COA19-590 **JUDICIAL DISTRICT 26**

NORTH CAROLINA COURT OF APPEALS

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	)	
STATE OF NORTH CAROLINA	)	
	)	**Mecklenburg County**
v.	)	**16 CRS 231894**
	)	
KEDAR A. MUHAMMAD	)	
	)	

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Defendant-Appellant's Opening Brief

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Issues Presented

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I. The trial court erred when it denied Mr. Muhammad's suppression motion because (1) Mr. Muhammad clearly invoked his *Miranda* rights to (a) counsel and (b) to remain silent and because (2) Detectives Carter and Peacock forced Mr. Muhammad to forego one right to receive the benefit of another right

STATEMENT OF THE CASE

This case was tried at the 4 December 2018 Criminal Session of the Mecklenburg County Superior Court before the Honorable Eric L. Levison upon a bill of indictment charging Kedar A. Muhammad with murder in violation of N.C.G.S. § 14-17. (Rp. 3) Mr. Muhammad pled not guilty, but a jury convicted him as charged on 14 December 2018. (Rp. 56; Tpp.1230-1231) Judge Levison sentenced Mr. Muhammad to life in prison without parole. (Rpp. 59-60; Tp. 1238) Mr. Muhammad appealed. (Rp. 61; Tp. 1239) On 21 December 2018, Mr. Muhammad filed a *Motion for Appropriate Relief* ("MAR") pursuant to N.C.G.S. § 15A-1414. (Rpp. 66-87) On 28 February 2019, the Honorable W. Robert Bell denied the MAR. (Rpp. 123-125) Mr. Muhammad appealed the denial. (Rp. 126)

STATEMENT OF GROUNDS FOR APPELLATE REVIEW

Mr. Muhammad appeals pursuant to N.C.G.S. §§ 7A-27(b), 15A-1444 from a final judgment of the Mecklenburg County Superior Court.

STATEMENT OF FACTS

A. Rechard Mickle wants to buy weed on 20 August 2016

On 20 August 2016, Rechard Mickle spent the afternoon with his girlfriend Ne'Terra Taylor. Mickle and Taylor had dated off-and-on in 2015 and 2016. Mickle had a history of possessing firearms. In April 2016, Mickle had been arrested and "locked up" for illegally possessing a firearm. (Tpp. 487, 528) Only days before August 20th, Mickle talked with Taylor about purchasing a firearm. Mickle also had a history

of lying to Taylor. During the early morning hours of August 20th, Taylor sent Mickle several "very irate" text messages after learning he'd cheated on her. Mickle also liked smoking marijuana. (Rp. 23; Tpp. 513, 528-529, 672-673, 676)

Around 2:00 p.m. on August 20th, Mickle and Taylor drove to Heath Springs, South Carolina. Before leaving, though, Mickle contacted his friend David Olmos about purchasing 1.5 pounds of marijuana. At 2:46 p.m., Olmos texted Kedar Muhammad, asking him how much he charged for 1.5 pounds of marijuana. Mr. Muhammad texted back and said $5,000 for 1.5 pounds. Shortly thereafter, at 2:57 p.m., Olmos texted Mickle and told him of Mr. Muhammad's $5,000 price. Olmos also texted Mickle that Mr. Muhammad could met him after 7:00 p.m. that night. Olmos gave Mickle Mr. Muhammad's phone number (980-215-2753). Immediately thereafter, around 3:00 p.m., Mickle called his brother Darius Williams regarding the drug transaction. (Tpp. 492, 642, 646-647)

B. The Walmart drug transaction

Mickle and Taylor left Heath Springs at 5:30 p.m. and returned to Charlotte about an hour later. Once back at Taylor's house, Mickle told Taylor he needed to meet with "KD." While Mickle sold auto parts, he never mentioned anything about auto parts as the reason he had to meet KD that night. He simply told Taylor he needed to meet KD for an undisclosed reason and that he needed to borrow her burgundy Expedition ("SUV"). Taylor agreed. Shortly after Mickle left Taylor's house, he picked up Williams. (Tpp. 492-494, 508-509, 516-517) At 6:35 p.m., Mickle and Mr.

Muhammad texted one another regarding where and when to meet. Mr. Muhammad told Mickle to meet him at the Walmart at 8180 South Tyron Street. (Tpp. 649-650)

Mr. Muhammad drove to the Walmart in his mother's (Doris Muhammad's) silver Passat. His brother, Ibrahim Muhammad, was with him. The State presented no digital or phone communications between Mr. Muhammad and Ibrahim where they mentioned bringing a firearm to the drug transaction for safety reasons or for robbing Mickle of the money he'd be bringing. (Tpp. 668-669)

At 8:40:21 p.m., Walmart surveillance cameras captured Mr. Muhammad's silver Passat backing into a parking spot in the Walmart parking lot. At 8:44:05 p.m., Mickle texted Mr. Muhammad, "I'm here." At 8:44:32 p.m., the front passenger in the silver Passat, Ibrahim, is seen exiting the front passenger door and entering the back-passenger seat. At 8:46:34 p.m., surveillance cameras captured Taylor's SUV backing into the parking space next to Mr. Muhammad's Passat. At 8:48:00 p.m., Mickle exits the SUV's front passenger door and enters the Passat's front passenger door. (Tpp. 650, 786-787)

Moments later, two people – Mr. Muhammad and Ibrahim – are captured exiting the Passat and fleeing the Walmart parking lot. Immediately thereafter, at 8:48:15 p.m., Williams is captured entering the Passat's front driver's side door and fleeing Walmart in the Passat with Mickle. Mickle, it turns out, had been shot four times. At 8:49:38 p.m., Mr. Muhammad and Ibrahim are captured "sprinting" past a tractor trailer parked in Walmart's parking lot. (Tpp. 768-787)

C. 911 calls and post-incident behaviors by Taylor and Williams

Instead of reporting the shooting to authorities or taking his brother into a hospital emergency room, Williams drove to the CaroMont Regional Medical Center ("CRMC") in Mount Holly, removed Mickle's body from the Passat, placed his body on the side of the road in front of the CRMC, and fled the CRMC in the Passat without informing anyone of Mickle's life-threatening injuries. (Tpp. 682, 787, 714-715)

At 9:18 p.m., CRMC personnel found Mickle, called the Mount Holly Police Department ("MHPD"), and reported a "homicide" because Mickle, by that point, had passed. The MHPD went to the CRMC, discovered Mickle's body, and contacted the Gaston County Sheriff's Office ("GCSO") for assistance. (Tpp. 681-682, 768)

At 9:01 p.m., someone from Walmart reported the shooting to the Charlotte-Mecklenburg Police Department ("CMPD"). CMPD officer Kou Xiong responded and interviewed a Walmart security officer who heard five-gun shots. Xiong found Taylor's SUV with its front lights on and driver's side door open. He also found a .40 FCC near the SUV, a black LG smart phone (Mr. Muhammad's) and a gold iPhone 6 (Ibrahim's). He didn't find a firearm near the SUV or in the Walmart parking lot. (Tpp. 538-539, 546-547, 563, 582, 768)

Xiong ran the SUV's plates, traced it to Taylor, and called her multiple times. Taylor eventually answered and came to the Walmart to retrieve her SUV. Before speaking with Taylor, though, Taylor called Mickle's phone at 9:00 p.m. The call connected and Taylor heard a noise in the background, but the person who'd answered

the phone, Williams presumably, didn't speak before hanging up. Williams, therefore, didn't tell Taylor about the shooting or the fact Mickle had been shot multiple times. Taylor quickly called back Mickle's phone, but Williams refused to answer. (Tp. 515)

Once at Walmart, Taylor refused to tell Xiong who she'd loaned her SUV to that night. Taylor, though, eventually said she'd loaned it to Mickle so he could buy diapers at Walmart for her children. The diaper part was a lie, as Taylor knew Mickle had told her he was meeting "KD" – but Taylor never told Xiong about KD. (Tpp. 500-501, 556, 566, 585)

