District Court, Elbert County, Colorado 751 Ute Ave. Kiowa, CO 80117 (393)621-2131	DATE FILED: August 30, 2018
THE PEOPLE OF THE STATE OF COLORADO **vs.** **JOE LOVE**	↑ COURT USE ONLY ↑ CASE NUMBER: 17CR11 DIVISION: 1

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO SUPPRESS STATEMENTS UNCONSTITUTIONALLY OBTAINED IN VIOLATION OF *MIRANDA* AND AS INVOLUNTARY, AND MOTION TO SUPPRESS ALL FRUITS OBTAINED AS A RESULT OF THE UNCONSTITUTIONAL INTERROGATION

This motion comes before the Court on the *Motion To Suppress Statements Unconstitutionally Obtained In Violation Of Miranda And As Involuntary, And Motion To Suppress All Fruits Obtained As A Result Of The Unconstitutional Interrogation* submitted by Defendant, Joe Love, on July 16, 2018 ("Motion to Suppress"). The People did not submit a written response to the Motion to Suppress. The Court held a hearing on the Motion to Suppress on August 15, 2018.

The Court has carefully reviewed the video/audio of the interrogation at issue (Exhibit MO1), as well as the transcript of the interrogation (Exhibit MO2). The Court also has carefully considered the testimony of the witnesses at the August 15, 2018 hearing, as well as the argument of counsel. The Court now finds, concludes, and orders as follows.

I. FACTS

The Court finds the following facts based on the credible testimony and exhibits presented at the hearing on August 15, 2018, particularly the video/audio of the interrogation of Defendant, along with the transcript of that interrogation. The citations to the transcript, "Tr.," are to Exhibit MO2.

1. On January 23, 2016, Decedent, Ed Butler, died as a result of two gunshot wounds to his head.

2. The Amended Complaint and Information filed on July 10, 2018, which was accepted by the Court on August 15, 2018, charges Defendant with 8 counts, including first-degree murder (Counts 1 and 2); second-degree kidnapping (Count 3); aggravated robbery (Counts 4 and 5); first-degree burglary (Counts 6 and 7); and tampering with physical evidence (Count 8).

3. On January 19, 2017 Investigator Michael Buoniconti of the 18th Judicial District Attorney's Office interrogated Defendant at the Fort Bliss Military Base, in Fort Bliss, Texas. Mr. Buoniconti was accompanied by Detective Eric Armstrong of the Elbert County Sheriff's Office.

4. On the date of the interrogation, Defendant was a private first class in the United States Army, living on the military base.

5. Defendant was interrogated in an interview room equipped with several cameras and audio recording capabilities, as demonstrated in Exhibit MO1.

6. Defendant entered the interview room at 9:08 a.m. on January 19, 2017 and was escorted out of the room over 15 hours later, at 12:29 a.m. on January 20, 2017.[1]

7. Defendant was accompanied to the interview room by Special Agent Claudio A. Pacchiega of the Fort Bliss Criminal Investigations Division (CID) office. No credible testimony was presented that Defendant was ordered, forced, or coerced to attend the interview. In other words, no credible evidence was presented that the Defendant did not attend the interview voluntarily.

8. Mr. Buoniconti entered the interview room only seconds before Defendant entered, through the same door. Moments after Defendant entered the room, a hand is seen in the video reaching for the doorknob from outside of the room and closing the door.

9. The Court estimates from the video that the room was approximately eight feet wide by 12-15 feet long. There was a single table in the room placed against the wall opposite the door. The table had three chairs: one chair along the exposed long side and one chair at each of the two the short ends. At either side of the table were two vertical windows, both of which had blinds that were drawn. The light in the room was provided by a ceiling lamp.

10. When Defendant introduced himself, he extended his hand in greeting to Mr. Buoniconti. Both his tone of voice and manner were cooperative. Defendant told Mr. Buoniconti that he had tried to call Mr. Buoniconti back several times. Tr. 1:23; 2:7-11.

11. Mr. Buoniconti and Defendant sat at the table approximately two feet apart. Mr. Buoniconti had a laptop computer on the table. Mr. Buoniconti sat at the long side of the

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[1] The parties agree that the time stamp on the video tape is 12 hours later than it should have been. The video shows Defendant to have entered the room at 9:08 p.m. The parties agree that it was at 9:08 a.m. The parties agree that other than the time stamp, the video accurately depicts what happened in the interview room. Further, the parties agree that, with the exception of minor errors in the transcription of the interview, the transcript provided to the Court is accurate. In setting forth the statements below, the Court relied on both the transcript and the video/audio of the interrogation.

table facing the wall. Defendant sat at the short end of the table to Mr. Buoniconti's left, facing Mr. Buoniconti. The closed door was behind Mr. Buoniconti.

12. When the interview began, the tone was conversational and Defendant showed no signs of distress, fear or anxiety. Defendant sat upright, with his hands either crossed or on his knees. As the interview progressed, Defendant sat back slightly in his chair.

13. Investigator Buoniconti had a yellow legal pad on which he took notes. On occasion, he used his laptop computer.

14. Investigator Buoniconti testified that he was armed during the interview, but he did not know if Defendant could see his weapon. No evidence was presented to the Court whether Defendant did or did not see the weapon.

15. The interview began with Investigator Buoniconti telling Defendant vaguely about the purpose of the interview: "So, what I need to do is try to get an idea about what's going on. And how you play a role into anything or if you do." Tr. 3:18-22. Investigator Buoniconti questioned Defendant about a prior domestic violence case involving Defendant's ex-girlfriend. Investigator Buoniconti then questioned Defendant on the death of his grandfather and great-grandfather. Thereafter, Investigator Buoniconti questioned Defendant extensively about the different cellular phones he used and the numbers associated with those phones. Investigator Buoniconti also questioned Defendant about prior employment and e-mail addresses he used.

16. At 9:25 a.m., Investigator Buoniconti told Defendant, "this is super helpful just to be able to talk to somebody about things and even though you know you don't have to talk to me." Defendant responded, "uh-huh (affirmative)." Tr. 12:9-14. Investigator Buoniconti continued, "I really appreciate you talking to me." Defendant responded, "Uh-huh (affirmative)." Tr. 12:15-17. Investigator Buoniconti repeated: "I appreciate you talking to me even though you don't have to. We got the door closed, because, you know, privacy issues and all, I just thought that that didn't even have a door handle on it, but it does. So, thank you for doing that, man, I really do appreciate that." Defendant responded twice during that statement, "Uh-huh (affirmative)." Tr. 13:19.

17. At 9:41 a.m., Investigator Buoniconti tells Defendant: "I feel some hesitation for the first time from you. What is – what's – what's the hesitation, talk to me. 'Cause I get weird vibes when people hesitate with thing, I don't know what it is. It's the first time I got this from you." Defendant responded, "No, really, I … No, I'm telling you …" Tr. 46:2-13. The Court cannot see Defendant's expression from the video, but his tone of voice and manner remain direct and cooperative; he does not appear to be stressed or anxious.

