

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA :
 :
 v. : No. 1:08CR384-1
 :
 DEMARIO JAMES ATWATER :

REPLY TO GOVERNMENT’S RESPONSE
TO MOTION TO SUPPRESS INTERROGATION OF THE DEFENDANT

COMES NOW the defendant, DEMARIO JAMES ATWATER, by and through his undersigned legal counsel, in reply to the Government’s response to the Motion to Suppress, and shows unto the Court the following.

The Government does not, in their response to the Defendant’s Motion to Suppress, deny that the Durham Police Department officers that took Demario Atwater into custody on March 12, 2008, physically assaulted and intimidated Mr. Atwater. The defendant specifically requests that the Government identify the names of the Durham Police Officers that took Mr. Atwater into custody. At least some of those officers are depicted in the WGHP Fox 8 News Video previously filed with this Court and can be seen taking Mr. Atwater into the Chapel Hill Police Department following his arrest. Some of those Durham police officers are further, on information and belief, depicted in the video of the holding area of the Chapel Hill Police Department recently provided to defendant’s counsel, a copy of which is filed in support of this brief.

The defendant further references, along with this reply, (1) the WGHP Fox 8 News Video depicting Mr. Atwater's condition while in custody of the Durham Police Department and while being brought into the Chapel Hill Police Department just before his interrogation, previously hand-filed with this Court as item #5 in Document # 223, filed March 22, 2010, entitled notice of Manual Filing as an exhibit to Docket Entry 52; (2) the defendant hereby files contemporaneously with this motion a dvd produced in discovery depicting the booking area of the Chapel Hill Police Department just prior to Mr. Atwater's custodial interrogation; (3) the defendant does hereby file under seal the 2 DVD's that depict Mr. Atwater's actual interrogation by the Chapel Hill Police Department, and requests that the Court view the 2 DVD's of Mr. Atwater's interrogation *in camera*; and (4) the defendant submits color photographs, attached as Exhibits 1-4 hereto, taken by the associated press of Mr. Atwater's cheek on the day of his arrest and custodial interrogation.

ARGUMENT

Legal Principles

It is a fundamental principle of our system of justice that "men are not to be exploited for the information necessary to condemn them before the law[.]" *Culombe v. Connecticut*, 367 U.S. 568, 581 (1961). To that end, the due process clause of the Fifth Amendment to the United States Constitution prohibits the

admission of a confession unless the government has met its burden of showing that the confession was voluntarily made. *Haynes v. Washington*, 373 U.S. 503 (1963).

"It is, I assume, common ground that if this record had disclosed an admission by the police of one truncheon blow on the head of petitioner, a confession following such a blow would be inadmissible because of the Due Process Clause." *Fikes v. Alabama*, 352 U.S. 191, 198 (1957) (Frankfurter, J., concurring). To be voluntary, a confession must be "the product of an essentially free and unconstrained choice by its maker." *Columbe v. Connecticut*, 367 U.S. 568, 602 (1961). Where, however, an accused's "will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process." *Id.*, at 602.

"[T]he constitutional inquiry is not whether the conduct of state officers in obtaining the confession was shocking, but whether the confession was 'free and voluntary;' that is (it) must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." *Malloy v. Hogan*, 378 U.S. 1, 7 (1964) (citing *Brown v. Mississippi*, 297 U.S. 278 (1936)). "In other words, the person must not have been compelled to incriminate himself. We have held inadmissible even a confession secured by so mild a whip as the refusal, under

certain circumstances, to allow a suspect to call his wife until he confessed." *Malloy v. Hogan*, 297 U.S. at 7 (citing *Haynes v. Washington*, 373 U.S. 503 (1963)). "The use of coerced confessions, whether true or false, is forbidden because the method used to extract them offends constitutional principles." *Lego v. Twomey*, 404 U.S. 477, 485 (1972).

