IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0062

STATE OF MONTANA,

Plaintiff and Appellee,

v.

FRANK MACIEL,

Defendant and Appellant.

REDACTED BRIEF OF APPELLANT

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, the Honorable Karen Townsend, Presiding

APPEARANCES:

CHAD WRIGHT
Appellate Defender
KRISTEN L. PETERSON
Assistant Appellate Defender
Office of State Public Defender
Appellate Defender Division
P.O. Box 200147
Helena, MT 59620-0147
krispeterson@mt.gov
(406) 444-9505

ATTORNEYS FOR DEFENDANT
AND APPELLANT

TIMOTHY C. FOX
Montana Attorney General
C. MARK FOWLER
Bureau Chief
Appellate Services Bureau
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

KRISTEN H. PABST
Missoula County Attorney
BRITTANY L. WILLIAMS
Deputy County Attorney
200 W Broadway
Missoula, MT 59802

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

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STATEMENT OF THE ISSUES

Issue One: Where interrogating officers used coercive techniques and psychological pressure upon an intellectually disabled man, was the confession involuntary under the totality of the circumstances?

Issue Two: Did Appellant's repeated, futile statements of his desire to end his custodial interrogation invoke his constitutional right to remain silent under *Miranda*?

Issue Three: Alternatively, must the judgment be amended to reflect the judge's oral order modifying a probation condition regarding Appellant obtaining a counseling assessment?

STATEMENT OF THE CASE

In March 2018, Frank Maciel was charged with felony robbery, Mont. Code Ann. § 45-5-401, for an incident nine months earlier. (D.C. Doc. at 3.) The State alleged Frank stole $20 and inflicted bodily injury in June 2017. (D.C. Docs. 3, 28 at 2.) Frank was interrogated two months after the incident, and probable cause for the Information was based largely upon that interrogation. (D.C. Doc. 1 at 2-3.)

Frank filed a motion to suppress his interrogation statements. (D.C. Doc. 14.) Frank argued his statements were not voluntary for

reasons that included his personal characteristics and the officers using deception, minimization of the offense, and implied promises of leniency. (D.C. Doc. 14 at 5-8.) Frank also argued the officers did not scrupulously honor his invocation of his right to remain silent under *Miranda v. Arizona*, 384 U.S. 436 (1966). (D.C. Doc. 14 at 8-10.)

An audio recording of Frank's interview was attached to his motion, along with a transcript from the Missoula police department. (Def.'s Ex. A-B, attached to D.C. Doc. 14.[1]) With the parties' agreement, the district court also reviewed a 2016 presentence investigation report from a different criminal case, which included a 2015 social assessment completed on Frank at Montana State Hospital. (Tr. at 6-7, 13-14; D.C. Doc. 22 at 4, 10-11.[2]) The district court denied the suppression claims without holding a hearing. (D.C. Doc. 22, attached as App. A.)

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[1] The transcription in this brief of the audio recording reflects undersigned counsel's best understanding of the audio recording.

[2] It is counsel's understanding that the 2016 PSI appears in this electronically submitted record under a folder entitled, "Exhibits." These documents are organized by an "Exhibit Record" list, which gives some exhibits different names than they received when admitted in open court. In this brief, the audio CD of Frank's interview will be referred to as "Ex. A," the 2016 PSI and its attached documents as "Ex. B," and the interview transcript as "Ex. C." (Tr. at 13-14.)

Frank entered a no contest plea. (Tr. at 22; D.C. Docs. 27-28.) He reserved his right to appeal the denial of his motion to suppress. (D.C. Doc. 28; Tr. at 17-18.) The district court sentenced Frank to 10 years in Montana State Prison with 5 years suspended. (Tr. at 40, attached as App. B; D.C. Doc. 31, attached as App. C.)

Orally, as part of a condition requiring a counseling assessment "with a focus on violence, controlling behavior, dangerousness and chemical dependency," the district court stated it would credit Frank for any prior program completed in prison. (Tr. at 44-45.) Frank had recently discharged a prior prison sentence. (Tr. at 32, 40.) The written judgment does not reflect that Frank would be given credit toward the counseling assessment condition for any prior program completed in prison. (D.C. Doc. 31 at 4.)

Frank timely appealed. (D.C. Doc. 38.)

STATEMENT OF THE FACTS

On August 22, 2017, a month and a half after he turned himself in on a probation violation, Frank found himself in a small, windowless concrete room in the Great Falls Detention Center at 11:49 a.m. (D.C. Docs. 14 at 2, 22 at 1, 4.) With Frank in the room were FBI Special

Agent Monte Shaide and Missoula Police Detective Guy Baker. (D.C. Doc. 22 at 1.) The officers wanted to discuss an incident in which Frank was a suspect that occurred over two months earlier, on the night of a Paul Simon concert in Missoula. (Ex. A at 00:32-00:45, 02:21-02:55.)

Frank, 27 years old, had been diagnosed with a moderate intellectual disability and ADHD. (D.C. Doc. 22 at 10-11.) Frank had one previous adult felony case from two years prior in which his fitness to proceed had been evaluated. (D.C. Doc. 22 at 10.)

Frank [redacted] (Ex. B, Initial Social Assessment at 6.[3]) He [redacted] was involved in the juvenile justice system. (Ex. B, Initial Social Assessment at 6-7; D.C. Doc. 22 at 11.) Frank has [redacted] (Ex. B., Initial

[3] Montana Code Annotated § 46-18-113(1) requires that "[a]ll presentence investigation reports must be a part of the court record but may not be opened for public inspection." Pursuant to M. R. App. P. 10(7)(a)-(b), Frank has, therefore, redacted information obtained directly from the 2016 PSI and the attached fitness to proceed evaluation from the public version of this brief.

Social Assessment at 5.) He suffers [redacted] (Ex. B, Initial Social Assessment at 5.)

When Special Agent Shaide and Detective Baker approached Frank, they had a victim's report of theft and assault with a foreign object by two unknown men on the California Street bridge in Missoula. (D.C. Doc. 1 at 2; Ex. A at 00:35-00:40, 51:53-51:59.) The victim was unable to identify the assailants, but his description led the officers to Christopher Brandon, who implicated Frank. (D.C. Doc. 1 at 2.)

