IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 081645

COMMONWEALTH OF VIRGINIA,

Appellant,

v.

MICHAEL RAY FERGUSON, JR.,

Appellee.

BRIEF FOR THE COMMONWEALTH

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STATEMENT OF THE CASE

This appeal originates from an en banc decision of the Court of Appeals of Virginia, with four judges dissenting, which held that the trial court erred in denying the defendant's motion to suppress and reversed his convictions for statutory burglary and grand larceny. Ferguson v.

Commonwealth, 52 Va. App. 324, 663 S.E.2d 505 (2008). This Court awarded the Commonwealth's petition for appeal on December 12, 2008.

ASSIGNMENTS OF ERROR

I. **THE COURT OF APPEALS ERRED IN RULING THAT FERGUSON'S CONFESSION WAS NOT ADMISSIBLE.**

II. **THE COURT OF APPEALS ERRED IN FINDING THE INTERROGATION NEVER CEASED.**

III. **THE COURT OF APPEALS ERRED IN FAILING TO FIND THAT FERGUSON REINITIATED THE DIALOGUE WITH POLICE, THAT HIS SUBSEQUENT WAIVER WAS KNOWING AND VOLUNTARY, AND THAT HIS CONFESSION THEREFORE ADMISSIBLE.**

QUESTION PRESENTED

I. **WHETHER FERGUSON'S CONFESSION WAS ADMISSIBLE NOTWITHSTANDING AN ALLEGED INITIAL MIRANDA VIOLATION BECAUSE THE INTERROGATION THEREAFTER CEASED, FERGUSON SUBSEQUENTLY REINITIATED THE CONVERSATION WITH THE POLICE AND THEN KNOWINGLY AND INTELLIGENTLY WAIVED HIS RIGHTS AND CONFESSED. (ASSIGNMENTS OF ERROR I, II, AND III).**

SUMMARY OF THE ARGUMENT

The Court of Appeals reversed Ferguson's convictions, finding Ferguson clearly and unambiguously asserted his right to counsel and that Ferguson had not reinitiated conversation with the police.[1] The Court of

[1] The Commonwealth, in its petition for appeal in this Court, assigned error to the holding that Ferguson properly asserted his right to counsel. Although that assignment of error was granted by this Court, the Commonwealth has decided not to pursue that issue on appeal.

Appeals held that the interrogation never ceased, inferring a plan by the investigating officer and an officer from a neighboring jurisdiction to deliberately violate Ferguson's rights, although the trial court found no evidence of such deliberate action. In doing so, the Court of Appeals ignored the proper standard of review and incorrectly relied upon the plurality opinion in Missouri v. Seibert, 542 U.S. 600 (2004). The interrogation in the instant case, however, did cease and Ferguson thereafter reinitiated the conversation with police. He then knowingly and intelligently waived his rights and confessed.

STATEMENT OF FACTS

On July 27, 2005, Pittsylvania County Deputy Sheriff Kenneth Glass responded to a reported burglary at the home of Mark and Tracy Worley. (App. 52, 111-12). Michael Ferguson and his stepbrother, Barry Waters, broke into the Worley home while the Worleys were at work. Ferguson and Waters stole the couple's television, DVD player, Play Station and assorted games, a large bag of coins, and Tracy Worley's jewelry. (App. 88-90, 93-94, 111-14). Ferguson and Waters then loaded the stolen items into Ferguson's 1996 black Eagle Talon and fled. (App. 31-32, 53, 56-57, 85-94, 112-13).

Tracy Worley's brother, Jamie Robertson, told the police he had seen a black Eagle Talon two-door sports car with distinctive blue stripes spinning its tires as it left the homeowners' driveway on the day of the burglary. (App. 332, 112-13). Shortly thereafter, Robertson saw the same distinctive car at the McDonald's in the nearby town of Altavista. (App. 57, 90, 113). Deputy Glass dispatched a "be on the lookout" message to all area police agencies, then personally called Captain Ken Walsh of the Altavista Police Department and asked him to look for the car. (App. 31-33, 53-54). The next day, Captain Walsh spotted and followed a black Eagle Talon with blue stripes that matched the description he had been given. (App. 54-55). Walsh, with the aid of a second officer in another patrol car, pulled the vehicle over. Ferguson was alone in the car. (App. 14, 37, 54). He stopped, pulling into the parking lot of the Gateway Minute Market in Altavista. (App. 26-27, 37, 43). Walsh and the other officer approached Ferguson and told him to "wait here" because somebody "wanted to come talk to [him]." (App. 38, 43). Neither officer drew a weapon or ordered Ferguson out of the car. Ferguson sat in his car and waited. (App. 38, 44, 58).