When determining the voluntariness of a statement, courts must be cognizant that "[t]here is torture of mind as well as of body; the will is as much affected by fear as by force." *Watts v. Indiana*, 338 U.S. 49 (1949). Thus, consistent with due process, "neither the body nor mind of an accused may be twisted until he breaks." *Culombe*, 367 U.S. at 584.

The government may make no use of a waiver, or any other statement, involuntarily obtained from a defendant in violation of the Fifth Amendment, *Mincey v. Arizona*, 437 U.S. 385, 398 (1977). The government must prove, in addition to formal compliance with *Miranda*, that any incriminating statement obtained from the defendant was given voluntarily. *Lego v. Twomey*, 404 U.S. 477, 484 (1972). A defendant may be properly warned and freely waive as required under *Miranda*, yet ultimately be coerced into making a confession. *Oregon v. Elstad*, 470 U.S. 298, 318 (1985) (ultimate test of admissibility is always the entire course of police conduct leading to the statement) and *Jackson v. Denno*, 378 U.S. 368, 376 (1964).

A confession is involuntary whether it occurs by physical intimidation or psychological pressure. *Arizona v. Fulminante*, 499 U.S. 279 (1991); *Townsend v. Sain*, 307 U.S. 293 (1963). The government bears a continuing burden to demonstrate voluntariness throughout the course of the interrogation leading to the statement, and the inquiry of necessity involves an evidentiary hearing on the issue. No single factor is determinative on the issue of voluntariness. Rather, this Court must look to the "totality of all the surrounding circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). Before the government can use any of the defendant's statements as evidence, it must establish that they were taken in accord with the above legal principles.

Finally, when a person invokes the constitutional right to counsel during a custodial interrogation, all questioning must cease until the person has been provided counsel. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981).

Facts

Issue 1: Police Coercion

According to documents received in discovery, on March 12, 2008, at approximately 5:00 a.m., the Durham SWAT team's "tactical unit" took Demario Atwater into custody. At approximately 5:20 a.m., Demario Atwater was brought to the booking area of the Chapel Hill Police Department. At

approximately 7:10 a.m., Chapel Hill Police Investigator Rodney Newcomer began his recorded interview with Demario James Atwater.

The press obtained videotaped footage of Demario Atwater as he was being transferred from the Durham Police Department's car to the booking area of the Chapel Hill Police Department. See Fox 8 WGHP Videotaped coverage, at approximately 59:25.

One need only view and listen to the taped interrogation itself to quickly see that Mr. Atwater is in fear because the Durham Police officers that arrested him had physically assaulted him, and that he was going to be assaulted again as soon as the instant interrogation ceased; and, therefore, that Mr. Atwater's statements were the product of police coercion and were not voluntary. He expressed his fears of continued physical abuse repeatedly and consistently (**a total of 78 times**) during the entire three hours of his questioning.

The Government's position that the Chapel Hill officer did not threaten or physically abuse Mr. Atwater after the *Miranda* warnings were issued omits consideration of the most pertinent facts. The Government attempts to gloss over the fact that the Durham Police Officers physically assaulted and threatened Mr. Atwater. Mr. Atwater was clearly, throughout his entire questioning, under the influence of that physical abuse and in a state of fear and intimidation, and it is the totality of *all* of the circumstances which must be considered here. The question

for the Court to determine is whether, considering *all* of the police conduct from arrest through interrogation, the statement given by Mr. Atwater is voluntary, knowing and intelligent.

The videotape of Mr. Atwater's interrogation reveals the following. The interrogating officer was clearly aware of Mr. Atwater's fear of further beatings, and repeatedly tried (unsuccessfully) to reassure the defendant that no harm would come to him in the custody of the Chapel Hill Police (as opposed to the Durham police). Mr. Atwater even declined an offer of a drink from the officer, indicating that he believed the police would "put something" in his drink; i.e., drug or poison him with it. The interrogating officer responded by bringing him an unopened can of coke, attempting to reassure the defendant by telling him that he could wipe the top and open the can himself to make sure it was not contaminated.

Mr. Atwater stated at one point in the videotaped interview that he badly wanted to talk to the interrogating officer, but was fearful that if he admitted any involvement in this matter he would be immediately assaulted.