A week before Special Agent Shaide and Detective Baker's interrogation, a detective from Great Falls was sent to see Frank regarding the case. (Ex. A at 10:05-10:12).) Apart from a few references made during Frank's interrogation (*e.g.*, Ex. A at 10:05-10:12), the record does not explain what was said between this other detective and Frank about the case.

After Frank was advised of his *Miranda* rights and agreed to speak, Frank said he knew "Paco" (whom the officers identified as Brandon) and had seen him that day but Frank said Frank left for Great Falls around lunchtime. (Ex. A at 00:55-5:52.) When Frank

persisted in this answer (Ex. A at 5:52-11:50), the officers applied psychological interrogation techniques to obtain Frank's confession.

The officers suggested they had video footage of the crime. (Ex. A at 12:57-13:12 ("Do you know that there's multiple businesses in that area that have security systems, they have cameras? . . . Did you notice if there's any cameras on that California Street bridge?").) The officers also implied they would triangulate Frank's phone to find his location. (Ex. A at 12:11-12:57.)

Confronted with these suggestions, Frank became angry and confused. (Ex. A at 13:33-13:37.) He became upset about talking further: "I don't need ta', like, be sittin' in here talkin' to you guys, I don't know what the fuck's going on." (Ex. A at 13:39-13:46.)

Detective Baker tried to trip Frank up by saying he had just disclosed a new detail that the victim had been assaulted. (Ex. A at 18:42-18:54.) The officers' tactic angered and again confused Frank: "I don't understand why the fuck I'm still in here talkin' to you guys." (Ex. A at 20:14-20:17, 22:06-22:09.) Detective Baker had actually suggested the new detail himself by his previous line of questioning. He had asked Frank whether he liked to fight, whether he had a history of

fighting, and told Frank his probation officer believed he could be involved because of past altercations. (Ex. A at 17:32-18:35.)

Faced with Frank's continued denials, the officers suggested they had video of Frank in Missoula near the California Street bridge the night of the incident: "Would there be any reason why you would be on video, after the hours of darkness, when you're claiming you left Missoula while it was daylight?" (Ex. A at 22:09-22:31.) When Frank expressed his understanding that they had said, "I'm, um, recorded," (Ex. A at 22:32-22:40), the officers did not correct him.

Frank's confusion continued. He at one point thought the person named Paul Simon referred to by the officers was the victim rather than the music star. (Ex. A at 23:38-24:03.)

Frank started asserting, "I guess I'll plead to guilty to somethin' that I didn't fuckin' do." (Ex. A at 24:28-24:32.) "I don't remember anything though." (Ex. A at 24:35-24:38.) "This is fuckin' scary dude." (Ex. A at 24:33-24:35.)

Twenty-five minutes into the interview, Frank broke down. (Ex. A at 25:00-25:10.) He started sobbing and moaning: "I fucking hate cops, I hate you guys, I just wanted to be left alone." (Ex. A at 25:10-25:15.)

Frank did not understand what was going on. (Ex. A at 25:15-25:17). Detective Baker assumed guilt from Frank's emotion: "I think you probably regret that this happened." (Ex. A at 25:22-25:24.) Frank pleaded he did not remember what happened and (apparent from the muffled tone of the audio) put his hands to his face and said, "I just wish I could die sometimes." (Ex. A at 25:25-25:31.)

Detective Baker persisted, asserting Frank was unique because, "You care about this person, didn't ya'?" (Ex. A at 25:34-25:36.) Frank desperately pleaded through a cracking voice: "I don't even know who he is. I don't know." (Ex. A at 25:36-25:38.) "[T]hat's why I'm getting upset when people are saying I did something, because I don't remember anything." (Ex. A at 25:39-25:45.)

Frank continued to assert he did not remember. (*E.g.*, Ex. A at 26:00-27:00.) "This is scarin' me . . . ." (Ex. A at 27:00-27:01.)

Detective Baker repeatedly tried to cajole Frank by telling him it was not "the crime of the century." (Ex. A at 19:37-19:43, 27:12-27:19 ("Frank, listen. A little bit of money, $20 or $25 was taken out of his pocket. It's not the crime of the century.").) The detective presented his questioning as simply administrative: "But I gotta, I gotta wrap the

case up . . . ." (Ex. A at 27:19-27:22.)

When Frank maintained that he did not remember, Special Agent Shaide moved in and further downplayed the questioning as largely administrative, explaining they came to Great Falls for another matter and were "not here specifically for you." (Ex. A at 27:40-27:46.) He told Frank it was a "minor incident," not of "major concern" to them and "we're just tryin' to resolve it and move on"—"[A]ll we need you to do is say, hey this is what happened. Me and this guy were together . . . ." (Ex A. at 27:49-28:14.) Although the officers told Frank it "could be" a felony, the officers also emphasized the offense involved "just a little bit of money." (Ex. A at 19:40-19:53, 27:13-27:15.)

Whenever Frank gave inculpatory answers, the officers changed demeanor and were pleased and thanked Frank. (Ex. A at 28:54-29:02.) But when Frank continued to assert he did not remember, Detective Baker became disapproving. (Ex. A at 29:00-29:28 ("Let's not backtrack," and "take one step forward and two steps back.").)

Detective Baker implied that, if Frank confessed, they might talk to the prosecutor to "present you in a positive light." (Ex. A at 30:58-31:30.) After Frank continued to assert he did not remember, the

officers persisted and assumed Frank's guilt in their questioning. (Ex. A at 32:18-32:23.)

After he'd sat thirty-four minutes in the room, Frank pleaded, "I just want to get the fuck outta here," and offered: "I'll plead out to somethin' that I didn't fuckin' do." (Ex. A at 34:00-34:05.) "I don't remember anything," he said, "I just want to get the fuck outta here, dude" and "seriously this is stressing me out." (Ex. A at 34:18-34:27.)