Once Xiong released the SUV to Taylor, she and her sister drove to the Day Lodge – a local hotel not far from Taylor's house and the Walmart where Mickle rented a room. Mickle had left his Day Lodge room key inside her SUV. Taylor, though, never mentioned the Day Lodge to Xiong nor did she call him once she found Mickle's Day Lodge key in the SUV. Mickle's Day Lodge room was dark and empty and there was no evidence he'd been there that night. (Tpp 501-502, 515-516)

Taylor and her sister then went to their mother, Lynette PeeGea's, house. They arrived at 11:30 p.m. Sometime between 4:00 a.m. and 5:00 a.m., Taylor's aunt Shelia called the family and told them Mickle had been shot and killed. During this same time period, Williams stopped by PeeGea's house. He ran into PeeGea's house, left Mickle's (LG-M5330) cellphone behind, ran back out of the house, and quickly drove off without talking to Taylor, her sister, or PeeGea. (Tpp. 502-503, 508, 512)

Although Taylor knew Mickle had picked up Williams after he'd dropped her (Taylor) off earlier that evening, Taylor claimed she didn't call Williams after speaking with Xiong or after her aunt Shelia had told the family about Mickle's shooting death. Also, Taylor claimed she never spoke with Williams when he ran into and out of PeeGea's house, but she somehow knew he'd left behind Mickle's (LG-M5330) cell phone. (Tpp. 508-509)

Moments after Williams fled PeeGea's house, Detectives Carter and Peacock came to PeeGea's house and questioned Taylor. Carter and Peacock had called Taylor between 4:00 a.m. and 5:00 a.m. and told her they were coming to speak with her. Shortly after they called, Taylor went outside PeeGea's house so she could wave them down. Immediately thereafter is when Williams ran out of the house, got into an undescribed car, and quickly drove off. (Tpp. 510-512) [1]

Although Taylor claimed she didn't talk to Williams when he'd stopped by PeeGea's house, and she claimed she didn't know he'd left anything in the house, she quickly found Mickle's (LG-5330) cell phone inside the house and gave it to Carter and Peacock. Taylor, though, lied to Carter and Peacock because she claimed she'd simply found an "unknown cell phone" in her house. Once the CMPD accessed the phone

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[1] Neither the prosecutor nor trial counsel ever asked Taylor what car Williams drove to and from PeeGea's house. He presumably drove Mr. Muhammad's Passat, but this fact wasn't fleshed out and firmly established at trial.

and downloaded its data, Carter and Peacock immediately knew it was Mickle's phone and that Taylor had presumably – and likely – lied to them. (Tpp. 510-512, 772)

Taylor told them Mickle had been communicating with David Olmos and KD, that Mickle "seemed very happy" after communicating with both, but that she "didn't really know" the substance of his conversations with Olmos and KD. She also said Mickle and Williams would "probably be together," but she didn't mention the fact Williams had just left behind Mickle's phone and had just fled PeeGea's house moments before their arrival. Carter and Peacock believed Taylor was deceptive and not entirely forthcoming. (Tpp. 510-512, 771-772)

After interviewing Taylor, Carter and Peacock searched for Williams. Williams, however, had fled to Heath Springs, South Carolina. Carter and Peacock only learned of this because Larry Kelly – a Heath Springs resident and Williams's uncle – contacted law enforcement and reported an unknown silver Passat parked in his backyard. Kelly led authorities to the Passat and Williams. Peacock spoke with Williams via the phone on 22 August 2016. The CMPD never interviewed Williams in person. (Tpp. 791-792, 794-795)

Williams still had the keys to the Passat. After speaking with Williams, who was still in Heath Springs, Peacock went to Williams's Gastonia, North Carolina residence (Shady Bark Drive) where he met GPD officers. The CMPD and GPD found (1) a loaded .40 handgun magazine, (2) a box of .40 ammunition, and (3) two bags of marijuana at the Shady Bark Drive residence. Specifically, they found the box of

ammunition and bags of marijuana hidden (or "stuffed") in the residence's chimney port, while they found the loaded handgun magazine hidden under the front porch. (Tpp. 796-798, 802, 812-813, 895-897)

Despite finding this evidence at Williams's Shady Bark Drive residence, and despite the CMPD's belief Mickle's death was a "drug rip off" gone bad, the CMPD never searched inside the Shady Bark Drive residence, nor did it seize Williams's phone to determine if he and Mickle had planned to rob Mr. Muhammad. (Tpp. 866-867, 895, 900) Also, the CMPD never questioned/interrogated Williams. Also, after Williams briefly spoke with Peacock on 22 August 2016, he never contacted the CMPD or the District Attorney's Office ("DAO") to check the status of his brother's case. Likewise, Peacock only called Williams twice after their brief August 22nd phone call: Peacock called Williams at 9:43 a.m. and 11:40 a.m. on August 24th. Williams didn't return either call and Peacock and the CMPD never called him again. (Tpp. 916-917)

D. Forensic evidence indicates shots fired from Passat's back seat

The CMPD recovered two .40 FCCs from the Passat (S-81A and S-81B) and a .40 FCC near Taylor's SUV in the Walmart parking lot (S-16A). All three .40 FCCs had been fired from the same weapon. (Tpp. 943-944, 950-951, 961, 965) The CMPD also identified two bullet holes in the Passat's roof (S-75, S-76). Based on the trajectories of these holes, the bullets that created them were likely fired from the Passat's back seat. (Tpp. 859, 952-954)

E. Mr. Muhammad's statement, his suppression motion, the suppression hearing, and trial

The CMPD arrested Mr. Muhammad on 22 August 2016. At 5:06 p.m., before Carter and Peacock *Mirandized* him, Mr. Muhammad invoked his *Miranda* right to counsel when he said, "I need my lawyer as soon as you tell me what I'm under arrest for." (Rp. 11) Carter and Peacock disregarded his clear invocation and continuing interrogating him until he signed the *Miranda* waiver at 5:08 p.m. (Rp. 9) During his post-invocation statement, Mr. Muhammad claimed he shot Mickle in self-defense but then claimed Ibrahim shot Mickle in self-defense. (Tpp. 825-832)[2]

Based on Mr. Muhammad's custodial statement, the State charged him with murder under N.C.G.S. § 14-17. (Rp. 3) Mr. Muhammad filed a suppression motion. (Rpp. 10-19) The trial court held a suppression hearing and entered findings and conclusions denying the motion. (Tpp. 13-53, 54-58)[3]

At trial, the State presented a felony-murder theory. The State claimed Mr. Muhammad and Ibrahim met Mickle and Williams at the Walmart to complete a felonious drug transaction, *i.e.*, 1.5 pounds of marijuana for $5,000. More importantly, the State claimed Mr. Muhammad and/or Ibrahim brought a deadly weapon, *i.e.*, a .40 firearm, with them to help facilitate their felonious drug transaction. The underlyingly

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[2] More details regarding Mr. Muhammad's interrogation are discussed in Claim #1, *infra*, pp. 14-16.
[3] The trial court's findings and conclusions are discussed in greater detail in Claim #1, *infra*, pp. 16-18.

felony, therefore, was the killing of another human being by a person committed to selling or attempting to sell marijuana with a deadly weapon.

During the course of said felony, Mickle was shot and killed with a .40 firearm that, the State claimed, either Mr. Muhammad or Ibrahim brought with them. (Tpp. 475-480) The physical evidence suggested the gunfire originated from the Passat's backseat – where Ibrahim was seated during the drug transaction. The State, though, had idea which of the two – Mr. Muhammad or Ibrahim – brought the .40 firearm used to shoot and kill Mickle. The State never considered the fact Mickle could've brought the firearm, that Mr. Muhammad or Ibrahim could've wrestled it from him when he tried robbing Mr. Muhammad of the 1.5 pounds of marijuana, and that whomever wrestled it from him then shot him with his own firearm. (Tpp. 859, 952-954)

The State, consequently, presented an acting in concert ("AiC") felony-murder theory, *i.e.*, if Mr. Muhammad didn't shot and kill Mickle, Ibrahim was AiC with Mr. Muhammad to facilitate the felonious drug transaction when he (Ibrahim) shot and killed Mickle after Mickle attempted to rob Mr. Muhammad. (Tpp. 1136-1140) The State presented no eyewitnesses to the shooting, *i.e.*, it didn't present Williams or Ibrahim.[4] The State also didn't seize Williams's cell phone or search his residence to determine if Mickle or Williams brought the .40 firearm that killed Mickle.

