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VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

COMMONWEALTH OF VIRGINIA	:	
	:	
v.	:	CR21-867
	:	Hearing date: 8/31/22
JAMES CHRISTOPHER JOHNSON	:	
Defendant	:	

COMMONWEALTH'S OPPOSITION TO MOTION TO SUPPRESS AND EXCLUDE STATMENTS

COMES NOW the Commonwealth, by her attorney, and moves this Honorable Court to deny defense counsel's Motion to Suppress and Exclude Statements ("the Motion").

FACTS

In August of 1998, following the murder of Andrea Cincotta, the Arlington County Police Department began investigating the details of her death, gathering evidence, and interviewing potential suspects. James Christopher Johnson reported her death to the Arlington Police Department and was initially interviewed as the reporting party and a witness. As the investigation progressed, Mr. Johnson became a suspect. Throughout multiple conversations with police, Mr. Johnson made statements regarding his relationships, his habits, and a detailed account of what he had done on the day Ms. Cincotta was killed. One statement came in the form of a vision, which he described to Arlington police both orally and in written form.

Mr. Johnson's vision statement indicates that Ms. Cincotta came home and found a t-shirt that Mr. Johnson used to masturbate into when she was not home. Mr. Johnson said that Ms. Cincotta was upset over the t-shirt. Mr. Johnson stated that he did not want to talk

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about the t-shirt, and lowered his hands in a downward motion, hitting her on the neck in the process. He stated that she fell down and hit the edge of a desk. He stated that immediately after that, he held her in his arms, and she was neither breathing nor moving. His statement indicates that she was dead, and that he put her in the closet and closed the door.

Mr. Johnson's written statement repeats many of the same details that he told police while being interviewed. Namely, that he did laundry that day, checked his answering machine when he got home, ate chocolate graham crackers, and drank root beer. He makes similar statements about these activities to Pat Brown, a private investigator who interviewed him in 2001. His reiteration of similar statements (excluding the physical altercation and concealment) to a non-law enforcement individual demonstrates that his initial statements were not made as a product of any undue influence or coercion by the Arlington County Police Department.

Mr. Johnson now moves to suppress his statements as the involuntary product of police coercion. The Commonwealth asserts that Mr. Johnson's motion does not state with particularity which statements he is trying to suppress or exclude, as is required by Rule 1:4(d) of the Supreme Court of Virginia. His motion is a mix of multiple different motions; an attempt to suppress statements based on unconstitutional police coercion as well as an attempt *in limine* to exclude statements based on the rules of evidence.

LEGAL STANDARDS

Generally, on a motion to suppress, "the burden of proof is on the defendant who seeks to suppress the evidence." *United States v. Seerden*, 264 F. Supp. 3d 703, 708 (4th Cir. 2017). Once the defendant has established the basis for his motion, the burden shifts to the Commonwealth to prove that "the challenged action did not violate the defendant's

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constitutional rights." *Trent v. Commonwealth*, 35 Va. App. 248, 250 (2001) (citing *Simmons v. Commonwealth*, 238 Va. 200, 204 (1989)); *Russell v. Commonwealth*, 33 Va. App. 604, 609 (2000) (same). The Commonwealth has the burden of establishing, by a preponderance of the evidence, the voluntariness of a confession. *Lego v. Twomey*, 404 U.S. 477, 488 (1972).

Further, "[e]videntiary rulings or relevance and materiality issues usually can only be made at trial and are not contemplated within Rule 3A:9." *Harward v. Commonwealth*, 5 Va. App. 468, 474 (1988). As such, motions *in limine* "are not properly used to exact from the court non-binding advisory or conditional rulings" on the relevance or materiality of evidence. *Id.*; *see also*, *United States v. Bolden*, 241 F. Supp. 673, 681 (E.D. Va. 2017) ("A motion in limine to exclude evidence [] should be granted only when the evidence is clearly inadmissible on all potential grounds") (quoting *United States v. Verges*, 2014 WL 559573 at *3 (E.D. Va. Feb. 12, 2014)).

