

STATE OF MICHIGAN  
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

M.S.Ct. No. 160436

vs

COA No. 346775

MUHAMMAD ALTANTAWI,

Oakland County Circuit Court No.  
2017-265355-FJ

Defendant-Appellant.

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DEFENDANT-APPELLANT'S REPLY BRIEF IN SUPPORT OF  
APPLICATION FOR LEAVE FOR INTERLOCUTORY APPEAL

NOTICE OF FILING AND CERTIFICATE OF SERVICE

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## REPLY ARGUMENT

### **A. Defendant was subjected to custodial interrogation such that *Miranda*<sup>1</sup> warnings were required:**

The trial court considered the fact that Muhammad attended the International Academy, “a school for extremely bright students”, in its *Miranda* assessment of whether a reasonable person would have known that he was free to leave or to remain silent. (Court, Hrg Tr 11/20/18, pp 16-17). However, a suspect’s intelligence and education were notably *not* included as permissible factors by the Michigan Court of Appeals in *People v. Barritt*, 325 Mich. App. 556 (2018), or by the United States Supreme Court in *JDB v. North Carolina*, 564 U.S. 261, 270-271; 131 S.Ct 2394; 180 L.Ed.2d 310 (2011). The prosecution counters that the trial court could properly consider where Muhammad went to school, reasoning that his young age was not a significant factor because his schooling suggests that he is intelligent. This reasoning is flawed, however. The Supreme Court has been steadfast in limiting the facts that can be considered under *Miranda*’s first-prong objective assessment, and has held that while a subject’s age can be considered (*JDB, supra*), factors such as a defendant’s background with law enforcement, prior *Miranda* warnings, and previous military history are subjective factors that cannot be considered. *Yarborough v. Alvarado*, 541 U.S. 652, 668-669; 124 S.Ct 2140; 158 L.Ed2d 938 (2004), citing *Berkemer v. McCarty*, 468 U.S. 420, 431-432; 104 S.Ct. 3138; 82 L.Ed2d 317 (1984) (suspect’s history with law enforcement cannot be considered). See also, *United States v. Peck*, 17 F.Supp.3rd 1345, 1360 (N.D. Ga. 2014) (previous military history).

In *Yarborough*, the Supreme Court distinguished between the many factors that can be

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<sup>1</sup> *Miranda v. Arizona*, 38 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)

considered in a court's assessment as to whether the defendant's statement to police was voluntary versus those that can be considered under the *Miranda* custody analysis. Significantly, this defendant is not raising a voluntariness challenge to the admission of his statements. Consequently, and in contrast, under the *Miranda* custody assessment, subjective factors such as intelligence, education and experience with law enforcement play no role. *Yarborough*, 541 U.S. at 667-668. The Court in *Yarborough* likewise rejected the specific tact attempted here by the prosecution – “subsum[ing] a subjective factor into an objective test by making the latter more specific in its formulation”, i.e., styling the objective inquiry as allowing consideration of what a “reasonable 17-year old, with no prior history of arrest or police interviews’ would perceive.” *Id.* 667. Here, the prosecution “subsum[es] a subjective factor [impermissibly] into an objective test”, *id.*, by arguing that the trial court only relied on Muhammad's attendance at the International Academy “as part of its conclusion that his age was not a determinative or significant fact, not as part of the custody analysis itself.” Brief at p 31. Under *Yarborough*, this is forbidden. A bright-line rule and strict adherence to an “objective test furthers ‘the clarity of [*Miranda*'s] rule’ . . . ensuring that the police do not need to ‘make guesses as to [the circumstances] at issue before deciding how they may interrogate the suspect.’” *Id.*, quoting from *Berkemer*, 468 U.S. at 430-431.

In contrast to intelligence and education, after the Supreme Court's decision in *JDB*, an interrogated person's age is an established, permissible factor for *Miranda*'s custody analysis. The fact that Muhammad was 16 years old at the time of the interrogation “helps to show that he was unlikely to have felt free to ignore his” father's request that he speak with police. *Yarborough*, 541 U.S. at 673 (Breyer, J., dissenting), discussing *Schall v. Martin*, 467 U.S. 253, 265; 104 S.Ct. 2403, 81 LEd2d 207 (1984) “And a 17-year-old is more likely than, say a 35-year-old, to take a police

officer's assertion of authority to keep parents outside the room as an assertion of authority to keep their child inside as well." *Yarborough*, 541 U.S. at 673.

