer any questions.** (VS 22; emphasis added).

Thus, immediately after Mr. Adams refused to answer any questions about motives in the Iverson case, Detective Harvey asked Mr. Adams questions about his motives in the Iverson case and then badgered Mr. Adams when he still refused to answer those questions. It could not be more clear that Detective Harvey violated Mr. Adams' limited invocation of his Miranda rights by continuing to ask questions on precisely the subject for which Mr. Adams had invoked his rights.

There is no question that Detective Harvey understood that Mr. Adams had invoked his right to not discuss his motivations in the Iverson case. When Detective Harvey asked, "McConnell, **how am I going to get anything as to whys, if you're not going to answer any questions,**" (VS 22; emphasis added), he made it completely clear that he understood that Mr. Adams had declined to answer "**any** questions" about his motives. See Anderson v Smith, 751 F2d 96, 103, (CA2, 1984) ("in asking why Anderson refused to talk, the lieutenant implicitly acknowledged that Anderson's decision was clear").

When Mr. Adams continued to deny any involvement in the Iverson case (VS 22-24), Detective Harvey once again tried to talk Mr. Adams out of his refusal to talk about the Iverson case:

WH: I--**I can understand your hesitancy to talk with us.**

MA: Okay.

WH: Okay? For lack of a better word, the gig is up . . .

MA: Um-hmm.

WH: It's done. It's done. All right.

MA: Okay.

WH: Uhm, the interview tonight . . .

MA: Um-hmm.

WH: Was to explain. Okay? **You're avoiding it. And I can understand your fear.** (VS 25; emphasis added).

Once again, Detective Harvey patently understood that Mr. Adams was refusing to talk about the Iverson case, and Detective Harvey was working hard to overcome that refusal.

Even though Mr. Adams had specifically refused to answer any questions about his possible motivation in the Iverson case until he had a lawyer present, Detective Harvey continued to hammer Mr. Adams on the need to give a motive:

WH: . . . Now is the time to let the world know that you're not a cold killer, that you have remorse for what happened **and to give me the reason why this occurred. That this didn't start out as a murder, okay? That you didn't sit down and discuss killing somebody. The discussion was something else. The discussion was you needed money.** I know that. Okay?

MA: Uh-hmm.

WH: **But it's gotta come from you.** Not from me. I wasn't

there. I was there later on (VS 26-27).

Finally, Mr. Adams admitted for the first time that he had information on the murder of Dr. Iverson (VS 29), and Detective Harvey once again worked to convince Mr. Adams to change his mind on his refusal to discuss the matter: "**Any avoidance on your part, I don't think looks good, do you?**" (VS 29; emphasis added). The following exchange then occurred:

WH: Okay? Your concern should be that anybody down the line has a total understanding of what occurred that day.

MA: Well, from what I know, personally, that it was supposed to be a robbery. I'll give you that.

WH: Okay. **Who did the robbery?**

MA: **Who did the robbery? I'll have to withhold that.**

WH: **For what reasons?**

MA: For what reasons? Personal reasons. Uh, like I said, I'm not trying--I'm not trying to string anybody up. I know in a court of law, a spouse doesn't have to testify against another spouse. (VS 30; emphasis added).

Thus, Mr. Adams clearly and unequivocally refused to answer questions about who had participated in the robbery of Dr. Iverson. **Detective Harvey clearly recognized that refusal by asking for a reason, and he immediately tried to get Mr. Adams to change his mind.** See Anderson, at 751 F2d at 103 ("in asking why Anderson refused to talk, the lieutenant implicitly acknowledged that Anderson's decision was clear"). Once again, no one reading this record could seriously claim that Detective Harvey "scrupulously honored" Mr. Adams' limited invocations of his Miranda rights.

Mosley at 103.

Indeed, the very first incriminating answer that Mr. Adams eventually gave was in response to the same question that he had earlier refused to answer:

WH: **Okay. Were you part of the robbery plan of Doctor Iverson?**

MA: Yes I was. (VS 37; emphasis added).

Thus, just a few minutes after Mr. Adams had directly refused to answer Detective Harvey's question, "**Who did the robbery?**" (VS 30), Detective Harvey asked Mr. Adams, "**Were you part of the robbery plan of Doctor Iverson?**" (VS 37), and finally drew an incriminating response.

As the trial court correctly recognized, Mr. Adams "resolutely" refused to answer certain questions, while agreeing to answer other questions (T 7/7/97 12). Therefore, as the trial court held, Detective Harvey could continue the interrogation. What the trial court failed to recognize, however, was that Mr. Adams' resolute refusal to answer certain questions was a limited invocation of his Miranda rights under Mosley and Barrett. As such, Detective Harvey was required to "scrupulously honor" that limited invocation, and he was absolutely barred from continuing to inquire about the subjects that Mr. Adams had placed off limits or from attempting to change Mr. Adams' mind.