Unsatisfied, the officers' asked Frank to "speculate" about the race of the victim. (Ex. A at 34:40-34:55.) A desperate Frank asserted "I don't know" and again offered, "I'll plead out to it, get the fuck outta here. I don't even care if I get another charge of felony or whatever. I don't care." (Ex. A at 34:56-35:13.) Unaffected, the officers told Frank, "I want to be able, when we leave here to be able to tell Mark, your probation officer, and a prosecutor if I talk to them" that "I talked to Frank," and he "has some issues, but he wants to get help and Frank was honest about what happened." (Ex. A at 35:15-35:28.)

Frank eventually told the officers he wanted to leave the room, and they dismissed the request out-of-hand. (Ex. A at 38:11-38:19.) After Frank said he remembered going towards the park and "I guess I

hit him," the officers asked, "So the money was in his hand?" (Ex. A at 38:02-38:11.) Frank replied, "Yeah," and immediately said, "Let's just get outta here now." (Ex. A at 38:11-38:13.[4]) Making clear the officers understood Frank as having said he wanted to physically leave the room, Detective Baker laughed and said, "We can't leave because we're at the lunch break, so they can't move you from here anyway . . . ." (Ex. A at 38:13-38:19.) He quickly turned the conversation back to the incident, praising Frank's admission: "But, I appreciate you being honest. Now maybe, sometimes when people talk about things, they remember things better. So, let's talk." (Ex. A at 38:19-38:25.)

When Frank said he was starting to remember and that he maybe did assault a person, the officers praised Frank for his new answers. (Ex. A at 39:04-39:33.) After more admissions, Frank eventually asked, "where did I assault him at? I just want to know. I don't remember what happened that night though." (Ex. A at 39:48-40:56.) The officers laughed. (Ex. A at 40:54-40:55.) After Frank again expressed that he did not care about going to prison, the officers told Frank they were only

[4] The police department transcript, also cited by the district court, transcribed Frank as stating, "Let's just get it out here now." (Ex. C at 49; D.C. Doc. 22 at 20.)

seeking the truth and did not want him to make things up and get in trouble for something he did not do. (Ex. A at 41:53-42:38.) The officers were wondering how much Frank was actually remembering or if he was just filling in gaps. (Ex. A at 42:46-42:51.)

When they again pressed Frank on the incident, Frank ultimately said he didn't remember and, with finality, that he was done with the interrogation:

> I don't even remember, like, to be honest with you. I don't remember. It - it - it could've been recorded, I don't give a fuck, I just wanna get the fuck outta here dude, I don't wanna talk about this more, I'll go to court and plead out to it. I don't give a fuck. I'm just tired of fuckin' sittin' here with you guys. [Pause]
>
> I must of did somethin', I don't remember, but, I mean, I just told you what I supposedly did.

(Ex. A at 43:21-43:45.) In this exchange, Frank's trial attorney and the State recounted Frank as saying, "I *don't* wanna talk about this more." (D.C. Docs. 14 at 2 (emphasis added); D.C. Doc. 17 at 8 (State's motion citing police department transcript but quoting Frank as saying, "I don't wanna talk about this more").) The police department transcript, which the district court cited, stated that despite Frank's obvious frustration with the interrogation, he said "I *wanna* talk about this

more." (Ex. C at 56; D.C. Doc. 22 at 20 (emphasis added).)

The officers continued questioning Frank. (*E.g.*, Ex. A at 43:44-43:59 ("So, so the guy said he was hit . . . with, with a foreign object.").) Shortly thereafter, Frank confessed that he beat up the victim. (Ex. A at 44:12-44:41.)

When asked about the location, Frank offered "wherever that place took a picture of me beatin' that dude up?" (Ex. A at 48:55-49:10.) Only then did Detective Baker backtrack on his previous statement about having video footage: "I never said any place took a picture of ya'," "I said, we checked the video at that convenience store," and "I haven't seen that video yet." (Ex. A at 49:10-49:26.)

In contrast to the victim's report, Frank said "Paco" was not there and no weapons were involved. (Ex. A at 43:50-44:12.) Detective Baker dismissed these discrepancies. (Ex. A at 51:53-52:02 ("let's not cloud that . . . .").) When asked about his previous different answers during the interrogation, Frank said he'd decided to "tell you the story" that "I assaulted the dude." (Ex. A at 52:50-53:05.)

At 12:45 p.m., still within the lunch hour that the officers had told Frank prohibited him leaving the interrogation, the officers ended the

questioning. (Ex. A at 54:31-54:34.)

Nearly seven months later, the instant charge was filed against Frank. (D.C. Doc. 3.)

STANDARDS OF REVIEW

This Court applies a bifurcated standard of review to rulings on motions to suppress. The Court reviews "whether the court's underlying factual findings are clearly erroneous and whether the court's interpretation and application of the law are correct." *State v. Morrisey*, 2009 MT 201, ¶ 14, 351 Mont. 144, 214 P.3d 708. Findings of fact are clearly erroneous if they are unsupported by substantial evidence, if the district court has misapprehended the effect of the evidence, or if the Court's review of the record leaves it with a definite or firm conviction that a mistake has been made. *Morrisey*, ¶ 14.

The Court has stated "whether a confession is voluntary is a factual issue that depends upon a consideration of the totality of the circumstances." *State v. Eskew*, 2017 MT 36, ¶ 16, 386 Mont. 324, 390 P.3d 129; *State v. Maile*, 2017 MT 154, ¶ 8, 388 Mont. 33, 396 P.3d 1270 ("The voluntariness of a confession or admission is a factual question which must take into account the totality of the circumstances.").

However, while the Court's review of a district court's findings as to historical facts is deferential, the ultimate constitutional question of voluntariness is a mixed question of law and fact that this Court decides de novo. *See State v. Covington*, 2012 MT 31, ¶ 13, 364 Mont. 118, 272 P.3d 43 ("We exercise plenary review of constitutional questions."); *State v. Warclub*, 2005 MT 149, ¶¶ 23-24, 327 Mont. 352, 114 P.3d 254 (clarifying the standard of review for the voluntariness of a guilty plea). "[T]he ultimate issue of 'voluntariness' is a legal question . . . ." *Miller v. Fenton*, 474 U.S. 104, 110 (1985)).