Mr. Johnson claims, without specificity, that his 1998 statements are irrelevant, unreliable, involuntary, and in violation of the law. Despite the lack of particularity in the pleading, the Commonwealth opposes the suppression or exclusion of any of his statements made to the police.

POLYGRAPHS

The Commonwealth agrees the results of polygraph examinations are not admissible. Thus, any reference to the results of the polygraphs will be redacted prior to admission into evidence.

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THE VISION STATEMENT

I. Relevance

Generally, "all relevant evidence is admissible." Va. R. Evid. 2:402. Evidence is relevant if it has "any tendency to make the existence of any fact in issue more probable or less probable than it would be without the evidence." Va. R. Evid. 2:401. "Every fact, however remote or insignificant, that tends to establish the probability or improbability of a fact in issue is relevant." *Virginia Elec. and Power Co. v. Dungee*, 258 Va. 235, 260 (1999). For relevant evidence to be admissible it must also be material. *Brugh v. Jones*, 265 Va. 136, 139 (2003). Evidence is material if it tends "to prove a matter that is properly at issue in the case." *Id.*

Mr. Johnson's statements about his activities, impressions, and actions are relevant and material. Mr. Johnson was interviewed as the sole reporting party, an essential witness, and the boyfriend of the victim. The statements that he made to police had a direct impact on the trajectory of their investigation.

Similarly, the vision statement that Mr. Johnson provided in 1998 is both relevant and material. The investigation surrounded the topic of how Ms. Cincotta was murdered and placed into a closet. Johnson's written statement describes how he believed that he put Ms. Cincotta into a closet after she died in his arms. Mr. Johnson alleges that his vision statement could mislead or confuse the jury, because of the possibility that it results in a discussion regarding false confessions. The Commonwealth does not argue that Mr. Johnson's vision statement was a confession. To the contrary, the Commonwealth maintains that this portion of the statement was deception that succeeded in derailing the original investigation.

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The fact that Mr. Johnson provided police with a statement that was not rooted in reality does not later prevent that same statement from being presented to the trier of fact. The jury is entitled to hear Mr. Johnson's statements in full, as one of their main duties is to assess credibility. Credibility will be at stake for every witness who testifies, including Mr. Johnson, should he choose to do so. Therefore, the jury is entitled to hear Mr. Johnson's account of what happened from the onset of the investigation, so they can understand the totality of Mr. Johnson's statements and motives. This evidence would further serve to provide insight to the jury as to why the investigation took the route that it did, why the indictment came twenty-three years later, and why Mr. Johnson was not arrested the very day he wrote his vision statement.

The probative value of lies, deception, or incomplete confessions that Mr. Johnson provided in 1998 outweighs any incidental prejudice, precisely because he is not charged based on a theory that he directly killed Ms. Cincotta. Mr. Johnson can argue against the weight any of these statements should be afforded to the jury, but they should not be excluded via pretrial motions.

II. Reliability

Mr. Johnson contends that the Commonwealth may seek to introduce his vision statement pursuant to Virginia Supreme Court Rule 2:804(b)(3)(B), which governs hearsay exceptions where a declarant is unavailable. Rule 2:804(b)(3)(B) states that "[a] statement which the declarant knew at the time of its making would tend to subject the declarant to criminal liability" is an exception to the rule against hearsay, "if the statement is shown to be reliable." Va. R. Evid. 2:804(b)(3)(B). Mr. Johnson cites a rule that does not apply to this situation at all. This rule is applicable only where a declarant is unavailable. The

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Commonwealth would seek to admit Mr. Johnson's vision statement as a statement by a party-opponent under Rule 2:803(0)(A). Rule 2:803(0)(A) states that "[a] statement offered against a party that is, [] the party's own statement," is an exception to the rule against hearsay, and may be admitted. Va. R. Evid. 2:803(0)(A). Rule 2:803(0)(A) notably has no requirement that the statement be reliable or corroborated.