The prosecution quibbles over whether the defendant was "ordered" to go downstairs just prior to the interrogation. Brief at p 33. However, the tape recording, combined with the officer's own testimony resolves the dispute. "You're gonna come downstairs with us." Those words spoken by a police officer to a teenager constitute a command, not a request. Moreover, the officer admits that at that point, Muhammad's father was not upstairs with Muhammad. (Molloy, Hrg Tr 9/21/19, pp 302-303, 347; Appendix Exhibit A, p 2)..<sup>2</sup>

The prosecution implies that because Muhammad told police that his mother died as a result of an accidental fall, and did not "confess" his guilt, somehow this is significant to the Court's analysis. Brief at p 32. However, this is a distinction without a difference. The prosecution likely will use the defendant's statement at trial as evidence of guilt because the defendant (at the suggestion of the police) placed himself in the room with his mother at the time of her fatal fall, and police claim that other evidence (the video) refutes that this was an accident. As such, the error in

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<sup>2</sup> The prosecution argues that because Muhammad only presented one witness of his own at the hearing on the motion to suppress (his father, Bassel Altantawi), and because the trial court did not find this witness credible in some respects (Brief at n 11, p 32), the defendant could not carry his burden of proof on the motion, and the lower court rulings should be upheld. This argument ignores the abundance of other evidence supporting the defendant's position, including admissions made during the officers' testimony and the tape recorded evidence. As such, the defendant sustained his burden of proof even disregarding those aspects of his father's testimony that the trial court found incredible.

its admission would not be harmless. *People v. Dandron*, 70 Mich. App. 439, 444 (1976); *People v. Hoffman*, 142 Mich. 531 (1905) (false exculpatory statements).

The prosecution argues that the duration of the questioning, which it claims lasted only 40 minutes, weighs against a finding of custodial interrogation. *Howes v. Fields*, 565 U.S. 499, 132 S.Ct. 1181, 182 L.Ed.2d 17 (2012). However, the prosecution's reliance solely on the tape-recorded, final interrogation ignores that police questioned Muhammad on multiple occasions, over the course of several days, often asking him the same questions over and over. Similarly, the prosecution downplays the extent to which Muhammad asked explicitly to remain silent. Brief at pp 34-35. On the contrary, Muhammad said at various points that "he didn't want to talk about it anymore, he just didn't want to talk about it"(Opinion, Hrg Tr 11/20/18, p 17), and his assertion of the right was ignored by the officers. The fact that he eventually succumbed to relentless pressure, by three police officers in a highly coercive atmosphere, does not diminish in any way the fact that he did express his desire to remain silent and he was simply rebuffed. Moreover, while the officers did not explicitly accuse Muhammad of murder, they made it abundantly clear to him that they knew the true facts and that they believed the story he was telling them was a lie. As such, the interrogation was accusatory in nature.

**B. The defendant's father was not authorized to consent to the seizure or search of a surveillance video, and the defendant did not consent to the intrusion.**

The prosecution argues that, as co-tenants by the entirety with his wife of the family home, Bassel Altantawi became sole owner at the time her death, that therefore he had authority to consent to all searches of the home, and that as such, case law relating to third-party consent is inapplicable. However, the prosecutor's framing of the issue is flawed in a critical respect – it identifies the home as “the property” for purposes of Fourth Amendment analysis. As such, it ignores longstanding case law recognizing that in a hybrid seizure and search situation – where police action involves both the home and property within the home – Fourth Amendment analysis must be applied at each step, and that the analysis must be applied both to the seizure and to the search of any item. *United States v. Whitfield*, 939 F.2d 1071, 1074-1075 (D.C. Cir. 1971); *People v. Mahdi*, 317 Mich. App. 446, 451; *United States v. Andrus*, 483 F.3d 711, 720 (10<sup>th</sup> Cir. 2007). The proper focus of the Court's Fourth Amendment analysis in this case is on both the seizure and later search *of the surveillance video*, not the search *of the home*. For example, in *Mahdi*, consent by the apartment owner (Mahdi's mother) to search their jointly occupied apartment did not justify a later search of the data in Mahdi's cell phone, and in *Andrus*, the Court had to analyze both the propriety of the search of the home and the propriety of the search of a computer, which both Andrus and his father used, before it was able to resolve the Fourth Amendment challenge. The defendant's challenge in this case is analytically