Walsh returned to his patrol car and dispatched a message that he had stopped a Black Eagle Talon with a blue pinstripe. (App. 54, 57, 61).

Hurt Police Chief Brian Marr, hearing of the stop, drove to the scene, as did Deputy Glass and Pittsylvania County Investigator Jerry Hagerman. (App. 14, 18, 54-55, 57, 61-62).

Hagerman approached Ferguson's car and asked him his name, then briefly conferred with Chief Marr. (App. 15, 62-63). Marr asked Hagerman if he wanted to use the Hurt Police Department/Town Hall to talk with Ferguson, which was only a half-mile away and was inside Pittsylvania County. (App. 15-16, 27, 29). Hagerman agreed, again approached Ferguson's car, and asked him if he would follow them to the Hurt Town Hall to talk. Ferguson agreed, and then drove to the Town Hall, followed by Hagerman, Glass, and Marr. (App. 15-16, 28).

Upon arriving at the Town Hall, Hagerman, Glass, Marr, another officer, and Ferguson went into the town council's conference room. (App. 16, 29, 63). As they entered the building, Ferguson asked why the police wanted to talk to him. Hagerman told Ferguson they wanted to talk with him about a "B and E" in Pittsylvania County. (App. 33). Hagerman asked Ferguson for permission to search his car, which Ferguson refused. (App. 35-36). Hagerman then turned on a tape recorder and made a preliminary statement identifying the time, place, and persons present. He stated that he had just asked Ferguson for permission to search his car and asked

Ferguson to repeat his response. Ferguson responded "Nah, I want a lawyer, you know what I'm saying?" (App. 19, 83).

Although Ferguson was not under arrest at that point, Hagerman informed him of his rights, pursuant to Miranda v. Arizona, 384 U.S. 436 (1966). (App. 20, 83-84). After Ferguson indicated he understood his rights, Hagerman asked if he wished to waive those rights and talk to them. (App. 83). Ferguson, who was twenty at the time, replied, "Uh, my moma [sic] said that if I get in any more trouble I need a lawyer." (App. 84).

Hagerman responded, "Well, you don't have to talk to me. Let me talk to you now." Hagerman then told Ferguson he had a positive identification of his car from the crime scene. He told Ferguson about four thousand dollars worth of goods had been stolen in the burglary. He then told Ferguson that he was in "big trouble" and suggested he should talk to them. (App. 84).

Hagerman asked Ferguson some basic questions, including where he lived, where he had been the day before and with whom he had been. (App. 84-85). Ferguson answered these questions and then Hagerman terminated the interview and turned the recorder off.[2] (App. 85).

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[2] The trial court suppressed these statements. (App. 99-100).

Hagerman directed Chief Marr to stay with Ferguson; then he and the other officers left to seek a search warrant for the car. (App. 21, 64).

Marr and Ferguson remained silent for about twenty minutes. (App. 50-52, 65, 69-70). Ferguson had known Marr for years. (App. 42, 65). Ferguson broke the silence, commenting that he had "messed up" or that the situation was "messed up" and that he did not want to go to jail. (App. 42, 51, 65, 68). The two then talked about Ferguson's family, his daughter, and about Ferguson's desire to find a job. (App. 65). Marr told Ferguson he needed to help himself and offered to help him. Marr then asked Ferguson if he would feel more comfortable talking with him than with Hagerman. (App. 65-66, 69). Ferguson said he would. (App. 66).

Marr re-advised Ferguson of his rights, which Ferguson waived verbally and in writing. Ferguson confessed to the burglary, which confession Marr recorded. (App. 65-66, 85-96). The entire conversation preceding Ferguson's confession lasted five or ten minutes. (App. 69-70).

On October 17, 2005, Ferguson was indicted for statutory burglary and grand larceny. (App. 1-2). He subsequently moved to suppress inclupatory statements he made to the police. Ferguson argued that he was in custody at the time he made the statements, that he invoked his right to have an attorney present, and that the police continued to question

him. (App. 3-5). Following a suppression hearing, the trial court held Ferguson was in custody and that he did invoke his right to have an attorney present, but that he subsequently reinitiated the conversation with the police. Accordingly, the trial court suppressed Ferguson's initial statements, but declined to suppress the statements Ferguson made after his reinitiation. (App. 78-100).

