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NO. 90846-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent

v.

NICHOLAS KEITH MAYER, Petitioner

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From the Court of Appeals for the State of Washington  
44232-9-II

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**PETITIONER'S SUPPLEMENTAL BRIEF**

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ORIGINAL

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I. LAW AND ARGUMENT:

A. MR. MAYER MADE AN UNEQUIVOCAL REQUEST FOR COUNSEL PRIOR TO HIS INTERROGATION DURING THE ADVISEMENT OF MIRANDA RIGHT AT THE POLICE STATION.

The *Miranda* Fifth Amendment right to counsel attaches only when a suspect invokes the right by making a clear and unequivocal request for counsel. *Miranda v. Ariz.*, 384 U.S. 436, 475 (1966). After the suspect invokes the right to counsel, law enforcement officials must cease interrogation. *R.I. v. Innis*, 446 U.S. 291, 301 (1980); *see, e.g., U.S. v. Ortiz*, 177 F.3d 108, 110 (1st Cir. 1999).

Courts have struggled with the definition of what comprises “a clear and unequivocal request for counsel.”

In some cases the courts more easily have found “a clear and unequivocal request for counsel.” In *U.S. v. Pugh*, 576 F.3d 135, 143-44 (2d Cir. 2009), the court held that the police had not scrupulously honored the defendant’s invocation of the right of to silence when officers continued to coax defendant into interrogation by saying that any cooperation would be brought to the attention of the U.S. Attorney and also by threatening to bring defendant before a U.S. Marshall. Similarly, in *U.S. v. Lafferty*, 503 F.3d 293, 304-05 (3d Cir. 2007) the court condemned officer conduct placing the defendant in an interrogation room

with his alleged accomplice who had previously confessed and they questioned accomplice in defendant's presence as not scrupulously honoring the defendant's invocation of the right to remain silence. Likewise, in *Anderson v. Terhune*, 516 F.3d 781, 784 (9th Cir. 2008), the court found that detective's had failed to scrupulously honor the defendant's invocation of his right to silence when questioning continued even after the defendant stated, "I don't even wanna talk about this no more," "I'm through with this," and "I plead the Fifth."

In *Davis v. United States*, 512 U.S. 452, 458-59 (1994), the 9<sup>th</sup> Circuit Court of Appeals set forth a standard for determining whether police had violated a criminal defendant's invocation of his right to remain silent. The standard attempted to deal with the natty issue of determining when an invocation of right to remain silent was clear and unambiguous. The Court held that the clarity of the invocation of the *Miranda* right to counsel should be determined objectively from the perspective of a reasonable police officer under the circumstances. *Id.*

In *Berghuis v. Thompkins*, 560 U.S. 360, 381, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010) the Court appeared to the adopt the reasoning of *Davis* and articulate an objective standard for ascertaining whether an invocation is "unambiguous" or "ambiguous and equivocal." This standard applies to police interrogations. *Id.*

A waiver must be “made with a full-awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.” *Berquis*, 560 U.S. at 371.

Criminal Rule [CrR] 3.1[b](1) provides in pertinent part that “the right to a lawyer accrues as soon as feasible after the defendant is taken into custody...” Thus, under Washington law. An indigent accused who is subjected to custodial interrogation has the right to have legal counsel appointed, without cost to him, prior to interrogation, whether or not he has been charged with the commission of a crime. *State v. Tetzlaff*, 75 Wn.2d 649, 453 P.2d 638 (1969).

In the instant case, the detective properly advised Mr. Mayer of his *Miranda* rights: “You have the right to an attorney before any questioning. If you cannot afford an attorney, one will be appointed for you without cost to you, if you so desire. You can exercise these rights at rights at any time.” RP 143.

Det. Dennison *knew* that Mr. Mayer was asking how to get a lawyer if he could not afford one. RP 143. Det. Dennison also *knew* there was a list of lawyers that Mr. Mayer could call by the BAC machine just down the hall in the police station. RP 142-143. Det. Dennison failed to tell Mr. Mayer about that list. *Id.*

Had Mr. Mayer known that he contact an attorney at the time of questioning he would have done so. RP 145. Det. Dennison deceived him by failing to inform him of available immediate access to counsel. RP 145.

The trial court found that Det. Dennison “believed” Mr. Mayer was asking how to get an attorney if he later was charged with a crime. CP 485, Finding of Fact No. 26.<sup>1</sup>

In the context of the conversation between the detective and Mr. Mayer, the detective knew exactly what Mr. Mayer meant when he asked when he could get an attorney. The detective advised Mr. Mayer for purposes of taking a custodial statement. That is abundantly clear from the record. The detective’s purpose in failing to make Mr. Mayer aware of the telephonic access to counsel a few rooms down the hall was to deceive Mr. Mayer into thinking that he could not get an attorney until he appeared before the court if he was charged with a crime.

The detective’s statement was contrary to the statement he had provided to Mr. Mayer moments before in the advisement of *Miranda* rights. However, Det. Dennison knew that Mr. Mayer had a drug addiction that he needed to feed and that he would be experiencing problems related

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<sup>1</sup> The State argued in its reply that Mr. Mayer had waived this issue because his appellate had failed to assign error to any of the trial court’s findings of fact and conclusions of law from the CrR 3.5 hearing. Although this is true, Mr. Mayer himself assigned error to them in the Statement of Additional Grounds. Appendix B, Page 1.

thereto. RP 145. It is reasonable to conclude that the detective, cognizant of the stress of being in custody and drug dependent as well as receiving conflicting advice, indeed erroneous advice, about his right to counsel during custodial interrogation would compel Mr. Mayer to make a statement. And indeed the detective was right.

However neither this Court nor the United States Supreme Court countenance such deliberate disregard for a suspect's constitutional right to counsel during interrogation. Further where the investigating officer, immediately following *Miranda* warnings informing the suspect that he has a right to counsel during interrogation, then informed the suspect that he could not get an attorney until he appeared before the court if charges were filed, the detective undermined the very constitutional provisions he is sworn to uphold.

Mr. Mayer's statements were obtained through disregard of his clear and unambiguous statement that he wanted an attorney. The detective's response, incredulous though it may have been informing Mr. Mayer that he could not in fact have an attorney at that time, doubtless confused the drug-dependent defendant. This deliberate deceit rendered his statements involuntary.

For these reasons and those set forth in the petition for review, Mr. Mayer respectfully asks this court to reverse his convictions.

RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of April, 2015.

/s/BARBARA COREY, WSBA#11778  
Attorney for Petitioner

CERTIFICATE OF SERVICE:

I declare under penalty of perjury under the laws Of the State of Washington that the following is a true and correct: That on this date, I delivered via ABC- Legal Messenger, a copy of this Document to: The Clark County Prosecutor's Office, 1013 Franklin Street, PO Box 5000 Vancouver WA 98666-5000 and to Nicholas Keith Mayer DOC#363038, Coyote Ridge Corrections Center 1301 Ephrata Ave., P.O. Box 769, Connell, WA 99326

4/6/15

/s/Kim Redford  
Legal Assistant

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