STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Supreme Court No.

Court of Appeals No. 299493

Plaintiff-Appellee

Lower Court No. 08-4955FH

-vs-

JUSTIN LEE FILE

Defendant-Appellant.

_____/

JACKSON COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee
_____

CHRISTINE A. PAGAC (P67095)
Attorney for Defendant-Appellant
_____

DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

STATE APPELLATE DEFENDER OFFICE

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Wherefore, Defendant-Appellant Justin File appeals from the November 29, 2011, per curiam Court of Appeals decision affirming his conviction. This application is being filed within 56 days of the Court of Appeals' opinion as required by MCR 7.302(B)(3). The opinion was rendered in Mr. File's timely appeal of right from his jury trial.

Mr. File seeks review because the decision is clearly erroneous, will cause material injustice, and conflicts with other Michigan Court of Appeals decisions, MCR 7.302(B)(5). The issues raised also involve legal principles of major significance to the state's jurisprudence, MCR 7.302(B)(3).

Defendant asks this Court to grant this application for leave to appeal or order other appropriate relief.

Respectfully submitted,

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Date: September 29, 2011

STATEMENT OF QUESTIONS PRESENTED

I. DID THE TRIAL COURT ERR IN FAILING TO SUPPRESS STATEMENTS MR. FILE MADE WHILE IN CUSTODY AFTER HE UNEQUIVOCALLY REQUESTED COUNSEL, VIOLATING HIS RIGHT TO COUNSEL? ALTERNATIVELY, TO THE EXTENT THE RECORDING IS NOT CLEAR, WAS COUNSEL INEFFECTIVE FOR FAILING TO PRESENT TESTIMONY TO ESTABLISH THE REQUEST?

Trial Court answered “No”

Court of Appeals answered "No".

Defendant-Appellant answers, "Yes".

INTRODUCTION: WHY LEAVE SHOULD BE GRANTED

The United States Supreme Court has held that the police must scrupulously honor unequivocal requests for counsel and immediately cease questioning. *E*.g., *Smith v Illinois,* 469 US 91 (1984); *Miranda v Arizona*, 384 US 436 (1966). Mr. File made such a request during his custodial interrogation, stating, "I want to talk to a lawyer because I'm not sure, I love Alicia and I don't want her in trouble." (Transcript attached as Appendix B[1][2][3]) The police should have immediately ceased questioning. They did not. Under *Miranda* and its progeny, Mr. File's subsequent inculpatory statements should have been suppressed.

The Court of Appeals decision that Mr. File's statements made after this request for counsel were admissible is contrary to clear U.S. Supreme Court precedent regarding the invocation of the right to counsel, particularly *Edwards v Arizona*, 451 US 477 (1981). The only reasonable interpretation of the statement in this case is that Mr. File is unambiguously invoking his right to counsel and is explaining why he wants to talk to a lawyer. The explanation of why a person wants a lawyer does not make the request ambiguous. For instance, in *Edwards*, the Court held that the statement "I want a lawyer before making a deal" was an invocation of the right to counsel, despite the caveat "before making a deal." Likewise, Mr. File's explanation that he wants a lawyer because he is worried about his girlfriend does not render his request ambiguous, and it does not make his request (as the Court of Appeals stated) contingent on "what would happen to Alicia." (Opn. at 6)

For this reason, on these issues and others stated more fully in the accompanying brief, the decision of the Court of Appeals is clearly erroneous, will cause manifest injustice to Mr.

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[2] This transcript ws prepared by the Jackson County Prosecutor's Office and filed with the Court of Appeals.

File, and conflicts with other Michigan Court of Appeals decisions. MCR 7.302 (B)(5). The issues raised also involve legal principles of major significance to the state's jurisprudence. MCR 7.302(B)(3). This Court should grant this application for leave to appeal and vacate Mr. File's conviction and sentence, or grant such other relief as may be appropriate.