[4] Mr. Muhammad subpoenaed Ibrahim and put him on the stand, but Ibrahim invoked his right to remain silent. (Tpp. 1053-1056)

The only evidence suggesting Mr. Muhammad or Ibrahim brought the firearm that killed Mickle came from Mr. Muhammad's custodial statement (S-1). Mr. Muhammad initially said he brought a .40 Glock to the drug transaction and used it in self-defense when Mickle attempted to rob. Mr. Muhammad then said Ibrahim shot Mickle with a .40 Glock in self-defense. (Tpp. 825-830, 839-842)

Trial counsel requested a voluntary manslaughter charge. The trial court denied the request and only charged first-degree felony-murder. (Tpp. 1082, 1113, 1219-1222). The jury convicted Mr. Muhammad of first-degree murder. (Rp. 56; Tp. 1231)

On 21 December 2018, Mr. Muhammad filed a 10-day MAR, *see* N.C.G.S. § 15A-1414, raising five claims, including one challenging the trial court's suppression ruling. (Rpp. 66-87) On 31 December 2018, Judge Levinson retired from the bench. (Rp. 123) Before retiring, though, Judge Levinson never entered his written findings and conclusions regarding the suppression motion as required by N.C.G.S. §15A-977(d).

The Honorable W. Robert Bell was assigned Mr. Muhammad's 10-day MAR. In his 28 February 2019 order, however, Judge Bell refused to adjudicate the suppression claim because doing so required "[a] review of the trial transcripts" which – at that point – hadn't been transcribed and produced. (Rp. 124) Judge Bell dismissed the suppress claim without prejudice and ordered, "[T]hat should [Mr. Muhammad] elect to refile his [MAR] he attach a copy of the trial transcripts with it." (Rp. 125) To date, then, no written findings and conclusions relating to Mr. Muhammad's suppression motion have been filed with the trial court or this Court.

ARGUMENTS

I. The trial court erred when it denied Mr. Muhammad's suppression motion because (1) Mr. Muhammad clearly invoked his *Miranda* rights to (a) counsel and (b) to remain silent and because (2) Detectives Carter and Peacock forced Mr. Muhammad to forego one right to receive the benefit of another right

A. Standard of review

Mr. Muhammad filed a suppression motion. (Rpp. 10-19) The motion challenged the legality of his custodial statement on Fifth and Sixth Amendment grounds as well as the "parallel provisions" in North Carolina's Constitution. (Rp. 10) The trial court held a suppression hearing and denied the motion. (Tp. 12-58) At trial, trial counsel objected when the prosecutor asked Peacock to summarize the substance of Mr. Muhammad's custodial statement. Trial counsel also objected when the prosecutor tried to publish the video-recording of Mr. Muhammad's custodial statement (S-1). (Tpp. 825, 836) The trial court overruled both objections.

The trial court's factual findings are conclusive and binding on this Court when supported by competent evidence. The trial court's legal conclusions, however, are reviewable *de novo*. Under this standard, the legal significance of the trial court's factual findings is a question of law for this Court to decide. *State v. Dix*, 194 N.C. App. 151, 154-155, 669 S.E.2d 25, 27 (2008).

B. Mr. Muhammad's arrest, interrogation, and unequivocal requests for counsel and to remain silent

On 22 August 2016, the CMPD arrested Mr. Muhammad at 12:40 p.m. and transported him to the CMPD Law Enforcement Center ("LEC"). At 1:32 p.m., officers placed Mr. Muhammad in an LEC interrogation room, handcuffed his legs/ankles to the floor, and left him in the room without food or water. At 3:56 p.m., the LEC lost power causing the lights in Mr. Muhammad's interrogation room to turn off. He sat in pitch darkness until 4:24 p.m. (Rp. 11; Tpp. 20-21, 891)

At 5:03 p.m. Carter and Peacock entered the interrogation room. They, however, never told Mr. Muhammad why he'd been arrested and why they wanted to question him. Mr. Muhammad had six or seven outstanding drug related arrest warrants from another jurisdiction. Thus, he assumed he'd arrested based on these warrants. At 5:06 p.m., shortly into Carter's and Peacock's introductions, and before they'd *Mirandized* him, Mr. Muhammad clearly invoked his *Miranda* right to counsel when he said, "I'm going to need my lawyer, as soon as you tell me what I'm under arrest for." Carter and Peacock disregarded his unequivocal request because they didn't immediately cease the interrogation and start the process of vindicating his right to counsel. Nor did they tell him why he'd been arrested. (Rp. 76; Tpp. 29, 23, 33-34, 889-890)

Carter, instead, confirmed Mr. Muhammad's invocation but told him to let her finish reading the *Miranda* rights form before he decided whether he needed/wanted an attorney. Carter then repeatedly asked if he wanted to speak with her and Peacock. Mr.

Muhammad interrupted and asked, "[A]bout what?" Carter, again, refused to tell him why he'd been arrested and why they were questioning him, all the while continuing to ask if he wished to give a statement. Carter and Peacock eventually convinced Mr. Muhammad to forgo his invocation, to sign the waiver form, and to give a statement. (Rp. 77; Tp. 23)

Immediately after signing the waiver form, at 5:08 p.m., Carter told Mr. Muhammad, "[M]e and my partner are homicide detectives." Mr. Muhammad replied, "Why didn't you tell me that, I thought I was here for warrants, that's why I said I would talk with you." He then clearly invoked his *Miranda* right to remain silent when he said, "You should have told me that, and if y'all had said that, <u>no I don't want to talk with you</u>." He then said, "<u>I don't know anything about a homicide</u>." Carter then asked, "So are you saying you don't want to speak to me at all?" Mr. Muhammad, again, clearly invoked his *Miranda* right to remain silent when he said, "<u>No I don't want to talk to you about what</u>." (Rp. 77)

Carter continued with her interrogation and said, "We want to ask you questions." Mr. Muhammad replied, "[A]bout what?" Peacock interjected and said, "[Y]our name has come up in this homicide investigation." At his point, Mr. Muhammad repeatedly tried to say something, but Peacock continually talked over him and shut down his attempts to say what he wanted to say.

Twenty minutes into his statement, at 5:28 p.m., Mr. Muhammad again clearly invoked his *Miranda* right to counsel when he said, "<u>I need my lawyer then</u> cause if this

is what y'all are trying to make it, it's really self-defense." Carter asked, "You don't want to talk to me?" Mr. Muhammad replied, "You're trying to make it sound a certain way like it's my fault." Carter then tried to convince him not to invoke his *Miranda* rights by stating, *inter alia*, "[W]e haven't said anything," "I believe you," and "I'm just trying to corroborate what you are saying." Based on these faux assurances, which disregarded his clear invocations, Mr. Muhammad continued speaking with Carter and Peacock. (Rpp. 77-78)

During his interrogation, Mr. Muhammad described a drug deal gone bad where he went to Walmart to sell 1.50 pounds of marijuana to Mickle but Mickle and Williams tried robbing him. He said he brought Ibrahim with him because of the amount of marijuana he was selling. Mr. Muhammad said he was in the front seat with Mickle when Mickle reached for his (Mickle's) gun. Mr. Muhammad said he grabbed the .40 Glock he'd brought and began shooting in self-defense. Mr. Muhammad then said he didn't shoot Mickle. He claimed Ibrahim shot him in self-defense from the back seat when Mickle reached for his (Mickle's) gun. (Tp. 830, 835-830, 839-842).