On January 24, 2006, with the consent of the Commonwealth, Ferguson entered conditional guilty pleas to statutory burglary and grand larceny, reserving his right to appeal the trial court's denial of his suppression motion. (App. 100-17). The trial court sentenced Ferguson to an active term of three years' incarceration. (App. 134-35).

STANDARD OF REVIEW

On appeal, it is the defendant's burden to show the denial of his suppression motion constituted reversible error. Harris v. Commonwealth, 276 Va. 689, 695, 668 S.E.2d 141, 145 (2008). The reviewing court is bound by the trial court's findings of historical fact unless plainly wrong or without evidence to support them and must give deference to the inferences that may be drawn from those factual findings. Commonwealth v. Hilliard, 270 Va. 42, 49-50, 613 S.E.2d 579, 584 (2005). However, "application of a constitutional standard to the facts of a particular case"

requires de novo review. Commonwealth v. Redmond, 264 Va. 321, 326, 568 S.E.2d 695, 697 (2004).

ARGUMENT

A. Governing legal principles

The Fifth Amendment commands that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself. U.S. Const. amend. V. Thus, when the police compel a suspect to make a statement, that statement is not admissible at trial. Brown v. Mississippi, 297 U.S. 278 (1936). To guard against the potential for compulsion inherent in all custodial interrogations, the United States Supreme Court, in Miranda v. Arizona, 384 U.S. 436 (1966), announced a "number of prophylactic rights designed to protect a suspect's privilege against self-incrimination." McNeil v. Wisconsin, 501 U.S. 171, 176-77 (1991). This included the right to have an attorney present during custodial interrogation. Miranda, 384 U.S. at 469-73.

A statement obtained in violation of Miranda, like one that is actually compelled, is inadmissible at trial, because the law presumes such a statement is involuntary. United States v. Patane, 542 U.S. 630, 639 (2004) (plurality opinion) (citations omitted). However, because the purpose of the Miranda rule is to protect the right against compelled

confessions but extends beyond the scope of that right by creating a presumption that any statement made in violation of Miranda is involuntary, the circumstances in which evidence must be excluded when a Miranda violation occurs are limited. See Patane, 542 U.S. at 639 (plurality opinion) (citations omitted); see also Seibert, 542 U.S. at 618 (Kennedy, J., concurring) (noting while the "Miranda rule has become an important and accepted element of the criminal justice system . . . not every violation of the rule requires suppression of the evidence obtained."). For example, where a statement is obtained in violation of the Miranda rule, a subsequent statement, obtained after a knowing, intelligent, and voluntary waiver of a suspect's rights under Miranda, will be admissible, provided the first statement was not actually compelled. Jenkins v. Commonwealth, 244 Va. 445, 454, 423 S.E.2d 360, 366 (1992) (citing Oregon v. Elstad, 470 U.S. 298, 308 (1985)).

Of course, the rights announced in Miranda may be waived. Edwards v. Arizona, 451 U.S. 477, 485 (1981); see also Michigan v. Mosley, 423 U.S. 96, 102 (1975) (acknowledging "a blanket prohibition against the taking of voluntary statements . . . would transform the Miranda safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent

assessments of their interests."). A Miranda waiver is established by showing a suspect was first warned of his rights and then made a knowing, intelligent, and voluntary waiver of those rights. See Miranda, 384 U.S. at 478-79.

If a suspect waives his Miranda rights, the police are free to question him. However, if the suspect invokes his right to counsel, the interrogation must cease until an attorney has been made available to the suspect *or the suspect reinitiates the interrogation.* Davis v. United States, 512 U.S. 452, 458 (1994). If police do initiate a subsequent "encounter in the absence of counsel . . . , the suspect's statements are presumed involuntary and therefore inadmissible as substantive evidence at trial," even if the suspect properly waives his Miranda rights. McNeil, 501 U.S. at 177. This rule is "designed to prevent police from badgering a defendant into waiving his previously asserted Miranda rights." Id. (quoting Michigan v. Harvey, 494 U.S. 344, 350 (1990)).