Since Detective Harvey did not "scrupulously honor" Mr. Adams' limited invocations of his Miranda rights, the resulting confession must be suppressed. Barrett, 479 US at 529; Soliz, 129 F3d at 104; Barone, 968 F2d at 1384; Lopez-Diaz, 630 F2d at 664; Jones, 461 So2d at 700-710.

C. **THE ERRONEOUS ADMISSION OF THE
VIDEOTAPED STATEMENT WAS NOT**

HARMLESS BEYOND A REASONABLE DOUBT.

The error in admitting Mr. Adams' videotaped statement in violation of his Fifth Amendment Self Incrimination Clause rights was certainly not harmless beyond a reasonable doubt. See Chapman v California, 386 US 18, 24; 87 S Ct 824; 17 L Ed 2d 705 (1967) (constitutional errors reviewed to determine whether error was harmless beyond a reasonable doubt). Indeed, the prosecution had almost no evidence against Mr. Adams other than the statement.

Both the United States Supreme Court and the Michigan Supreme Court have recently noted that only in exceptional cases can the erroneous admission of a confession be considered harmless error. In Arizona v Fulminante, 499 US 279, 296; 111 S Ct 1246; 113 L Ed 2d 302 (1991), the Court stated that, "A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him." The Court went on to state: "Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so." Id. (internal citation omitted). The Court next noted that while all confessions are damaging, a full confession is even worse: "While some statements by a defendant may concern isolated aspects of the crime or may be incriminating only when linked to other evidence, a full confession in which the defendant discloses a motive for and means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision." Id.; see also People v Dunn, 446 Mich 409, 422-424; 521 NW2d 255 (1994) (quoting Fulminante and noting that "a full-confessional statement ordinarily is not harmless").

Here, there was no physical evidence of any kind linking Mr. Adams to the Iverson case. Unlike Ms. Coomer, whose fingerprints were found on Dr. Iverson's

checks that were cashed shortly after she disappeared, the case for Mr. Adams' involvement in the crime turned almost entirely on the statement. Other than the statement, there was essentially no evidence to contradict Mr. Adams' defense that Ms. Coomer had acted alone and had later shared details of the crime with Mr. Adams.⁷

The proof is in the pudding. The prosecutor's closing and rebuttal arguments in Mr. Adams' case were largely devoted to quoting from, and playing excerpts of, Mr. Adams' videotaped statement (T8 125-127, 132, 133-135, 136, 137, 179-181, 182-183). As the prosecutor himself admitted, the videotaped statement was the core of the case against Mr. Adams (T8 124, 131).

Therefore, it is inconceivable that the trial court's erroneous decision to admit the videotaped statement was harmless beyond a reasonable doubt. Accordingly, Mr. Adams is entitled to a new trial at which the videotaped statement must be suppressed.

⁷ The only other evidence that even arguably pointed to Mr. Adams' involvement in the crime itself was the testimony of Sherry Smith. Ms. Smith testified that Mr. Adams had a bandage on his left hand the day after Dr. Iverson's disappearance, and, when Ms. Smith asked about the injury, Mr. Adams replied that he had been assaulted by a doctor (T5 199-202). Ms. Smith admitted that she had not told the police about the bandage or the alleged conversation when she had been interviewed (T5 202-207, 210). Even taken at face value, Ms. Smith's testimony, without the videotaped statement, is hardly compelling evidence of guilt.

II. **THE ADMISSION OF THE VIDEOTAPED STATEMENT VIOLATED THE FIFTH AMENDMENT BECAUSE THE DETECTIVE FAILED TO STOP THE INTERROGATION WHEN MR. ADAMS ASKED FOR AN ATTORNEY "RIGHT NOW."**

Summary of Argument, Standard of Review, and Issue Preservation

As discussed in Issue I, supra, Mr. Adams' videotaped statement should have been suppressed because Detective Harvey did not "scrupulously honor" Mr. Adams' repeated refusals to discuss his involvement and motives in the Iverson case (VS 22-30). While Detective Harvey may have been entitled to continue the interview, he violated Mr. Adams' Miranda rights by continuing to ask questions about the subjects that Mr. Adams had placed off limits.