The CMPD never recovered a .40 firearm from Mr. Muhammad's or Ibrahim's persons or residences. (Tp. 665)

C. The trial court's findings and conclusions

The trial court's oral findings and conclusions are garbled because it didn't clearly set forth in writing its findings and conclusions. Based on undersigned counsel's reading of the trial court's oral ruling, much of what the trial court said can be

characterized as conclusory legal conclusions, *i.e.*, conclusions with no nexus to a set of factual findings explaining why the conclusions are – or should be considered – valid and supported by the record.

First, the trial court concluded that even if Mr. Muhammad unequivocally requested counsel, the fact he continued answering Carter's and Peacock's questions meant he didn't properly invoke his right to counsel. (Tp. 55)

Second, the trial court concluded Mr. Muhammad's "conversations and expressions" during the interrogation didn't "arise to the level of [a] Sixth Amendment violation." (Tpp. 55-56)[5]

Third, the trial court found that a "reasonable officer in the position of these detectives would have… reasonable grounds to continue to engage, and to continue to clarify" after Mr. Muhammad invoked his rights to counsel and silence.

Fourth, the trial court concluded that – *post-arrest* – Mr. Muhammad didn't have a right to be told the cause of his arrest once Carter and Peacock began questioning him. (Tpp. 55-56)

Fifth, the trial court concluded that – *post-arrest* – Mr. Muhammad didn't have a right to be told the cause of his arrest because this was a homicide investigation and it's reasonable not to immediately inform a homicide suspect that he's been arrested for homicide. (Tp. 56)

[5] *Miranda* is a Fifth Amendment violation. The Sixth Amendment isn't at issue here.

Sixth, the trial court concluded if the CMPD violated N.C.G.S. § 15A-401(c)(2), it wasn't a "material or substantial violation." (Tp. 56)

Seventh, based on Mr. Muhammad's "intelligence," and the fact he appeared "articulate," he appeared "aware of his surroundings," and he "had experience with law enforcement protocols and mechanics before" his arrest, the trial court found he voluntarily and knowingly waived his *Miranda* rights. (Tp. 57)

Eighth, the trial court concluded Mr. Muhammad didn't make an "unambiguous or clear assertion of [his] right to counsel before speaking." (Tp. 57)

Ninth, the trial court found it couldn't "say that" Carter's and Peacock's "activities… went too far, or that" they violated Mr. Muhammad's *Miranda/Edwards* rights. (Tpp. 57-58)

At the very end of its oral ruling, the trial court said, "So, if there's a conviction, I will come back and make findings of fact very specific for the record." (Tp. 58) The trial court – Judge Levinson – never entered his written findings and conclusions because he retired from the bench on 31 December 2018 – two weeks after the jury returned its verdict. (Rp. 123) As argued below, Mr. Muhammad challenges the trial court's findings and conclusions.

D. Claims based on trial court's findings and conclusions

1. N.C.G.S. 15A-§977(d) violation

After a suppression hearing on a properly filed motion, the trial court is required to make written factual findings to resolve disputed factual questions as well as legal

conclusions based on these factual findings. N.C.G.S. 15A-§977(d). The failure of a trial court to make written findings and conclusions requires a new suppression hearing. *State v. Grogan*, 40 N.C. App. 371, 253 S.E.2d 20 (1979).

Judge Levinson never entered his written findings and conclusions. Thus, if the Court finds it can't adequately adjudicate Mr. Muhammad's suppression claims without written findings and conclusions, the Court must remand for a new suppression hearing.

2. Violation of ***Miranda's*** right to counsel

a. Introduction

Minutes after Carter and Peacock entered Mr. Muhammad's interrogation room, Mr. Muhammad said, "I'm going to need my lawyer, as soon as you tell me what I'm under arrest for." Carter and Peacock understood this statement to be an invocation of his *Miranda* right to counsel. They also understood its significance because Carter confirmed his invocation but told him to let her finish reading the *Miranda* rights form before he decided whether he *really* needed/wanted an attorney.

Carter's and Peacock's actions represent a straightforward *Miranda*/*Edwards* violation. There was nothing equivocal about Mr. Muhammad's statement. No experienced law enforcement officer could reasonably or logically construe the phrase – "I'm going to need my lawyer" – in a manner inconsistent with this phrase's plain meaning. And, again, Carter construed this phrase consistent with its plain meaning, *i.e.*, Mr. Muhammad requested an attorney. Carter, though, quickly understood the

invocation's significance because instead of honoring it and immediately ceasing the interrogation, she tried to convince Mr. Muhammad he needed to listen to his *Miranda* rights before determining whether he *really* wanted/needed an attorney.

Carter's statement, though, represents nothing more than her unconstitutional attempt to keep Mr. Muhammad talking despite the fact he clearly invoked his right to counsel. Moreover, a defendant's *Miranda* right to counsel doesn't spring to life only after he's been *Mirandized*. Mr. Muhammad had a right to counsel the moment Carter and Peacock entered the interrogation room and began questioning him.

Furthermore, Carter's belief that Mr. Muhammad couldn't knowingly or intelligently invoke his right to counsel without first being formally *Mirandized* is specious for one simple reason. The *Miranda* rights contained the following passages:

(3) I have the right to talk to a lawyer and to have a lawyer here with me while I am being questioned.

(4) If I want to have a lawyer with me during questioning, but cannot afford to pay a lawyer, one will be appointed to represent me at no cost before questioning.

(Rp. 9)

These passages, though, simply confirm what Mr. Muhammad already knew and requested. Mr. Muhammad knew he had a right to counsel and he immediately invoked this right – even before Carter *Mirandized* him. He didn't need Carter to tell him what he already knew. He needed Carter and Peacock to honor his clear invocation by ceasing their interrogation and taking the necessary steps to put him in touch with an attorney.

b. ***Miranda*, *Edwards*, and its progeny**

If a custodial suspect "indicates in any manner and at any stage of the process [of interrogation] that he wishes to consult with an attorney before speaking, there can be no questioning." *Miranda v. Arizona*, 384 U.S. 436, 444-445 (1966). Consequently, when a custodial suspect requests counsel, he can't be "subject[ed] to further interrogation… until counsel has been made available to him, unless the [custodial suspect] himself initiates further communication, exchanges, or conversations with police." *Edwards v. Arizona*, 451 U.S. 477, 484-485 (1981); *Minnick v. Mississippi*, 498 U.S. 146, 147 (1990); *Arizona v. Roberson*, 486 U.S. 675, 680-681 (1988).

"[L]aw enforcement officers do not scrupulously honor a Defendant's unambiguous request [for counsel] when those officers unceasingly interrogate Defendant and ignore his clear request [for counsel]." *United States v. Abdallah*, 911 F.3d 201, 215 (4th Cir. 2018). Put differently,

> Under *Miranda*, the onus is not on the suspect to be persistent in his demand to remain silent. Rather, the responsibility falls to the law enforcement officers to scrupulously respect his demand. Relying on the fact that it was the defendant, not the interrogators, who continued the discussion, *ignores the bedrock principle that the interrogators should have stopped all questioning*. A statement taken after the suspect invoked his right to remain silent [or right to counsel] cannot be other than the product of compulsion, subtle or otherwise.

Jones v. Harrington, 829 F.3d 1128, 1141 (9th Cir. 2016) (quotations and citations omitted; emphasis added).

Edwards, consequently, "set forth a 'bright-line rule' that all questioning must cease after an accused requests counsel." *Smith v. Illinois*, 469 U.S. 91, 98 (1984); *Solem v. Stumes*, 465 U.S. 638, 646 (1984). Without "a bright-line prohibition, the authorities through '[badgering]' or 'overreaching' – explicit or subtle, deliberate or unintentional – might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." *Id.* *Edwards*, therefore, "is 'designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Minnick v. Mississippi*, 498 U.S. at 151 (quoting *Michigan v. Harvey*, 494 U.S. 344, 350 (1990)).