18. At 9:58 a.m., Defendant asked Investigator Buoniconti: "So, all this has to do with – with Jordan [Defendant's ex-girlfriend]?" Tr. 69:23-24. At that point Defendant was sitting with his arms crossed. Investigator Buoniconti responded, "Well, I'm trying to figure out

some things with this, yeah, with – with – in general from your time frame between June and let's say January, what – who – who's your circle? Like who are you hanging out with …." Tr. 69:25-70:4. The interview continued with Defendant identifying the people he spent time with during those months. Tr. 70:5-73:8.

19. At 10:01 a.m., Investigator Buoniconti suddenly changed the subject of the questioning. He asked Defendant: "So what brought you to Elbert County on January—it would have been the 23rd, that Saturday. What brought you to Elbert County?" Tr. 73:21-23. Defendant responded, "What's Elbert County?" Tr. 73:24. Defendant went on to say, "I don't recall being out in no Elbert." Tr. 74:5-6. Investigator Buoniconti then tells Defendant that he "feel[s] like you've been honest with me," Tr. 74:13-14, and that "I'm not gonna lie to you." Tr. 78:4-5. Investigator Buoniconti states: "But it's really important that you're honest with me. And that you talk to me about why you were up there. 'Cause I know you were. I know you were in that trailer. I know you were. And there's certain times, Joe, that – that – in a person's life that comes up – and I don't know if you're a God-fearing man or not, but there's a reason why I'm here." Tr. 78:12-20.

20. Defendant did not respond to Investigator Buoniconti's encouragement to talk about the "trailer" other than to say "Uh-huh (affirmative)" several times. In fact, for several minutes, Investigator Buoniconti kept speaking to Defendant in an effort to encourage Defendant to talk about the "trailer" and Defendant responded either "uh-huh," "yeah," or "hmm." Tr. at 75-79. Despite Defendant's obvious reluctance to answer his questions, Investigator Buoniconti kept pressing: "And I need you to be honest with me. I know it's not gonna be easy. But I need it. I need you to tell me why you were in there. It's time. It's been a long time. And it's time. It's time to talk to me. It's time to talk to me about what went on. And why were you there? Tell me. Why were you in that trailer?" Tr. 78:24-79:8. Defendant's body language and actual language changed during this exchange. He sat back in his chair and was not animated. He moved little. He kept Investigator Buoniconti's gaze but said very little for several minutes. For his part, Investigator Buoniconti did not raise his voice, but his tone and language were insistent.

21. At 10:05, Defendant said, "No, I went through a lot, you know?" Tr. 79:12. Investigator Buoniconti responded: "I know you did. That's why I'm here." Defendant said, "I know." Investigator Buoniconti continued: "Why were you there, man? You got to tell me. I know you don't know me, Joe, but I'm telling you, you got to tell me, you got to talk. You got to – you got to help me out and – and show me what – what's going on, man." Tr. 79:13-20.

22. In response to Investigator Buoniconti's insistence that Defendant talk to him, Defendant responded, at 10:06 a.m., ***"I don't got nothing else to say. I don't have no more money for a lawyer, you know? … Took all that money so I don't got nothing else to say."*** Tr. 79:21-80:1.

23. Investigator Buoniconti ignored Defendant's statements that he had "nothing else to say" and that he did not have money for a lawyer. Instead, Investigator Buoniconti persisted in his questioning: "I know you don't got money, **I'm not worried about money or any of that stuff**. I'm worried about you. Why were you out there? What brought you out there? Who brought you out there?" Tr. 80:11-14. During that entire time, Defendant sat impassive, and his body language had changed. He was no longer animated. He moved his head slightly forward and backward, and tapped his foot slightly, but otherwise did not move and did not say anything for several minutes. Nevertheless, Investigator Buoniconti persisted in his attempt to convince Defendant to talk to him. When there was silence, Investigator Buoniconti sat silently and stared directly at Defendant.

24. At 10:09 a.m., after a period of silence, Investigator Buoniconti asked again, "So what were you doing out there? Who were you out there with?" Tr. 81:14-15. Defendant appears to have started to cry. He initially began to respond with a mumbling, indiscernible response. He then said, "I don't know. When I talked to them cops about the DUI and told them, look, I'm already in the backseat when it – everything I said, then they just tried to use it against me." Tr. 81:16-20. At this point (10:10 a.m.), Investigator Buoniconti responded:

> Well, I can't tell you, you know, if you need an attorney or don't need an attorney, you know, I didn't – ***I didn't, you know, read you Miranda, because you know, it didn't apply right then – right now***.

Tr. 81:21-24. Investigator Buoniconti continued to tell Defendant that he cannot advise Defendant whether to get an attorney. Thereafter, referring to his requests that Defendant speak with him, Investigator Buoniconti told Defendant that he wished Defendant would "take me up on that," referring to his requests that Defendant speak with him. When Defendant remained silent, Investigator Buoniconti asked, "You're not gonna?" Tr. 82:10-11.

25. Despite Investigator Buoniconti's persistent entreaties, Defendant repeated for the *third time:* ***"I don't got nothing to say."*** Tr. 82:12. This was at 10:11 a.m. – five minutes after Defendant had first invoked his right to remain silent.

26. Investigator Buoniconti immediately responded: "Hang tight. Do me a favor, stay off your phone, okay?" Investigator Buoniconti then opened the door, left the interview room, and closed the door behind him. Several seconds later, Detective Armstrong opened the door, entered the room, closed the door behind him, and sat down across the table from Defendant. Ex. MO1 at 10:12 a.m.

27. At 10:17 a.m., Detective Armstrong offered Defendant some water. Defendant declined that offer, but said, "I got to go pee. I got some water right here." Tr. 83:8-9. Armstrong left the room, closing the door behind him.

28. Investigator Buoniconti and Detective Armstrong both returned to the interview room a few seconds later (at 10:17:52). Investigator Buoniconti stated to Defendant: ***"This is a warrant, you're not free to leave at this point"*** and showed Defendant a search warrant.[2] Tr. 84:6-9. He then explained to Defendant that they would be going through a "process." Tr. 84:17-22. Thereafter, Investigator Buoniconti told Defendant, "you'll just have to kind of chill and hang." Tr. 84:24-25. While he said this, Investigator Buoniconti was standing next to Defendant. Meanwhile, Detective Armstrong had closed the door and stood or sat next to it. Ex. MO1 at 10:18-10:19. Both Investigator Buoniconti and Detective Armstrong remained at all times between Defendant and the door.

29. At 10:19, Defendant repeated: "Can I go to the bathroom? I got to go pee." Tr. 20-21. Investigator Buoniconti and Detective Armstrong then both escorted Defendant out of the room. Detective Armstrong testified at the motions hearing that he accompanied Defendant to the bathroom and remained in the bathroom at all times while Defendant used the facilities. The transcript reflects that Investigator Buoniconti and Defendant left the room at 10:19:48. Tr. 86:2. In fact, all three men exited the room. The transcript reflects that Defendant and Detective Armstrong returned at 10:22:21 and that Investigator Buoniconti returned at 10:47:11 a.m. The video reflects that Detective Armstrong remained with Defendant until Investigator Buoniconti returned and that the door remained closed. During the time they remained in the room together, Defendant sat mostly slouched over forward or leaning back in the chair. He also sat with his head on the table. He and Detective Armstrong exchanged few if any words.