STATEMENT OF FACTS

In the early morning hours of October 3, 2008, Kajen Thompson returned home to discover that the home she had been renting for less than a week was on fire. The prosecution's theory was that Thompson's ex-boyfriend, Defendant Justin File, had either set the fire himself or helped his co-defendant Alicia Williams do so. Williams had previously pled guilty to the offense, and had confessed to the police that she had acted alone (although she recanted this part of the statement after her plea). At trial, Mr. File's attorney argued that he had not set the fire. A jury found Mr. File guilty of arson of a dwelling house, acquitting him of preparation to burn. (Judgment of Sentence) Mr. File was sentenced to 5 to 20 years in prison. (Judgment of Sentence)

The night of the fire, Mr. File, his co-defendant Williams, and Thompson had all been at the Main Street Pub in Hanover. Thompson arrived first to meet Justin Zieman, for a date. (TI, p 206, 233-235) Before she arrived, a man named Justin had called asking if there was a woman at the bar named Kajen. (T I, p 274) The bartender asked the patrons and determined that no one named Kajen was at the bar and reported this to the caller. (T I, pp 274-75) The bartender also mentioned the call to Thompson when she arrived. (T I, p 276)

Shortly thereafter, Mr. File arrived at the pub with Williams and the two sat down at the bar next to Thompson and Zieman. (T I, p 277) According to Thompson, Mr. File and Williams were alternately rude and chummy. (T I, p 170) Zieman described Mr. File as pestering and provocative. (T I, p 237) Thompson thought Mr. File was drunk and acting like he wanted to date both her and Williams. (T I, p 174) He had left voicemails for her saying that he wanted things to work out. (T I, p 216) At one point, the bartender asked Mr. File and Williams to stay on the opposite side of the bar from Thompson so that there would not be any problems. (T I, p 277)

Despite this request, Mr. File and Williams seemed to be following Thompson around the bar. (T I, pp 170-74)

The bartender overheard Mr. File say to Williams, "why don't you just go ahead and do it, you know you can do it. You know, I'll back you up. Don't worry about it, I'll take him on. You just take her." (T I, p 279) At this point, the bartender asked Mr. File and Williams to leave (T I, p. 281) As they did so, Williams asked Thompson if she wanted to come out and look at pictures of her child. (T I, p 175) Stuchell warned Thompson not to go, but she went anyway. (T I, pp 281-83) Thompson's cousin, Eli Brown, followed the three outside. (T I, p 255)

Once outside, Thompson testified that Williams suddenly punched her. (T I, p 175) Brown, however, said that the women exchanged words before the first punch was thrown. (T I, p 256) The women began fighting and rolling around on the ground. (T I, pp 176-77) Mr. File tried to break up the fight but Brown pulled him back and the two exchanged punches. (T I, pp 257-58, 298)

Brown grabbed Thompson and went back into the bar. (T I, p 257) Mr. File and Williams attempted to go back inside as well, but were pushed back out of the door by Zieman and Brown several times. (T I, pp 178, 260) Mr. File and and Williams left. Thompson stayed at the bar for another hour, until about midnight, and talked to the police. (T I, pp 182-83)

Thompson and Zieman left the bar and went out to eat on the way back to Thompson's home. (T I, p 185) As she turned onto the street where she lived, Thompson could see flames coming from her home. (T I, p 185) The flames extended from the deck at the base of the front door to the top of the roof. (T I, pp 186, 194) She also noticed that the scarecrow she had hung from the deck was missing. (T I, p 186) Zieman kicked the front door in and then attempted to fight the fire with a garden hose. (T I, pp 244-46) Thompson called 911. (T I, p 192)

Meanwhile, Michigan State Police Troopers Gina Gettel and John Richards were attempting to contact Mr. File and Williams about the bar fight. (T II, pp 6-7) At about 2 a.m. on October 3, Trooper Gettel called Mr. File and told him there was an incident she needed to discuss with him to which Mr. File responded "oh, you're talking about when I got my ass kicked at the bar." (T II, pp 8-9) Gettel said that Mr. File sounded drunk and was slurring his words. (T I, p 12) They arranged for Mr. File to come that evening to be interviewed. (T II, p 10) Mr. File refused to give them Williams' phone number or location and told Trooper Gettel that she had jumped out of the car in Hanover and he had spent the rest of the night searching for her. (T II, p 10) After making the phone call, Gettel and Richards heard the county fire tone and recognized the address as the residence of Thompson whom they had interviewed in the assault case that they were investigating. (T II, p 8) Gettel and Richards responded to the scene of the fire and continued to attempt to contact File and Williams. (T II, pp 17-18)