Moreover, and quite relevant here, "although an individual cannot waive [his] right to counsel prior to receiving *Miranda* warnings, a suspect in custody can certainly assert [his] right to have counsel present during [his] impending interrogation prior to *Miranda* warnings and the actual onset of questioning." *State v. Torres*, 330 N.C. 517, 526, 412 S.E.2d 20, 25 (1992). "It would make little sense to require a defendant already in custody to wait until the onset of questioning or the recitation of her *Miranda* rights before being permitted to invoke her right to counsel." *Id.* at 517, 412 S.E.2d at 26.

In this same vein, "there is no requirement that an unambiguous invocation of *Miranda* rights also be 'knowing and intelligent.' That is the standard applied to the waiver of *Miranda* and other constitutional rights, not to the invocation of such rights." *United States v. Abdallah*, 911 F.3d at 212. Thus, the State can't argue Mr. Muhammad

didn't knowingly and intelligently *invoke* his right to counsel because he invoked said right before Carter *Mirandized* him. *Id.*

The request for counsel must be unambiguous, *Davis v. United States*, 512 U.S. 452, 459 (1994), meaning the custodial suspect must, "at a minimum," give "some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police." *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991); *Davis v. United States*, 512 U.S. at 459; *State v. Torres*, 330 N.C. at 528, 412 S.E.2d at 26.

Thus, determining whether the custodial suspect's request was unambiguous "is an objective inquiry." *Davis v. United States*, 512 U.S. at 459; *State v. Dix*, 194 N.C. App. at 155, 669 S.E.2d at 27. A "statement either is such an assertion [of the right to counsel] or it is not." *Smith v. Illinois*, 469 U.S. at 97-98. This objective inquiry "avoids difficulties of proof and… provide[s] guidance to officers on how to proceed in the face of ambiguity." *Berghuis v. Thompkins*, 560 U.S. 370, 381-382 (2010).

The invocation, though, needn't include "magic words," *State v. Torres*, 330 N.C. at 528, 412 S.E.2d at 26, and the suspect needn't "speak with the discrimination of an Oxford don" to invoke his right to counsel. *Davis v. United States*, 512 U.S. at 459; *accord Emspak v. United States*, 349 U.S. 190, 194 (1955) (explaining that "no ritualistic formula or talismanic phrase is essential in order to invoke" Fifth Amendment rights). "To require precise and exact language to invoke one's right to counsel would undermine *Miranda* by working to the disadvantage of those who arguably need its protections the

most: the uneducated and those unfamiliar with the criminal justice system." *State v. Torres*, 330 N.C. at 528, 412 S.E.2d at 26.

Furthermore,

> There is no requirement that *Miranda* invocations be measured, polite, or free of anger, in the assessment of the officers to whom they are directed. Indeed, a purported invocation that is not assertive enough may be deemed too equivocal to pass muster under *Davis*; if invocations that are perceived as overly assertive also are disqualified, then suspects will be left to walk a tonal tightrope, with no margin for error on either side.

United States v. Abdallah, 911 F.3d at 212.

Also of particular import here is the line of cases holding that "an accused's *postrequest* responses to further interrogation" – after clearly invoking his right to counsel – "may not be used to cast retrospective doubt on the clarity of the initial request [for counsel] itself." *Smith v. Illinois*, 469 U.S. at 100 (emphasis in original). As the U.S. Supreme Court said in *Smith*:

> Using an accused's subsequent responses to cast doubt on the adequacy of the initial request itself is even more intolerable. No authority, and no logic, permits the interrogator to proceed… on his own terms and as if the defendant had requested nothing, in the hope that the defendant might be induced to say something casting retrospective doubt on his initial statement that he wished to speak through an attorney or not at all.

Id. at 98-99 (quotations and citation omitted); *accord Edwards v. Arizona*, 451 U.S. at 484; *United States v. Abdallah*, 911 F.3d at 211.

c. The trial court's errors

Based on the case law, the trial court made the following errors.

First, no reasonable law enforcement officer can possibly construe the phrase "I'm going to need my lawyer" as anything other than a straightforward request to exercise his *Miranda* right to counsel. "Neither the State nor the [trial court] below… have pointed to anything [Mr. Muhammad] previously had said that might have cast doubt on the meaning of his statement ["I'm going to need my lawyer"]… Nor have they pointed to anything inherent in the nature of [Mr. Muhammad's] actual request for counsel that reasonably would have suggested equivocation." *Smith v. Illinois*, 469 U.S. at 96-97. Thus, the trial court's finding that Mr. Muhammad didn't make an "unambiguous or clear assertion of [his] right to counsel" isn't supported by the record and is wrong. (Tp. 57)[6]

State v. Ladd, 308 N.C. 272, 302 S.E.2d 164 (1983) is on point. In *Ladd*, after officers *Mirandized* the defendant and began questioning him about a robbery-murder, the defendant answered a few questions regarding the stolen money, but when further questioned, the defendant said, "I don't want to say where the rest of the money is now, but I will tell you where the rest of the money is after I talk to my lawyer." The lead officer stopped questioning the defendant and exited the car the defendant was in

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[6] Notably, Judge Levinson never explained how the phrase – "I'm going to need my lawyer " – is ambiguous. Judge Levinson made this conclusory and unsupported statement toward the end of his garbled findings and conclusions. Simply claiming a phrase is ambiguous doesn't make it ambiguous. Judge Levinson had a statutory duty, *see* N.C.G.S. 15A-§977(d), to make findings supporting his conclusion that this phrase – "I'm going to need my lawyer" – is ambiguous.

during the interrogation. Another detective, though, continued the interrogation, urging the defendant to do something right for once in his life and tell where the rest of the money was. The defendant eventually relented and led the police to the stolen money. *Id.* at 281-281, 302 S.E.2d at 170-171.

The trial court held that the defendant clearly invoked his right to counsel when he said – "after I talk to my lawyer" – and suppressed the defendant's statements revealing the stolen money's location. The officers, however, were permitted to testify regarding the defendant's statement that he was willing to reveal the money's location after speaking with an attorney. *Id.*

Our Supreme Court agreed with the trial court's first ruling, *i.e.*, the defendant "clearly expressed" his *Miranda* right to counsel and all subsequent statements had to be suppressed, but disagreed with is second ruling, *i.e.*, where it permitted interrogating officers to tell the jury what the defendant said immediately before he said "after I speak with my lawyer." *Id.* at 282-283, 302 S.E.2d at 171. The Supreme Court disagreed with the second ruling because it permitted the State to introduce evidence the defendant invoked his right to counsel. *Id.* at 283-284, 302 S.E.2d at 171-172.

The first ruling is probative here. If the phrase – "after I speak with my lawyer" – represents a "clear expression" of the defendant's request for counsel, then the phrase – "I'm going to need my lawyer" – must also represent a "clear expression" of Mr. Muhammad's right to counsel.

State v. Morris, 332 N.C. 600, 422 S.E.2d 578 (1992) is also on point. In *Morris*, the defendant was convicted of sexually assaulting and murdering his girlfriend's two-year-old daughter. When police interrogated him, an officer *Mirandized* him and then asked "if he would like to waive his right to counsel. [The] [d]efendant responded, 'I don't know.'" The officer then "asked [the] defendant if he would sign a waiver of counsel form. [The] [d]efendant responded, 'No, because I don't know how much I want to tell you.'" *Id.* at 608, 422 S.E.2d at 583. At this point, the officer stopped the interrogation. Shortly thereafter, though, the officer returned with the District Attorney and both "revived" the interrogation. The officer claimed the defendant eventually "broke down and gave a statement" which included elements for each charged offense. *Id.*

The defendant moved to suppress his statement under *Edwards*, arguing that when he answered "No" to the officer's question of whether he'd waive his right to counsel, his refusal plainly meant he wanted an attorney because, as the defendant clearly stated, "I don't know how much I want to tell you." The trial court denied the motion, concluding the defendant knowingly and voluntarily waived his right to counsel. *Id.*

On appeal, our Supreme Court agreed with the defendant and reversed the trial court's non-suppression ruling. The Supreme Court framed the issue this way:

> In the case at bar, the right to counsel is at issue, not the right to remain silent. As the trial court's findings of fact note, [the interrogating officer] asked defendant if he would like to waive his "right to counsel" and if he would sign a waiver of counsel form. The issue, then, is whether defendant's responses to those questions constituted a waiver of, or an invocation of, the right to counsel.