A defendant who initially has invoked his right to counsel may subsequently waive that right. However, "to withstand constitutional challenge," the waiver "must satisfy two distinct requirements. First, further discussions between the police and the accused must have been initiated by the accused." Correll v. Commonwealth, 232 Va. 454, 462, 352 S.E.2d

352, 356 (1987) (citing Oregon v. Bradshaw, 462 U.S. 1039, 1044 (1983) and Edwards, 451 U.S. at 482). Second, the waiver must be knowing, intelligent, and voluntary. Id. Such waiver "must be evaluated in view of the totality of circumstances, including [the suspect's] background and experience and the conduct of the police." Id. at 464, 352 S.E.2d at 357 (citation omitted).

B. The interrogation ceased and Ferguson thereafter initiated further contact with the authorities.

The Court of Appeals, in reversing Ferguson's conviction, found that "despite appellant's invocation of his right to counsel, the interview never ceased." Ferguson, 52 Va. App. at 340, 663 S.E.2d at 512. Accordingly, the Court of Appeals declined to address the question of whether Ferguson's statement to Chief Marr reinitiated the dialogue under Edwards. Id. at 347, 663 S.E.2d at 516. The trial court, however, found Investigator Hagerman did stop interrogating Ferguson. The trial court further found that Ferguson and Chief Marr then sat in silence and that the silence was broken *by Ferguson*. (App. 78-79). The Court of Appeals erred by failing to give deference to these factual findings, see Hilliard, 270 Va. at 49-50, 613 S.E.2d at 584, and by failing to address the question of whether Ferguson's statement to Chief Marr reinitiated the dialogue under Edwards.

Investigator Hagerman explicitly terminated the interview, saying the "time is now 1:32 p.m. This concludes the interview with . . . Michael Ferguson" and turning off the tape recorder. (App. 84). Hagerman directed Chief Marr to stay with Ferguson; then he and the other officers left to seek a search warrant for Ferguson's car. (App. 57). For the next twenty minutes, Ferguson and Marr sat in silence. (App. 50, 52, 57-59, 63-64). This silence did not constitute interrogation. Certainly, it did not constitute "express questioning." Rhode Island v. Innis, 446 U.S. 291, 301 (1980). Nor did it constitute the functional equivalent of interrogation, as Chief Marr neither said anything nor did anything he should have known was "reasonably likely to elicit an incriminating response" from Ferguson.[3] See id.

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[3] In reversing Ferguson's conviction, the Court of Appeals held that Hagerman and Marr engaged in a purposeful course of conduct "clearly tailored to 'elicit an incriminating response from Appellant' despite his repeated requests for counsel." Ferguson, 52 Va. App. at 343, 663 S.E.2d at 514. However, the trial court, noting it was clear that Hagerman wanted to detain Ferguson while he obtained a search warrant, expressly found there was no evidence Hagerman's decision to leave Ferguson with Marr was part of a plan to convince Ferguson to confess. (App. 80-81). The Court of Appeals erred by failing to give proper deference to this factual finding, which was amply supported by the record. See Hilliard, 270 Va. at 49-50, 613 S.E.2d at 584. Indeed, the record shows Marr had not been participating in the investigation, which originated in a different jurisdiction, and knew very little about it. (App. 63, 65). Marr was merely "standing by with [Ferguson] waiting" for Hagerman to return from his effort to obtain a search warrant. (App. 64).

Chief Marr said and did exactly nothing. As the dissent from the Court of Appeals' opinion so aptly stated:

> It would take a remarkably potent — and, to date, unprecedented — legal fiction to deem an utterly mute police officer as the functional equivalent of an interrogator. Although "staring silently" at a suspect may make him a bit ill at ease, it is hardly the equivalent of an interrogation. United States v. Thongsophaporn, 503 F.3d 51, 57 (1st Cir. 2007). "While silence may feel awkward or uncomfortable under some circumstances, there is no requirement that the police engage in small talk." Id.
>
> Police officers, after all, "do not interrogate a suspect simply by hoping that he will incriminate himself." Arizona v. Mauro, 481 U.S. 520, 529 (1987); see also Jenkins v. Commonwealth, 244 Va. 445, 453, 423 S.E.2d 360, 365 (1992). Nor is the "subtle compulsion" of being confined to an "interview room," by itself, the functional equivalent of a Miranda interrogation. Gates v. Commonwealth, 30 Va. App. 352, 356, 516 S.E.2d 731, 733 (1999). "'Interrogation,' as conceptualized in the Miranda opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself." Rhode Island v. Innis, 446 U.S. 291, 300, 303 (1980) (rejecting an interpretation of Miranda "equating 'subtle compulsion' with interrogation"); see also United States v. Kimbrough, 477 F.3d 144, 149-50 (4th Cir. 2007).