30. Investigator Buoniconti returned to the room at 10:47, and then left less than a minute later. Detective Armstrong remained in the room with Defendant. Detective Armstrong sat in the chair next to the closed door.

31. At 11:30 a.m., Mike Dixon with the District Attorney's office and officers with El Paso County Police Department entered the interview room to retrieve buccal swabs, photographs, and fingerprints from Defendant. *See* Tr. 86:22-23. The law enforcement officers also confiscated Defendant's cell phone.

32. At 11:35 a.m., Defendant asked Dixon, "Do I have to do a piss test or can I go to the bathroom, I really have to pee." Tr. 89:20-21. At this point, three men were in the room with the Defendant and the door was closed. A few seconds later, Defendant was told he could leave the room, the door was opened, and he was accompanied out of the room at 11:35 a.m. He returned at 11:37 a.m. Thereafter, Defendant was questioned by Texas law enforcement officers until 11:49 a.m., when Defendant left the room with the Texas officers.

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[2] In his motion, Defendant repeatedly referred to the warrant as an arrest warrant. The transcript and video suggest, and the Court finds, that it was a search warrant.

33. Defendant returned to the room at 12:09 p.m. It is not clear where he had been. While he was out, Mr. England, a Texas officer, asked Detective Armstrong if he was going to continue to talk to Defendant: "He's not a dummy. Are you – you going to talk to him again? … He's probably smart enough to know that – it doesn't work that way." Detective Armstrong replied, "I agree man. I agree." Tr. 99:17-100:4.

34. Investigator Buoniconti returned to the room at 12:30 p.m. At that point, he began to ask Defendant what Investigator Buoniconti referred to as "clarifying" questions. Specifically, Investigator Buoniconti asked Defendant several times whether Defendant would not talk to Investigator Buoniconti about anything without an attorney, or whether Defendant was willing to talk to Investigator Buoniconti about certain things "outside the trailer" or other "peripheral things" without an attorney. Tr. 100:20-102:17. Defendant responded simply, "I talked to you." Tr. 102:18.

35. Investigator Buoniconti thereafter continued to try to convince Defendant to speak with him while Detective Armstrong was in the room. Tr. 102-112. The door remained closed.

36. At 12:45 p.m., Investigator Buoniconti asked Defendant when he had last eaten. Defendant replied, "Yesterday." Tr. 112:14-15. Investigator Buoniconti told Defendant that they would get him food. Defendant asked for a blanket, telling Investigator Buoniconti "I'm cold." Tr. 113:1. After that, several hours ensued during which Defendant remained in the room and the various law enforcement officers went in and out. The video reflects that Defendant was never left alone in the room. Tr. 115-124. Food was brought in for Defendant, but he ate little or none of it. Defendant continued to complain about being "freezing." *E.g.,* Tr. 120:11-14.

37. At 5:33 p.m., Investigator Buoniconti returned to the room. Tr. 124:6. He explained to Defendant that he had applied for and executed warrants for Defendant's barracks and vehicle. Tr. 124:7-22.

38. At 5:36 p.m., Investigator Buoniconti said to Defendant: "So, I guess with that, where are you at with that? Is it that you don't want to talk to me and you don't have anything to say to me, or is it that you are requesting an attorney? 'Cause that hasn't been made clear." Tr. 126:7-10. Defendant was silent for a full minute, then responded: "Yeah, ***I don't have money for an attorney***, so – " Tr. 126:11-12. Investigator Buoniconti interrupted: "Well, that's neither here nor there . . . ." Tr. 126:13-14.

39. Thereafter, for the next several minutes, Investigator Buoniconti persisted with his attempt to clarify what he repeatedly referred to as the "procedural thing," tr. 126-132, which he explained as: "I got to know if you want [to] at least attempt that; or if you're, you know, requesting an attorney, because it's different for me." Tr. 130:6-8. Defendant was sitting at the table hunched forward with a blanket wrapped around him. He said very little, while Investigator Buoniconti rarely stopped talking in his attempt to convince

Defendant to talk to him. Significantly, despite Defendant's several comments that he could not afford an attorney, Investigator Buoniconti did not advise Defendant that the state would provide an attorney for him. Neither did Investigator Buoniconti advise Defendant of any of his other rights.

40. At 5:49 p.m., Defendant stated: "Yeah, I can talk to you some more." Tr. 132:20. Investigator Buoniconti responded: "You know where I'm at, you know that I'm not – that **you don't have to talk to me**." Defendant replied, "Yeah, I know." Tr. 132: 23-25. Investigator Buoniconti then began a statement that lasted over a minute to which Defendant did not respond. In the middle of the lengthy statement, Investigator Buoniconti said: "I don't want to be in this chair anymore, and I'd say okay, right? 'Cause I – **you don't have to be in that chair anymore if you don't want to be.** I feel like you and I are on the same page with that. But I – I wish –you know, they aren't on there." Tr. 133:15-19. Investigator Buoniconti did not *Mirandize* Defendant at that point. Defendant did not respond to Investigator Buoniconti's statements. He moved very little. Defendant gave no indication that he understood Investigator Buoniconti to have told him that he was free to leave at that point or that there had been any change in the significant restriction to his freedom of movement. The Court finds that no reasonable person would have understood that he was no longer in custody.

41. At no time did Investigator Buoniconti or any of the other law enforcement officers tell Defendant that he was free to leave. Indeed, they never let Defendant use the restroom by himself. At no time did Defendant attempt to leave the interview room without law enforcement personnel, nor, at any point, did law enforcement personnel leave Defendant alone or permit him to leave the room alone. Under the circumstances presented in this case, no reasonable person would have believed that they were free to leave the room or that their freedom of movement was otherwise unrestricted. In other words, the Court finds that, at the time he began his confession, Defendant believed that he remained under arrest. The Court further finds that any reasonable person also would have believed that he remained under arrest.

42. For the next several hours, Defendant provided a detailed description of the events that took place on January 23, 2016. Defendant began the description at 6:07 p.m.–nine hours after he first entered the room–and continued the description for over an hour. Tr. 148:23-195:21.

43. Defendant's pre-*Miranda* statements to Investigator Buoniconti consisted of Defendant telling Investigator Buoniconti that on January 23, 2016, he went for a drive and found himself at what he believed to be an abandoned trailer at the end of a dead end. Defendant stated he entered the trailer through the storage door. While in the trailer, Defendant stated he looked around and did not think that anyone else would show up at the trailer. At some point, Defendant heard a vehicle pull up and he heard someone on the phone. Defendant stated he hid in the back of the trailer when the victim entered the trailer. Defendant grabbed a .357 pistol that he had found inside the trailer and he

confronted the victim, telling him that he wanted to leave. Defendant stated he noticed that the victim had a gun on his belt, so he took it away from him. Defendant stated he took the victim outside of the trailer. Thereafter, the victim came towards Defendant, startling him, at which point Defendant shot the victim. Defendant knew the victim was dead. Defendant then retrieved both guns and went to a Walgreens in Colorado Springs to purchase a bucket and Drano. He then put the guns in the bucket, poured the bottle of Drano in the bucket, and disposed of the guns in Colorado Springs somewhere West of I-25.

