**STATE OF MAINE** **SUPREME JUDICIAL COURT**
**Sitting as the Law Court**

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| STATE OF MAINE | ) | No. PEN-21-256 |
| | ) | |
| v. | ) | |
| | ) | |
| DERRIC MCLAIN | ) | |

On Appeal From the Penobscot Unified Criminal Docket, Bangor

# Reply Brief of Appellant, Derric McLain

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1. **By asking "is there a a lawyer here" Derric invoked his right to counsel.**

Derric invoked his right to counsel by asking if a lawyer was here immediately following the reading of his *Miranda* right. The only logical reason for asking was to invoke his right to counsel and have counsel provided before questioning.

This Court has made clear a pre-waiver invocation (even ambiguously) is an invocation and interrogation must cease. "When an individual has not yet made a valid waiver of the Miranda rights and invokes, even ambiguously, the right to remain silent or the right to an attorney, he or she has invoked the Miranda rights." *State v. Lockhart*, 830 A.2d 433, 443 (Me. 2003).

The State's brief, and trial court's decision, does not address the standard in *Lockhart.* Instead, they analysis Derric's statements under the more stringent standard of an unambiguous invocation of *Davis v. United States*, 512 U.S. 452, 459 (1994). But Davis only applies to post-Miranda waiver invocations.

Under this Court's pre-Miranda waiver standard announced in Lockhart, Derric ambiguously invoked his right to counsel.

Derric's question as to whether there "is a lawyer here?" is a more compelling invocation of the right to counsel than the question in *Lockhart* of "should I talk to a lawyer?" Derric's question—coming on the heels of being told he has a right to a lawyer—is a request to have a lawyer present. Derric's question is not a general inquiry as to advice on whether he should have a lawyer as in *Lockhart*.

The Court in *Lockhart* found the proper procedure for such a general inquiry on whether a lawyer is needed is properly addressed by re-reading *Miranda* to the suspect and inquiring whether he or she wishes to proceed. That was done in *Lockhart* and upheld on appeal. That was not done in this case. Rather, the officers told Derric there was no lawyer present and proceeded forward.

The cases cited by the State in support of a valid waiver are all distinguishable from the present facts.

In *State v. Curtis*, 552 A. 2d 530 (Me.1988), "the Canadian detective asked him [suspect] if he was familiar with a 'thing called Miranda.' Curtis responded, "I know it by heart. I've already spoken to my attorney.'" *Id.* at 532. The Court held: "Curtis' statement that he was familiar with the Miranda warnings and that he had already spoken to his attorney was not a request for an attorney. "Curtis was then immediately advised of his rights, but did not again refer to his attorney during the interrogation." *Id.*

In this case, Derric did was first told of his right to a lawyer and to have one present before any questioning. He then asked if there was a lawyer here. After being told no, he was never re-read his rights. These facts are entirely distinguishable from *Curtis*.

In *State v. Nielsen*, 946 A. 2d 382 (Me. 2008), the suspect made a pre-Miranda comment to his father that it would not be a bad idea to wait for a lawyer. *Id.* at 387. The Court found this was not an invocation because "Nielsen's statement that waiting for an attorney was 'not a bad idea' is not the kind of

unambiguous invocation of the right to counsel required by *Davis*. Furthermore, to the extent this statement constituted an ambiguous request for an attorney, Trooper Hanson properly reiterated to Nielsen that it was his decision whether or not he spoke with police, and Nielsen reaffirmed his willingness to do so." *Id.* at 388.

In Derric's case, his post-Miranda question as to whether "is there a lawyer here?" Is more equivalent to asking for a lawyer than the pre-Miranda comment to non-law enforcement in *Nielsen*. Moreover, the officers in this case never clarified whether Derric wished to continue without a lawyer present.

In *State v. McCluskie*, 611 A. 2d 975 (Me.1992), the suspect was read Miranda and proceeded to answer questions. After some period of time answering questions, he said, "I've talked too much the way it is anyway, without a lawyer." *Id.* at 977. These circumstances are different than Derric's case in a few ways. First, Derric asked if a lawyer was present immediately after Miranda and before answering questions. And secondly, Derric's question was directly related to having a lawyer present

before questioning rather than some comment about talking too much already.

For all of the above reasons, and the reasons set forth in the Appellant's principal brief, the Court should find Derric invoked his right to counsel.