Similarly, although Mr. Atwater appears to have clearly and succinctly asked for the assistance of a lawyer on *five* occasions during the interview (after four of which the interviewer continued to question him), he expressed reluctance to press the issue, again believing that this would upset the interrogating

officer and cause the interview to be concluded at which time the defendant was convinced that he would be severely beaten or killed.

Mr. Atwater clearly establishes his basis for these fears as (a) the arresting officers' earlier physically assaultive behaviors and (b) the arresting officers' repeated threatening statements suggesting that they intended to beat him further when the interview was concluded. This coercive conduct on the part of custodial authorities induced in Mr. Atwater an acute state of fear and duress that overwhelmed his capacity for self-determination and thus negated his ability to participate in a voluntary manner during the interrogation session held at the Chapel Hill Police Department on March 12, 2008.

Additionally, these same factors interfered with the defendant's right to the assistance of counsel given that he feared he would be beaten or killed once the interrogation was completed, and/or that he would be beaten or killed if he angered investigating officers by invoking his right to counsel.

The video of the defendant being escorted into the Chapel Hill Police Department reveals him to be very unsteady on his feet. It appears in the video that the officers are almost carrying him into the police department. (See 630 outside camera of Chapel Hill Police Department at approximately 6:51 a.m.) The video of the booking area at the Chapel Hill Police Department

further documents the officers bringing Mr. Atwater into the area, with his feet dragging the ground.

Mr. Atwater was observed to have fresh abrasions on his face after his arrest. See associated press photographs attached hereto.

During his interrogation at the Chapel Hill Police Department, the defendant repeatedly indicated that he feared a subsequent beating. He stated, on the videotape, "I'm gonna get my ass kicked first of all because I'm not saying the things that y'all want to know. I'm not saying the things y'all want to hear." (Atwater DVD at approximately 11:00¹). Mr. Atwater stated, "some of the officers looked like they were trying to stop the others from doing what they was doing to me but as soon as we get in the damn Jeep, they started hitting me, too." The defendant continued, "...I got down on the ground myself and they stomped my fucking face in the damn ground. They hit me 9 or 10 times in the car. Then they got mad because the press was onto me. They were like, 'I guess that's all we can do here. I hope they handle him in Chapel Hill.'" (Atwater DVD at 23:46 - 24:46)

During his interrogation at the Chapel Hill Police Department, the defendant stated, "I'm gonna get out of here and get my ass whooped." (Atwater DVD at 51:10). "Now what am I gonna do? Call the police on the police?... As soon as I get out

¹All times noted from the videotape are approximate.

of here and you leave me - I'll bet you when I show up in court I won't look like this." (Atwater DVD at 33:50 - 33:35). And shortly thereafter stated, "I might not even make it to court". (Atwater DVD at 33:36).

When offered a drink, Mr. Atwater stated, "Y'all might put something in my drink." (35:53). While alone in the interrogation room, the defendant stated to himself, "They say this shit ain't gonna happen again. Man, they gonna fuck my ass up." (37:15-39:25).

During his interrogation at the Chapel Hill Police Department, the defendant stated, "I'm gonna get my face smashed again." (43:24). "It's just going to lead to a whole bunch of me not telling you what you want to know and then you're going to get mad and I'm gonna get out of here and get my ass whooped." (50:50 - 51:13).

When the interrogating officer attempted to reassure Mr. Atwater that he was safe (for example, stating, "I guarantee you that nothing will happen to you,") the defendant responded, "You can't help me." (51:42). Later, when the officer told him he would not be beaten up, the defendant responded, "Yeah. I am. I already know that." (52:01).

On the first occasion that the defendant asked for a lawyer, he then stated, "Let me go out and get my ass whooped a million times. By the time we get to court y'all gonna beat my ass so

much I'm probably just gonna say anything. I'm probably not gonna give a damn." (54:01 - 54:21).