44. At 7:26 p.m., Investigator Buoniconti read Defendant his *Miranda* rights. Tr. 197:7-17. Investigator Buoniconti stated, "Hang on. Procedural stuff, different now that we had this talk." Tr. 196:25-197:1. By that time, Defendant was still visibly cold and he was tired. Defendant had eaten little since the day before, even though the law enforcement officers had provided him food. Defendant signed an acknowledgement of his rights at 7:27:50 p.m. Ex. MO1.

45. After receiving his *Miranda* advisement, Defendant gave Investigator Buoniconti permission to search his car. Tr. 199-202.

46. During the day, while Defendant remained in custody, Investigator Buoniconti with the assistance of the Texas law enforcement officers, applied for and executed the following four warrants:

    a. to search Defendant's barracks and to seize specified items, such as Defendant's necklace and his watch,

    b. to search Defendant's vehicle;

    c. to seize his phone;

    d. to take from Defendant buccal swabs and other DNA samples.

    The law enforcement officers executed each of those warrants during the day and Investigator Buoniconti advised Defendant that each of the warrants had been granted and executed.

47. Between 7:34 p.m. and 8:13 p.m., Investigator Buoniconti questioned Defendant extensively about where Defendant had disposed of the two firearms he had removed from the scene of Decedent's death. Tr. 202:24-224:17. Defendant used a computer to identify that location. Those firearms were later recovered by the Elbert County Sheriff.

48. Beginning at 9:10 p.m., Tr. 224:22, Investigator Buoniconti went over Defendant's confession with him, largely summarizing the details of what Defendant already had told him about the events of January 23, 2016. Defendant thereafter confirmed that Investigator Buoniconti had summarized the events correctly. Tr. 230:12-22.

49. Defendant was escorted from the room at 12:29 a.m. Tr. 244:9-10. By the Court's calculation, that was 15 hours, 21 minutes after he entered the room. The record reflects that Defendant had left the room on a few occasions during the day to use the restroom, and was, at all times, accompanied by law enforcement officers.

II. ANALYSIS

A. Defendant Was In Custody When He Was Told "You Are Not Free To Leave" And At All Times Thereafter.

1. *Miranda v. Arizona*, 384 U.S. 436, 471 (1966), protects a defendant's Fifth Amendment right against self-incrimination by requiring police to provide an advisement before custodial interrogation. *Accord People v. Matheny*, 46 P.3d 453, 462 (Colo. 2002). Thus, when a suspect is subjected to *interrogation* while in *custody*, statements obtained from the suspect without advisement of his *Miranda* rights are subject to suppression. *People v. Lee*, 630 P.2d 583, 590 (Colo. 1981).

2. Where a *Miranda* advisement is required, the prosecution bears the burden of showing that a defendant was informed of his *Miranda* rights, and that he voluntarily, knowingly, and intelligently waived them. *Jones v. People*, 711 P.2d 1270 (Colo. 1986).

3. A suspect is in custody when his "freedom of action is curtailed to a 'degree associated with formal arrest.'" *People v. Polander*, 41 P.3d 698, 705 (Colo. 2001) (quoting *Berkemer v. McCarty*, 468 U.S. 420, 440, (1984)). *Accord People v. Elmarr*, 181 P.3d 1157, 1162 (Colo. 2008); *Matheny*, 46 P.3d at 467.

4. The determination of whether a suspect is in custody is an objective inquiry made on a case-by-case basis in light of the totality of the circumstances. *People v. Taylor*, 41 P.3d 681, 683–85 (Colo. 2002).

5. In determining whether a defendant is in custody, courts should consider the following non-exclusive factors, none of which is determinative:

> (1) the time, place, and purpose of the encounter; (2) the persons present during the interrogation; (3) the words spoken by the officer to the defendant; (4) the officer's tone of voice and general demeanor; (5) the length and mood of the interrogation; (6) whether any limitation of movement or other form of restraint was placed on the defendant during the interrogation; (7) the officer's response to any questions asked by the defendant; (8) whether directions were given to the defendant during the interrogation; and (9) the defendant's verbal or nonverbal response to such directions.

Matheny, 46 P.3d at 465–66.

6. Interrogation occurs when police attempt to elicit incriminating information from an individual. *Rhode Island v. Innis,* 446 U.S. 291 (1980); *People v. Haurey*, 859 P.2d 889 (Colo. 1993). The term "interrogation" under *Miranda* refers not only to express questioning by a police officer, but also to any words or actions on the part of the officer that the officer "should know are reasonably likely to elicit an incriminating response from the suspect." *People v. Thomas*, 839 P.2d 1174, 1178 (Colo. 1992) (citations omitted).

7. The Court concludes that Defendant was not in custody when he entered the interview room on January 19, 2017. As set forth above, there is no evidence that Defendant went to the interview involuntarily. At the beginning of the interview, Defendant was animated and cooperative with Investigator Buoniconti, both in his body language, verbal language, and tone; and he acknowledged that he understood that he did not have to talk to Investigator Buoniconti. Nothing in the Defendant's words or conduct when he entered the interview room indicated that he believed his freedom of action was curtailed to a degree associated with a formal arrest. The Court finds that, when Defendant entered the interview room, Defendant did not believe, and no reasonable person would have believed, that he was in custody.

8. The Court concludes that Defendant was in custody when he was told by Investigator Buoniconti, ***"This is a warrant, you're not free to leave at this point."*** The video indicates that Investigator Buoniconti entered the room after a break with a piece of paper that he did not show Defendant immediately, but to which he referred as a "warrant." Under the totality of circumstances of this matter, the Court concludes that, at all times after Defendant was told he was not free to leave and was shown a warrant, Defendant was in custody, because any reasonable person would have believed that his freedom of action was curtailed to a degree associated with formal arrest. Several factors support this finding, as discussed below.

    a. The language used by Investigator Buoniconti was critical. The directive, ***"This is a warrant, you're not free to leave at this point"*** would cause a reasonable person to assume that the "warrant" was an arrest warrant, even if it was not. Also significant is that, when Investigator Buoniconti told Defendant that he was not free to leave, he was, in fact, holding a warrant, albeit a search warrant, not an arrest warrant.

    b. Defendant was, and had been for over an hour, in a closed room with two law enforcement officers blocking his way to the door. At least one of those officers was armed.

    c. Investigator Buoniconti's tone of voice was authoritative when he told Defendant he was not "free to leave." His manner was not friendly, as it had been up to that point.

d. Moreover, although Defendant had been in the room only with Investigator Buoniconti until that point, the two were then joined by Detective Armstrong, who stood or sat next to the closed door.