The Court reviews criminal sentences including at least one year of incarceration for legality only. *State v. LaField*, 2017 MT 312, ¶ 11, 390 Mont. 1, 407 P.3d 682.

SUMMARY OF THE ARGUMENT

The statements Frank—an intellectually disabled 27-year-old—made during his formal interrogation with a detective and an FBI special agent were the result of Frank's will being overborne by the officers' coercive interrogation tactics in violation of due process. Detective Baker and Special Agent Shaide coerced Frank's confession with deception about their evidence and Frank's ability to leave the

interrogation room, downplaying the offense that carried the possibility of 40 years in prison for Frank, ignoring Frank's distress, and other coercive psychological techniques. The district court's factual findings on voluntariness were not supported by substantial evidence and misapprehended the effect of the evidence. The district court erred in applying the facts to the law and determining Frank's confession was voluntary.

The State also violated Frank's *Miranda* right to remain silent when the officers ignored Frank's repeated expressions during this custodial interrogation that he wanted to end the interrogation and leave the room. Frank expressed to the officers that he wanted to be left alone and leave the interrogation. Later, Frank said he did not want to talk. Each time, Frank's desires were ignored. The interrogation continued. Frank's repeated statements over the course of the interview unambiguously and unequivocally communicated to a reasonable officer that Frank wanted to cease the interrogation. Since Frank's invocations of his constitutional right to remain silent were not scrupulously honored by the officers, the Court must reverse the district

court's ruling and suppress Frank's statements made following his invocations.

Alternatively, the written judgment must be amended to reflect the judge's oral order giving Frank "credit" for any prior program completed in prison with regards to the probation condition requiring a counseling assessment in the written judgment.

ARGUMENT

I. Where interrogating officers used coercive techniques and psychological pressure upon an intellectually disabled man, the confession was involuntary under the totality of the circumstances.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution, coupled with the Fifth Amendment right against self-incrimination, prohibit the use of an involuntary confession in a criminal prosecution. *Eskew*, ¶¶ 14-15. An involuntary confession is inadmissible for any purpose. *Morrisey*, ¶ 29; *see also*, Mont. Code Ann. § 46-13-301(4). After the defendant moves to suppress a confession, the State bears the burden of proof regarding voluntariness by a preponderance of the evidence. Mont. Code Ann. § 46-13-301(2); *Eskew*, ¶ 14.

The voluntariness inquiry examines "the totality of all the surrounding circumstances" to determine whether "the suspect's will was overborne by the circumstances surrounding the giving of the confession." *Morrisey*, ¶ 26. The inquiry asks whether "the confession [was] the product of an essentially free and unconstrained choice by the maker." *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973). A confession should be given freely "without compulsion or inducement of any sort." *Morrisey*, ¶ 26. The test calls for "a careful scrutiny of all the surrounding circumstances." *Schneckloth*, 412 U.S. at 226. A suspect's state of mind is central to the traditional voluntariness test. *Morrisey*, ¶ 42.

Courts have recognized a multitude of considerations to assess the voluntariness of a confession. *E.g.*, *Eskew*, ¶ 16. The considerations focus upon "'the characteristics of the accused and the details of the interrogation'" to weigh "'the circumstances of pressure against the power of resistance of the person confessing.'" *Dickerson v. United States*, 530 U.S. 428, 434 (2000) (citations omitted). The defendant's age, education, background and experience with law enforcement are relevant factors. *Eskew*, ¶ 17. Other relevant factors are "coercive

questioning," "psychological coercion," isolation in a small room, and lying to the suspect. *Eskew*, ¶¶ 17-18. A proper *Miranda* advisement, while relevant, "'is not a license to coerce a confession.'" *Eskew*, ¶ 17 (quoting *State v. Allies*, 186 Mont. 99, 115, 606 P.2d 1043, 1051 (1979)).

Here, this Court is in the same position as the district court in assessing the evidence of the interrogation. The audio recording in the record is the only evidence of the substance of the interrogation—no witnesses testified. *Cf. City of Missoula v. Metz*, 2019 MT 264, ¶ 30, 397 Mont. 467, 451 P.3d 530 (explaining that, while a lower court assesses credibility and the weight to be given testimony, the Court may not "simply disregard" contradictory video evidence).

This interrogation pitted Frank—an intellectually disabled 27-year-old with a fourth-grade reading ability and ADHD—against an FBI special agent and a Missoula city police detective. While the 54-minute interrogation was just short of an hour, even a brief interrogation can be involuntary. *E.g.*, *State v. Hermes*, 273 Mont. 446, 450-51, 904 P.2d 587, 589-90 (1995) (confession during an interrogation in a pickup truck was involuntary, where the interrogation only constituted 7 pages of transcript (*State v. Hermes*, No 94-211, Brief of

Appellant, at 3-10)). The district court correctly found the location of the interrogation as a small room at the Great Falls Detention Center favored involuntariness. (D.C. Doc. 22 at 14.)

As to the characteristics of the accused, the district court recognized that Frank's moderate intellectual disability favored him in the voluntariness question. (*See* D.C. Doc. 22 at 17.) However, the district court concluded Frank's juvenile history weighed against him. (*See* D.C. Doc. 22 at 17-18 (reasoning Frank "has had significant exposure to the criminal justice system, starting as a juvenile with charges for two serious crimes" and explaining the juvenile incidents).)

The district court erred in weighing Frank's experience as a juvenile in favor of voluntariness. The youth criminal justice system has a significantly different purpose than the adult criminal justice system—to rehabilitate youths while their characters remain changeable. *See Kent v. United States*, 383 U.S. 541, 554 (1966); Mont. Code Ann. § 41-5-102 (establishing the rehabilitative purposes of the Youth Court Act). The State presented no evidence supporting that Frank's involvement in the juvenile justice system would have educated and prepared him for withstanding the psychological pressures of an

adult formal interrogation. If anything, Frank's experience as a juvenile tended towards showing his formal interrogation as an adult was involuntary, as it may have created confusion for him as to the officers' purpose.