The evening of October 3, Richards picked up Mr. File and Williams brought them to the State Police Post to be interviewed. (T II, pp 19, 22) The trooper told Mr. File that he was not under arrest and was free to go. (T II, p 20) Richards gave a summary of Williams' interview to File and asked if what she said was true. (T II, pp 20-21) Mr. File admitted that he drove when they left the bar and that they ended up running out of gas in Albion. (T II, p 21) Mr. File stated that he went to Albion to see some friends because he was afraid the people at the bar would come to his house to fight him. (T II, p 21) During the interview, Richards noticed blisters from a burn on Mr. File's right hand between his index and middle fingers. (T II, pp 22-24) Mr. File explained that he had fallen asleep in a chair at his home with a lit cigarette in his hand. (T II, pp 96-97) When Richards dropped Mr. File off at his home after the interview, he observed a burn on the left arm of a chair and took pictures of it. (T II, pp 96-97)

Richards interviewed Mr. File and Williams again on December 8, 2008 at the Jackson County Jail. (T II, pp 26-27) Although the jury did not hear Williams' testimony, this time Williams confessed, telling the officer that she had acted alone when she started the fire that burned Thompson's house. (T II, p 78) Trooper Richards admitted that when he interviewed Mr. File he told him that Williams had changed her story, even though she had not. (T II, p 78)

At the time of his interview with Richards, Mr. File was in custody and signed a Miranda form. (T II, p 28) This interview was recorded. (Def. Exh. A) On the morning of trial, the parties asked for a ruling on the admissibility of Mr. File's confession. (T I, p 11) Mr. File's counsel argued that the statements must be suppressed on Sixth Amendment grounds because Mr. File's requests for a lawyer were ignored. (T I, pp 16, 19) The prosecutor argued that the Fifth, not the Sixth, Amendment was the applicable constitutional right. (T I, p 17)

The first request was made at about 10:40 into the interview. At ten minutes into the interview, the officer explains to him that arson carries a maximum 20 year sentence, and why the maximum is so long. In response, Mr. File states, "I guess I'll have to get a lawyer here if she's saying its me." (Transcript, p 6 (a copy of the transcript of Mr. File's statement, prepared by the prosecutor's office and filed with the Court of Appeals, is attached hereto as Appendix B) The officer responds, "You don't want to try to get it all cleared up at once?" adding that he was "here to give you the benefit of the doubt."

After playing the tape for the trial court, the parties stated:

> MR. DUNGAN: Your Honor, in my review of listening to this a number of times, I had the quote "I guess I'll have to get a lawyer now that she's saying it's me."
> THE COURT: Okay. Mr. Chabalowski, would you agree in large part that that's...
> MR. CHABALOWSKI: I didn't catch the, now that she's saying it's me, but the substance of his statement about an attorney was,

> yes, I guess I'll have to get a lawyer. That's how I understood it as well.

(T I, p 12; Def Exh A)

Again, at approximately the 21 minute mark, in response to the officer saying that he had two different theories about what happened and wanted to hear Mr. File's version, Mr. File says "I want to talk to a lawyer because I'm not sure, I love Alicia and I don't want to get her in trouble." (Exh. B, p 12) The officer responds by saying that Alicia is already going to be charged. Twelve minutes later, at 33:17, after repeated questioning, the officer states that Mr. File had earlier said that he "might want an attorney" and asks him specifically to waive his right to counsel. (Def Exh B)

The court denied the motion to suppress. (T I, pp 19-20)

> Okay. Well I -- I - I think it's clearly -- there -- there is some uncertainty, there's some equivocation going on and -- and I think the trooper responsibly does what -- what a trooper should do in that situation. He then tries to clarify definitively for the defendant, now I want to try to clear this up because you kind of suggested to me a couple of times you think you need a lawyer or not. And then I think your client waives. So I -- I'm going to allow the statement in.
>
> So he was -- he was Mirandized before and then even when I look at the totality of the other circumstances where your client, you know, definitively walked out and -- and refused to participate in a further one, you know, based, you know, I mean that -- that would even add even more fuel to the -- to the court's determination that in this situation, yes, there might have been some equivocation but in -- in the end, you know, I think the trooper fully explaining and fully covering that and fully going through it one last time makes it clear to me that he knowingly, intentionally and voluntarily waived his right to counsel both under the Fifth and Sixth Amendments.