Ferguson, 52 Va. App. at 349, 663 S.E.2d at 517 (Kelsey, J., dissenting).

Thus, contrary to the majority's holding, Chief Marr did not continue Hagerman's interrogation and Ferguson's comments breaking the silence did not constitute a response to "further police-initiated custodial

interrogation."[4] Ferguson, 52 Va. App. at 344, 663 S.E.2d at 514 (citations omitted). Rather, as the trial court found, the interrogation had ceased and it was Ferguson who reinitiated communication with the police. (App. 74-75, 78-79).

Ferguson conceded he broke the silence. (App. 44-45, 74-75, 78-79). Of course, not every comment to the police is sufficient to initiate further conversation. Rather, the reinitiating remark must show "a willingness and a desire for a generalized discussion about the investigation." Bradshaw, 462 U.S. at 1046-46. The Supreme Court in Bradshaw recognized that:

> [t]here are some inquiries, such as a request for a drink of water or a request to use a telephone, that are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation. Such inquiries or statements, by either an accused or a police officer, relating to routine incidents of the custodial relationship, will not generally

[4] Thus, the majority's reliance on Hines v. Commonwealth, 19 Va. App. 218, 450 S.E.2d 403 (1994), was misplaced. Hines merely stands for the proposition that once a defendant invokes "his right to confer with his counsel, '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.'" Hines, 19 Va. App. at 221, 450 S.E.2d at 404 (quoting Edwards, 451 U.S. at 484). Here, Ferguson's reinitiating remark was not in response to further police interrogation and his subsequent waiver was valid.

> "initiate" a conversation in the sense in which that word was used in Edwards.

Id. at 1045.

The Bradshaw Court held that a suspect's question, "Well, what is going to happen to me now?," asked after the invocation of the right to counsel but prior to further interrogation, initiated further conversation, validating the suspect's subsequent waiver of his Miranda rights. Id. at 1045-47. When a suspect makes such a remark, police officers are free to inquire into whether he has changed his mind and wished to speak with them without an attorney. See Edwards, 451 U.S. at 490 (Powell, J., concurring) (cited by Bunch v. Commonwealth, 225 Va. 423, 435, 304 S.E.2d 271, 277 (1983)).

Here, Ferguson and Chief Marr sat in silence for about 20 minutes after Investigator Hagerman ceased questioning Ferguson and left. Ferguson broke that silence, commenting on the "mess" of the situation and stating that he did not wish to go to jail. Plainly, Ferguson "evinced a willingness and a desire for a generalized discussion about the investigation" and Chief Marr could properly act upon this willingness

without violating Edwards.[5] Bradshaw, 462 U.S. at 1045-46; Yeatts v. Commonwealth, 242 Va. 121, 132, 410 S.E.2d 254, 261 (1991).

Any error by Investigator Hagerman is of no moment with respect to Ferguson's subsequent reinitiation with Chief Marr. Of course, the statements Ferguson made in response to Hagerman's questioning were suppressed by the trial court.

Furthermore, because Edwards is a "prophylactic rule designed to prevent police from badgering a defendant into waiving his previously asserted Miranda rights," Harvey, 494 U.S. at 350, reinitiation by a suspect can occur after an Edwards violation, provided there is no actual coercion involved and that the subsequent waiver is knowing and voluntary. See Height v. State, 642 S.E.2d 812, 814 (Ga. 2007) (finding prior Edwards violation did not require suppression of subsequent statement where defendant initiated further discussions with police, was re-advised of and waived his Miranda rights, and then gave a statement); People v. Bradford,

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[5] The Court of Appeals opined that, because Ferguson was in continuous custody from the time he invoked his right to counsel until he confessed, his confession was presumed to be involuntary and inadmissible. Ferguson, 52 Va. App. at 343, 663 S.E.2d at 514. The court was mistaken. The Constitution requires, not a subsequent meeting, but that the suspect "initiate[] further discussions with the police," Smith v. Illinois, 469 U.S. 91, 95 (1984), or "further communication, exchanges, or conversations with the police." Edwards, 451 U.S. at 485.