As to the details of the interrogation, the district court found "neither Detective Baker or Agent Shaid used impermissible psychological techniques," and there was "no lying or deception about what was known." (D.C. Doc. 22 at 15.) The district court's finding is not supported by substantial evidence and misapprehended the effect of the evidence.

When the questioning was proving fruitless, Detective Baker decided to imply the officers possessed surveillance video footage of Frank in the area the night in question. (Ex. A at 12:57-13:16, 22:09-22:31.) The implication was clear—we saw you, you did it, you are guilty. When Frank said it was weird he was recorded, no clarification was made that the officers had not actually seen any recording. (Ex. A at 22:32-22:40.) Detective Baker clarified his comment only after Frank confessed. (Ex. A at 49:10-49:26.) Frank was led to, and did, believe the officers had pictures of him. (Ex. A at 49:06-49:15.)

"Lying to [a] defendant about how much is known about his involvement in the crimes, is particularly repulsive to and totally incompatible with the concepts of due process embedded in the federal and state constitutions." *Allies*, 186 Mont. at 113, 606 P.2d at 1051. Not only did the officers imply to Frank they possessed video footage of him, they implied they could and would track Frank's location by his phone. (Ex. A at 12:11-12:57.) Just like the surveillance video, the State never offered evidence supporting that the officers made any attempt to secure tracking information from Frank's phone or that they had any intent to do so.

Worse, when Frank said thirty-eight minutes into the interview that he wanted to leave the room, the officers compelled Frank to continue talking on the false premise that he had to because he could not leave the room. Detective Baker told Frank, "We can't leave because we're at the lunch break, so they can't move you from here anyway" and led Frank back to the questioning. (Ex. A at 38:11-38:25.)

Even if it was true that no one could physically leave the room during lunch due to security issues, Frank possessed the constitutional right at all times to end the interrogation. *Miranda*, 384 U.S. at 445-

46. Up to this point, Frank had continually expressed displeasure with the interrogation: "I don't need ta', like, be sittin' in here talkin' to you guys . . . ." (Ex. A at 13:39-13:42, 20:14-20:17.) Yet, when Frank said he wanted to leave the room, the officers ignored the clear reason Frank wanted to do so—to end the questioning. The officers dismissed Frank's request off-hand and gave him the false belief he had to continue talking to them because they were unable to physically leave the room. Notably, the officers expressed no issue terminating the interrogation at 12:45 p.m., after Frank confessed, even though it was still well within the lunch hour. (Ex. A at 54:31-54:34.)

This Court "'will not condone the use of deception to obtain a confession.'" *Eskew*, ¶ 18 (quoting *State v. Old-Horn*, 2014 MT 161, ¶ 25, 375 Mont. 310, 328 P.3d 638). Frank's interrogation was riddled with subtle deception about video footage the officers did not have and Frank's ability to end the interrogation. The district court erred when it concluded it was "unable to find in either the transcript of the interview or in the audio recording anything" amounting to "any deception on the part of the two officers." (D.C. Doc. 22 at 10.)

The officers also deceived Frank about the consequences of confessing. The officers repeatedly responded to Frank's denials by downplaying the crime as not "the crime of the century" but rather a "minor incident," in which "a little bit of money" was taken, and the victim was "okay." (Ex. A at 19:37-19:45, 24:56-25:02, 27:12-27:19, 27:49-27:51.) The officers merely wanted administratively to "wrap the case up," which was not "a major concern to us." (Ex. A at 27:19-27:55.) When Frank expressed worry about getting "hit with another felony," Detective Baker calmed him by saying, "You're not charged with anything. We're just investigating this." (Ex. A at 33:25-33:31.)

The district court dismissed these concerns by reasoning the crime was indeed not "the crime of the century" and by concluding the officers did not minimize the facts of the offense. (D.C. Doc. 22 at 16.) Yet, Frank faced the possibility of 40 years in prison for felony robbery. Mont. Code Ann. § 45-5-401(2). To Frank, a 27-year-old, felony robbery could be "the crime of the century" and put him in prison for a large portion of the rest of his life. Officers did not convey to Frank the 40-year potential penalty for assaulting a person while stealing $20.

The district court also erred when it concluded it did not find "anything that amounts to a promise of leniency" by the officers. (D.C. Doc. 22 at 10.) In fact, the officers implied they would ask for leniency for Frank from the prosecutor or his probation officer if he confessed. (Ex. A. at 30:58-31:30; 35:15-35:28.) "A confession induced by . . . any direct or implied promise, however slight, may be involuntary." *Eskew*, ¶ 16 (quoting *Old-Horn*, ¶ 17).

The district court overlooked other coercive psychological techniques. The district court dismissed any concerns arising from Frank's mid-interview emotional breakdown because the breakdown simply did "not last long." (D.C. Doc. 22 at 10.) The district court also disregarded that the officers asked an intellectually disabled person questions that minimized his ability to deny the offense, employing a guilt-assumption technique this Court has "condemned . . . as coercive." *Hermes*, 273 Mont. at 450, 904 P.2d at 589. For example, after Frank claimed he did not remember what happened, the officers asked him, "[D]id you hit him with your fist or did you hit him with an object?" (Ex. A at 32:18-32:23.) The officers also assumed guilt from Frank's mid-interview emotional breakdown. (Ex. A at 25:22-25:24.)

In addition, the district court's voluntariness ruling incorrectly relied upon its perception that Frank's confession was truthful. Society's "abhorrence" to involuntary confessions "does not turn alone" on untrustworthiness but also upon "the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." *Spano v. New York*, 360 U.S. 315, 320-21 (1959); *Allies*, 186 Mont. at 110, 606 P.2d at 1049.