e. Investigator Buoniconti directed Defendant to "stay off your phone" and that "you'll just have to kind of chill and hang." Later, the law enforcement officers seized Defendant's cell phone.

f. Although Defendant asked to use the bathroom, he was not permitted to do so by the law enforcement officers until it was convenient for them. The law enforcement officers accompanied Defendant to and from the restroom and watched him while he was in the restroom.

g. Defendant was guarded by at least one law enforcement officer in the closed interview room, and the officer was always between Defendant and the door.

h. At no time did Defendant initiate contact with Investigator Buoniconti or other law enforcement personnel.

i. At the time Defendant began his confession, he was exhausted, cold, and hungry. He was completely dependent on the law enforcement officers to bring him food (which he did not eat), permit him to use the bathroom, turn up the heat, and bring him a blanket.

j. Defendant became much less animated and forthcoming in his conversation immediately upon being asked by Investigator Buoniconti about the events that took place on January 23, 2016. Defendant's posture also changed. He had been sitting upright before the questioning focused on the events of January 23, 2016; after that, his posture was slouched.

k. Defendant was required to provide photographs, fingerprints, and buccal swabs to law enforcement officers while in the interview room with the door closed.

l. Investigator Buoniconti informed Defendant of four different warrants that he had obtained during the day.

m. By the time Defendant gave his confession, he had been in the interview room for nearly 9 hours. Investigator Buoniconti had ignored Defendant's three different statements that he did not want to talk.

n. Defendant repeatedly stated that he could not afford a lawyer. Rather than advise Defendant that the state would provide him a lawyer at no cost to him, Investigator Buoniconti dismissed Defendant's statement, telling Defendant that his inability to afford a lawyer was "neither here nor there." That Investigator Buoniconti refused to advise Defendant of his right to free counsel after Defendant repeatedly stated that he

could not afford a lawyer is particularly concerning to the Court. After Defendant stated that he could not afford a lawyer, Investigator Buoniconti attempted to "clarify" whether Defendant would talk to Investigator Buoniconti about certain issues without a lawyer. Because Investigator Buoniconti did not advise Defendant of his right to free counsel, Defendant was placed on the horns of a dilemma: should he proceed alone, or should he proceed with counsel, which he could not afford? The real option–that of proceeding with state-appointed counsel–was not provided to Defendant at that time. This dilemma is precisely what the advice to a custodial suspect of his right to free counsel is designed to prevent.

o. Despite his obvious discomfort, Defendant stayed in the interview room, as he was commanded to do, for over 15 hours.

p. Given that he was being closely guarded by a law enforcement officer the entire time, Defendant reasonably believed that he was under arrest.

B. Defendant's Invocation of His Right To Remain Silent Should Have Been, But Was Not, "Scrupulously Honored."

1. At 10:06 a.m., Defendant told Investigator Buoniconti, ***"I don't got nothing else to say. I don't have no more money for a lawyer, you know? ... Took all that money so I don't got nothing else to say."*** Tr. 79:21-80:1. Again at 10:11 a.m., Defendant repeated: ***"I don't got nothing to say."*** Tr. 82:12.

2. Citing *People v. Arroya*, 988 P.2d 1124 (Colo. 1999), Defendant argues that his statements must be suppressed for the additional reason that Investigator Buoniconti ignored Defendant's invocation of his right to remain silent. In *Arroya,* the Colorado Supreme Court held that when a criminal suspect invokes his right to remain silent during a custodial interrogation, the police must "scrupulously honor" the assertion of this right to comply with the *Miranda* doctrine. 988 P.2d at 1130. By its terms, *Arroya* applies only to custodial interrogation. *Arroya* held as follows:

> We hold that before the obligation of police to respect fully a suspect's right to remain silent is triggered, a suspect, *who is in custody and being questioned*, must clearly articulate the right to remain silent. This must be done in such a manner that a reasonable police officer under the circumstances would understand the suspect's conduct and words to mean that she is asserting her right under *Miranda* to cut off questioning.

988 P.2d at 1126-27 (emphasis added).

3. Defendant told Investigator Buoniconti clearly on three occasions that he had "nothing else to say" or "nothing to say." Defendant's statements are legally indistinguishable from the statement at issue in *Arroya,* where the suspect said, "I don't want to talk no more." Here, the Court must consider under a totality of circumstances whether a

reasonable law enforcement officer would have understood that Defendant had asserted his right to cut off questioning. Specifically,

> [t]he trial court must review a wide range of factors on a case-by-case basis in order to consider the totality of the circumstances. The trial court should assess the words spoken by the defendant and the interrogating officer, the officer's response to the suspect's words, the speech patterns of the suspect, the content of the interrogation, the demeanor and tone of the interrogating officer, the suspect's behavior during questioning, the point at which the suspect invoked the right to remain silent, and who was present during the interrogation.

988 P.2d at 1132. This Court adopts the findings set forth above. Considering the totality of circumstances in this case, the Court concludes that a reasonable officer would have understood that Defendant's three statements to Investigator Buoniconti that he had "nothing [else] to say" unambiguously meant, and should have been interpreted by Investigator Buoniconti to mean, that Defendant intended to invoke his right to remain silent.

4. Defendant made all three statements invoking his right to remain silent before Investigator Buoniconti told him that he was not free to leave. For that reason, the People argue *Arroya* is inapplicable and Investigator Buoniconti was not required to "scrupulously honor" Defendant's invocation of his right to remain silent. The Court disagrees for the following reasons:

   a. The transcript and video reflect that Defendant made the three statements that he had "nothing to say" at 10:06 a.m. and 10:11 a.m. As set forth above, Defendant was not yet in custody when he made those statements. He was effectively placed under arrest at 10:17 a.m. – only 6 minutes later – when Investigator Buoniconti told Defendant, "This is a warrant, you're not free to leave at this point."

   b. Immediately after the Defendant invoked his right to remain silent for the third time, at 10:11 a.m., Investigator Buoniconti left the room.

   c. There was no substantive communication between Defendant and law enforcement officers after Investigator Buoniconti left the room.

   d. When Investigator Buoniconti returned to the room, the first thing he told Defendant was "This is a warrant, you're not free to leave at this point." That was at 10:17 a.m.—six minutes after Defendant's statement that he had "nothing to say."

   e. Given the temporal and factual proximity of Defendant's third invocation of his right to remain silent and his functional arrest – which events were separated by no communication between Defendant and Investigator

Buoniconti – the Court concludes that Investigator Buoniconti was required in this case to "scrupulously honor" Defendant's invocation of his right to remain silent.

5. Had Investigator Buoniconti scrupulously honored Defendant's invocation of his right to remain silent, Investigator Buoniconti would have ceased all questioning of Defendant when he effectively placed Defendant in custody by showing him the warrant and telling him he was no longer free to leave. That was at 10:17 a.m.

6. Investigator Buoniconti's failure to honor Defendant's invocation of his right to remain silent compels this Court to order the suppression of all of Defendant's statements made after 10:17 a.m.