Id. at 609, 422 S.E.2d at 583.

The Supreme Court said the "defendant invoked his right to counsel when he refused to sign the waiver form; in effect, his answer to… [the] question of whether he would sign the waiver of counsel form was 'No' because without assistance he did not know what his legal rights and position were, and until he did, he could not know how much he was willing to say." *Id*. The Court added:

> Certainly, [the] defendant's immediate, negative response to [the] pointed invitation to waive counsel is at least as indicative of a desire to have the help of an attorney during custodial interrogation as defendant Torres' inquiry as to whether she needed an attorney and defendant Tucker's attempts to call his attorney.

Id. (referencing the defendants in *State v. Tucker*, 331 N.C. 12, 414 S.E.2d 548 (1992) and *State v. Torres*, 330 N.C. 517, 412 S.E.2d 20 (1992)).

Most significant, however, is the fact the Supreme Court found the defendant's "No" response to be an *unambiguous* request for counsel. This can be gleaned from the following passage: "Even if the Court *were to deem defendant's response an ambiguous invocation*, [the interrogating officer] would have had to cease interrogation except for narrow questions designed to clarify [the defendant's] true intent." *Id*. (quotations and

citations omitted; emphasis added). The italicized portion makes clear the Supreme Court found the defendant's "No" response to be an unambiguous request for counsel.

Consequently, if the defendant's "No" response constitutes a clear request for counsel, Mr. Muhammad's statement – "I going to need my lawyer" – must also constitute a clear request for counsel.

Second, because Mr. Muhammad clearly invoked his right to counsel, Carter and Peacock had to immediately cease questioning, even if they hadn't reviewed the *Miranda* waiver form, and not approach him again "until his attorney was made available unless he himself initiated subsequent communication with [them]." *State v. Tucker*, 331 N.C. at 35, 414 S.E.2d at 561; *accord Edwards v. Arizona*, 451 U.S. at 484-485. The trial court held otherwise, approving of Carter's and Peacock's post-request interrogation, because it erroneously concluded Mr. Muhammad's invocation was ambiguous.

Third, although the trial court's oral findings and conclusions are garbled, its on-the-record comments strongly suggest it used Mr. Muhammad's post-request answers to Carter's continued interrogation to conclude his request for counsel was ambiguous. This was impermissible. *Smith v. Illinois*, 469 U.S. at 98-99, 100. The best example of this is the following statement from the trial court:

> [W]hen you look at the conversation between the defendant and the officer, there was a valid *Miranda* waiver obtained. Even if you – and then when you look at the -- whether or not the defendant made a – an unambiguous or reasonably clear demand for counsel, this defendant, by his conduct and by his conversation, was clearly continuing to engage, knew very well what the prior experience - what the standard of procedure was, that he ultimately would be told what his charge would, certainly if he was taken down to the magistrate at some point.

(Tp. 55)

The trial court's analysis is wrong. It's not about what Mr. Muhammad said once Carter disregarded his clear invocation and continued interrogating him, it's about whether Mr. Muhammad made a clear invocation in the first place. Mr. Muhammad made an unambiguous request for counsel when he said, "<u>I going to need my lawyer</u>[.]" Mr. Muhammad's clear invocation should've ceased all questioning and Carter and Peacock had a constitutional duty to *scrupulously* respect his invocation and take the necessary steps to put Mr. Muhammad in touch with his attorney or a court-appointed attorney.

Had Carter and Peacock followed their constitutional duties, and afforded Mr. Muhammad the opportunity to consult with an attorney, who knows whether he would've continued speaking with them, and this is where the prejudice comes into play. Carter's and Peacock's actions – and the trial court's approval of said actions – deprived Mr. Muhammad of his most critical *Miranda* right: his right to speak with an

attorney before deciding whether he wanted, needed, or should to speak with the CMPD.

Fourth, had Carter and Peacock ceased the interrogation as *Edwards* requires, they could've only recommenced their interrogation under two sets of circumstances. The first requires the defendant to re-initiate the conversation and to make a knowing and intelligent waiver of the right to counsel. *Oregon v. Bradshaw*, 462 U.S. 1039, 1044-1046 (1983); *State v. Tucker*, 331 N.C. at 35-36, 414 S.E.2d at 561. This didn't happen here because Carter and Peacock never stopped the interrogation. Carter simply disregarded Mr. Muhammad's clear invocation and told him he needed to listen to and understand his *Miranda* rights so he could determine if he *really* wanted/needed to speak with counsel.

The second involves police-initiated interrogation once counsel is present. *McNeil v. Wisconsin*, 501 U.S. at 176-177; *Minnick v. Mississippi*, 498 U.S. 146 (1990). This also didn't occur because Carter and Peacock never scrupulously honored Mr. Muhammad's clear invocation and therefore never vindicated his right to counsel.

Moreover, because Carter and Peacock never stopped the interrogation, Mr. Muhammad's post-invocation statements "are presumed involuntary and therefore inadmissible as substantive evidence at trial," *even the statements he gave after he signed the Miranda waiver form*. *McNeil v. Wisconsin*, 501 U.S. at 177. Again, this "bright-line" exclusionary rule is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Michigan v. Harvey*, 494 U.S. at 350.

McNeil, consequently, invalidates the trial court's finding that Mr. Muhammad's post-invocation action of signing the *Miranda* waiver form – and continuing to "engage" with Carter and Peacock by answering their questions – made his initial *clear* invocation legally and constitutionally insignificant.

d. Prejudice

The trial court should've suppressed Mr. Muhammad's *entire* statement because he immediately and clearly invoked his right to counsel. The trial court didn't, violating his Fifth Amendment rights. The State, therefore, has the burden of demonstrating the trial court's erroneous admission was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b); *Chapman v. California*, 386 U.S. 18, 24 (1967). An error isn't harmless if it's reasonably likely the error *may have* impacted the jury's verdict. *United States v. Giddins*, 858 F.3d 870, 885 (4th Cir. 2017). In conducting this analysis, the Court must be mindful that a "confession is like no other evidence" because "a defendant's own confession is probably the most probative and damaging evidence that can be admitted against him[.]" *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991).

The State can't meet this high burden. Mr. Muhammad's post-invocation statements contained admissions to the critical element regarding the first-degree felony-murder charge. The prosecutor admitted as much during closing argument when he said, "[T]he defendant['s] [statement] told you everything you had to hear to convict him of first-degree murder." (Tp. 1194) Most notably, Mr. Muhammad's post-invocation statement had him or Ibrahim bringing the .40 firearm to the drug

transaction. If the State couldn't prove either Mr. Muhammad or Ibrahim brought .40 firearm to the transaction, the jury couldn't convict him of first-degree felony murder under a direct responsibility theory or AiC theory. (Tp. 1221) ("And [the] fourth [element], that the sale or attempted sale of marijuana was committed or attempted with a deadly weapon… I instruct you that a firearm is a deadly weapon.")

Without Mr. Muhammad's statement, the State was left with the less than clear phone calls Mr. Muhammad made to his family from jail. The State, keep in mind, presented no eyewitnesses, nor did it present the victim's own brother, Darius Williams, to vindicate his brother's death. The easiest and most impactful way Williams could've done this was by taking the stand and telling jurors that both he and Mickle went to the drug transaction unarmed. Williams, remember, never contacted the CMPD or DAO after Peacock spoke with him on 23 August 2016. Also, the State never recovered the murder weapon from Mr. Muhammad or Ibrahim. The State, though, recovered a .40 loaded magazine under Williams's front porch as well as the suspected marijuana from the drug transaction.