In addition, the videotaped statement should have been suppressed because Detective Harvey did not terminate the interrogation when Mr. Adams asked for an attorney "right now" (VS 32). Instead of honoring that request, Detective Harvey successfully persuaded Mr. Adams to change his mind by telling him that:

[O]nce you say you want a lawyer, our interview is done. And quite possibly the chances for an explanation as to what went wrong that day goes out the tubes. Possibly. Very probably. Okay? As I told you before, this is your one shot. (VS 32).

Mr. Adams then agreed to answer more questions. A few minutes later, Mr. Adams made the first in a series of incriminating statements when he admitted that he had been involved in the robbery of Dr. Iverson (VS 37).

The trial court erred in considering Mr. Adams' request for an attorney "right now" to be "ambiguous" within the meaning of Davis v United States, 512 US 452; 114 S

Ct 2350; 129 L Ed 2d 362 (1994) (T 7/7/97 12). The trial court was able to reach that conclusion only by considering the responses and statements that Mr. Adams made **after Detective Harvey persuaded Mr. Adams to reconsider his request for an attorney.** Such an approach is directly contrary to Smith v Illinois, 469 US 91; 105 S Ct 490; 83 L Ed 2d 488 (1984). In Smith, the Court held that if the defendant makes a clear invocation of his right to counsel, the prosecution may not point to the defendant's **subsequent** remarks to cast doubt on the clarity of the invocation, particularly when, as here, those subsequent remarks are in response to a police effort to persuade the defendant to change his mind. Therefore, Mr. Adams' videotaped statement should have been suppressed.

The trial court's decision on a motion to suppress an incriminating statement is reviewed de novo, but factual findings are reviewed for clear error. People v Kowalski, 230 Mich App 464, 472; 584 NW2d 613 (1998); see also Miller v Fenton, 474 US 104, 112; 106 S Ct 445; 88 L Ed 2d 405 (1985) ("ultimate constitutional question of the admissibility of a confession was a mixed question of fact and law subject to plenary federal review" (internal citation, quotation marks, and bracket omitted)). Since, as in Issue I, the relevant factual record in this case is undisputed and is preserved on videotape, this Court's review of the trial court's decision is de novo. This issue has been fully preserved for appellate review by Mr. Adams' pre-trial motion to suppress his videotaped statement.⁸

⁸ As discussed in footnote 6, supra, Mr. Adams' interlocutory application for leave to appeal from the trial court's denial of his motion to suppress did not produce any "law of the case" because this Court declined to reach the merits of that interlocutory application.

A. **MR. ADAMS' CLEARLY INVOKED HIS MIRANDA RIGHT TO COUNSEL BY ASKING IF HE COULD HAVE AN ATTORNEY "RIGHT NOW."**

If a defendant requests counsel during a custodial interrogation, the interrogation must cease until and unless counsel is present. Edwards v Arizona, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981). In order to invoke that right to counsel so as to terminate all questioning, a defendant must "unambiguously request counsel." Davis v United States, 512 US 452, 459; 114 S Ct 2350; 129 L Ed 2d 362 (1994). As the Davis Court explained this test, "he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." Id.

On page 32 of the transcript of the videotaped statement, Mr. Adams met that standard:

MA: **So when would I be able to talk to a lawyer if I wanted to talk to a lawyer?**

WH: We can stop the interview right now.

MA: **Can I talk to him right now?** (VS 32; emphasis added).

Contrary to the trial court's holding, there was nothing at all ambiguous about Mr. Adams' request to talk to a lawyer "right now." Compare People v Granderson, 212 Mich 673, 676-677; 538 NW2d 471 (1995) (defendant's statement, "I'm ah need that [a lawyer] `cause I can't afford none," reflected future need for appointed counsel, not

present desire).

The fact that Mr. Adams' request for counsel "right now" ended with a question mark does not make his request ambiguous, any more than if he asked, "Can I have a glass of water right now?" or "Can I go to the bathroom right now?" It would be pure sophistry to treat such a request for a glass of water or to visit the restroom as "ambiguous" simply because the speaker was polite enough to frame his request as a question rather than a command. Mr. Adams' request, "Can I speak to him [a lawyer] right now?" was an unambiguous request to speak a lawyer "right now" within the meaning of Davis.

The test of Davis, as quoted above, is whether "a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." Davis at 459. Here, **Detective Harvey clearly understood Mr. Adams' statement to be a request for an attorney.** Immediately after Mr. Adams' request, Detective Harvey said:

WH: **Sure. We'll stop the interview. Once you say you want to talk to a lawyer, by law, I stop the interview. Okay? And will not continue.** All right (VS 32; emphasis added).

