IN THE MISSOURI
SUPREME COURT

No. SC95613

STATE OF MISSOURI,

Plaintiff/Appellant,

vs.

DAVID HOLMAN,

Defendant/Respondent.

RESPONDENT'S SUBSTITUTE BRIEF

Respectfully Submitted:

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APPEAL FROM THE 39th CIRCUIT COURT OF LAWRENCE COUNTY, MISSOURI
THE HONORABLE JACK A.L. GOODMAN

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF FACTS

The state has appealed the Lawrence County Circuit Court, the Honorable Judge Jack Goodman's Order Sustaining Motion to Suppress. (Appellant's Substitute Brief, Appendix, 1-2. ("Appx."). The Circuit Court considered the presentation of deposition testimony presented by defense counsel and the prosecuting attorney, a police report prepared by Lawrence County Deputy Ryan Devost, (Joint Exhibit 1), Deposition Transcript of Deputy Devost (Joint Exhibit 2) and Deposition Testimony of Lawrence County Sheriff Deputy Detective Melinda McElroy (Joint Exhibit 3). The Circuit Court concluded:

> The phrase 'I ain't signing shit without my attorney' **uttered in response to the reading of *Miranda* rights** and the request to sign a form giving consent to search Defendant's home, clearly indicates that the Defendant does not wish to engage with the police without counsel. Without question, the Defendant invoked the right to counsel in regard to the requested consent to search and any other matter that would require his signature. Colloquially, the phrase "I ain't signing shit without my attorney" more likely indicates that Defendant won't consent to anything without the benefit of legal counsel. Case law requires a broad, rather than narrow, interpretation of defendants request for counsel. *Oregon v. Bradshaw*, 462 U.S. 1039, 1041 (1983); *Edwards* at 479; *Connecticut v. Barrett*, 479 U.S. 523, 529 (1987). In *Connecticut*, the U.S. Supreme Court held that interpretation is required only where the defendant's words, understood as ordinary people would

understand them, are ambiguous. In this case, there is no ambiguity that defendant was invoking the right to counsel.

Appx. at 2. Emphasis added.

There was no agreement between the state and defendant as to the meaning of the proffered deposition testimony presented to the Circuit Court. (*See, generally*, Transcript; LF, 9-12). In fact, the parties argued to the Circuit Court the facts presented had opposite meanings because of the context of the statements. (TR, 20-24). At the end of the hearing, the parties and the Circuit Court agreed the issue presented in the Motion to Suppress was a fact question dependent upon the context and timing of the *Miranda* warnings in relation to the invocation of Mr. Holman's right to have an attorney present. (TR, 20-24).

The Circuit Court was aware of the following: on May 21, 2015, the Circuit Court scheduled a hearing for a Motion to Suppress Statements. (L.F. 11). The trial of the allegations alleged in the Information was scheduled for June 21, 2015. On May 19, 2015, the state subpoenaed witnesses to the hearing for the Motion to Suppress all of which failed to appear at the hearing for the Motion to Suppress. (Legal File ("LF") p. 9). The witnesses had been deposed on May 14, 2015 and the state prosecutor and defense counsel knew what the testimony of the witnesses would be had they appeared. (Transcript ("Tr.") 2, Joint Exhibit 2, 3).

The facts presented to the Circuit Court through Defendant's Motion to Suppress, the recitation of facts from the attorneys, the police report of Deputy Devost and the deposition transcripts of the deputy and detective of the Lawrence County Sheriff Department were thus:

At approximately 12:00 a.m. on December 10, 2013, RaDonna Holman discharged a Smith & Wesson .40 caliber handgun at David Holman striking him in the arm. (LF, 19). David Holman, fearing for his life returned fire towards the threat striking RaDonna Holman one time; killing her. (LF, 19). David Holman began performing cardiopulmonary resuscitation and dialed 911 seeking assistance. (LF, 19). Approximately 50 minutes after calling 911, Deputy Devost and Deputy Michael Thorn of the Lawrence County Sheriff's Department arrived on the scene. (LF, 19).

The Deputies approached the home and found the front door ajar with a screen door. (Tr. 3). The Deputies knocked and were told by Mr. Holman they could come in. (Tr. 3). Deputy Devost performed a security sweep while Deputy Thorn proceeded to Mrs. Holman attempting compression portions of CPR. (Tr. 3). Deputy Devost took Mr. Holman to the living room and there placed him in handcuffs and removed him from the home. Mr. Holman explained to the deputy that his wife shot him. (LF, 19, Joint Exhibit 2 44:13-16).