When the officer asked the defendant if he (the officer) had touched him, the defendant replied, "You ain't gonna do it because the damn cameras, motherfuckers in there watching, this shit going on right now." (54:22 - 54:34). Returning to the topic of Mr. Atwater's first request for counsel, the defendant stated, "as soon as I request this damn lawyer you going to go over there, stop the tape, turn it off, beat my ass your damn self, walk out of here, go to wherever I go, they gonna beat my ass too. . ." (54:48).

Mr. Atwater informed the officer that he had never previously been assaulted by law enforcement officers, after which the interrogating officer again stated that he would not be assaulted. At that point Mr. Atwater responded, "It was already done to me." (59:30).

The interrogating officer attempts to reassure Mr. Atwater by telling him that he is now in Chapel Hill's jurisdiction and that nothing bad would happen to him there. Mr. Atwater then stated again that he had already been assaulted and that they would probably beat him further in such a way that he would look "exactly the same" when he went to court. (1:00:00).

On the second occasion that Mr. Atwater asked for a lawyer, he stated further "I want to so bad, but I know no matter what I

tell y'all I'm going to get my ass beat." Shortly thereafter he states, "My ass is about to get beat. . . . They'll tase me." (1:02:51 and 1:03:43). Subsequently, while the interrogating officer repeatedly attempts to convince the defendant that he is safe, Mr. Atwater states, "I'm about to get killed." (1:05:07).

Mr. Atwater also states on several occasions that he believes law enforcement officers are "probably beating my girl's ass." (1:13:15). On another occasion while alone in the interview room, Mr. Atwater stated, "They gonna beat my ass. I'm gonna die in this motherfucker. Probably gonna die in this motherfucking room right here." (1:14:37)

Mr. Atwater also stated that law enforcement officers would get an inmate or inmates to hurt him. Later in the interview, Mr. Atwater states that the interrogating officer was getting "frustrated" and that the officer would "send me out there and they gonna whoop my ass . . . I just . . . and your part is done. And now they gonna whoop my ass." (1:36:05). Mr. Atwater repeatedly disagreed with the interrogating officer when he told the defendant that he could "guarantee" that nothing would happen to him.

Later in the interview Mr. Atwater states that he is "getting played" and that "this (Chapel Hill Police Department) is just like Durham" (i.e., he believes the officers will harm him, or that they will have someone else, such as another inmate,

harm him). (2:24:20 & 2:25:26). When the interrogating officer tells defendant that nobody harmed his "girl", defendant responded by stating, "They did at the scene! I saw 'em!" and then stated, "They fucked my girl up. (mumbles) They gonna beat my ass --- they say they not, they're gonna --- they just gonna do a whole lot of motherfuck." (2:28:54 - 2:33:15)

Defendant subsequently laughs when Officer Newcomer again tells Mr. Atwater that he can guarantee that nobody will touch him. Moments later he stated, "All I know is I'm gonna die. I'm about to die." The interrogating officer then asks him "How are you about to die?" at which time the defendant responded, "Y'all are going to kill me or somebody gonna beat me to death."

(2:40:21 - 2:40:54).

In response to a question from the interrogating officer about what the defendant's mother "thinks about all this", the defendant stated, "She know I'm dying. She know I about to die (unintelligible). . . what I did and what I didn't do, whether I was close, whether I wasn't close, whether I was around it or not, doesn't really matter, 'cause either way y'all see it I'm gonna die." (2:51:02 - 2:51:39). Shortly thereafter the defendant can be heard stating to himself "God, they gonna beat my kids". (3:00:00).

When asked if he thought he deserved the death penalty, Mr. Atwater responded, "No, cause I'm gonna do it to myself"

(2:37:29) and shortly thereafter stated, "I understand y'all killing us. Because y'all think that we killed this girl so y'all gonna kill us." (2:38:40 - 2:38:55). Mr. Atwater states these things on videotape in the hours after his arrest. Mr. Atwater states these things repeatedly and over the course of a three hour video. Mr. Atwater never relents from the idea that he is going to be beaten and killed, and is never assuaged by the officer's assurances that nothing would happen to him. Mr. Atwater demonstrates a fixed and persistent belief that he will be beaten, substantially harmed, or even killed when the video camera is turned off or if he were to request an attorney.