(T I, pp 19-20)

As a result, the jury learned of Mr. File's inculpatory statement. (Def Exh B) Mr. File stated that he knew where Thompson lived, but that Williams did not. (T II, p 30) Mr. File said

that he parked in front of Thompson's driveway and got a gas can out of the truck. He then poured the gas on a Halloween decoration next to the deck. He never moved the decoration. As he was lighting the decoration the fumes in the gas can sucked the flames in and burned his hand. He began shaking the gas can and eventually dumped the gas can in the yard. As he was leaving, it looked as though the decoration was going out. He did not intend to burn the house. (Def Ex. A) No gas can was found at the scene. (T II, pp 35, 104)

Sergeant Kenneth Hersha, a fire investigator, conducted a cause and origin analysis at the scene. (T II, pp 117-18) According to Hersha, both Williams' and Mr. File's statements were consistent with his findings. (T III, p 45) Hersha determined that there were two points of origin: one where the scarecrow had been hung on the deck and one at the base of the front door. (T II, 148-49) The only combustible material between the points was a portion of the deck which was not burned. (T II, p 149) At trial, Hersha testified that if a small amount of ignitable liquid is used or if it was confined to a small area then there is often times no evidence of its use because it is all consumed. (T II, p 153) If a larger amount is used, Hersha asserted that irregular burn patterns would be visable. (T II, p 153) Hersha added that soil is the best material to take a sample of to test for accelerants because the vapors go deep into the soil and will remain for days. (T III, p 20) No soil sample was taken and no testing done. (T III, p 33) Remnants of the scarecrow were found by the door which was not where Thompson had left it. (T II, p 155)

Williams was charged and pled no contest to arson of a dwelling house. (T III, pp 70-71) At her plea hearing before the Honorable John G. McBain on March 30, 2008, the factual basis was satisfied by the police report because Williams had little memory of the night in question. At sentencing on May 29th, 2009, she still had significant memory loss and could not give the court much information about the offense during her allocution. The Court told Williams that "It just

seems to me in my review of this that maybe Mr. File may be the more culpable party, maybe not . . . you could testify, you can cooperate in the case against Mr. File and that certainly might put you in a better posture because right now you score prison." The court then set sentencing over until after File's trial.

Mr. File filed a motion to present hearsay evidence of third party culpability to introduce the confession by Williams through Trooper Richards on the basis that she would be unavailable as a witness due to memory loss and expected assertion of her Fifth Amendment rights. A hearing was held on June 4, 2009, to determine Williams' availability as a witness. Williams' memory had improved. Williams testified that she was the one driving when they left the bar and then she switched places with File after awhile. (6/4, p 8) Mr. File drove for awhile before stopping in a wooded area. (6/4, p 8) Williams did not know where they were. (6/4, p 9) Mr. File got out, opened the back of the vehicle, was gone for 5-10 minutes, opened the back again, got back in the vehicle, and they left. (6/4, p 8) As they were leaving, Williams saw flames coming from some sort of structure or building. (6/4, pv8) Williams then woke up in Albion the next morning. (6/4, p 8) Mr. File told Williams that he had poured gasoline on the scarecrow and lit it on fire. (6/4, p 17) He had burns on his hand which he said came from a piece of plastic that landed on his hand. (6/4, p 17)

At that hearing, Williams never complained about lack of memory. (6/4, pp 5-23) Williams told the court that her statements to the court about being too intoxicated to remember were lies and that she remembered everything that happened from start to finish. (6/4, p 14) She stated that she lied to the police to protect Mr. File. (6/4, p 15) Williams' surprise testimony demonstrated that she was available as a witness. Williams was not called as a witness at trial

but Mr. File did present evidence, by way of the register of actions in her case, that she had pled no contest to charges relating from the incident. (T III, pp 70-71)

After a jury trial before the Honorable John G. McBain, Mr. File was found not guilty of preparation to burn but was found guilty of arson of a dwelling house. (T IV, p 14) Mr. File was sentenced to 5-20 years in prison. (S I, p 16)