The district court mistakenly reasoned that reliability of the ultimate confession excused improper police tactics that led to it. The district court found "significant" that Frank said at the end of the interview he had lied earlier. (D.C. Doc. 22 at 15.) The district court excused the officers' tactics of praising Frank's inculpatory answers by reasoning this praise was simply "reinforcement of the Defendant's truth telling after he had been telling lies for a substantial portion of the interview . . . ." (D.C. Doc. 22 at 15.) The district court also pointed to instances where it believed Frank gave new details to the officers. (D.C. Doc. 22 at 5 (setting forth that Frank gave a new detail about

Brandon's involvement), 15 (relying on Frank giving a detail of the victim being "beaten up").)

In any event, the record does not support that Frank offered details about the incident that he was not told before he confessed. Frank was contacted by a detective prior to this interrogation about this incident. (Ex. A at 10:05-10:12).) The State did not submit any evidence of what Frank learned about the incident in that initial conversation. When Frank first mentioned Brandon, the officers did not tell Frank he'd disclosed a new detail. (Ex. A at 03:12-03:17.) When Detective Baker told Frank that he had said a new detail about the offense involving an assault, Detective Baker's preceding line of questioning had already suggested that detail. (Ex. A at 17:32-18:54.)

Viewing the totality of the circumstances, Frank's confession was involuntary. It is evident from the audio recording the officers' tactics upset and confused an intellectually disabled man. Frank had a mid-interview breakdown and moaned through tears: "I hate you guys"; "I just wanted to be left alone"; "I just wish I could die sometimes." (Ex. A at 25:10-25:15, 25:28-25:31.) On multiple occasions, Frank said he was confused (Ex. A at 13:33-13:37, 20:14-20:17), he did not understand why

he was still in the room talking to the officers (Ex. A at 13:39-13:46, 22:06-22:09), and he wanted the questioning to cease. (Ex. A at 34:00-34:27, 38:11-38:13, 43:21-43:45.) Yet it did not.

Faced with the unending questioning, Frank repeatedly referenced confessing to something in order to end the interrogation: "I'll plead out to somethin' that I didn't fuckin' do. I just want to get the fuck outta here." (Ex. A at 34:00-34:05.) "I'll plead out to something that I didn't do, I'll just get it done and over with." (Ex. A at 34:05-34:12.) Although the officers themselves ultimately questioned whether Frank was giving a false confession and told him not to do that (Ex. A at 41:53-42:51), by then it was evident from the preceding forty-one minutes of interrogation that the only way to get out of that room was to tell the officers what they wanted to hear.

The officers' coercive techniques and psychological pressure, combined with the coercive interrogation environment and Frank's intellectual disability, failed to establish Frank's statements were voluntary. Frank was unconstitutionally compelled to admit to stealing money and assaulting the victim.

The district court erred in denying the motion to suppress on the grounds that Frank's statements were voluntary. As a result, Frank must be allowed to withdraw his plea, and his statements must be suppressed for all purposes. *See Morrisey*, ¶ 29; Mont. Code Ann. §§ 46-12-204(3), 46-13-301(4).

II. Frank's repeated, futile statements of his desire to end his custodial interrogation invoked his constitutional right to remain silent.

The Fifth Amendment to the United States Constitution (applicable to Montana via the Fourteenth Amendment) and Article II, Section 25 of the Montana Constitution provide that no person shall be compelled, in any criminal case, to be a witness against himself. *State v. Nixon*, 2013 MT 81, ¶ 17, 369 Mont. 359, 298 P.3d 408. In *Miranda*, the United States Supreme Court established "concrete constitutional guidelines" for law enforcement to follow in custodial interrogation, recognizing that today's interrogation practice "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." *Miranda*, 384 U.S. at 441-42, 467.

Miranda protections include informing a person in custodial interrogation of the person's right to remain silent and "scrupulously honor[ing]" an invocation of that right. *Miranda*, 384 U.S. at 478-79; *Morrisey*, ¶ 42. If the right is invoked, the police must cease any interrogation. *Morrisey*, ¶ 38. Statements obtained in violation of *Miranda* are not admissible. *Morrisey*, ¶ 34.

An accused may invoke the right to remain silent "in any manner, at any time prior to or during questioning." *Miranda*, 384 U.S. at 473-74. "[A] suspect must articulate his desire to remain silent 'sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request' to not speak with the police." *Nixon*, ¶ 31 (quoting *Davis v. United States*, 512 U.S. 452, 459 (1994)). The invocation must be unambiguous and unequivocal. *Nixon*, ¶ 31. But, "a suspect need not 'speak with the discrimination of an Oxford don,'" *Davis*, 512 U.S. at 459, or rely on "'any special combination of words.'" *Morrisey*, ¶ 40 (citation omitted). "[L]aypeople are not learned in constitutional principle or legal nicety . . . ." *Morrisey*, ¶ 40.

Whether a suspect invokes his right to remain silent "is an objective inquiry." *Morrisey*, ¶ 40. The Court does not "merely look to specific passages from a transcript in isolation," but also "'consider[s] the circumstances in which the statement was made.'" *Nixon*, ¶ 32 (citation omitted).

Here, the State has conceded that officers subjected Frank to "custodial interrogation" and that *Miranda* applies. (D.C. Doc. 17 at 1, 7-8.) The parties do not dispute that Frank was given a *Miranda* warning. (Ex. A at 00:55-2:10.) The disputed *Miranda* question is whether Frank invoked his right to cease the interrogation.

After the questioning commenced, Frank repeatedly expressed frustration with it. Thirteen minutes into the interview, Frank said, "I don't need ta', like, be sittin' in here talkin' to you guys, I don't know what the fuck's going on." (Ex. A at 13:39-13:46.) Seven minutes later, he said, "why am I in here talkin' to you guys?" (Ex. A. at 20:14-20:17.) Two minutes later, Frank said he did not understand why "I'm still in here talkin' to you guys." (Ex. A. at 22:06-22:09.)

Frank started expressing a desire to leave the room: "I'll plead out to somethin' that I didn't fuckin' do. I just want to get the fuck

outta here." (Ex. A at 34:00-34:05.) "I don't remember anything, I just want to get the fuck outta here, dude." "I just want to get out of here, like seriously." (Ex. A at 34:18-34:27.)