Issue 2: Failure to Record

The officer that interrogated Demario Atwater was a Chapel Hill Police Department Investigator, Rodney Newcomer. Investigator Newcomer had, at the time of the interrogation, a statutory obligation to videotape all of Mr. Atwater's confession. Further, it is clear that Investigator Newcomer was aware of the statutory obligation to videotape the interrogation by *his own admission* on the video, "Well I have to record it by law." (54:48). Investigator Newcomer's failure to videotape the confession in its entirety renders the unrecorded statements that he allegedly obtained from Mr. Atwater inadmissible and in violation of applicable North Carolina law.

Investigator Newcomer's interrogation led into questioning regarding Mr. Atwater's brothers, to which Mr. Atwater responded, "I want my lawyer." Mr. Atwater then follows up with a comment about how they are going to beat his ass (now that he has requested his lawyer). Mr. Atwater then says, "... no, wait. If we can go outside and talk for 3 seconds, somewhere other than this room, where there's no cameras... I will say something to you where I can smoke..." (1:50:53 - 1:51:25). About two minutes later, Atwater and Newcomer leave the interview room.

The video demonstrates that Atwater and Newcomer then re-enter the interview room (approximately 2:21:21) and Mr. Atwater stated, "I knew you was playing me." Investigator Newcomer proceeded with his interrogation of Mr. Atwater: "Tell me about that night... Tell me about the early morning hours of March the 5th..." Mr. Atwater again repeatedly expressed his fear regarding how he was going to be injured or killed. Newcomer then asked, "Why did you want to talk to me off camera?" Mr. Atwater answered, "So I could smoke a cigarette." (2:40:55). He further stated he only got one puff, "cause I didn't want to tell you anything and you kept trying to get me to." Newcomer then stated, "Let's talk about what you told me off-camera," to which Mr. Atwater responded, "I didn't even tell you nothin'." Newcomer continued, "You told me you were there... You admitted that she was in the vehicle with you." Mr. Atwater responds, "Just go

ahead and sit there and play me... Now you're trying to put words in my mouth." (2:50:20).

The North Carolina legislature has taken care to ensure that interrogations in homicide cases are video or audio taped. North Carolina Gen. Stat. Section 15A-211 (West 2010), Electronic recording of interrogations, effective March 1, 2008, requires "the creation of an electronic record of *an entire custodial interrogation* in order to eliminate disputes about interrogations, thereby improving prosecution of the guilty while affording protection to the innocent and increasing court efficiency." (emphasis added).

This law was in place at the time Investigator Newcomer interrogated Mr. Atwater. The synopsis in the history of the bill details that it is "an act to provide that a custodial interrogation in a homicide case must be electronically recorded in its entirety." 2007 N.C. ALS 434. N.C. Gen. Stat § 15A-211 continues at subparts (c)(2) to define "[i]n its entirety" as "[a]n uninterrupted record that begins with and includes . . . advice to the person in custody of that person's constitutional rights" and that the record "ends when the interview has completely finished[.]" While the statute details that "[b]rief periods of recess. . . do not constitute an 'interruption' of the record[,]" it goes on to clarify that the "record will reflect the starting time of the recess and the *resumption of the*

interrogation." Id. (emphasis added). To leave no doubt as to the significance of a complete recording, subpart (e) states that "[i]f the court finds that the defendant was subjected to a custodial interrogation that was not electronically recorded in its entirety, any statements made by the defendant after that non-electronically recorded custodial interrogation, even if made during an interrogation that is otherwise in compliance with this section, may be questioned with regard to the voluntariness and reliability of the statement" (emphasis added).