929 P.2d 544, 565 (Cal. 1997) (holding "if the statement made after an Edwards violation is voluntary, 'the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made'" (citation omitted)); see also Correll, 232 Va. at 462-64, 352 S.E.2d at 356-57 (finding despite multiple interrogations conducted in violation of invocation of right to counsel, confession was admissible where it "resulted from dialogue initiated by" defendant and "followed a waiver that was knowingly and intelligently given.").

The Court of Appeals erroneously relied on Seibert, 542 U.S. 600, for its determination that the 20 minutes of silence that followed Hagerman's termination of the interview "was not sufficient to turn the interview into two distinct interrogations." Ferguson, 52 Va. App. at 342-43, 663 S.E.2d at 513-14. In Seibert, police deliberately questioned the defendant without advising her of her Miranda rights, obtained a confession, allowed the defendant a short break, then advised her of her rights and, using the earlier unwarned confession, obtained a nearly identical confession. Seibert, 542 U.S. 604-06. The Supreme Court found the second confession, obtained by use of a two-step questioning technique based on a deliberate violation of Miranda, was inadmissible. Seibert, 542 U.S. at 605-06, 620.

The only similarity between the "break" in Seibert and the period of silence here, however, is that both were 20 minutes long. In Seibert, police obtained an unwarned confession and then allowed the defendant a twenty minute "coffee and cigarette break." After the break, police resumed the questioning, first advising Seibert of her rights and obtaining a waiver thereof. Seibert, 542 U.S. at 605-06. Here, Hagerman explicitly terminated the interview. The record is devoid of any evidence Hagerman meant only to give Ferguson a break before resuming the questioning.

Moreover, unlike the defendant in Seibert, it was Ferguson who initiated further conversation with the police. Thus, this was not a mere break followed by further police-initiated interrogation. That is, it was not "'two spates of *integrated and proximately conducted questioning*,'" Ferguson, 52 Va. App. at 342, 663 S.E.2d at 514 (quoting Seibert, 542 U.S. at 600 (plurality opinion)), but two distinct and independent interrogations: one initiated by police, the other by Ferguson.

Further, the Court of Appeals relied for this proposition on the plurality opinion in Seibert. That reliance is in error. As the dissent from the Court of Appeals noted:

> The plurality opinion in Seibert was the opinion of four of nine Justices. "Because Seibert is a plurality decision and Justice Kennedy concurred in the result on the narrowest grounds, it is his concurring opinion that provides the controlling law." United

> States v. Street, 472 F.3d 1298, 1313 (11th Cir. 2006) (citing Romano v. Oklahoma, 512 U.S. 1, 9 (1994); Marks v. United States, 430 U.S. 188, 193 (1977); United States v. Gonzalez-Lauzan, 437 F.3d 1128, 1136 n.6 (11th Cir. 2006)); see United States v. Mashburn, 406 F.3d 303, 308-09 (4th Cir. 2005).

Ferguson, 52 Va. App. at 353, 663 S.E.2d at 519 (Kelsey, J., dissenting) (footnote omitted); see also Panetti v. Quarterman, 551 U.S. ___ 066407, 127 S. Ct. 2842, 2856 (2007) (noting "[w]hen there is no majority opinion, the narrower holding controls.").

The Seibert concurrence relied on a much narrower ground to find the confession inadmissible, recognizing an exception to the Elstad rule that a statement made after a Miranda violation is admissible if obtained after a knowing, intelligent and voluntary waiver. Seibert, 542 U.S. at 620-22. The concurrence held this narrow exception to Elstad is ""applicable only in the *infrequent* case" where the police have used "a two-step questioning technique based on a *deliberate violation* of Miranda.""" Ferguson, 52 Va. App. at 355, 663 S.E.2d at 520 (Kelsey, J., dissenting) (quoting Seibert, 542 U.S. at 620-22 (Kennedy, J., concurring in judgment)).

Absent proof of a purposeful effort to circumvent Miranda, Seibert does not require suppression of a properly warned and voluntary subsequent statement. Rather, the principle announced in Elstad "holds

true *even in* the context of a single interrogation where the constitutional violation takes place only twenty minutes prior to the voluntary, fully-warned, confession." Ferguson, 52 Va. App. at 355, 663 S.E.2d at 520 (Kelsey, J., dissenting). In short, Seibert neither requires a finding that the questioning at issue here was a single interrogation nor, as there is no proof of a deliberate attempt to circumvent Miranda, does it exempt the case from the Elstad rule that a statement made after a Miranda violation is admissible if obtained after a knowing, intelligent and voluntary waiver.

