IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

UNITED STATES OF AMERICA,	
v.	**Criminal Nos. 2008-CF1-26996** **2008-CF1-27068** **2008-CF1-26997**
DYLAN M. WARD, **JOSEPH R. PRICE,** **and** **VICTOR J. ZABORSKY,**	**Judge Lynn Leibovitz** **Status Hearing – March 12, 2010**
Defendants.	

DEFENDANT DYLAN WARD'S MOTION TO SUPPRESS STATEMENTS AND INCORPORATED MEMORANDUM OF POINTS AND AUTHORITIES

Defendant Dylan Ward ("Ward"), by and through counsel, respectfully moves this Court for an order suppressing his statements to law enforcement because they occurred in violation of his Fourth, Fifth and Sixth Amendment rights. As demonstrated below, Ward was unlawfully seized and his statements were made in response to custodial interrogation without first being advised of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). Having obtained statements from Ward in violation of his constitutional rights, the government should be prohibited from introducing them at trial.

I. FACTUAL BACKGROUND

On August 2, 2006, Defendants Joseph Price and Victor Zaborsky owned a home at 1509 Swann Street, N.W., Washington, D.C., where they resided with their longtime friends and tenants, Ward and Sarah Morgan.

Robert Wone, Price's friend of more than fifteen years, made arrangements with Price to spend the night of August 2, 2006, at the Swann Street home. Wone arrived at 1509 Swann

Street at approximately 10:30 p.m. At 11:49 p.m., Zaborsky called 9-1-1 and reported that Wone had been stabbed.

Paramedics arrived on the scene approximately five minutes and forty seconds into the 9-1-1 call. Metropolitan Police Department ("MPD") officers arrived on the scene at about the same time.

Shortly after MPD's arrival, one of the MPD officers directed Price, Ward, and Zaborsky to sit down in the living room on the first floor of the house. The same officer directed a uniformed officer to watch the three men.

Price asked one of the MPD officers to which hospital Wone was being transported and at approximately 12:06 a.m. called Wone's wife, Kathy Wone, to inform her. Price suggested to Zaborsky and Ward that they should all get dressed and go to the hospital as well. One of the MPD officers told the men they could not go to the hospital, that they were to remain seated in the living room, and that they were not to move. When Ward needed to use the restroom and get a glass of water he had to ask permission and was watched by the police. Eventually, after more than a dozen officers had arrived at and entered the home, an MPD officer directed a uniformed MPD officer to escort Price, Ward, and Zaborsky, one at a time, upstairs to get dressed.[1]

A police officer escorted Ward to his bedroom on the second floor and stood guard while Ward dressed in shorts, a shirt and a jacket. The police officer told Ward that he could not take his telephone or wallet with him. The officer then escorted Ward back downstairs. Ward, Price and Zaborsky were told that they were being taken to the police station for questioning. Ward was not asked if he wanted to go to the police station or whether he wished to make a statement. Nor was he informed that he had a right not to go to the station. Instead, Ward was placed in the

[1] At the time, each of the men was in his underwear. Ward and Zaborsky had on robes.

back seat of a patrol car by a uniformed MPD officer. A protective metal screen separated the driver from the back of the patrol car, where Ward was made to sit.[2]

Ward arrived at MPD's Violent Crimes Branch in Anacostia sometime between 12:30 and 1:00 a.m. on August 3, 2006, and was escorted inside where he was locked inside of an interrogation room. The room was small and furnished with three chairs: two office chairs and one metal chair. A length of chain was bolted to the floor. Ward was left alone, locked in the room for some period of time. Eventually, MPD officers entered the room and began to interrogate Ward.[3]

Before interrogating Ward, the detectives did not inform him of his *Miranda* rights. Specifically, they did not tell Ward at any time that he had a right not to make a statement, that anything he said could be used against him, that he had a right to counsel, or that counsel would be appointed for him if he could not afford to pay for counsel. Nor did the detectives indicate that Ward was free to terminate the interview and leave at any time.

The police interrogated Ward for approximately eleven hours. The first part of his interview occurred inside of the locked interrogation room. Several detectives asked him numerous questions about what happened before and after the discovery that Wone had been stabbed. As the police officers came and left the interrogation room, they had to use a password protected keypad to exit the locked room. They did not tell Ward the password, nor did they leave the door open for him to freely leave. In fact, there were several instances where Ward was left alone in the locked interview room but needed to use the bathroom. Ward had to pound on the door to gain the attention of an officer on the other side who then opened the door,

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[2] Price, Ward, and Zaborsky were all transported in separate police cars to the police station.
[3] Ward's complete interrogation was not recorded. Instead, MPD interrogated Ward for a considerable period of time before beginning to videotape the interrogation.

escorted Ward to the bathroom, and escorted Ward back into the locked interview room. This initial part of the interrogation, which lasted approximately five hours, was not videotaped.[4]

At some point, the police began taping the interrogation. Detectives Wagner and Norris entered the locked room and continued the interrogation, once again asking Ward numerous questions about the circumstances surrounding Wone's death. Once again, they failed to inform Ward of any of his rights under *Miranda*. They refused Ward's repeated requests to use a telephone. Instead, the police directly accused Ward, Price and Zaborsky of killing Wone:

> SERGEANT WAGNER: I'm very troubled, I have to be honest with you. I don't believe we're getting to the truth.
>
> MR. WARD: Everyone keeps telling me that. I don't know why.
>
> SERGEANT WAGNER: Well, because some – one or more of you stabbed Mr. Wone.