Assuming *arguendo*, that Mr. Johnson chooses not to testify, that does not make him an unavailable witness, since he has "complete control over his own availability as a witness." *Bailey v. Commonwealth*, 62 Va. App. 499, 505 (2013).

All of Mr. Johnson's statements are all covered by this hearsay exception, and this Court should not exclude it as such. The Commonwealth will seek to introduce all of his statements as made by a party opponent pursuant to Rule 2:803(0)(A), which would satisfy the requirements surrounding the Virginia ban on hearsay. Further, the vision statement would not be introduced for the truth of the matter asserted, given that the Commonwealth acknowledges that the statement is not a reflection of reality.

III. Voluntariness

A statement to police is given freely and voluntarily if it is "the product of an essentially free and unconstrained choice by its maker." *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973). When a declarant's "will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process." *Id.* at 225-26. Courts must consider the "totality of the circumstances," when assessing whether a declarant's will has been "overborne." *United States v. Pelton*, 835 F.2d 1067, 1071 (4th Cir. 1987). The "totality of the circumstances" includes the "setting of the interview, and the details of the interrogation." *Id.*

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Factual misrepresentations made by police to suspects during interviews is one factor relevant to the assessment. *See Fraizer v. Cupp*, 394 U.S. 731, 739 (1969); *Arthur v. Commonwealth*, 24 Va. App. 102 (1997). However, "the fact that the police misrepresented" facts pertaining to the investigation is, by itself, "insufficient . . . to make [an] otherwise voluntary confession inadmissible." *Fraizer*, 394 U.S. at 739; *see also, e.g., Oregon v. Mathiason*, 429 U.S. 492 (1977) (concluding that the defendant's confession was not involuntary despite an officer lying about having fingerprint evidence that places the defendant at the scene of the crime); *United States v. Whitfield*, 695 F.3d 288, 302–03 (4th Cir. 2012) (stating that police "misrepresentations are insufficient, in and of themselves, to render a confession involuntary") (internal citation and quotation marks omitted); *United States v. Haynes*, 26 F. App'x 123, 134 (4th Cir. 2001) (concluding that without more, "an otherwise voluntary confession" is not rendered involuntary despite officers making "several false statements about the evidence they had" and the "interview room created the impression that there was an extensive investigation" of the defendant); *Novak v. Commonwealth*, 20 Va. App. 373, 380 (1995) (affirming the denial of defendant's motion to suppress confession given after the detective told defendant that a police officer knew of specific evidence incriminating the defendant, "all of which was untrue"); *Wilson v. Commonwealth*, 13 Va. App. 549 (1992) (finding that the defendant's confession was voluntary despite police lying about the victim having identified him as her assailant).

Further, coercive police tactics are a "necessary predicate" to a finding of involuntariness. *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). And "even where there is causal connection between police misconduct and a defendant's confession, it does not

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automatically follow that there has been a violation of the Due Process Clause." *Id.* at 164, n. 2.

Mr. Johnson's will was not overborne and his capacity for self-determination was not critically impaired. Mr. Johnson voluntarily met with, and provided statements to, detectives multiple times in the days following the murder of his girlfriend. He acknowledges in his motion "that American police are permitted to lie about evidence." Def. Mot. at 12. During the course of their investigation, Detectives Brenneman and Carrig asked Mr. Johnson questions about his knowledge of the circumstances of Andrea's death. They did not employ interrogation techniques that can be considered "so offensive to a civilized system of justice" so as to be considered a violation of Mr. Johnson's Fourteenth Amendment rights. *Miller v. Fenton*, 474 U.S. 104, 109 (1985) (citing *Mincey v. Arizona*, 437 U.S. 385, 401–02 (1978) (petitioner's "will was simply overborne" when detectives questioned him in the intensive care unit, while he was "weakened by pain and shock, isolated from family, friends, and legal counsel, and barely conscious," and connected to breathing and feeding tubes); *Haynes v. Washington*, 373 U.S. 503, 504 (1963) (written confession was involuntary where petitioner, having been arrested and detained overnight, was "repeatedly told that he would not be allowed to" call his attorney and his wife "unless and until he cooperated" and confessed) (internal quotation marks omitted); *Ashcraft v. Tennessee*, 322 U.S. 143, 153 (1944) (confession was involuntary where the petitioner was held against his will, "without sleep or rest," and questioned for thirty-six consecutive hours); and *Chambers v. Florida*, 309 U.S. 227 (1940) (confessions, provided in the investigation of the murder of a white woman, were involuntary where petitioners, part of a