C. Ferguson knowingly and intelligently waived his rights and confessed.

Here, the record as a whole shows Ferguson voluntarily, knowingly and intelligently waived his right to counsel after he reinitiated the conversation with the police. See Correll, 232 Va. at 464, 352 S.E.2d at 357 (citation omitted). Assessing whether a confession is voluntary requires an examination of the totality of the circumstances to determine whether the statement is the "product of an essentially free and unconstrained choice by its maker," or whether the maker's will "has been overborne and his capacity for self-determination critically impaired." Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973); Gray v. Commonwealth, 233 Va. 313, 324, 356 S.E.2d 157, 163 (1987).

In assessing the totality of the circumstances to determine whether a defendant's will was overcome, a court considers "both the characteristics of the accused and the details of the interrogation." Schneckloth at 266; see also Gray, 233 Va. at 324, 356 S.E.2d at 163 (totality of circumstances includes defendant's background and experience and the conduct of police).

No evidence shows Ferguson's will was overborne or that he could not make an intelligent decision about how he wished to proceed. Ferguson, who was on probation at the time, was acquainted with the criminal justice system and his rights. (App. 49-50, 84-86, 103, 109). Indeed, Ferguson mentioned counsel prior to being advised of his rights. Ferguson was 20 years old at the time of his confession, had completed the 11th grade and had received his GED. (App. 36-37, 103-04). See Gray, 233 Va. at 325, 356 S.E.2d at 163 (considering, in assessing totality of circumstances, that defendant, who was 28, had high school equivalency diploma, could read and write, said he understood his rights and had prior experience with criminal justice system).

Further, Marr re-read the Miranda warnings before beginning the second interview and Ferguson signed Miranda waiver forms. (App. 31, 74-76, 86-87). See Seibert, 542 U.S. at 608 (plurality opinion)

(acknowledging "giving the warnings and getting a waiver" is generally sufficient to establish a knowing, intelligent, and voluntary waiver). No promises were made to Ferguson.

Moreover, that Ferguson and Marr knew each other and that Marr offered to "help" Ferguson "cannot be considered coercion or inducement." Midkiff v. Commonwealth, 250 Va. 262, 269, 462 S.E.2d 115, 116 (1995). Nor did Marr induce Ferguson's waiver by sitting in silence with Ferguson for 20 minutes and, when Ferguson reinitiated the conversation, by treating him respectfully. Marr's silence simply did not amount to the sort of police overreaching that the Supreme Court has condemned because it might "wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." Smith, 469 U.S. at 98 (citation omitted).

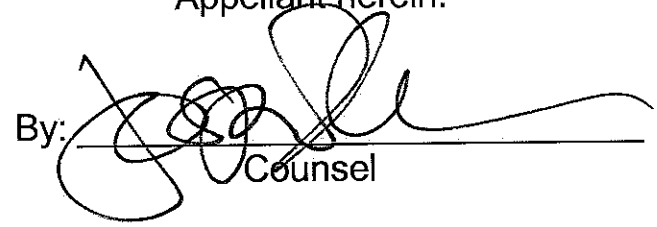
Under the totality of the circumstances presented, Ferguson made a knowing, voluntary and intelligent waiver of his rights when he elected to speak to Marr and the trial court properly admitted his confession.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed and the judgment of the Circuit Court for Pittsylvania County affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
Appellant herein.



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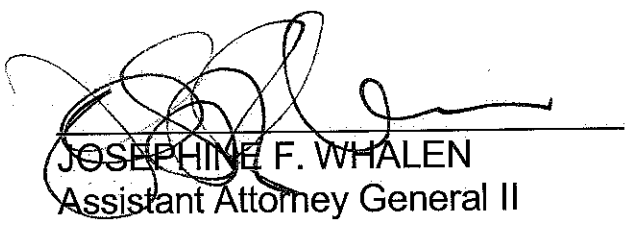
CERTIFICATE OF TRANSMISSION AND SERVICE

On January 21, 2009, the required copies of this brief were hand-delivered to the Clerk of this Court, and three copies were mailed to Glenn L. Berger, Esquire, P.O. Box 298, Altavista, Virginia 24517, counsel for the Appellant.

Electronic copies of this brief and the appendix have been provided to the Court.



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