Deputy Devost then placed Mr. Holman in a patrol car while they waited for Deputy Thorn. (Tr. 4). A short time later, the EMTs arrived and declared that Mrs. Holman was dead. (Tr. 4). Everyone left the home, and the crime scene was taped off and secured. (Tr. 4). Deputy Thorn then took Mr. Holman to the ambulance to have his wound treated. (Tr. 4). While Deputy Thorn and Mr. Holman were talking inside the ambulance, he became animated and upset with the law enforcement officers for not addressing the medical needs of his wife. (Tr. 4). Mr. Holman became increasingly emotional, and he continued to ask why the officers were not doing anything for his wife and stated that he could not believe that she had shot him. (Tr. 4).

Believing that it was appropriate to advise Mr. Holman of his constitutional rights, Deputy Devost read Defendant the Miranda warnings from a department-issued card he kept inside his shirt pocket. (Tr. 4-5). Deputy Devost then asked Mr. Holman to execute a Consent to Search form so the authorities could process the scene. (TR, 4-5).

Mr. Holman was in handcuffs when he was advised of his constitutional rights. (TR, 5). Mr. Holman immediately responded: "I ain't signing shit without an attorney." (TR, 5). Deputy Devost suggested to Mr. Holman "we couldn't do anything for his wife until we were lawfully allowed to enter his residence." (TR, 10; Joint Exhibit 1). Mr. Holman remained silent to Deputy Devost's assertion. Deputy Devost then ceased all questions to Mr. Holman. (TR, 5).

Mr. Holman was removed from the scene and taken to the hospital for treatment; released and then taken to the Lawrence County jail. (LF, 20). The following morning, Detective McElroy removed Mr. Holman from his cell and, after advising him of his rights per *Miranda*, began interrogating him. (TR, 14).

The Circuit Court found the phrase: "I ain't signing shit without my attorney" uttered in response to the reading of *Miranda* rights and the request to sign a form giving consent to search Defendant's home, clearly indicates that the defendant does not wish to engage the police without counsel." (Appx. p. 2). The Circuit Court reached that conclusion after it had "reviewed the exhibits submitted at the hearing, the Suggestions in Support of Motion Suppress Statements filed by Defendant on May 22, 2015, and the Suggestions in Response to Defendant's Motion to Suppress filed June 1, 2015." (LF, 41-42).

POINTS RELIED ON

THE TRIAL COURT DID NOT ERR IN GRANTING MR. HOLMAN'S MOTION TO SUPPRESS STATEMENTS FINDING THAT DETECTIVE MCELROY AND DEPUTY SERGEANT BERRY VIOLATED MR. HOLMAN'S FIFTH AMENDMENT RIGHT TO COUNSEL BECAUSE MR. HOLMAN HAD UNEQUIVOCALLY INVOKED HIS RIGHT TO COUNSEL IN THAT IMMEDIATLEY UPON BEING ADVISED OF HIS CONSTITUTIONAL RIGHTS PER MIRANDA HE UNEQUIVOCALLY EXPRESSED HIS DESIRE TO DEAL WITH THE POLICE ONLY THROUGH THE PRESENCE OF COUNSEL.

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

Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981)

Connecticut v. Barrett, 479 U.S. 523, 107 S. Ct. 828, 93 L. Ed. 2d 920 (1987)

State v. Hunter, 840 S.W.2d 850 (Mo. 1992)

ARGUMENT

THE TRIAL COURT DID NOT ERR IN GRANTING MR. HOLMAN'S MOTION TO SUPPRESS STATEMENTS FINDING THAT DETECTIVE MCELROY AND DEPUTY SERGEANT BERRY VIOLATED MR. HOLMAN'S FIFTH AMENDMENT RIGHT TO COUNSEL BECAUSE MR. HOLMAN HAD UNEQUIVOCALLY INVOKED HIS RIGHT TO COUNSEL IN THAT IMMEDIATLEY UPON BEING ADVISED OF HIS CONSTITUTIONAL RIGHTS PER MIRANDA HE UNEQUIVOCALLY EXPRESSED HIS DESIRE TO DEAL WITH THE POLICE ONLY THROUGH THE PRESENCE OF COUNSEL.