identical to that involved in *Mahdi*, with the surveillance video data in this case analogous to the data in Mahdi's cell phone.

In a footnote and without any case law support, the prosecution implies that it matters that Mr. Andrus was 51 years old, while Muhammad was a minor. Brief at p 39, n 13. This argument implies incorrectly that while adults enjoy a Fourth Amendment reasonable expectation of privacy and the right to be free from unreasonable searches and seizures, minors do not. Muhammad was not at school, or in a detention facility, where his reasonable expectation of privacy would be lessened by necessity.<sup>3</sup> The Fourth Amendment intrusion occurred in Muhammad's home. *Silverman v. United States*, 365 U.S. 505, 511, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961) ("At [the Fourth Amendment's] very core stands the right of a man to retreat to his own home and there be free from unreasonable governmental intrusion."). Making matters worse, the prosecution does not even claim a recognized exigency, and admits that it did not have probable cause or a warrant, for the intrusion. Brief at pp 41-42.

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<sup>3</sup> *Contrast Board of Education of Independent School District No. 92 of Pottawatomie County, et al., v. Earls*, 536 U.S. 822, 122 S.Ct. 2559, 153 L.Ed2d 735 (2002) (the Fourth Amendment reasonableness inquiry requires consideration of a school's custodial and tutorial responsibilities); and *J.B. ex rel. Benjamin v. Fassnacht*, 801 F.3d 336 (2015) (upholding strip searches in a juvenile detention facility).

Here, at the time of the seizure and search, Bassel Altantawi did not have an interest in the surveillance video data that would divest Muhammad Altantawi of his interest in it, or that would divest Muhammad of his reasonable expectation of privacy in it. Bassel knew very little about the surveillance equipment, and the information he did claim to know was wrong. He didn't know where it was located, and he did not know the password necessary to access data. Appellee Brief at p 6. Even more significant, the facts of record in a related Altantawi family child protective services proceeding demonstrate that the likely purpose of the surveillance system was to protect the deceased and her children, including Muhammad, *from* Bassel Altantawi. Bassel had plead no contest to a criminal domestic violence charge involving Mrs. Altantawi. At the time of the seizure and search of the surveillance video, a protective order barred Bassel from even being near the house, and a tether enforced the order. The court presiding over the couple's divorce and custody case found that the children were also at risk of violence at the hands of their father. A 2016 interim custody order gave Mrs. Altantawi sole custody of the children.<sup>4</sup> The court also ordered that Bassel Altantawi was not to be alone with his own children. He was allowed only supervised visitation at a preordained counseling center selected by the court, which was housed in DHHS's building. *In re Altantawi*,

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<sup>4</sup> From the date of the interim order to the present, Bassel Altantawi never regained legal or physical custody over Muhammad. Custody did not simply revert to Bassel when Mrs. Altantawi died. Bassel Altantawi remains the subject of an ongoing child protective proceeding, with the Michigan Department of Health and Human Services (DHHS) seeking to exercise jurisdiction over Bassel's children.

*Minors*, unpublished per curiam opinion of the Court of Appeals, entered June 27, 2019, (Docket No. 345779), appended, \*2.