C. Investigator Buoniconti Did Not Honor Defendant's Invocation of His Right to Counsel.

1. As set forth above, at the same time Defendant told Investigator Buoniconti that he had "nothing else to say," Defendant also stated that he could not afford an attorney. Specifically, Defendant stated, at 10:06 a.m., ***"I don't got nothing else to say. I don't have no more money for a lawyer, you know? Took all that money so I don't got nothing else to say."*** Tr. 79:21-80:1.

2. Beginning at 12:30 p.m., Investigator Buoniconti began to ask Defendant "clarifying" questions about whether Defendant had asked for an attorney. Specifically, Investigator Buoniconti asked Defendant several times whether Defendant would not talk to Investigator Buoniconti about anything without an attorney, or whether Defendant was willing to talk to Investigator Buoniconti about certain things "outside the trailer" or other "peripheral things" without an attorney. Tr. 100:20-102:17. Defendant responded simply, "I talked to you." Tr. 102:18.

3. By late afternoon, Defendant still had not spoken with Investigator Buoniconti. At 5:36 p.m., Investigator Buoniconti asked Defendant: "So, I guess with that, where are you at with that? Is it that you don't want to talk to me and you don't have anything to say to me, or is it that you are requesting an attorney? 'Cause that hasn't been made clear." Tr. 126:7-10. Defendant was silent for a full minute, then responded: "Yeah, ***I don't have money for an attorney***, so . . . ." Tr. 126:11-12. Investigator Buoniconti replied: "Well, **that's neither here nor there** . . . ." Tr. 126:13-14. Thereafter, for the next several minutes, Investigator Buoniconti persisted with his attempt to clarify whether Defendant had intended to invoke his right to counsel. Tr. 126-132. Significantly, Investigator Buoniconti did not advise Defendant that the state would appoint him free counsel if he wanted to speak with a lawyer.

4. In *People v. Bradshaw*, 156 P.3d 452 (Colo. 2007), the Colorado Supreme Court discussed the law relating to request for an attorney:

> The United States Supreme Court has held that a request for counsel must be unambiguous and unequivocal to be sufficient. *Davis*, 512 U.S. at 461–62, 114 S.Ct. 2350. In determining whether a request for counsel was sufficient, the trial court must consider whether the accused's statements "can reasonably be construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police." *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991). The accused's request must be sufficiently clear so "that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Davis*, 512 U.S. at 461–62, 114 S.Ct. 2350. If sufficiently clear, the officer must "scrupulously honor" the accused's request. *Smith v. Illinois*, 469 U.S. 91, 95 (1984). We have recognized and applied the Supreme Court's finding that requests for attorneys be scrupulously honored. *People v. Gonzales*, 987 P.2d 239, 241 (Colo. 1999).

156 P.3d at 457. Thus, the test is whether a reasonable police officer would have understood that Defendant had invoked his right to counsel. Here, Defendant tied his invocation of his right to remain silent with his inability to afford an attorney: *"I don't got nothing else to say. I don't have no more money for a lawyer, you know? Took all that money so I don't got nothing else to say."* Tr. 79:21-80:1.

5. In *People v. Fish*, 660 P.2d 505 (Colo. 1983), *abrogated on other grounds by People v. Hopkins*, 774 P.2d 849, 851–52 (Colo. 1989), the Colorado Supreme Court held that the Defendant had made an unambiguous request for counsel when he was told by officers "no" after he asked, "Do I need an attorney?" Here, Investigator Buoniconti twice dismissed Defendant's statements that he could not afford an attorney. First, he stated, "I know you don't got money, I'm not worried about money or any of that stuff. I'm worried about you. Why were you out there? What brought you out there? Who brought you out there?" Tr. 80:11-14. Later, Investigator Buoniconti responded, "Well, that's neither here nor there . . . ." Tr. 126:13-14. This Court perceives little difference between Investigator Buoniconti's response to Defendant and the response of the officers in *Fish*. Under the circumstances of this case, the Court concludes that a reasonable officer would have interpreted Defendant's statement that he had nothing to say because he could not afford a lawyer as an invocation of both his right to counsel and his right to remain silent.

6. Once Defendant made an unequivocal request for counsel, he was "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." *People v. Bradshaw*, 156 P.3d 452, 458 (Colo. 2007) (quoting *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981)). *See also People v. Redgebol*, 184 P.3d 86, 99 (Colo. 2008) (a request for counsel must be scrupulously honored).

7. Had Defendant's request for counsel been ambiguous, Investigator Buoniconti would have been entitled to ask clarifying questions for the sole purpose of determining if he requested an attorney. *See, e.g., People v. Benjamin*, 732 P.2d 1167, 1170 (Colo. 1987) (if the accused's statements concerning the right to counsel are ambiguous, police officials are not prohibited from asking the accused to clarify whether he or she in fact desires to be represented by counsel). But that is not what happened here. When Defendant first mentioned that he could not afford an attorney, Investigator Buoniconti did not ask clarifying questions. Instead, he asked direct questions designed to elicit incriminating information: "Why were you out there? What brought you out there? Who brought you out there?" Tr. 80:13-14. Later, when Defendant stated again that he could not afford an attorney Investigator Buoniconti dismissed the statement by telling Defendant "that's neither here nor there . . . ." Tr. 126:13-14. Although Investigator Buoniconti undeniably did ask Defendant such clarifying questions later, he also went beyond that, trying subtly to convince Defendant to speak with him.

8. Moreover, as set forth above, Investigator Buoniconti never advised Defendant at that time of his right to court-appointed counsel. At no point did Investigator Buoniconti cease the interrogation and summon counsel for Defendant.

D. Even If Defendant Had Not Invoked His Right to Remain Silent, Defendant Was Required to Be Given His *Miranda* Warning While Being Subjected to Custodial Interrogation.

1. As set forth above, this Court concludes that Defendant was in custody, and therefore was required to be provided his *Miranda* warning, at such time as Investigator Buoniconti told Defendant he was "not free to leave" while holding a warrant.

2. Because Defendant was subjected to custodial interrogation without being advised of his *Miranda* rights, and without Defendant making a voluntary, knowing, and intelligent waiver of those rights, all of Defendant's *Pre-Miranda* statements obtained as a result of that interrogation must be suppressed.

3. Citing *People v. Begay*, 325 P.3d 1026 (Colo. 2014), the People urge the Court not to "conflate" 4th Amendment analysis with 5th Amendment analysis. *Begay* held that the language "You are not free to leave" does not, in and of itself, constitute "custody" for purposes of entitlement to a *Miranda* warning. As set forth above, this Court does not conclude that Defendant was in custody simply because Investigator Buoniconti told Defendant, "You are not free to leave at this point." The Court has considered the totality of circumstances, as *Begay* and *Matheny* require. *Id.* at 1032.

4. Moreover, even if Investigator Buoniconti had told Defendant that he was "free to leave" (which he did not do, contrary to Investigator Buoniconti's testimony), under the circumstances of this case a *Miranda* warning was still required. "Telling the suspect he is free to leave does not necessarily mean that no *Miranda* warning is required, especially

when all the external factors point to finding the defendant in custody." *People v. Hankins*, 201 P.3d 1215, 1219 (Colo. 2009).