### 2. **Derric never re-initiate questioning after invoking his right to counsel and never waived his right to counsel.**

Derric never re-initiated questioning after invoking his right to counsel because the interrogation never ceased. Moreover, Derric never waived his right to counsel before answering questions. Immediately following *Miranda*, Derric asked if a lawyer was present. The officers did not cease the interrogation until a lawyer was present, but remained and waited to see if Derric would answer questions after being told there was no lawyer. The officers never inquired if Derric wanted to answer questions without a lawyer present.

The Supreme Court has held that once a suspect "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the

authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. *Edwards v. Arizona*, 451 US 477, 484-85 (1981).

In *Oregon v. Bradshaw*, 462 US 1039 (1983), the Supreme Court provided guidance on when a suspect re-initiates interrogation. The suspect requested a lawyer and the police immediately ended the interrogation. *Id.* at 1041-42. Later that day, during a drive from the police station to the jail, the suspect asked, "what is going to happen to me now?" *Id.* at 1042. The officer responded by telling Bradshaw that he did not have to speak with the police because he had requested an attorney. *Id.* After discussing where the officer was taking Bradshaw and the offense with which he would be charged, the officer suggested that Bradshaw might want to take a polygraph test. *Id.* Bradshaw agreed, and the next day he signed a waiver of his Miranda rights, took the test, and made incriminating statements. *Id.*

The Court in *Bradshaw* made clear that not only does the suspect need to re-initiate questioning but also waive his or her right to counsel. "But even if a conversation taking place after the accused has expressed his desire to deal with the police only through counsel, is initiated by the accused, where re-interrogation follows, the burden remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation." *Id.* at 1039, 1044.

Following the guidance of *Bradshaw*, this Court has held: "First, the defendant must have himself initiated a further generalized discussion relating directly or indirectly to the investigation. Second, the defendant, in the totality of the circumstances, must have knowingly and intelligently waived his right to have counsel present." *State v. Libby*, 546 A. 2d 444, 448 (Me. 1988) (internal citations omitted).

Derric never re-initiated questioning because the interrogation never ceased. The officers never indicated they were ending the interrogation or left after Derric invoked his

right to counsel. For example, in the *Bradshaw* case, the officers immediately ended the interrogation when the suspect invoked, and at a later time the suspect re-initiated on his own by asking "what's going to happen to me now." Here, there was no break in the interrogation and thus no questioning to re-initiate.

Furthermore, and perhaps more clearly, Derric never waived his right to counsel. Derric was effectively denied his right to counsel by the officers telling him no lawyer was present. He was never given the opportunity to wait until a lawyer could be made available, or to stop questioning without a lawyer. Unlike in *Bradshaw*, where the officer reminded the suspect he did not need to speak to him without a lawyer, the officers in this case made no such reminder. Additionally, in Bradshaw, the suspect signed a written Miranda waiver after re-initiating questioning. No waiver was signed here and no further inquiry into Derric's rights were made in this case.

Therefore, the Court should find Derric never re-initiated questioning or waived his right to counsel.

3. **Derric has standing to challenge the seizure of his person on the side of the road.**

Derric has standing to challenge the seizure of the vehicle he was a passenger in and the 22 minute seizure on the side of the road.

The Supreme Court in *Brendlin v. California*, 551 U.S. 249, 255 (2007), held that all occupants of a stop car are seized for Fourth Amendment purposes. In *Brendlin*, the Court held a passenger stopped in a vehicle is seized under the Fourth Amendment even if the driver was the object of the intended stop.

The challenge in this case is to the prolonged stop and seizure on the side of the road for twenty-two minutes. As a passenger in the stopped car, Derric has standing to challenge the probable cause of this seizure and subsequent evidence obtained as a result of this constitutional violation.

This case is different from *State v. Lovett*, 109 A.3d 1135, (Me. 2015), cited by the State. The passenger in Lovett was challenging the search of the car, not his seizure on the side of the road. Here, Derric is challenging the constitutionality of his

22 minute seizure on the side of the road. If the Court finds that seizure unconstitutional, the subsequent search of the car is suppressed as the fruit of the illegal seizure.

Therefore, Derric has standing to challenge the seizure of the car and himself on the side of the road.

Dated: February 22, 2022

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify the above reply brief was sent on February 22, 2022 to AAG Jason Horn, 97 Hammond Street, Bangor, ME 04401.

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