Mr. Adams must respectfully request that this Court watch the relevant portion of the videotape: as Detective Harvey made the above statement, **he gathered up his papers in preparation to leave the interview room.**

Thus, Detective Harvey, both through his words and his actions, clearly understood that Mr. Adams had made an effective request for counsel when he said, "Can I talk to him [a lawyer] right now?" Not only a reasonable officer would understand that statement to be a request for a lawyer; the officer who was actually conducting the interrogation understood it that way. At that point, Detective Harvey

was required to terminate the interview without interrogating Mr. Adams further and without attempting to change Mr. Adams' mind.

B. UNDER SMITH v ILLINOIS, MR. ADAMS' POST-INVOCATION RESPONSES TO DETECTIVE HARVEY'S CONTINUED INTERROGATION CANNOT BE CONSIDERED TO RENDER MR. ADAMS' INVOCATION "AMBIGUOUS."

As discussed above in Part A of this argument, there was nothing ambiguous about Mr. Adams' invocation of his right to counsel when he stated, "Can I talk to him [a lawyer] right now?" (VS 32). It was only by considering the remarks that Mr. Adams made **after** Detective Harvey persuaded him to change his mind that Mr. Adams' initial invocation became ambiguous.

In Smith v Illinois, 469 US 91; 105 S Ct 490; 83 L Ed 2d 488 (1984), the defendant, in response to his Miranda warning about the right to counsel, stated, "Uh, yeah. I'd like to do that." Id. at 93. The United States Supreme Court explained what happened next:

Instead of terminating the questioning at this point, the interrogating officers proceeded to finish reading Smith his Miranda rights and then pressed him again to answer their questions:

Q: . . . If you want a lawyer and you're unable to pay for one a lawyer will be appointed to represent you free of cost, do you understand that?

A: Okay.

Q: Do you wish to talk to me at this time without a

lawyer being present?

A: Yeah and no, uh, I don't know what's what really.

Q: Well. You either have [to agree] to talk to me this time without a lawyer being present and if you do agree to talk with me without a lawyer being present you can stop at any time you want to.

A: All right. I'll talk to you then. Smith at 93.

The United States Supreme Court peremptorily reversed the admission of Smith's confession. The Court first found that Smith's statement, "Uh, yeah. I'd like to do that," was an unambiguous request for counsel. Id. at 96-97.

The Court next rejected the approach of the lower courts, which used Smith's **subsequent** statements to cast doubt on the clarity of his invocation:

The courts below were able to construe Smith's request for counsel as "ambiguous" only by looking to Smith's **subsequent** responses to continued police questioning and by concluding that, "considered in total," Smith's "statements" were equivocal. This line of analysis is unprecedented and untenable. . . . **Where nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous, all questioning must cease.** In these circumstances, an accused's subsequent statements are relevant only to the question whether the accused waived the right he had invoked. Smith at 97-98 (emphasis added; internal citations and footnotes omitted).

The Court summed up its holding: "an accused's postrequest responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself. Such subsequent statements are relevant only to the distinct question of waiver." Id. at 100. The Court rejected the notion that Smith's post-invocation agreement to speak was a waiver because it came in response to police-initiated

conversation. Id. at 98-99.

Smith is on all fours with this case. Just like Smith, Mr. Adams clearly invoked his right to counsel with his statement, "Can I talk to him [a lawyer] right now?" (VS 32). Mr. Adams' invocation of his right to counsel only became "ambiguous" in the trial court's view because Detective Harvey, just like the officer Smith, immediately set out to change Mr. Adams' mind:

MA: Can I talk to him right now?

WH: Sure. We'll stop the interview. **Once you say you want to talk to a lawyer, by law, I stop the interview. Okay? And will not continue.** All right.

MA: Can you give me about five minutes just to sit here and think?

WH: Certainly can. We'll pull everything out. Can we sit in here with you? You want uh . . .

MA: That's your decision, it doesn't matter if you're in here or not.

WH: **Okay. Just consider one thing.**

MA: What's that?

WH: **That once you say you want a lawyer, our interview is done. And quite possibly the chances for an explanation as to what went wrong that day goes out the tubes. Possibly. Very probably. Okay? As I told you before, this is your one shot.**

MA: What is this my one shot to?

WH: **This is your one shot to help yourself. After this, and if you want a lawyer, that full within your rights, and I'm not going to impede that, slow that down, stop that or sway you one way or another . . .**

MA: Well what I know--what went wrong that day--from what I know, okay? What I know. (VS 32; emphasis added).

Exactly as in Smith, it was only **after** Detective Harvey explained that the interview would stop that Mr. Adams' asked for time to think. Mr. Adams did not agree to "reinitiate" the conversation but simply asked for time to think. To make sure that Mr. Adams would change his mind, Detective Harvey then twice told Mr. Adams that "this is your one shot."