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group of "thirty to forty" black men who were warrantlessly arrested, were detained and questioned for five consecutive days)).

Mr. Johnson was never under arrest. He was not detained, handcuffed, or held against his will. He was free to go home, and in fact did so between each meeting with the police. The Motion states that he was questioned for twenty-eight hours. This was spread over the course of three days, was nonconsecutive, and still provided plenty of time for Mr. Johnson to go home to eat and rest. It also provided time to speak privately to family, friends, and even seek legal counsel if he so chose.

The false confession analysis that Mr. Johnson sets forth in his Motion also does not apply to these facts. Mr. Johnson made a statement to police that was untrue, uncorroborated, and couched as a hypothetical. The Motion focuses on individuals being coerced into false confessions that help the Commonwealth prove criminal charges. Mr Johnson, however, is not charged on a theory which relies on the vision statement being true. He is instead charged with a crime that is inconsistent with the vision statement portion of his interview.

The police did not pressure him into admitting that he killed Ms. Cincotta. Their interest was solely to uncover the truth about what had happened to her. Any statements that Mr. Johnson provided needed to be corroborated before criminal charges could be sought, and not having been corroborated, Mr. Johnson was not charged. Police were merely asking questions in an attempt to do so, and in furtherance of their investigation. Rather than producing the truth, Mr. Johnson's statements led the police astray for over twenty years, away from their goal of identifying those responsible for her murder. It appears clear from the trajectory of this investigation that Mr. Johnson responded to police deceit with deceit of his own.

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Mr. Johnson's Motion relies on policy, rather than legal, arguments. His brief describes flaws within the American criminal legal system, and asks this Court to ignore Virginia, Fourth Circuit, and United States Supreme Court precedent, as well as the facts of this case. Pretrial motions such as this should analyze and rely on the current state of the law as established by precedent. This Motion does not.

IV. Miranda

Mr. Johnson argues that his *Miranda* rights were not read to him. *See generally Miranda v. Arizona*, 384 U.S. 436 (1966). *Miranda* rights are only applicable when an individual is subjected to "custodial interrogation." *Id.* at 444. Whether an individual is in custody is determined objectively. *See Stansbury v. California*, 511 U.S. 318, 323 (1994). "[S]ubjective views harbored by either the interrogating officers or the person being questioned are irrelevant." *J.D.B. v. North Carolina*, 564 U.S. 261, 271 (2011) (quoting *Stansbury*, 511 U.S. at 323) (internal quotation and citation marks omitted). An individual is in custody, for the purposes of *Miranda* applicability, when he is "deprived of his freedom of action in any significant way," such that the restraint is the "functional equivalent to arrest." *Id.* at 477; *United States v. Beard*, 119 F. App'x 462, 466 (4th Cir. 2005) (quoting *United States v. Parker*, 262 F.3d 415, 419 (4th Cir. 2001)). If an individual voluntarily spoke to police and is free to leave at any time during that interaction, he is not in custody. *See, e.g., Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (suspect was not in custody when he called police and agreed to be questioned at the state parole office at their request, drove himself to the parole office, was told he was not under arrest before detectives questioned him behind closed doors, and, after questioning, left on his own accord).