The burden then lies with the State to prove by the strict standard of clear and convincing evidence that the alleged statement, taken contrary to statutory requirement, is both voluntary and reliable. In addition, the State must further show, by clear and convincing evidence, "that law enforcement officers had good cause for failing to electronically record the interrogation in its entirety." Id. Unlike a lesser standard required in some states, North Carolina demands the burden of proof of clear and convincing.²

Remedies "shall be granted as relief for" noncompliance in one of many forms listed in subpart (f) of the statute, including (1) consideration by the court in motions to suppress an alleged statement of the defendant, (2) the failure being admissible in support of claims the alleged statement was involuntary or is

² 705 Ill. Comp. Stat. Ann. 5/103-2.1(d)(f) (West 2007).

unreliable, and (3) when noncompliance is presented at trial, "the jury *shall be instructed* that it may consider credible evidence of compliance or noncompliance to determine whether the defendant's statement was voluntary and reliable." (emphasis added).

Of the more than 240 convictions overturned by DNA evidence in the United States, 25 percent involve false confessions.³ Pursuit of truth is the common goal of both criminal investigations and electronic recordings. Similar to the *Miranda* warning's attempt to ensure the voluntariness and reliability of statements made by a suspect, electronic recordings also seek to secure these safeguards. "The electronic record of police [interrogations] with criminal suspects is an efficient and powerful law enforcement tool."⁴ For more than half a century, jurisprudence across the nation reflects the usefulness and applicability of using electronic recordings of interrogations. *Stephan v. State*, 711 P.2d 1156, 1158 (Alaska 1985)(citing *Hendricks v. Swenson*, 456 F.2d 503, 506-07 (8th Cir. 1972) (suggesting that videotapes of interrogations protect a defendant's rights and are a step forward in the search for

³ *False Confessions*, Innocence Project, available at <http://www.innocenceproject.org/understand/False-Confessions.php>.

⁴ Thomas P. Sullivan, *Police Experience with Recording Custodial Interrogations*, Center for Wrongful Convictions, at 1, available at <http://www.law.northwestern.edu/wrongfulconvictions/issues/causesandremedies/falseconfessions/SullivanReport.pdf>.

truth); *Ragan v. State*, 642 S.W.2d 489, 490 (Tex. Crim. App. 1982) (Tex. Code Crim. Proc. Ann. art. 38.22, § 3 (Vernon 1979) requiring that oral statements of the accused during custodial interrogations must be recorded in order to be admissible); Model Code of Pre-Arrest Procedure § 130.4 (Proposed Official Draft 1975) (requiring sound recordings of custodial interviews). Both the Alaska and Minnesota Supreme Courts have held that defendants "are entitled as a matter of due process to have their custodial interrogation recorded."⁵ While those decisions are state constitution interpretations, they nevertheless demonstrate the growing trend among jurisdictions; ensuring law enforcement avoids disputes about the circumstances and actuality of confessions while securing the credibility and reliability of authentic confessions.⁶

It is this, and similar reasoning, that has persuaded over 500 jurisdictions nationwide, including North Carolina, to regularly record interrogations.⁷ Additionally, while federal law does not require suppression solely on the basis that police interrogation was not electronically recorded, three federal jurisdictions do require electronic recording of interrogations;

⁵ Innocence Project, available at <http://www.innocenceproject.org/fix/False-Confessions.php>.

⁶ *Id.*

⁷ *Id.*

Air Force Office of Special Investigations, The Department of Defense, and the Naval Criminal Investigative Services.⁸

Demario Atwater's recorded statements bear further indicia of unreliability. As the Government concedes, Mr. Atwater denies having made the statements purportedly attributed to him by the interrogating officer while on the videotape.