5. It is clear that Investigator Buoniconti interrogated Defendant while Defendant was in custody. Investigator Buoniconti asked Defendant many questions designed to elicit incriminating information. To be sure, Investigator Buoniconti's methodology was to ingratiate himself with Defendant and he never raised his voice. He nonetheless asked questions designed to elicit incriminating information, which did, in fact, elicit a detailed confession *after* Defendant had told Investigator Buoniconti three times that he had "nothing to say" and that he (Defendant) could not afford an attorney.

6. Because Investigator Buoniconti interrogated Defendant while Defendant was in custody and because he elicited incriminating statements without having given Defendant his *Miranda* warning, all of Defendant's pre-*Miranda* statements must be suppressed. *See, e.g., Verigan v. People*, 420 P.3d 247, 251 (Colo. 2018).

E. Defendant's Post-Miranda Statements Also Must Be Suppressed.

1. As set forth above, after Defendant gave his detailed confession, Investigator Buoniconti gave Defendant his *Miranda* warning. That occurred at approximately 7:30 p.m., after Defendant had been in the interview room over 10 hours.

2. Beginning at 9:10 p.m., Tr. 224:22, Investigator Buoniconti went over Defendant's confession with him, largely summarizing the details of what Defendant already had told him about the events of January 23, 2016. Defendant thereafter confirmed that Investigator Buoniconti had summarized the events correctly. Tr. 230:12-22.

3. Citing *Missouri v. Seibert*, 542 U.S. 600 (2004), Defendant argues that the Court must suppress all of his statements after the *Miranda* warning was given. The People have advised the Court that the correct governing decision on this issue is *Verigan*, 420 P.3d 247. In *Verigan,* the Colorado Supreme Court held as follows:

> when making a suppression determination in a case such as this, a trial court should conduct an initial inquiry into whether the People have proved by a preponderance of the evidence that the police did not deliberately use a two-step interrogation procedure to obtain a confession. If the court determines that the use of the procedure was deliberate, then the court should determine whether curative measures (e.g., an additional warning or a substantial break in time and circumstances between the pre- and post-warning statements) were employed, such that the suspect would understand the import and effect of the warning at the time of the later statement. If not, then the statements are inadmissible. If, however, the trial court determines that the People proved that the police did not deliberately use a two-step technique to undermine *Miranda*, then it should apply the voluntariness test enunciated in [*Oregon v. Elstad*, 470 U.S. 298 (1985)].

420 P.3d at 254 ¶ 34.

4. In *Elstad,* the Supreme Court held that if a suspect *voluntarily* gives a statement prior to a *Miranda* warning, and the suspect thereafter *voluntarily* waives his rights prior after receiving the *Miranda* warning, then the post-warning statement is admissible, because it was knowingly and voluntarily made. 470 U.S. at 309. The focus of the inquiry with respect to both the pre-warning and post-warning statements is on the voluntariness of the statements. *Id.* at 318. *Elstad* did not define the factors to be considered to determine the voluntariness of the statements, but it admonished that "the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements." *Id.*

5. Accordingly, pursuant to *Verigan,* the first question this Court must answer is "whether the People have proved by a preponderance of the evidence that the police did not deliberately use a two-step interrogation procedure to obtain a confession." 420 P.3d at 254 ¶ 34. For the following reasons, the Court finds and concludes that the People did not sustain their burden.

   a. First, it is notable in this case that, during the 15 hours Defendant was detained in the interview room at Fort Bliss, Investigator Buoniconti applied for and executed four separate warrants. Those warrants were accompanied by affidavits. Investigator Buoniconti told Defendant about each warrant, asked for Defendant's assistance, and explained when the warrants were executed and what items were seized. It is clear that Investigator Buoniconti was knowledgeable and experienced in police investigations and the constitutional limitations imposed on law enforcement officers during those investigations.

   b. Second, Investigator Buoniconti clearly knew about the requirement of a *Miranda* warning. He raised the topic himself, when he told Defendant, "I didn't, you know, read you Miranda, because you know, it didn't apply right then – right now." Tr. 81:21-24.

   c. Third, Investigator Buoniconti gave Defendant his Miranda warnings – both oral and written – after Defendant's confession. Investigator Buoniconti referred to the warning as "Procedural stuff, different now that we had this talk." Tr. 196:25-197:1. Investigator Buoniconti gave no satisfactory explanation as to why he knew to give the warning after the confession, but did not give the warning prior to the confession.

   d. Fourth, Investigator Buoniconti knew that if Defendant's invocation of his right to counsel was vague, Investigator Buoniconti was entitled to ask clarifying questions regarding the scope of Defendant's invocation of that right. Investigator Buoniconti asked Defendant several times whether Defendant was willing to talk with Investigator Buoniconti about anything without an attorney, or whether Defendant was willing to talk to Investigator Buoniconti about certain things "outside the

trailer" or other "peripheral things" without an attorney. Tr. 100:20-102:17. This demonstrates to the Court that Investigator Buoniconti is extremely knowledgeable about the law regarding the *Miranda* warning, including when a suspect must be given that warning.

e. Fifth, after Investigator Buoniconti gave Defendant his *Miranda* warnings, he carefully summarized Defendant's confession and asked Defendant whether he had correctly summarized Defendant's prior statements. Tr. 230:12-22. Investigator Buoniconti asked Defendant: "So, you're saying that – that my verbal summary was – was representative of what we talked about?" Defendant responded: "Yeah." Tr. 230:19-22. The language used by Investigator Buoniconti here demonstrates that he thought carefully about ensuring that Defendant would acknowledge his pre-*Miranda* statements after he was warned. It also provides further evidence of Investigator Buoniconti's general sophistication as an investigator: he was so concerned about the taint of Defendant's pre-*Miranda* statements that he attempted to sanitize them through the post-*Miranda* summary.

f. Sixth, the Texas law enforcement officers and even Detective Armstrong of the Elbert County Sheriff's Office appear to have had doubts about how Investigator Buoniconti conducted the interrogation of Defendant. During an exchange with Detective Armstrong, one of the Texas officers stated: "He's not a dummy. Are you – you going to talk to him again? … He's probably smart enough to know that – it doesn't work that way." Detective Armstrong replied, "I agree man. I agree." Tr. 99:17-100:4. The Court infers that the men were referring to Defendant.

g. Seventh, the Court observed Investigator Buoniconti carefully during his testimony at the motions hearing. The Court listened carefully to his testimony. The district attorney asked Investigator Buoniconti "Did you deliberately do this in an effort to try to circumvent the Miranda warning in order to get Mr. Love to hopefully speak with you then?" Investigator Buoniconti answered, "No." Significant to the Court is that Detective Armstrong did not corroborate that testimony. The Court finds Investigator Buoniconti's testimony on this issue to be not credible.