Smith makes clear that the fact that Mr. Adams fell for Detective Harvey's tactics is completely irrelevant to the question of whether Mr. Adams' earlier invocation of his right to counsel was ambiguous. Further, as in Smith, the fact that Mr. Adams agreed to continue talking **only after** Detective Harvey persuaded him to do so completely precludes any possibility of finding that Mr. Adams reinitiated the conversation.

Therefore, all of the videotaped statement that came after Mr. Adams' invocation should have been suppressed. Up to that point, Mr. Adams had not made any incriminating statements. Shortly after he invoked his right to counsel and Detective Harvey persuaded him to change his mind, Mr. Adams for the first time admitted playing a part in the robbery of Dr. Iverson (VS 37). He then proceeded to give a full confession to both the robbery and murder of Dr. Iverson.

C. THE ADMISSION OF THE VIDEOTAPED STATEMENT WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

As explained in Issue I, Part C, supra, the error in admitting Mr. Adams' videotaped statement in violation of his Fifth Amendment Self Incrimination Clause

rights was not harmless beyond a reasonable doubt. See Chapman, 386 US at 24 (constitutional errors reviewed to determine whether error harmless beyond a reasonable doubt); Fulminante, 499 US at 296 (recognizing that confessions, especially full confessions, are devastating to the defense); Dunn, 446 Mich at 422-424 ("a full-confessional statement ordinarily is not harmless").

Since, as explained in Issue I, Part C, the prosecution essentially had no case without the videotaped statement, it is inconceivable that the decision to admit the videotaped statement was harmless beyond a reasonable doubt. Accordingly, Mr. Adams is entitled to a new trial at which the videotaped statement must be suppressed.

III. **THE TRIAL COURT VIOLATED THE DOUBLE JEOPARDY CLAUSE BY: (1) IMPOSING SEPARATE SENTENCES FOR FELONY MURDER AND PREMEDITATED MURDER; AND (2) IMPOSING SEPARATE SENTENCES FOR FELONY MURDER AND AN UNDERLYING FELONY.**

Standard of Review and Issue Preservation

This Court reviews constitutional questions de novo. People v Pitts, 222 Mich App 260, 263; 564 NW2d 93 (1997). This Court has held that Double Jeopardy Clause issues are preserved for appellate review without the necessity of an objection in the trial court "because a significant constitutional question is presented." People v Passeno, 195 Mich App 91, 95; 489 NW2d 152 (1992). In any event, Mr. Adams did object at sentencing to being sentenced on two counts of first-degree murder for the death of a single individual (ST 29).

The Merits

The Fifth Amendment Double Jeopardy Clause, US Const, Amend V, protects a defendant from receiving separate sentences for first-degree premeditated murder and first-degree felony murder for the death of a single victim. People v Bigelow, 229 Mich App 218; 581 NW2d 744 (1998). In addition, a conviction and sentence for both felony-murder and an underlying felony violates double jeopardy. People v Wilder, 411 Mich 328, 342; 308 NW2d 112 (1981); People v Harding, 443 Mich 693, 714; 506 NW2d 482 (1993); People v Passeno, 195 Mich App 91, 97; 489 NW2d 152 (1992).

Here, Mr. Adams was convicted of both first-degree premeditated murder and first-degree felony murder for the death of a single individual (T10 7). The trial court

sentenced Mr. Adams on both counts (ST 42), and issued a Judgment of Sentence (attached as Appendix B to this Brief) reflecting two concurrent terms of life imprisonment without parole. These multiple convictions and sentences violate Mr. Adams' Double Jeopardy Clause rights. Bigelow, supra.

In addition, Mr. Adams was convicted of both kidnapping and felony murder, with one of the underlying felonies being kidnapping (T8 195-197; T10 7), and he was sentenced on both counts (ST 42). The multiple convictions and sentence once again violate the Double Jeopardy Clause. Wilder at 342.

Therefore, if a new trial is not ordered for the reasons set forth in Issues I and II, this Court must: (1) order that the two counts of first-degree murder be consolidated into a single count supported by two theories, Bigelow at 220; and (2) order that the kidnapping conviction and the accompanying 25 to 60 year sentence be vacated. Passeno at 97.

SUMMARY AND RELIEF

THEREFORE, Defendant-Appellant McConnell Adams, Jr., respectfully requests that this Honorable Court reverse his convictions and remand for a new trial.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: _____
DAVID A. MORAN (P 45353)
Assistant Defender
645 Griswold
3300 Penobscot Building
Detroit, Michigan 48226
(313) 256-9833

Dated: **April 13, 1999**