A. STANDARD OF REVIEW.

This Honorable Court reviews a trial court's ruling on a motion to suppress in the light most favorable to the ruling and defers to the trial court's determinations of credibility. *State v. Edwards*, 116 S.W.3d 511, 530 (Mo. 2003), *citing*, *State v. Villa–Perez*, 835 S.W.2d 897, 902 (Mo. banc 1992). The inquiry is limited to whether the decision is supported by substantial evidence, and it will be reversed only if clearly erroneous. *Id. citing*, *State v. Rousan*, 961 S.W.2d 831, 845 (Mo. banc 1998). The Court will consider evidence presented at a pre-trial hearing, as well as any additional evidence presented at trial. *Id. citing*, *State v. Deck*, 994 S.W.2d 527, 534 (Mo. banc 1999).

A trial court's ruling on a motion to suppress will be reversed only if it is clearly erroneous. *State v. Lammers*, 479 S.W.3d 624, 630 (Mo. 2016), *quoting*, *State v. Sund*, 215 S.W.3d 719, 723 (Mo. banc 2007). A trial court's ruling will be deemed clearly erroneous if, after review of the entire record, a reviewing Court is left with the definite and firm

impression that a mistake has been made. *Id. quoting*, *Moore v. State*, 458 S.W.3d 822, 829 (Mo. banc 2015). A reviewing court defers to the trial court's factual findings and credibility determinations and considers all evidence and reasonable inferences in the light most favorable to the trial court's ruling. *Id*.

At a suppression hearing, the State bears both the burden of producing evidence and the risk of nonpersuasion to show by a preponderance of the evidence that the motion to suppress should be overruled. *State v. Abeln*, 136 S.W.3d 807-08 (Mo.App. W.D. 2004). In ruling on a motion to suppress, "[t]he trial court may choose to believe or disbelieve all or any part of the testimony presented by the State, even though it may be uncontradicted, and may find the State failed to meet its burden of proof." *Id.*

In reviewing the trial court's decision to grant a motion to suppress, the Court reviews the evidence presented and all reasonable inferences drawn therefrom in the light most favorable to the trial court's order and disregards all evidence and inferences to the contrary. *State v. Hoyt*, 75 S.W.3d 879, 882 (Mo.App. W.D.2002). Even where the trial court's decision was based solely on records, the Court "defer[s] to the trial court as the finder of fact in determining whether there is substantial evidence to support the judgment and whether the judgment is against the weight of the evidence." *State v. Abeln,* 136 S.W. 3d at 808, *quoting*, *Reece v. Director of Revenue*, 61 S.W.3d 288, 291 (Mo.App. E.D.2001). The Court defers to the trial court's factual findings, and the only issue that the Court reviews *de novo* where the trial court has ruled on a motion to suppress is whether the defendant's rights were violated as a matter of law under the historical facts found by the trial court. *State v. Schmutz,* 100 S.W.3d 876, 878 (Mo.App. S.D.2003). "If the ruling is

plausible, in light of the record viewed in its entirety, an appellate court will not reverse, even if convinced that it would have weighed the evidence differently." *State v. Haldiman*, 106 S.W.3d 529, 533 (Mo.App. W.D.2003) (citing *State v. Milliorn*, 794 S.W.2d 181, 184 (Mo. banc 1990)).

B. ANALYSIS.

1. **Introduction**.

The question before the Circuit Court was whether Mr. Holman unequivocally indicated to Deputy Devost that he wanted the presence of an attorney in dealing with law enforcement. *See*, *Edwards v. Arizona*, 451 U.S. 477, at 484 (1981). The Circuit Court found the phrase "'I ain't signing shit without my attorney' uttered in response to the reading of *Miranda* rights and the request to sign a form giving consent to search Defendant's home, clearly indicates that the Defendant does not wish to engage with the police without counsel." (Appx. 2).

The state acknowledges the appropriate standard of review is for this Honorable Court to review the trial court's ruling in the light most favorable to the ruling and defer to the trial court's determination of credibility. Even if the Circuit Court reviewed records and heard stipulated testimony from the attorneys, the Circuit Court is still aware of the witnesses and their statements set out in the Joint Exhibits.