Frank's frustration became a statement he wanted to leave the room and end the interrogation when he said: "Let's just get outta here now." (Ex. A at 38:11-38:13; D.C. Docs. 14 at 2, 18 at 4.) Although the police department transcript, also cited by the district court, recounted Frank as saying, "Let's just get it out here now" (Ex. C at 49; D.C. Doc. 22 at 20), the officers' response makes clear that Frank unambiguously communicated that he wanted to leave the room. Detective Baker immediately responded, "We can't leave because we're at the lunch break, so they can't move you from here anyway . . . ." (Ex. A at 38:13-38:14.) Rather, he said "let's talk." (Ex. A at 38:24-38:25.)

Questioning was required to cease when Frank unambiguously told the officers, in language they understood, that he wanted to leave the room and thereby end the interrogation. Up to this point, Frank had repeatedly expressing dissatisfaction with the questioning and a desire that it end. When Frank told the officers he wished to leave the room, a reasonable officer would understand that Frank was asking to

terminate the interrogation. *Nixon*, ¶ 31. There is no other reasonable meaning to take from Frank's statement and the officer's reaction in response confirming Frank wished to leave the interrogation room. *See Commonwealth v. Howard*, 16 N.E.3d 1054, 1065 (Mass. 2014) ("I would like to stop at that point" sufficiently clear under the circumstances as invoking right to remain silent); *State v. Walker*, 372 P.3d 1147, 1159 (Kan. 2016) ("I'm done" followed by, "Can you take me to a cell now?" invoked right to remain silent).

Even if Frank had not yet invoked his right to remain silent when he told the officers he wanted to leave the room, Frank certainly did so five minutes later. Frank said with resignation: "I just wanna get the fuck outta here dude," adding, "I don't wanna talk about this more, I'll go to court and plead out to it. I don't give a fuck. I'm just tired of fuckin' sittin' here with you guys." (Ex. A at 43:21-43:36.) He paused, and then said that he had already told the officers what supposedly happened. (Ex. A at 43:36-43:45.) The officers did not stop questioning.

The district court's finding that Frank said "I wanna talk" rather than "I *don't* wanna talk" (D.C. Doc. 22 at 19-20), is not supported by substantial evidence. Again, the only evidence of the substance of this

interview is the audio recording; no testimony was taken from Frank or either officer. Thus, the usual logic of deferring to the trial court's assessment of conflicting testimony does not apply. *Cf. Metz*, ¶ 30.

That Frank expressed he did not want to talk is evident from the audio recording itself. The "don't" in Frank's statement is discernable in the audio recording. Frank talks quickly and the inflection in his voice changes when he says he doesn't want to talk anymore, which somewhat masks the word "don't," but the "d" sound remains apparent. (Ex. A at 43:28-43:29.) Although the police department transcriber did not transcribe Frank as having said, "don't," there were typos throughout the transcript. (*E.g.*, Ex. A at 42:23-42:24; Ex. C at 54 (transcribing "guilt" as "Quilt").) Frank's trial attorney transcribed him as having said "don't," and the State did as well, although purporting to cite the transcript. (D.C. Docs. 14 at 2, 17 at 8.)

Whether or not Frank specifically said the word "don't," the context of Frank's entire statement makes clear that he, yet again, was communicating a desire to cease the interrogation and stop talking with the officers. In the preceding forty-three minutes of the interview Frank expressed frustration with the continued questioning and a

desire to leave the room. In this latest statement, Frank again reiterated those desires, repeating that he didn't remember and "I just wanna get the fuck outta here dude." Frank said he will handle the matter, not with the officers, but in court—"I'll go to court and plead out to it"—and that he was, again, tired of the interrogation—"I'm just tired of fuckin' sittin' here with you guys." (Ex. A at 43:21-43:36.) The context of Frank's statement makes clear that when he referred to talking to the officers, he was expressing he did *not* wish to talk anymore to them. A reasonable officer would have understood, if he hadn't yet, that Frank was invoking his right to cease the questioning.

The district court concluded Frank did not make "any sort of unambiguous statement that he wants to remain silent." (D.C. Doc. 22 at 20.) The court reasoned "a Defendant must at least speak as did the Defendant in *Morrisey*" or in cases cited therein, where the defendants said, "I ain't saying nothing," "I got nothing to say," "I ain't got nothin' to say," "No quiero declarer nada" ("I don't want to declare"), or "I don't have anything to say." (D.C. Doc. 22 at 20 (citations omitted).)

The district court erred because there are no "'talismanic phrases or any special combination of words'" required to invoke one's right to

remain silent. *Morrisey*, ¶ 40. Other courts have explained "'context is generally as important, if not more important, than the exact words a suspect uses in a statement that is alleged to be an invocation of the right to remain silent.'" *McCloud v. State*, 208 So. 3d 668, 676 (Fla. 2016) (citation omitted); *see also*, *Nixon*, ¶ 32; *State v. Rogers*, 760 N.W.2d 35, 58 (Neb. 2009) (explaining relevant circumstances of the context of an invocation include "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").

In *Nixon*, ¶¶ 33-34, where the Court concluded the defendant did not invoke his right to remain silent, the defendant said, "I really don't have anything to talk about" at the start of an interrogation but then directed "talk away sir," after being giving more information about the interrogation's topic. In *State v. Jones*, 2006 MT 209, ¶¶ 10, 27, 333 Mont. 294, 142 P.3d 851, in the context of ruling on the voluntariness of the confession, the Court concluded a defendant made an equivocal

invocation of his right to remain silent by stating he was "through talking" but continued to deny his involvement in the crime.

The Florida Supreme Court reviewed a similar case as here in *Deviney v. State*, 112 So. 3d 57 (Fla. 2013). The defendant said "I'm ready to go" during the middle of an interview and followed up his comment with the statement, "I don't see how you all think I did that." *Deviney*, 112 So. 3d at 77. As questioning continued, the defendant eventually said, "How much better can I explain, I did not do this," and he repeatedly said, "I'm done," which he said meant "I'm ready to go home and I did not do this and if I did do it I want you all to show me that I did do it." *Deviney*, 112 So. 3d at 77. When the questioning persisted, he said again he was "done" and "ready to go home" and asked if he could leave the interrogation room. *Deviney*, 112 So. 3d at 77. The court held the defendant made an unequivocal invocation of his right to remain silent by repeatedly stating he was "done" and asking to leave the room. *Deviney*, 112 So. 3d at 77-78.