Mr. File appealed as of right, asserting that because he had unequivocally requested counsel during custodial interrogation, the trial court had erred in failing to suppress his statement. The Court of Appeals held that Mr. File's statement, "I want to talk to a lawyer because I am not sure, I love Alisha and I don't want her in trouble," was not an unequivocal request for counsel. Similarly, his earlier statement "I guess I'll have to get a lawyer if she is saying it's me" also did not suffice to assert his right to counsel. Accordingly, the Court of Appeals held that the trial court did not err and affirmed Mr. File's conviction.

I. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS STATEMENTS MR. FILE MADE WHILE IN CUSTODY AFTER HE UNEQUIVOCALLY REQUESTED COUNSEL, VIOLATING HIS RIGHT TO COUNSEL. ALTERNATIVELY, TO THE EXTENT THE RECORDING IS NOT CLEAR, COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT TESTIMONY TO ESTABLISH THE REQUEST.

Standard of Review and Issue Preservation

Constitutional issues are reviewed de novo. *People v. Echaverria,* 233 Mich. App. 356; 592 N.W.2d 737 (1999). This Court also reviews de novo a trial court's ultimate decision on a motion to suppress evidence. *People v Beuschlein,* 245 Mich App 744, 748; 630 NW2d 921 (2001).

The parties sought a ruling on the admissibility of Mr. File's statement on the first day of trial. (T I, pp 13-16). Defense counsel argued that the statements were inadmissible on Fifth Amendment grounds. (T I, pp 13-16) No witnesses testified, and counsel did not ask that they do so. To the extent that the recording was not clear, counsel's failure to call witnesses to clarify the record was ineffective assistance of counsel. The determination of whether a defendant has been denied effective assistance of counsel "is a mixed question of fact and constitutional law." *People v Grant,* 470 Mich 477, 484; 684 Nw2d 686 (2004); *People v Leblanc,* 465 Mich 475, 579; 640 NW2d 246 (2002). "[F]indings of fact are reviewed are reviewed for clear error…[and] [q]uestions of constitutional law are reviewed … de novo." *People v Grant, supra* at 484-85; *People v LeBlanc*, *supra* at 579. A motion to remand was filed for an evidentiary hearing under *People v. Ginther,* 390 Mich 436, 443, 212 NW2d 922 (1973). That motion was denied.

Discussion

The trial court ruled that Mr. File had used "some equivocation" and that there "might have been some equivocation" when he twice asked for a lawyer before confessing his involvement in setting the fire at issue. (T I, pp 19-20) The trial court found that because he waived his *Miranda* rights several minutes after his last request that his subsequent inculpatory statements were admissible. This ruling was error. Likewise, the Court of Appeals erred in affirming this decision.

The Fifth Amendment, which applies to the states by virtue of the Fourteenth Amendment, *Mallory v Hogan*, 378 US 1, 6 (1964), provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." US Const, Am V. In *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), the United States Supreme Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." If a suspect says he wants an attorney, interrogation must stop. *Id.*, 384 US at 473-474. These safeguards are intended to protect a citizen's Fifth Amendment rights and are necessitated by the fact that "the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id* at 467. Interrogation "refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v Innis*, 446 US 291, 301 (1980).

While a suspect may waive his *Miranda* rights, the prosecution must show that the waiver was knowing, intelligent and voluntary, a very high standard of proof under *Johnson v Zerbst*, 304 US 458 (1938). In *Edwards v Arizona*, 451 US 477 (1981), the United States Supreme Court created a presumption that once a suspect invokes his right to the presence of counsel, any waiver of that right in response to a later police attempt at custodial interrogation is involuntary. *Edwards* held at 484-485:

> [W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights . . . [H]e is 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.

As the Supreme Court stated recently in *Maryland v Shatzer,* 130 S Ct 1213 (2010); 2010 US LEXIS 1899, quoting *Miranda v Arizona at 384 US 456,* "[i]t is easy to believe" that a suspect's later waiver was "coerced or badgered" when he has been held in uninterrupted *Miranda* custody since his first refusal to waive. He remains "cut off from his normal life" and isolated in a "police-dominated atmosphere." [*14-15.] *Shatzer* reaffirmed the vitality of the judicially-created *Edwards* rule, while declining to extend it to a situation where there was a more than two-week break between the first and second police attempts at interrogation.