Upon being advised of his Constitutional rights per *Miranda*, Mr. Holman immediately, emphatically and unequivocally invoked his right to counsel pursuant to the Fifth Amendment of the United States Constitution. *Miranda v. Arizona*, 384 U.S. 436, 86

S. Ct. 1602, 16 L. Ed. 2d 694 (1966)**,** *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981).

Mr. Holman did not qualify his invocation; state, imply or suggest that he was willing to proceed forward in discussing the circumstances of the allegations in some limited way without the presence of an attorney. See, e.g., *Connecticut v. Barrett*, 479 U.S. 523, 527, 107 S. Ct. 828, 831, 93 L. Ed. 2d 920 (1987).

Whether Mr. Holman was under interrogation when he was asked to sign the Consent to Search form is not dispositive to the questions presented herein. The State suggests that Mr. Holman could not anticipatorily invoked his right to counsel. The Circuit Court found upon being advised of his Constitutional Rights, Mr. Holman immediately indicated to Deputy Devost his unwillingness to proceed forward with his dealings with police without the presence of an attorney. At that point in time, Mr. Holman had been handcuffed and was under arrest. The invocation of his rights is operative whether he is being interrogated or not. An assertion of one's Constitutional rights is effective upon indicating a desire for the presence of an attorney.

Lawrence County deputies were required to immediately cease all communications with Mr. Holman until he was provided an attorney or until Mr. Holman had initiated contact with the deputies. Detective McElroy is the person who initiated contact with David Holman and took him out of his jail cell without providing him an attorney.

2. The Appropriate Standard of Review.

The state acknowledges that the appropriate standard of review for the case at bar is to view the trial court's judgment in the light most favorable to the ruling and defer to the

trial court's determination of credibility. (Appellant's Brief at 11). Moreover, the state acknowledges that the inquiry is limited to whether the decision is supported by state substantial evidence and that the Circuit Court's judgment should be reversed only if it is clearly erroneous.

The state suggests the facts presented to the Circuit Court were uncontested and that no deference is due. (Appellant's Brief at 12). In addition to the facts set out in the transcript, the Circuit Court received suggestions in support and opposition to the Motion to Suppress, a police report, and two depositions that totaled over 200 pages. "Under the 'clearly erroneous' standard of review, the trial court's findings of fact are entitled to deference even where they are based on physical or documentary evidence which is equally available to an appellate court." *State v. Williams,* 334 S.W.3d 177, 181 (Mo.App. W.D. 2011). "Even where the trial court's decision was based solely 'on the records,' we defer to the trial court as finder of fact in determining whether there is substantial evidence to support the judgment and whether the judgment is against the weight of the evidence.' " *Id.* (quoting *State v. Abeln,* 136 S.W.3d 803, 808 (Mo.App. W.D.2004)).

The state's brief does not suggest a different standard of review. The state argues the evidence and the reasonable inferences drawn therefrom in the light most favorable to itself and disregards all evidence and inferences to the contrary. (*Cf. State v. Abeln*, 136 S.W.3d 803, 807 (Mo. App. W.D. 2004).

3. An Issue of Fact was Presented to the Circuit Court in the Motion to Suppress.

Mr. Holman respectfully suggests to this Honorable Court a fact issue was presented to the Circuit Court in the Motion to Suppress which was: what was the meaning of "I ain't signing shit without an attorney" when the statement was given as an immediate response to the first question presented by the officer immediately upon the recitation of the *Miranda* warnings. (TR, 20-21). "A factual issue is contested if disputed in any manner, including by contesting the evidence presented to prove that fact." *Pearson v. Koster,* 367 S.W.3d 36, 44 (Mo. banc 2012).

"[A] party can contest the evidence in many ways, such as by putting forth contrary evidence, cross-examining a witness, challenging the credibility of a witness, pointing out inconsistencies in evidence, **or arguing the meaning of the evidence**." *Id.* (Emphasis added). "Once contested, a trial court is free to disbelieve any, all or none of the evidence, and the appellate court is not to re-evaluate testimony through its own perspective." *Id. See, also, State v. Avent,* 432 S.W.3d 249, 253 (Mo.App. W.D. 2014).

The operative fact the Circuit Court focused on was that Mr. Holman made the statement "I ain't signing shit without my attorney" to Deputy Devost immediately after being advised of his *Miranda* warnings. The operative law as set out in the Circuit Court's Order is *Edwards v. Arizona,* 451 U.S. 477, at 484 (1981), finding the defendant clearly and unequivocally indicated to Deputy Devost he "[did] not wish to engage with the police without counsel" when he made the statement. (Appx. 1-2).