Here, like in *Deviney*, Frank intimated throughout the questioning that he did not wish to engage in further questioning with the officers and ultimately stated he wanted to leave the interrogation room in an

attempt to end the questioning. After that request was dismissed out-of-hand, Frank shortly thereafter said he did not wish to talk further. Unlike *Nixon*, Frank did not make an off-hand comment that he did not have anything to talk about at the inception of the interrogation. Unlike *Jones*, Frank explicitly told the officers he wanted to leave. When he said later that he did not want to talk and further reiterated the reasons for his desire to stop talking (that he had told the officers what happened), he did not thereafter continue talking about the crime. Where a person—like Frank here—repeatedly communicates a desire to cease the interrogation—officers cannot just ignore that request and wait for the right "special combination of words." *Morrisey*, ¶ 40. At two separate points in time, Frank unambiguously expressed that he did not wish to engage in further questioning with the officers.

The district court reasoned that Frank's statements that he wanted to leave could have meant Frank simply wanted to leave custody—and not this specific interrogation. (D.C. Doc. 22 at 20.) This reasoning does not hold water. The officers understood Frank as asking to leave the actual interrogation room when they answered that he could not leave during lunch. Likewise, previously, Frank had

expressed displeasure with his present interrogation and not custody generally. (Ex. A at 13:39-13:42 (saying "I don't need ta', like, be sittin' in here talkin' to you guys"), 20:14-20:17 (asking "why am I in here talkin' to you guys").) When Frank said later that he did not wish to talk "about this more," it was evident that Frank wished to cease the present specific interview he had been having.

At two separate points during Frank's interview, he articulated a desire to cease the interrogation "sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request" to not speak with the police. *Nixon*, ¶ 31. Officers failed to scrupulously honor Frank's invocation when they refused to discontinue the interrogation. *Morrisey*, ¶ 38. As a result, Frank's statements made after he invoked his right to remain silent must be suppressed. *Morrisey*, ¶ 34.

III. Alternatively, the judgment must be amended to reflect the judge's oral order crediting the probation condition requiring a counseling assessment with any prior program completed in prison.

The sentence orally pronounced before the defendant is the legally effective criminal sentence. *LaField*, ¶ 32. The Court will remand for

the written judgment to be conformed to the oral pronouncement if the defendant was not afforded an opportunity to respond to the additional written portions of the judgment at sentencing, and the new portions substantively increase the defendant's loss of liberty or sacrifice of property. *State v. Hamilton*, 2018 MT 253, ¶¶ 51-52, 393 Mont. 102, 428 P.3d 849; *LaField*, ¶¶ 33, 35.

If this Court upholds the district court's suppression order, it should remand to the district court with instructions for the court to conform its written judgment to the oral pronouncement with respect to the probation condition requiring that Frank obtain a counseling assessment. (D.C. Doc. 31 at 4 (Condition 18).) Condition 18 requires:

> Defendant shall complete a counseling assessment with a counselor approved by the court with a focus on violence, controlling behavior, dangerousness, and chemical dependency and follow all recommendations for counseling, referrals, attendance at psychoeducational groups or treatment, including any indicated chemical dependency treatment made by the counseling provider.

(D.C. Doc. 31 at 4.)

Orally, when reading this condition, the district court modified the condition to clarify that Frank would not have to obtain a new counseling assessment if he had previously completed the program in

prison: "If you completed this program when you were previously in prison, I'll give you credit for any completion that you have already done on that condition of probation." (Tr. at 44-45.) Yet the written judgment does not reflect the judge's oral modification order, and simply requires Frank to obtain a counseling assessment regardless of whether he previously completed the program in prison.

The nonconformance with regard to the counseling assessment condition substantively increases Frank's sentence because—without the judge's oral modification stated—Frank is required to obtain (and possibly pay for) a new counseling assessment, regardless of whether he already obtained and paid for the program in prison. This Court remedied a similar nonconformance in *LaField*, ¶ 33, where the defendant was orally required to obtain a mental health evaluation only if one did not occur by a certain date, but the judgment required the defendant to obtain a mental health evaluation without consideration of whether one had already occurred.

Since the judgment does not conform to the oral pronouncement with regard to Frank's requirement that he obtain a counseling assessment on probation, the written judgment must be amended to

reflect the judge's oral "credit" towards that condition for any prior program completed in prison.

CONCLUSION

Frank respectfully requests the Court hold the district court erred in denying his motion to suppress his interrogation statements. Frank asks the Court to remand for withdrawal of the plea and suppression of Frank's statements.

Alternatively, Frank respectfully requests the Court remand for conformance of his written judgment with the oral pronouncement regarding the need to obtain a new counseling assessment on probation.

Respectfully submitted this 13th day of April, 2020.

OFFICE OF STATE PUBLIC DEFENDER
APPELLATE DEFENDER DIVISION
P.O. Box 200147
Helena, MT 59620-0147

By: /s/ Kristen L. Peterson
KRISTEN L. PETERSON
Assistant Appellate Defender

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 8,523, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Kristen L. Peterson
KRISTEN L. PETERSON

APPENDIX

Order on Defendant's Motion to Suppress His Statement as Involuntary ..... App. A

Oral Pronouncement of Sentence ..... App. B

Judgment ..... App. C

CERTIFICATE OF SERVICE

I, Kristen Lorraine Peterson, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 04-13-2020:

Kirsten H. Pabst (Prosecutor)
200 W. Broadway
Missoula MT 59802
Representing: State of Montana
Service Method: eService

Timothy Charles Fox (Prosecutor)
Montana Attorney General
215 North Sanders
PO Box 201401
Helena MT 59620
Representing: State of Montana
Service Method: eService

Electronically signed by Kim Harrison on behalf of Kristen Lorraine Peterson
Dated: 04-13-2020