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Every conversation that Mr. Johnson had with the police was of his own accord. While in the police department, he was sitting in a room with direct access to an unlocked door. At certain times, Mr. Johnson was left in the room alone while the door was wide open. In one instance, he stands up and leaves the interview room to use the restroom. The door remained unlocked from the inside, and Mr. Johnson remained unrestrained at all times.

Mr. Johnson voluntarily spoke to police multiple times that weekend in August of 1998. He could have simply told the police he was not interested in returning the following day. He was not compelled to speak to detectives. He could have made phone calls rather than coming in person. He gave every indication that he was voluntarily and freely speaking to the police. There was no attempt to end the conversation. Now, he regrets doing so.

At no point during the original investigation of this case was Mr. Johnson placed under arrest, or even detained in the broadest sense of the word. He was free to leave at any time. He voluntarily reported to the police station. He was never handcuffed. He was never placed in the back of a cruiser car. There was never a display of force. The detectives were all in plain clothes. He even asked detectives how he could be helpful. At the time, Mr. Johnson was being interviewed as the reporting party and as a witness. He was not charged with any crimes until twenty-three years later.

Over the years, Mr. Johnson kept in touch with Kevin Cincotta. In 2018, Mr. Cincotta organized and recorded a meal with Mr. Johnson. During that recorded interaction, Mr. Johnson claims that the police files did not contain the entire story.

The police and the parties refer to Mr. Johnson's statement as a vision or a dream. The Commonwealth maintains that it was a lie. The weight of any such statements is a determination that should be made by the jury alone.

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OTHER STATEMENTS

Mr. Johnson has not alleged with specificity what other statements he seeks to suppress or exclude as inadmissible, as Rule 1:4(d) requires from all pleadings. Regardless, what Mr. Johnson told police during the first weekend of interviews is highly relevant and material. His statements pertain to his relationships with those who were involved in Ms. Cincotta's life, his habits, and a detailed account of what he did the day she was killed. Those statements are all relevant and admissible as statements by a party opponent. Much of what he said relates directly to important trial subjects such as motive, opportunity, intent, scheme, plan, knowledge, and identity.

EXCLUSION IS AN EXTREME REMEDY

The exclusionary rule is an extreme remedy designed to deter deliberate police misconduct. "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Herring v. United States*, 555 U.S. 135, 144 (2009).

Police deception during investigations is permissible, as Mr. Johnson also acknowledges. *See* Def. Mot. at 12. Many courts have analyzed the legality of police deception as an investigatory technique. *See Fraizer v. Cupp*, 394 U.S. 731 (1969); *United States v. Haynes*, 26 F. App'x 123 (2001); *Wilson v. Commonwealth*, 13 Va. App. 549 (1995). In cases where deceptive tactics have been utilized, controlling authority has ruled that statements and confessions are nevertheless admissible. *See, e.g., Novak v. Commonwealth*, 20 Va. App. 373, 385–88 (1995) (affirming the admission of defendant's confession, which was made after after police lied about the strength of their case against

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him). The police in this case relied on a technique that was available to them and commonly utilized at the time. Whatever one may think of this practice, the law permits it. They did not take any unlawful steps in their quest to obtain the truth from Mr. Johnson, and therefore suppression is inappropriate.

The Commonwealth maintains that Mr. Johnson's statements were provided voluntarily, and that he was not subject to any sort of custody, detention, or arrest. He certainly was not "strung up by his toenails," as he alleges with great exaggeration in his Motion. His statements in their entirety are facts that the jury should be able to consider as they deem fit.

CONCLUSION

For the reasons stated above, and others to be adduced at a hearing on the matter, the Commonwealth respectfully asks the Court to deny Mr. Johnson's Motion to Suppress and Exclude Statements.

Respectfully submitted this 29th day of August, 2022.

_____//s//_____
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