The Circuit Court received a complete transcript of the Deposition of Deputy Devost and Detective McElroy, as well as the police report prepared by Deputy Devost. (TR, 2). The Circuit Court announced in its Order that the matter "was taken under advisement to review the exhibits and submissions of the parties and the applicable law." (LF. p. 41-42). The Circuit Court stated in its Order Sustaining Motion to Suppress: "The court has reviewed the exhibits submitted at the hearing, the Suggestions in Support of Motion Suppress Statements filed by Defendant on May 22, 2015, and the Suggestions in Response to Defendant's Motion to Suppress filed June 1, 2015." (Appx. 1-2). The Circuit Court was free to disbelieve any, all or none of the evidence and the reviewing court should not re-evaluate testimony through its own perspective. *Pearson v. Koster,* 367 S.W.3d at 44.

In reviewing questions of fact, the reviewing court will defer to the trial court's assessment of the evidence if any facts relevant to an issue are contested. *Id.* There is no information as to what portion of the Exhibits the Circuit Court found compelling or important and what portions of the Exhibits were disregarded by the Circuit Court. But what is clear is Judge Goodman examined exhibits and testimony submitted by stipulation which did not transform those exhibits into stipulated facts.

Appellant's Substitute Brief suggests Mr. Holman is not allowed to anticipatorily invoke his rights per *Miranda* citing *State v. Case,* 140 S.W.3d 80 (Mo. App. W.D. 2004) and *McNeil v. Wisconsin*, 501 U.S. 171 (1991). Neither of these cases is relevant to the analysis herein and are distinguishable to the facts in the case at bar. Mr. Holman was handcuffed and being questioned in the ambulance by Deputy Thorn. Deputy Devost

testified in deposition that he was advised by his mentor to advise Mr. Holman of his right per *Miranda* as soon as it was applicable. (Joint Exhibit 3, 55:13-56:6).

Mr. Holman did not anticipatorily invoke his right to counsel. It is appropriate to invoke your Fifth Amendment rights to counsel when you have been handcuffed, removed from your home, advised of your constitutional rights per *Miranda*, and then be asked to sign a document allowing the police to search your home.

The Circuit Court examined the context of the statement "I ain't signing shit without an attorney" and concluded there "was no ambiguity in that Defendant was invoking the right to counsel." (Appx. 2).

4. David Holman Unequivocally Requested the Assistance of Counsel Upon Being Advised of his Constitutional Rights.

David Holman emphatically and unequivocally indicated his unwillingness to deal with the police without the assistance of counsel. He immediately invoked his right to the aid of an attorney upon being advised of his Constitutional rights. Moreover, he did not relinquish those rights even in the face of Deputy Devost's suggestion that the police would not provide medical aid to Ms. Holman for her injuries unless David Holman consented to a search.

In *Miranda v. Arizona*, 384 U.S. 436, 439, 86 S. Ct. 1602, 1609, 16 L. Ed. 2d 694 (1966), the United States Supreme Court determined the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination required that custodial interrogation be preceded by advice to the putative defendant that he has the right to remain silent and also the right to the presence of an attorney. *Id.*, at 479, S.Ct., at 1630.

The Court also indicated the procedures to be followed subsequent to the warnings. If the accused indicates that he wishes to remain silent, "the interrogation must cease." If he requests counsel, "the interrogation must cease until an attorney is present." *Id.*, at 474, 86 S.Ct., at 1627.

After initially being advised of his Miranda rights, an accused may himself validly waive his rights and respond to interrogation. See, *North Carolina v. Butler*, 441 U.S. 369, 372, 99 S. Ct. 1755, 1756, 60 L. Ed. 2d 286 (U.S. 1979). However, the Supreme Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel. *See, e.g. Miranda v. Arizona*, 384 U.S. 436, 439, 86 S. Ct. 1602, 1609 (1966).

In *Edwards*, the Court held:

> when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.
>
> We further hold that an accused, such as Edwards, 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 U.S. 477, 484-85, 101 S. Ct. 1880, 1885, 68 L. Ed. 2d 378 (1981).

The Supreme Court stated in *Edwards* that *Miranda* itself indicated that the assertion of the right to counsel was a significant event and that once exercised by the accused, "the interrogation must cease until an attorney is present." 384 U.S., at 474, 86 S.Ct., at 1627. After *Miranda*, the Court did not abandon that view. In *Michigan v. Mosley*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975), the Court noted that *Miranda* had distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and had required that interrogation cease until an attorney was present only if the individual stated that he wanted counsel. 423 U.S., at 104, n. 10, 96 S.Ct., at 326, n. 10.