Williams, moreover, fled North Carolina after the botched robbery attempt by him and Mickle, traveling to Heath Springs, South Carolina and leaving Mr. Muhammad's Passat in his uncle's backyard. This type of flight is indicative of a guilty conscience. *State v. Bagley*, 183 N.C. App. 514, 521, 644 S.E.2d 615, 620 (2007). If Mickle and Williams didn't rob – or attempt to rob – Mr. Muhammad, and Mickle's death represented a cold-blooded murder by Mr. Muhammad or Ibrahim, why didn't Williams

come forward and say as much to vindicate Mickle's death and to hold Mr. Muhammad and/or Ibrahim accountable? Williams's silence and lack of cooperation is deafening and doubt-raising.

The jail calls, unlike his long, *unconstitutional* interrogation, don't explicitly place the .40 firearm in Mr. Muhammad's or Ibrahim's possession before Mickle entered the Passat with the intent to rob Mr. Muhammad. Yes, Mr. Muhammad mentioned self-defense and the fact Mickle was killed with a .40 firearm, but these ambiguous statements don't answer the question of who brought said .40 firearm into the Passat: Mr. Muhammad, Ibrahim, or Mickle.

The prosecutor argued that because Mr. Muhammad mentioned the caliber of the firearm during the jail calls this could only mean one thing: Mr. Muhammad or Ibrahim had to have brought the firearm to the drug transaction. (Tp. 1179) According to the prosecutor, Mr. Muhammad couldn't have possible known the firearm's caliber if Mickle pulled the firearm on him and he (Muhammad) wrestled it away from him and then shot him in self-defense. This reasoning is false and myopic.

Mr. Muhammad or Ibrahim could've easily wrestled the gun away from Mickle and turned it on him in self-defense, meaning Mickle brought the .40 firearm. More importantly, as the trial court found, Mr. Muhammad "had experience with law enforcement protocols[.]" (Tp. 57) While such experience is generally not a good thing for defendants, in this respect it's relevant to the fact Mr. Muhammad had experience with firearms and could easily identify a .40 firearm when confronted with one.

In the end, the prosecutor's argument – that Mr. Muhammad or Ibrahim had to have brought the firearm to the drug transaction because Mr. Muhammad knew the firearm's caliber – rests on pure speculation. Without Mr. Muhammad's statement, the phone calls weren't enough to prove the deadly weapon element beyond a reasonable doubt. Mr. Muhammad's statement, though, without question proved the deadly weapon element. Thus, it's not only reasonably likely Mr. Muhammad's statement *may have impacted* the jury's decision regarding the deadly weapon element, it's a near certainty because Mr. Muhammad first said he had the firearm before saying Ibrahim had the firearm.

Mr. Muhammad, therefore, is entitled to a new trial.

3. Violation of *Miranda's* right to remain silent

a. Introduction

Immediately after Mr. Muhammad signed the *Miranda* waiver form, at 5:08:45 p.m., Carter finally told him she and Peacock were homicide detectives. Mr. Muhammad replied, "Why didn't you tell me that, I thought I was here for warrants, that's why I said I would talk to you." More importantly, he then said, "You should have told me that, and if y'all had said that, <u>no I don't want to talk to you</u>." He then said, "<u>I don't know anything about a homicide</u>." Recognizing that he'd just invoked his right to remain silent, Carter asked, "So are you saying you don't want to speak with me at all?" He replied, "<u>No I don't want to talk to you about what</u>." (Rp. 77)

Carter, again, understood the substance and significance of Mr. Muhammad's "No I don't want to talk to you about what" because she quickly replied, "We want to ask you questions." Carter and Peacock continued questioning him despite his clear invocation to remain silent. (Rp. 77) A reasonable law enforcement officer in a custodial interrogation setting can only construe the phrases – "no I don't want to talk to you" and "No I don't want to talk to you about what" – to mean one thing: the custodial suspect is invoking his right to remain silent. Like the right to counsel violation, this too is a straightforward *Miranda* violation because the case law is identical.

b. *Miranda's* right to remain silent

To protect a custodial suspect's constitutional right against self-incrimination, *Miranda* established certain "procedural safeguards" officers must adhere to during custodial interrogations. *Miranda v. Arizona*, 384 U.S. at 478-479. First, suspects must be informed of their "right to remain silent" and their "right to the presence of an attorney." *Id.* at 444. If a suspect "indicates *in any manner*, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Id.* at 473-474 (emphases added). Thus, by invoking the right to remain silent, a suspect has the "right to cut off questioning" and officers must cease questioning the suspect. *Id.*; *United States v. Abdallah*, 911 F.3d at 209-210.

To invoke the right to remain silent and cut off questioning, the suspect's invocation must be "unambiguous." *Berghuis v. Thompkins*, 560 U.S. at 381-382. A statement is unambiguous when a "reasonable police officer under the circumstances

would have understood" the suspect's statement to be an invocation of his right to remain silent. *Tice v. Johnson*, 647 F.3d 87, 107 (4th Cir. 2011). This objective inquiry "avoids difficulties of proof and… provide[s] guidance to officers on how to proceed in the face of ambiguity." *Berghuis v. Thompkins*, 560 U.S. at 381-382.

Numerous courts have held that materially indistinguishable statements – like the two Mr. Muhammad said ("no I don't want to talk to you" and "No I don't want to talk to you about what") amount to an unambiguous invocation of *Miranda's* right to remain silent. For example, the Fourth Circuit Court of Appeals recently held that when a defendant, during the reading of his *Miranda* rights, told investigators he "wasn't going to say anything at all," the defendant unambiguously invoked his right to remain silent. *United States v. Abdallah*, 911 F.3d at 207-210 ("I'm not going to say anything at all").

The Fourth Circuit Court of Appeals also took the position, in a habeas case, that when a defendant told interrogators, "I have decided not to say any more," he unambiguously invoked his right to remain silent. *Tice v. Johnson*, 647 F.3d at 107 ("I have decided not to say any more."); a*ccord Jones v. Harrington*, 829 F.3d at 1140 ("I don't want to talk no more"); *United States v. McCarthy*, 382 F. App'x 789, 791-792 (10th Cir. 2010) ("I don't want nothing to say to anyone."); *McGraw v. Holland*, 257 F.3d 513, 515, 518 (6th Cir. 2001) ("I don't wanna talk about it."); *Arnold v. Runnels*, 421 F.3d 859, 865 (9th Cir. 2005) ("[T]he Supreme Court [never] has required that a suspect seeking to invoke his right to silence to provide any statement more explicit or more technically-

worded than 'I have nothing to say.'"); *United States v. Reid*, 211 F.Supp.2d 366, 372 (D. Mass. 2002) ("I have nothing else to say.").

Based on these cases, Mr. Muhammad's statements – "no I don't want to talk to you" and "No I don't want to talk to you about what" – are unambiguous invocations of his right to remain silent. The trial court's conclusion holding otherwise, therefore, is wrong and unsupported by the record.

Moreover, when determining whether an invocation is ambiguous, courts can consider whether the "request [itself]… or the circumstances leading up to the request would render [the request] ambiguous[.]" *Smith v. Illinois*, 469 U.S. at 98. As mentioned, though, trial and appellate courts can't "cast ambiguity on an otherwise clear invocation by looking to circumstances which occurred *after* the request." *United States v. Abdallah*, 911 F.3d at 211 (emphasis added). Yes, Mr. Muhammad continued to address Carter's and Peacock's repeated questions, but his willingness to do so and his answers to said questions can't be used to manufacture an artificial ambiguity on an otherwise clear invocation of his right to remain silent. This, though, is what the trial court did here. It manufactured a faux ambiguity by focusing on the post-request dialogue between Carter, Peacock, and Mr. Muhammad. The trial court's ambiguity conclusion, consequently, is wrong and unsupported by the record.