The flaw in the prosecution’s argument as to consent is its misplaced focus on the home as the object of the Fourth Amendment intrusion. After presenting this Court with authority as to Bassel’s ownership over the house, the prosecution makes only a passing reference to his alleged ownership of “the family home *and its contents*”. Brief at p 36 (emphasis supplied) . However, extending the prosecution’s framing of the issue to its logical conclusion would allow police to confiscate and search everything in the house as of the date of Mrs. Altantawi’s death, including all personal effects (jewelry, clothing, computers, cell phones), even though Bassel had not lived with the family for nearly two years. This conclusion is clearly at odds with the holdings and analyses of the *Whitfield*, *Andrus* and *Mahdi* cases, above. If an owner or landlord cannot consent to the search of interior personal objects, the replacement owner or landlord cannot logically either.

The prosecution declines to respond in any way to the defendant’s further argument that his resultant statement to police (prompted by the police confronting Muhammad with the surveillance video) is a fruit of the poisonous tree, under *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), and its progeny, which must be suppressed for this reason as well.

Consequently, Bassel could not consent to the seizure or search of the surveillance video as he was not Muhammad's lawful custodial parent, and Bassel's tenancy by entirety over the home did not supply him with ownership rights over the video. Bassel knew nothing about the DVR system. Muhammad, in contrast, was able to explain how the surveillance equipment worked, and on a prior occasion, he had personally viewed the surveillance video streaming to his mother's cell phone. (Molloy, Hrg Tr 9/21/18, pp 111-112). The surveillance system was for his benefit. As such, the defendant has established by clear and convincing evidence (a) that he had a reasonable expectation of privacy in the surveillance video, (b) that he had a right to be free from unreasonable seizures and searches of the video, (c) that Bassel's rights of ownership did not extend to the subject of the seizure and search (the video) and (d) that Bassel did not enjoy custody over his son so as to consent on his behalf.

**C. Interlocutory review by this Court is appropriate.**

The prosecutor argues to this Court that interlocutory litigation of these issues is improper, ignoring that the Court of Appeals was asked to make the same assessment and decided on the unique facts of this case that interlocutory consideration was appropriate. *People v. Altantawi*, unpublished order of the Court of Appeals, entered March 7, 2019, (Docket No. 346775). Moreover, this Court, on occasion, has granted interlocutory review as to questions of the admissibility of

evidence. See e.g., *Rock v. Crocker*, 497 Mich. 1034 (2015) (granting interlocutory appeal), and 499 Mich. 247 (2016) (affirming judgment in part, vacating in part).

The challenges presented here are legal issues of broad significance to the state's jurisprudence. Moreover, the prosecutor's own briefing demonstrates that the defendant's statement and the surveillance video (both challenged herein) are the only pieces of evidence incriminating to this defendant. The prosecution concedes that prior to the discovery of video surveillance (which led to the statement), police did not even have probable cause for a warrant. Brief at pp 41-42. The Supreme Court has long recognized the uniquely damning influence of disclosing an incriminating statement to jurors.<sup>5</sup> Here, without the defendant's statements, and without the surveillance video, the prosecution has no evidence linking the defendant to his mother's death. Interlocutory review is proper here.

Respectfully submitted,

Dated: December 16, 2019

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<sup>5</sup> "All of the Justices in [*Arizona v. Fulminante*, 499 U.S. 279, 296; 111 S.Ct. 1246; 113 L.Ed2d 302 (1991)], agreed that defendant's full confession is not just another piece of evidence; it is the one item that, alone, can form the basis of conviction by removing what otherwise would be a reasonable doubt." *Holguin v. Harrison*, 399 F.Supp.2d 1052, 1061-1062 (N.D. Cal. 2005) ("Holguin may not have been prosecuted but for his statements"), discussing *Fulminante*, 499 U.S. at 296 (White, J.), *id.* 312 (Rehnquist, C.J.); *id.* 313 (Kennedy, J., concurring).

**NOTICE OF FILING AND CERTIFICATE OF SERVICE**

I hereby certify that on the 16<sup>th</sup> day of December, 2019, I electronically filed Defendant-Appellant's Reply Brief in Support of Application for Leave to Appeal, Brief, Exhibits in Support, and this Notice of Filing and Certificate of Service with the Clerk of the Court using the Court's e-file and serve system, which will send notification of such filing to Joshua J. Miller, Assistant Oakland County Prosecuting Attorney, an e-filer, at appellatedivision@oakgov.com.

/s Carole M. Stanyar

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