The *Edwards* holding was refined in *Smith v. Illinois*, 469 U.S. 91, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984); see, also, *State v. Reese*, 795 S.W.2d 69 (Mo. 1990). There the court held that the first inquiry must be as to whether the accused actually invoked his right to counsel. *Reese*, 795 S.W. 2d at 72. If the answer to this inquiry is affirmative, then the police may not initiate further questioning. The principal holding of the case is that, once a sufficient request for counsel is made, the accused's subsequent declarations may not be received to show that the initial request was ambiguous. *Id*. But Edwards and Smith rights attach only if the defendant indicates a desire for the assistance of counsel in his dealings with the police. *Id*.

The Sixth Amendment right to counsel attaches only at the initiation of adversary criminal proceedings, see *United States v. Gouveia*, 467 U.S. 180, 188, 104 S.Ct. 2292, 2297, 81 L.Ed.2d 146 (1984), and before proceedings are initiated a suspect in a criminal investigation has no constitutional right to the assistance of counsel. Nevertheless, the

Supreme Court held in *Miranda* that a suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning, and that the police must explain this right to him before questioning begins. The right to counsel established in *Miranda* was one of a "series of recommended 'procedural safeguards' ... [that] were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected." *Davis v. United States*, 512 U.S. 452, 457-458, 114 S. Ct. at 2354, (quoting, *Michigan v. Tucker*, 417 U.S. 433, 443–444, 94 S.Ct. 2357, 2363–2364, 41 L.Ed.2d 182 (1974).

The right to counsel recognized in *Miranda* is sufficiently important to suspects in criminal investigations, the Supreme Court has held, that it "requir[es] the special protection of the knowing and intelligent waiver standard." *Edwards v. Arizona*, 451 U.S., at 483, 101 S.Ct., at 1884. If the suspect effectively waives his right to counsel after receiving the *Miranda* warnings, law enforcement officers are free to question him. *North Carolina v. Butler*, 441 U.S. 369, 372–376, 99 S.Ct. 1755, 1756–1759, 60 L.Ed.2d 286 (1979). But if a suspect requests counsel at any time during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation. *Edwards v. Arizona*, supra, 451 U.S., at 484–485, 101 S.Ct., at 1884–1885. The second layer of prophylaxis for the *Miranda* right to counsel is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights," *Michigan v. Harvey*, 494 U.S. 344, 350, 110 S.Ct. 1176, 1180, 108 L.Ed.2d 293 (1990). To that end, the Supreme Court has held that a suspect who has invoked the right to counsel cannot be questioned regarding any offense unless an attorney is actually

present. *Minnick v. Mississippi*, 498 U.S. 146, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990). "It remains clear, however, that this prohibition on further questioning—like other aspects of *Miranda*—is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose." *Connecticut v. Barrett*, supra, 479 U.S., at 528, 107 S.Ct., at 832.

The applicability of the rigid prophylactic rule of Edwards requires courts to "determine whether the accused actually invoked his right to counsel." *Smith v. Illinois*, supra, 469 U.S., at 95, 105 S.Ct., at 492 (emphasis added), quoting *Fare v. Michael C.*, 442 U.S. 707, 719, 99 S.Ct. 2560, 2569, 61 L.Ed.2d 197 (1979). To avoid difficulties of proof and to provide guidance to officers conducting interrogations, this is an objective inquiry. *See Connecticut v. Barrett*, supra, 479 U.S., at 529, 107 S.Ct., at 832. Invocation of the Miranda right to counsel "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." *McNeil v. Wisconsin*, 501 U.S., at 178, 111 S.Ct., at 2209.

The suspect must unambiguously request counsel. "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, 105 S.Ct., at 494. Although a suspect need not "speak with the discrimination of an Oxford don," 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. If the statement fails to meet the requisite level of clarity, Edwards does not require that the officers stop questioning the suspect. See *Moran v. Burbine*, 475 U.S. 412, 433, n. 4, 106 S.Ct. 1135, 1147, n. 4, 89 L.Ed.2d 410 (1986).