The videotaped interrogation demonstrates that Investigator Newcomer encourages Mr. Atwater to talk about what they had allegedly discussed off camera, to which Mr. Atwater responds, "I didn't say nothing" (2:48:10) and shortly thereafter, "I didn't even tell you nothin." (2:48:15). Responding to Newcomer's repeated attempts to have Mr. Atwater admit that he told Newcomer something off-camera, Mr. Atwater insists that he only wanted to go outside to smoke a cigarette, and he elaborates, "I got one puff." (2:48:55) "And you didn't let me get no more puffs 'cause I wouldn't tell you nothin'" (2:49:00). Further, responding to Newcomer's attempts to characterize their "off-camera" discussion, Mr. Atwater once again demands his lawyer: "Just go

⁸ *United States v. Dobbins*, 165 F.3d 29 (6th Cir. Aug. 27, 1998) ("[F]ederal law does not require that a state electronically record custodial interrogations and confessions"); *United States v. Short*, 947 F.2d 1445, 1451 (10th Cir. 1991), *cert. denied*, 503 U.S. 989 (1992) (noting that there is no case law supporting the defendant's position that the police should have recorded his interrogation); see also Thomas P. Sullivan, *Departments That Currently Record A Majority of Custodial Interrogations*, at 6, National Association of Criminal Defense Lawyers, available at [http://www.nacdl.org/sl_docs.nsf/freeform/MERI_resources/\\$FILE/Deptsthatcurrentlyrecord\(asof11210\).pdf](http://www.nacdl.org/sl_docs.nsf/freeform/MERI_resources/$FILE/Deptsthatcurrentlyrecord(asof11210).pdf)

ahead and get my lawyer 'cause I ain't listening to you sit here and try to switch stuff around." (2:52:00). The off-camera alleged statements should accordingly be suppressed, on these additional grounds.

3. Issue 3: Afraid to Request Counsel

As set forth above, when a person invokes the constitutional right to counsel during a custodial interrogation, all questioning must cease until the person has been provided counsel. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981).

During the recorded part of the interview between Investigator Newcomer and Mr. Atwater, despite Mr. Atwater's expressed fear as evidenced by his recorded statements that he will be beaten or killed for requesting legal counsel, Mr. Atwater requests a lawyer on five *separate occasions* before the questioning is stopped. Mr. Atwater's *first* request for a lawyer occurred when Investigator Newcomer said, "Come on. Tell me what happened." Atwater responded, "...go ahead, call my lawyer. Let me go out and get my ass whooped a million times..." (54:01). Mr. Atwater then continued expressing his fear of being "whooped a million times" or beaten. Newcomer, instead of ending the interrogation pursuant to Mr. Atwater's request for counsel, responded, "Have I touched you once?" (54:22). Mr. Atwater responded, "You ain't gonna do it because the damn cameras...in there watching, this shit going on right now." (54:34).

Investigator Newcomer told Mr. Atwater, "Ain't nobody looking in that, you can see the shutters closed, that goes into somebody's office." (54:42). Mr. Atwater once again expresses his fear of being beaten for requesting a lawyer. Newcomer continued his pattern of ignoring Mr. Atwater's request for a lawyer and moved onto a different topic; showed Mr. Atwater a photograph of Laurence Alvin Lovette and asked, "You gonna let him tell the story?" (55:51)

Mr. Atwater's *second* request for a lawyer occurred a little after one hour into the interview in response to Newcomer's interrogation, "We got you in her vehicle in the back seat. How do you explain that? It was her vehicle. How do you explain that?" Mr. Atwater responded, "I want my lawyer." Newcomer said, "Are you requesting your lawyer at this point? Are you done speaking with me about this?" Mr. Atwater, clearly fearful for what would happen when he requested a lawyer, says, "I want to so bad but I just know no matter what I tell y'all I'm about to get my ass beat." (1:02:36 - 1:03:05). Newcomer responded that Mr. Atwater was not going to get his "ass beat," promising that they will not touch Mr. Atwater, and, instead of ending the interrogation, promptly encouraged Mr. Atwater to "tell me what happened that night." Mr. Atwater repeated, "My ass is about to get beat." (1:03:06 - 1:03:34).