Furthermore, even if Mr. Muhammad's comments to remain silent came across angrily – because Carter and Peacock had refused to tell him, *until he waived his rights*, they were questioning him in connection with a homicide – the State can't possibly

argue that an angry request can't also be an unambiguous request. As the Fourth Circuit Court of Appeals recently said:

> There is no requirement that *Miranda* invocations be measured, polite, or free of anger, in the assessment of the officers to whom they are directed. Indeed, a purported invocation that is not assertive enough may be deemed too equivocal to pass muster under *Davis*; if invocations that are perceived as overly assertive also are disqualified, then suspects will be left to walk a tonal tightrope, with no margin for error on either side.

United States v. Abdallah, 911 F.3d at 212.

c. Prejudice

The prejudice analysis is identical to the above prejudice analysis, *supra*, pp. 32-35, because Mr. Muhammad immediately invoked his right to remain silent once Carter and Peacock informed him they were homicide detectives investigating a homicide. Mr. Muhammad had said nothing incriminating before clearly invoking his right to remain silent. It's reasonably likely, therefore, his illegally introduced statement *may have* impacted the jury's first-degree felony murder verdict, requiring a new trial.

4. Forcing Mr. Muhammad to forego one right for another

a. Introduction

Once the CMPD arrested Mr. Muhammad, state law required it to inform him of "the cause of [his] arrest" as "promptly as is reasonable under the circumstances[.]" N.C.G.S. § 15A-401(c)(2). Under the Fifth Amendment, Article I, section 23 of the North Carolina Constitution, and *Miranda's* progeny, Mr. Muhammad had a right to

remain silent and right to counsel during his custodial interrogation. Vindicating the former right, *i.e.*, promptly informing him of "the cause of [his] arrest," was necessary to effectively and intelligently vindicating the later right, *i.e.*, determining whether he should invoke his rights to silence and counsel.

If a custodial suspect has no idea why he was arrested and why his interrogators wish to question him, he can't possibly assess, *intelligently*, his *Miranda* rights. One need only look at the *Miranda* rights form presented to Mr. Muhammad to understand this dynamic.

I, Kedar Aziz Muhammad, am 22 years old. My date of birth is 7/15/94. My address is 5618 Landmark Dr. I have finished the 12 grade in school and can/cannot read. I have been told by Detective Carter, who I understand is a police officer/detective that he/she would like to question me. This officer/detective has also explained to me and I understand that:

KM (initials) (1) I have the right to remain silent.

KM (initials) (2) Anything I say can be and may be used as evidence against me.

KM (initials) (3) I have the right to talk to a lawyer and to have a lawyer here with me while I am being questioned.

KM (initials) (4) If I want to have a lawyer with me during questioning, but cannot afford to pay a lawyer, one will be appointed to represent me at no cost before questioning.

The form first says a "police officer/detective… would like to question me." Question "me" about what though? The Carolina Panther's chances of going to the Super Bowl? Whether Duke or North Carolina will win the men's NCAA basketball championship? A drug case? A parking ticket? A murder? In other words, the most important information on this form is missing, *i.e.*, the reason why the CMPD arrested Mr. Muhammad and would like to speak with him.

The form then lists the basic *Miranda* rights. While a custodial suspect may understand these basic rights in the abstract, he can't possibly understand them – at the ground level, so to speak – if the interrogating officers never tell him why they "would like to question [him]." Take the first two *Miranda* rights, for instance: "I have the right to remain silent" and "Anything I say can be and may be used as evidence against me." If a custodial suspect has no idea why he's been arrested, *knowing* and *understanding* these two *Miranda* rights do nothing for him. Put differently, *knowing* one's *Miranda* rights is fundamentally different than *intelligently vindicating* one's *Miranda* rights. The same reasoning applies to the last two *Miranda* rights regarding the right to counsel. Sure, a custodial suspect will know these rights, but if he still doesn't know why he's been arrested, he can't intelligently determine whether it would be in his best interests to request counsel or freely speak with the interrogating officer(s).

This is what happened here. The VCAT officers who arrested Mr. Muhammad never told him "the cause of [his] arrest." When Carter and Peacock began their interrogation, they too refused to tell Mr. Muhammad "the cause of [his] arrest." Carter and Peacock only told Mr. Muhammad "the cause of [his] arrest" once he signed the *Miranda* waiver form. Once they did, though, Mr. Muhammad immediately expressed his frustration with them because he believed he'd been arrested on outstanding warrants regarding drug cases – not a murder. Moreover, when he realized they wanted to speak with him about a murder, he quickly and clearly told them he didn't want to speak with them and that he knew nothing about any murder case.

Simply put, Carter and Peacock made Mr. Muhammad forego his *Miranda* rights, to exercise his "right to know" under N.C.G.S. § 15A-401(c)(2). Forcing Mr. Muhammad to forego one right to exercise another right is unconstitutional, *Simmons v. United States*, 390 U.S. 377 (1968); *State v. Diaz*, 2019 N.C. LEXIS 790, *11-13, 2019 WL 3916717 (Aug. 16, 2019), and the trial court should've suppressed Mr. Muhammad's statement on this constitutional ground as well.

The trial court made erroneous findings and conclusions regarding this issue.

First, the trial court concluded that – *post-arrest* – Mr. Muhammad didn't have a state or federal right to be informed of the charges against him because this was a homicide investigation and it's reasonable not to promptly inform a suspect that he's being questioned in connection with a homicide. (Tp. 56)

This finding or conclusion, whatever it may be, is wrong. There's no homicide exception for N.C.G.S. § 15A-401(c)(2). Furthermore, there's no reason Carter and Peacock couldn't have "promptly" told Mr. Muhammad the "cause for [his] arrest" the moment they walked into the interrogation room. The record makes clear they *strategically* and *purposely* refused to tell him the "cause of [his] arrest" until he'd signed the waiver sheet.

In other words, if Carter and Peacock could "promptly" discuss the "cause of [his] arrest" immediately after they believed he'd signed away his *Miranda* rights, they surely could've informed him of this same information *before* he signed the waiver sheet. They didn't, however, because they both knew if they did, he'd likely invoke his rights

to silence and counsel. Thus, at the end of the day, Carter and Peacock gamed the system by withholding crucial information from Mr. Muhammad; information they both knew would likely lead to him not speaking with them; and information Mr. Muhammad needed to know to intelligently and effectively vindicate his *Miranda* rights in way that best served his interests at that point.

Second, the trial court concluded if the CMPD violated N.C.G.S. § 15A-401(c)(2), it wasn't a "material or substantial violation." (Tp. 56) This too is incorrect – and the above reasoning explains why. By not "promptly" informing Mr. Muhammad regarding the "cause of [his] arrest," this prejudiced him in a "material and substantial" way because he couldn't intelligently and meaningfully determine whether he should vindicate his rights to silence and counsel. Mr. Muhammad even told Carter and Peacock he felt he'd been hoodwinked by them because he believed he'd been arrested for outstanding warrants relating to drug offices. More importantly, he told them had they promptly informed him that he'd been arrested for murder, he wouldn't have signed the waiver form. He also invoked his right to remain silent at that point, telling them twice he didn't want to speak with them regarding "any murder."

b. Prejudice

The prejudice, again, is the same as argued *supra*, pp. 32-35.

CONCLUSION

WHEREFORE, based on the foregoing facts and authorities, Mr. Muhammad respectfully requests the Court to grant him a new trial based on the trial court's refusal to suppress his entire statement.

Respectfully submitted this the 12th day of October, 2018.

(Electronically Submitted)
Craig M. Cooley
COOLEY LAW OFFICE
5000 Centre Greenway, Ste. 500
Cary, NC 27513
craig.m.cooley@gmail.com
412-607-9346 (cell)

CERTIFICATE OF COMPLIANCE WITH N.C. R. APP. P. 28(J)(2)

Counsel certifies that this brief is not in compliance with N.C. R. App. P. 28(j)(2) in that it is printed in 14-point Garamond font and contains more 8,750 words in the body of the brief. Counsel, therefore, has filed a motion requesting the Court's permission to exceed the word limit requirement.

CERTIFICATE OF SERVICE

On 12 October 2019, counsel emailed a copy of this pleading to Assistant Attorney General Tracy Nayer at tnayer@ncdoj.gov.