David Holman dialed 911 requesting an ambulance respond to his home because his wife had shot him and he had shot her. Within moments of arriving at the Holman residence, Deputy Devost placed David Holman under arrest and removed him from the residence. Moments later, Deputy Devost advised Mr. Holman of his Constitutional rights per *Miranda*. Immediately upon being advised of those rights, David Holman emphatically and unequivocally indicated he wanted the presence of an attorney before dealing with law enforcement officers by stating: "I ain't signing shit without my attorney." At that moment in time, Deputy Devost ceased all communications with Mr. Holman.

The State suggests Mr. Holman is not being interrogated when he makes the statement. Mr. Holman is not attempting to suppress the statement "I ain't signing shit with my attorney." Mr. Holman is suggesting that he emphatically and unequivocally stated to Deputy Devost that he (Mr. Holman) wanted an attorney. The suggestion that Mr. Holman was not under interrogation at the time he invoked his right to counsel is not dispositive to this issue. A defendant who has been arrested but who has not been interrogated can still invoke his right to counsel; and such invocation is operative for all purposes. The notion that a person who is handcuffed and just been advised of his Fifth Amendment rights cannot invoke his right to counsel for all purposes is absurd and would turn the prophylactic nature of *Miranda* and its progeny on its head.

The State points this Honorable Court to the holding of *State v. Baldwin*, 290 S.W.3d 199 (Mo. App. W.D. 2009). The case is distinguishable to the case at bar. The case dealt with a suspect executing a Consent to Search form after the suspect had invoked his right to counsel. The Court noted the consent to search did not involve self-incriminating

statements. The case at bar is distinguishable from Baldwin because Mr. Holman did not consent to a search of his home and is not attempting to suppress evidence of the search.

5. David Holman Did Not Indicate a Willingness to Proceed Forward Without the Presence of Counsel.

If a 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. *See*, *Connecticut v. Barrett*, 479 U.S. 523, 525, 107 S.Ct. 828, 830, 93.

In *Barrett*, the Supreme Court concluded that a suspect's "limited requests for counsel . . . accompanied by affirmative announcements of his willingness to speak with the authorities" should be taken at their face value and do not bar the authorities from questioning him within the limitations he has imposed. 479 U.S. at 529, 107 S.Ct. at 832.

In *Barrett*, the defendant, in response to his second *Miranda* warning said "he would not give a written statement unless his attorney was present but had 'no problem' talking about the incident." *Id*. at 525, 107 S.Ct. at 830. Afterwards, one of the officers reduced his recollection of the conversation to writing, and the trial court held it admissible. The Supreme Court of Connecticut reversed Barrett's conviction, stating that requests for counsel must be given broad construction, and that the State had not established a subsequent waiver. *Id*.

The United States Supreme Court reversed, and, in holding that the Fifth Amendment did not require the exclusion of the statement, said:

> The fundamental purpose of the Court's decision in *Miranda* was "to assure that the individual's right to choose between speech and silence remains

> unfettered throughout the interrogation process." ... 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 provided by Barrett to obtain an oral confession is quite consistent with the Fifth Amendment. Miranda gives the defendant a right to choose between speech and silence, and Barrett chose to speak.

Id. at 528–29, 107 S.Ct. at 831–32 (emphasis added).

The Court also noted that it was not abandoning the rule of broad construction, but rather that no construction was necessary. "Interpretation is only required where the defendant's words, understood as ordinary people would understand them, are ambiguous. Here, however, Barrett made clear his intentions, and they were honored by police." *Id*. at 529, 107 S.Ct. at 832.

David Holman did not make any affirmative statement and did not indicate in any way that he was willing to proceed forward without the presence of an attorney in a limited fashion. See, *Id*. See, also, *State v. Reese*, 795 S.W.2d 69, 73 (Mo. 1990); *State v. Hunter*, 840 S.W.2d 850, 870 (Mo. 1992); *United States v. Quiroz*, 13 F.3d 505 (2d Cir. 1993).

In *State v. Hunter*, 840 S.W.2d 850, 870 (Mo. 1992), the defendant argued a confession he provided in March of 1989 was inadmissible under *Connecticut v. Barrett*. This Honorable Court analyzed the case and noted the following:

> At a meeting prior to the confession, defendant told police officers, 'Well, if the reward money is still being offered next time you come talk to me, bring an attorney; if not, there's no need to bring an attorney.' At the

next meeting, the officers informed defendant that the reward had been withdrawn. They also advised defendant of his Miranda rights. Defendant signed a form waiving those rights. He then gave a confession.