Edwards did not decide the legal consequences of a less than clear assertion of the right to counsel, but *Davis v United States,* 512 US 452, 459 (1994), did, holding that the request for counsel must be unambiguous. *Davis* said that where "a reasonable police officer in the circumstances would understand the statement to be a request for an attorney," the officer must stop questioning the suspect.

Davis is entirely consistent with *Smith v Illinois*, 469 US 91 (1984). *Smith* holds that that under *Miranda* and *Edwards* an accused's post-request responses to further interrogation "may not be used to cast doubts on the clarity of his initial request for counsel." *Id.* at 92. *Smith* says that the first inquiry must be whether the accused actually invoked his right to counsel.

Both of Justin File's requests for counsel were unequivocal. About 10 1/2 minutes into the interrogation, after being informed that Ms. Williams told the police that he started the fire, Mr. File says "I guess I'll have to get a lawyer here if she's saying its me." (App B, p 6) The officer then asks, "You don't want to try to get it all cleared up at once?" Although Mr. File's use of the phrase "I guess" may seem to express uncertainty when viewed out of context, when taken in context, the entire statement is expressed as a conclusion akin to "well, since she says that it is me who did it, I need a lawyer" as opposed to "I might need a lawyer now that she says that it is me." The officer's statement in response, "don't you want to get this all cleared up at once" indicated that he even believed this was a request for counsel. Questioning should have stopped at this point. It did not.

Even if this first request could be viewed as equivocal, the second instance where Mr. File again requests a lawyer was not. This second request occurs at about 21 minutes into the interrogation. In response to the officer stating that he had two different theories about what happened and wanted to hear his version, Mr. File said, "I want to talk to a lawyer because I'm not sure, I love Alicia and I don't want her in trouble." (App B, p 12) This statement is a simple declaration invoking his right to counsel. His voice does not raise at the end as if he were asking a question and it is an assertion "I want a lawyer." Once again, the officer does not scrupulously honor the request, instead responding that Alicia is already going to be charged regardless of what Mr. File does. (App B, p 12)

Smith further holds that if the accused invoked his right to counsel, subsequent statements can be admitted only if the defendant both "(a) initiated further discussion with the police, and (2) knowingly and intelligently waived the right he had invoked." *Id.* at 95. There can be no question that the further discussion with the police was initiated by the police. In both instances, the officer continues virtually uninterrupted by Mr. File's request for counsel. (App B) Under *Edwards* and *Smith,* his subsequent statements were inadmissible.

The trial court's finding that Mr. File's request for counsel was "somewhat equivocal" particularly in light of the "totality of the circumstances" is contrary to the evidence and the law. Further, as the caselaw makes clear, unequivocal statements cannot be rendered ambiguous by looking to his *subsequent* responses. The United States Supreme Court rejected this position in no uncertain terms in *Smith,* where the Court called this notion "unprecedented," untenable" and "palpably untenable under *Edwards."*

> The courts below were able to construe Smith's request for counsel as "ambiguous" *only* by looking to Smith's *subsequent* responses to continued police questioning and by concluding that, "considered in total," Smith's "*statements*" were equivocal. This line of analysis is unprecedented and untenable. As Justice Simon emphasized below, "[a] statement either is such an assertion [of the right to counsel] or it is not." *Id.* at 97; citations omitted; emphasis in original.
>
> [W]e reject this approach as palpably untenable under *Edwards.* Whether in the same interrogating session or in subsequent sessions, the so-called "flavor" of an accused's request for counsel cannot be dissipated by continued police questioning. *Id.* at 98
>
> With respect to the waiver inquiry, we accordingly have emphasized that a valid waiver "cannot be established by showing only that [the accused] responded to further police-initiated interrogation" *Edwards v Arizona,* 451 U.S., at 484. Using an accused's subsequent responses to cast doubt on the adequacy of the initial request *itself* is even more intolerable. "No authority, and no logic, permits the interrogator to proceed . . . on his own terms and as if the defendant had requested nothing, in the hope that the defendant might be

> induced to say something casting retrospective doubt on his initial statement that he wished to speak through an attorney or not at all." *Id*. at 98-99; citation omitted; emphasis in original.