6. For the foregoing reasons, this Court concludes that Investigator Buoniconti did deliberately intend to use a two-step procedure in order to obtain Defendant's confession.

7. This Court now must determine "whether curative measures (e.g., an additional warning or a substantial break in time and circumstances between the pre- and post-warning statements) were employed, such that the suspect would understand the import and effect of the warning at the time of the later statement." *Verigan,* 420 P.3d at 254 ¶ 34. The Court finds and concludes that such curative measures were not employed in this case.

8. The only potentially curative measure that might be said to have been employed was that there was a break of approximately an hour and a half between the Miranda advisement and Defendant's subsequent confirmation of Investigator Buoniconti's summary of his

confession. However, during that time, Investigator Buoniconti continued to question Defendant. Indeed, Investigator Buoniconti spent a great deal of time with Defendant in an attempt to locate the two firearms Defendant had disposed of. Defendant was not given a meaningful break. He was still cold, hungry, and exhausted. He was still in the closed interview room with law enforcement personnel between him and the door. Investigator Buoniconti did not provide an additional warning before he summarized Defendant's statement to ensure that Defendant understood his rights. Defendant did not consult with counsel. In short, there was nothing to indicate that Defendant's post-warning statements were given after he knowingly and intelligently waived his rights.

9. Even if the Court determined that the People had met their burden of demonstrating that Investigator Buoniconti had not deliberately used a two-step interrogation technique, the Court still would find that Defendant's post-*Miranda* statements were involuntarily given. Unlike here, *Elstad* involved a situation where the suspect originally provided voluntary statements. Then, after he was *Mirandized,* the suspect again gave voluntary statements. The Supreme Court held that, in those circumstances, while the pre-warning statements had to be suppressed, the post-warning statements did not have to be suppressed, because the Court had confidence that the subsequent statements were voluntarily made. 470 U.S. at 314-18. The Supreme Court explained:

> absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of *Miranda* warnings to a suspect who has given a *voluntary* but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights.

470 U.S. at 314 (emphasis added). However, the majority in *Elstad* also provided the following caution:

> We do not imply that good faith excuses a failure to administer *Miranda* warnings; nor do we condone inherently coercive police tactics or methods offensive to due process *that render the initial admission involuntary and undermine the suspect's will to invoke his rights once they are read to him.*

470 U.S. at 317; 105 S.Ct. 1297 (emphasis added).

10. The prosecution bears the burden of showing that a suspect voluntarily, knowingly, and intelligently waived his rights after being given a *Miranda* warning. *Jones v. People*, 711 P.2d 1270, 1275 (Colo. 1986).

11. The prosecution also bears the burden of demonstrating that a suspect makes statements voluntarily after *Miranda* warnings are given. *Id.*

12. The prosecution's burden in establishing a valid *Miranda* waiver is to prove the waiver by a preponderance of the evidence. *People v. Hopkins*, 774 P.2d 849, 853 (Colo. 1989).

13. The prosecution did not sustain those burdens in this case. This Court finds that, at the time Defendant began his confession at approximately 6:07 p.m., Investigator Buoniconti through his persistence and insistence, had effectively subjugated Defendant to Investigator Buoniconti's will. *See Miranda v. Arizona,* 384 U.S. 436, 457 (1966). *See also Schneckloth v. Bustamonte*, 412 U.S. 218, 225–26 (1973) (if a suspect's "will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process") (internal quotes and citation omitted).

14. For the reasons set forth above, this Court concludes that, by the time Defendant gave his initial confession, Defendant's volition had been compromised. The Court further concludes that Defendant's volition was not restored simply by having been read his rights. Nor were curative measures employed that restored Defendant's volition such that his post-warning statements were voluntarily given.

15. Accordingly, even if the Court had not already concluded that Defendant's statements must be suppressed as a result of investigator Buoniconti's failure to "scrupulously honor" Defendant's invocation of his right to remain silent, the Court concludes that Defendant's post-*Miranda* statements must be suppressed for the additional reason that they were involuntarily given.

F. ALL PHYSICAL EVIDENCE OBTAINED AS A RESULT OF THE UNCONSTITUTIONAL INTERROGATION MUST BE SUPPRESSED

1. Defendant argues that the "fruit-of-the-poisonous-tree" doctrine requires the Court to suppress the physical evidence obtained as a result of the statements. The cases analyzing whether evidence learned after a *Miranda* violation must be suppressed focus not on whether the *Miranda* warning was given, but rather on whether the evidence obtained was the product of a voluntary statement. *See, e.g.*, *People v. Bradshaw*, 156 P.3d 452 (Colo. 2007) (although the physical evidence was obtained after a *Miranda* violation, the evidence should not have been suppressed because this violation did not rise to the level of actual coercion in violation of the Fifth Amendment); *People v. Gosselin*, 205 P.3d 456, 461 (Colo. App. 2008) (upholding trial court's denial of suppression of physical evidence following *Miranda* violation because "the record here demonstrates that defendant's statements were voluntary and not the result of coercion"). *But see People v. Hopkins*, 774 P.2d 849, 852 (Colo. 1989) ("[i]f a custodial statement is obtained from a suspect without a valid waiver of *Miranda* rights, then any evidence obtained by the police as the direct result of the constitutional violation must also be suppressed, unless the prosecution establishes that this same evidence would inevitably have been discovered, is sufficiently attenuated from the initial interrogation to permit its

admission at trial, or was obtained from a source independent of the illegality") (citations omitted).

2. In *U.S. v. Patane*, 542 U.S. 630 (2004), the U.S. Supreme Court considered whether a gun recovered after the defendant's voluntary but unwarned confession must be suppressed. The Court held that, because the statements that led to the gun's recovery were voluntary, the mere fact that the defendant had not been warned does not require the gun's suppression. *Id.* at 644 (plurality opinion).

3. As the Court discussed *supra,* Defendant's post-*Miranda* statements were not voluntary. As a result, the physical evidence obtained as a result of Defendant's post-*Miranda* statements must be suppressed.

CONCLUSION

For the foregoing reasons, the Court GRANTS the Motion to Suppress in part and DENIES it in part. The Court is compelled to suppress all of Defendant's statements that he gave to the investigating officers *after* 10:17 a.m. on January 19, 2017. In addition, the Court is compelled to suppress all physical evidence about which the investigating officers learned from Defendant after 10:17 a.m. on January 19, 2017. Such suppressed evidence includes the two firearms that Defendant removed from the scene on January 23, 2016 in Elbert County, Colorado.

The Court does not suppress any statements given by Defendant prior to 10:17 a.m. on January 19, 2017. Nor does the Court suppress any of the physical evidence about which the investigating officers learned from Defendant before 10:17 a.m. on January 19, 2017.

The Court does not suppress any other evidence seized from Defendant, such as (1) the DNA evidence retrieved from Defendant, *i.e.,* the buccal swabs; (2) Defendant's cell phone; (3) items seized from Defendant's barracks; or (4) items seized from Defendant's vehicle.

SO ORDERED: August 30, 2018.

BY THE COURT:

SEAL

Gary M. Kramer
District Court Judge