Under *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), a defendant who has clearly asserted his right to counsel may not be subject to further police-initiated interrogation until counsel has been made available. However, an invocation of a right to counsel which is by its terms limited in some respect does not foreclose further police questioning so long as police honor the limitation. *Connecticut v. Barrett*, 479 U.S. 523, 529–30, 107 S.Ct. 828, 832–33, 93 L.Ed.2d 920 (1987). See also *State v. Reese*, 795 S.W.2d 69, 73 (Mo. banc 1990), cert. denied, 498 U.S. 1110, 111 S.Ct. 1025, 112 L.Ed.2d 1106 (1991); *State v. Gill*, 806 S.W.2d 48, 51 (Mo.App.1991); *State v. Thomas*, 698 S.W.2d 942, 947 (Mo.App.1985). Here the police scrupulously complied with the precondition that if the reward was withdrawn, further interrogation without counsel was permissible. An objection to the confession would have been meritless. The post-conviction court was not clearly erroneous in finding counsel was not ineffective for failing to investigate and file a meritless motion to suppress defendant's confession. *See State v. Jalo*, 796 S.W.2d 91, 98 (Mo.App.1990). *State v. Hunter*, 840 S.W.2d 850, 870 (Mo. 1992).

The facts of the case at bar are much different. Mr. Holman clearly indicated he wanted the presence of counsel and would not cooperate with the police without the

presence of counsel even if it meant the police would not aid his wife with her injuries. There was no indication by David Holman that he would proceed in his dealings with the police in a limited fashion. His statement that he would not "sign shit without his attorney" was an emphatic and unequivocal statement that he wanted an attorney present before moving forward in any way. *See, Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 1884-85, 68 L. Ed. 2d 378 (1981).

The state subpoenaed witnesses to testify at the Motion to Suppress but all the witnesses failed to appear. (LF, 9). Because the witnesses had been previously deposed, the state and the defendant agreed as to what the parties would testify to if they appeared. (TR, 2). At a suppression hearing, the State bears both the burden of producing evidence and the risk of non-persuasion to show by a preponderance of the evidence that the motion to suppress should be overruled. *State v. England*, 92 S.W.3d 335, 339 (Mo.App. W.D.2002) (quoting *State v. Weddle*, 18 S.W.3d 389, 391 (Mo.App. E.D.2000)). In ruling on a motion to suppress, "[t]he trial court may choose to believe or disbelieve all or any part of the testimony presented by the State, **even though it may be un-contradicted**, and may find the State failed to meet its burden of proof." *State v. Talbert,* 873 S.W.2d 321, 325 (Mo.App. S.D.1994) (emphasis added).

The Transcript of the hearing indicates clearly and concisely the state of Missouri and the defendant disagreed about the meaning and effect of defendant's statement: "I ain't signing shit without an attorney" and the context in which Mr. Holman uttered it. Moreover, the state and defendant were specifically questioned by the Circuit Court as to

the context and timing of Mr. Holman's statements in relation to the reading of his *Miranda* warnings. (TR, 20-24).

The record makes clear the parties did not stipulate to all of the facts of the case and did not stipulate as to how those facts would be analyzed by the Circuit Court. The parties agreed "on most of the facts and then the question will become what is operative law vis-à-vis the facts." (TR, 2:13-16). Moreover, the Circuit Court did not treat the hearing as though the facts were undisputed; leaving the Circuit Court with the task of "[trying] to determine the meaning of the defendant's reported assertion of the right to counsel and the **context of it and whether or not it is clear and unequivocal.**" (TR, 20:24-21:2; emphasis added).

CONCLUSION

For the foregoing reasons, this Honorable Court should affirm the Honorable Judge Jack Goodman's Order Sustaining Motion to Suppress.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH
SUPREME COURT RULE 84.06(c)

The undersigned hereby certifies that Respondent's Substitute Brief contains the information required by Missouri Supreme Court Rule 55.03 and that it complies with Rule 84.06(b) in that it contains 7,739 words as indicated by the word processing program used to prepare such Brief.

By: /s/ Jason Coatney
Jason Coatney

Certificate of Service

The undersigned hereby certifies that a true and accurate copy of the foregoing Respondent's Substitute Brief was electronically filed with the Supreme Court this 13th day of July, 2016 for electronic transmission to all interested parties and was transmitted USPS to:

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