Mr. Atwater's *third* request for counsel occurred when Investigator Newcomer's interrogation led into questioning regarding Mr. Atwater's brothers, to which Mr. Atwater responded, "I want my lawyer." Investigator Newcomer responded to Mr. Atwater's request, "You want your lawyer?" Mr. Atwater nodded his head up and down, indicating yes. Investigator Newcomer asked if Mr. Atwater was done speaking with him, and Mr. Atwater said, "yeah, 'cause you done involved my brother and shit and it's like you didn't say it as a threat, but it's a threat." (1:49:14 - 1:50:23). Mr. Atwater then followed up with a comment about how they are going to "beat my ass" (now that he has requested his lawyer). He is clearly fearful, and says, "...no, wait. If we can go outside and talk for 3 seconds, somewhere other than this room, where there's no cameras...I will say something to you where I can smoke..." (1:50:53 - 1:51:25) About two minutes later, Atwater and Newcomer leave the interview room.

Mr. Atwater's *fourth* request for a lawyer occurred after he and Investigator Newcomer returned to the interrogation room. Upon resuming videotaped interrogation, Investigator Newcomer encouraged Mr. Atwater to talk about what they discussed off camera, to which Mr. Atwater responded, "I didn't say nothing" (2:48:10) and shortly thereafter, "I didn't even tell you nothin'." (2:48:15). Responding to Newcomer's repeated attempts to encourage Mr. Atwater to admit that he told Newcomer something

off-camera, Mr. Atwater insisted that he only wanted to go outside to smoke a cigarette, and he elaborated, "I got one puff." (2:48:55). "And you didn't let me get no more puffs 'cause I wouldn't tell you nothin'." (2:49:00). Further, responding to Investigator Newcomer's attempts to describe their "off-camera" discussion, Mr. Atwater once again demanded his lawyer, "Just go ahead and get my lawyer 'cause I ain't listening to you sit here and try to switch stuff around." Upon this *fourth* request for a lawyer, Newcomer stated, "Okay, all right. If you're done, we'll get you a lawyer. You done?" Mr. Atwater responded, "Yeah, go ahead. I'm gonna get my ass whooped." (2:52:00).

Incredibly, even after this exchange, Investigator Newcomer then asked Mr. Atwater if he would consent to providing samples of his DNA: **"Hey Rio, will you give us consent to get samples of your DNA?"** (2:55:55) Mr. Atwater declined, and requested his lawyer for a *fifth* time, saying, "I just need my lawyer." (2:56:20). Finally, after his *fifth* request for a lawyer, Investigator Newcomer relented and the interrogation ceased.

Mr. Atwater clearly expressed that he was afraid of being beaten by the police if he were to request a lawyer. This was prompted by the Durham Police Department's conduct during and after Mr. Atwater's arrest. This behavior was coercive and intimidating, and interfered with Mr. Atwater's right to counsel. All of Mr. Atwater's statements after the *Miranda* warnings were

given continued to demonstrate that he was still under the fear and stress of the physical beating at the hands of the officers. Accordingly, the *Miranda* warnings are invalid and all statements obtained were involuntary and in violation of Mr. Atwater's right to counsel.

CONCLUSION

The events leading up to the interrogation, beginning with Mr. Atwater's arrest by the Durham Police Department, and the interrogation itself, are replete with violations of the law. Demario Atwater was assaulted during the arrest itself, after voluntarily lying down on the sidewalk with his hands outstretched. While handcuffed, he was assaulted inside the Durham Police Department car. During the interrogation, Mr. Atwater expressed his fear that he would be further beaten or even killed if he requested an attorney. Nonetheless, the record shows that Mr. Atwater felt overwhelmed enough by the interrogation that he expressed his need for an attorney on five separate occasions before the interrogation ceased. Additionally, contrary to North Carolina state law, the Chapel Hill Police Department investigator failed to record the entire interrogation.

For the reasons set forth in the original Motion to Suppress, in the instant reply brief, and as will be demonstrated at an evidentiary hearing, Mr. Atwater requests that this Court

suppress the entirety of both the video recorded statement of Mr. Atwater and the statements that Investigator Newsom claims that Mr. Atwater allegedly made while off-camera as well.

Respectfully submitted this the 29th day of March, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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