Looking to Mr. File's earlier response to police questioning as the trial court did – leaving the station when he was *not* in custody – to determine whether his subsequent invocation of rights was sufficiently vigorous is equally irrelevant. Mr. File could not leave the police station during this round of questioning: he was in custody and not free to leave.

The Court of Appeals decision is also directly contrary to clearly established Supreme Court precedent. The Court held that the first assertion of the right to counsel was equivocal because it was "almost identical" to the statements in *Tierney.* As for the second invocation, the Court of Appeals stated, "[a] reasonable understanding of [Mr. File's statement] could have been that the defendant may or may not actually have wanted counsel, depending on what would happen to Alisha." In fact, this interpretation is unreasonable. What Mr. File said was "I want a lawyer because I'm not sure, I love Alicia and I don't want her in trouble." He is obviously explaining *why* he wants a lawyer. His reasoning does not make the request ambiguous. Just as in *Edwards, supra,* the statement "I want an attorney before making a deal" was an unambiguous request for counsel that prohibited further questioning by the police (not just further plea discussions), so to was Mr. File's statement. Moreover, the Court of Appeals' further explanation why the request was ambiguous, that the officer was engaging in "good police practice" by "clarifying" what Mr. File was asking, is not supported by the record. The officer does not respond to this statement by expressing any confusion about whether Mr. File was requesting counsel. Instead, he continues to question Mr. File for another five pages of transcript before mentioning counsel again. (App B)

A preserved constitutional error requires reversal unless it can be shown beyond a reasonable doubt that the error was not harmless requiring the appellate court to determine there is a reasonable probability that the error contributed to the guilty verdict. *Chapman v. California*, 386 U.S. 18 (1967). The admission of defendant's inculpatory statements made after the invocation of the right to counsel cannot be considered harmless error. The United States Supreme Court has noted that it is difficult to consider improper admission of a defendant's confession harmless due to the fact that it confessions are "'the most probative and damaging evidence that can be admitted against him . . . [and] confessions have profound impact on the jury.'" *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) quoting *Bruton v. United States*, 391 U.S. 123, 139-40 (1968). Further, Mr. File's statements are the only evidence that he actually lit the fires. The rest of the evidence solely establishes that he was present at the scene. This creates a significant probability that the statements of Mr. File contributed to the guilty verdict. The error therefore cannot be considered harmless and the conviction should be vacated.

Alternatively, to the extent this Court finds that the tape recording is insufficiently clear to establish an unequivocal request for counsel, trial counsel was ineffective for waiting until the morning of trial to move to suppress the statement and for failing to call witnesses to testify. The United States Constitution guarantees every defendant the right to be assisted by counsel. U.S.C. Const. Amend. VI. In *Strickland v. Washington*, the Supreme Court stated that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The Court elaborated a two part test for determining whether counsel's assistance was ineffective: (1) "the defendant must show that counsel's performance was deficient" and (2) "the defendant must show that the

deficient performance prejudiced the defense." *Id*. at 687. The same protection is provided by the Michigan Constitution. *People v Pickens,* 446 Mich. 298; 521 NW2d 797 (1994).

Rather than filing a proper motion to suppress and holding a full hearing on the issue, trial counsel waited until the morning of trial and then sought a ruling on admissibility. (T I, p 11; Appendix A) The disagreement between defense counsel and the prosecutor about the content of the tape recording (defense counsel stated that Mr. File said "I want to talk to a lawyer" while the prosecutor thought he heard "I think I should talk to a lawyer"), should have alerted trial counsel to the need to call Mr. File to the stand to clarify any perceived ambiguity in the tape recording. Counsel's failure to do so rendered his performance deficient, and prejudiced the defense. (*See* Motion to Remand) Mr. File should be granted a new trial, or at a minimum a remand on this issue.

SUMMARY AND RELIEF

For the reasons stated above, Defendant-Appellant asks this Honorable Court to either grant this application for leave to appeal, or any other appropriate peremptory relief.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: _____

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Date: January 23, 2012