Tr. 2:11-17. A few minutes later he repeated the accusation:

> SERGEANT WAGNER: But that is what I'm telling you, let me just say – because eventually it – it's going to come out. It's going to come out. Either from you or Joe or Victor – one of them is going to tell. If it isn't you, then you're going to go down.

Tr. 4:6-12.

Detective Norris similarly accused Ward, Price and Zaborsky of being responsible for Wone's death:

> DETECTIVE NORRIS: And one thing that – I mean, Vic – I don't know. I don't know. But something happened in that house tonight that cost somebody their life. And I think it happened between the four of you-all. And somehow, some way, it's going to come out.

Tr. 50:15-19.

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[4] The government has not disclosed to the Defense the content or substance of this part of the interrogation.

At approximately 6:18 a.m., after having been held in a locked interrogation room for almost six hours, Detective Norris told Ward that he was going to be taken to the FBI for a lie detector test. Ward was not asked whether he wanted to participate in the test, he was simply informed by the police that it was to happen. When Ward asked whether he needed a lawyer, Detective Norris told him that he did not:

> DETECTIVE NORRIS: Well, I'll tell you what we'll do. It's 6:18 right now – a.m. okay? I can get ahold of one of my guys from the FBI who does the lie detector, the test. He does that. Why don't I give him a call, see if he can set it up for you today. Let's just get this over with. You'll just go down there and you take this test and let's just get it over with. And if you clear it, you pass, and –
>
> MR. WARD: Shouldn't I have a lawyer here with me? I don't know –
>
> DETECTIVE NORRIS: What do you need a lawyer for?
>
> MR. WARD: I don't know how this works.
>
> DETECTIVE NORRIS: But you don't need a lawyer. I mean, if I didn't do anything, what do I need a lawyer for?
>
> MR. WARD: I don't have anything to hide.
>
> DETECTIVE NORRIS: Exactly, so what do you need a lawyer for?
>
> MR. WARD: Just because I've never had anything like this happen to me before and I'm scared because I don't know how these things work.
>
> DETECTIVE NORRIS: Well, you just go down there –
>
> MR. WARD: I don't –
>
> DETECTIVE NORRIS: Okay. Let me explain it to you. You're going down there. I can't be there. Okay? The only one that can be there is him – and you.

Tr. 53:11 – 54:15.

Shortly after this exchange, Detective Norris told Ward that he could make a phone call to inform his employer that he was not going to be there. Tr. 55:19. However, he did not allow Ward to make such a call. Instead, he left Ward locked in the interview room for a substantial

period of time before Detective Waid entered the room, locked the door behind him, and continued the interrogation. Like the other detectives, Waid asked Ward to explain what happened before and after Robert Wone was discovered stabbed.[5]

At approximately 8:30 a.m. Ward was transported, in a locked police car and escorted by two police officers to the FBI Washington Field Office. He was left for a time, locked in the police car without the ability to unlock and open the door. Ward was escorted by the police into an FBI waiting room and then into a windowless room with a chair, desk and computer. The FBI polygrapher, Agent Paul Timko, administered a polygraph test to Ward. Again, Ward was not informed of his *Miranda* rights and was not told he was free to leave. At the conclusion of the test, Ward was interviewed by the examiner.[6] Now in police custody for more than nine hours, Ward told the agent that he wanted to talk to his parents and to a lawyer. Nevertheless, Timko continued to ask Ward questions.

When the FBI interview concluded, Ward was escorted out of the FBI building. Sergeant Brett Parson met Ward and offered to take him where he needed to go. Ward, who was still without his cell phone and wallet, got into the front seat of Sgt. Parson's car. Once inside of the car, Sgt. Parson told Ward that although they had planned to release him, there was a change in plans. Ward was going to be taken back to the Violent Crimes Branch because, as Parson told Ward, Price and Zaborsky "were talking." Once again, Ward was not asked whether he wanted to return to the police station; he was simply forced to accompany Sgt. Parson back there.

During the drive back to, and once at, the Violent Crimes Branch, Sgt. Parson continued to speak to Ward, attempting to get more information from him about the events of the preceding evening. Again, Ward was not told that he had a right to refuse to speak to the police, that

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[5] Det. Waid's interview of Ward was also videotaped.
[6] The government has not disclosed to counsel for the Defense the substance of this interview.

anything he said could be used against him, that he had the right to speak to a lawyer, and that if he could not afford a lawyer one would be appointed for him.[7]

Eventually, at approximately 11:38 a.m. on August 3, 2006 - more than eleven hours after having been taken into custody - Ward was released.

II. LEGAL ANALYSIS

A. WARD'S STATEMENTS TO POLICE WERE OBTAINED IN VIOLATION OF *MIRANDA V. ARIZONA*.

Among the oldest and most sacrosanct rights of every American citizen are those "basic rights that are enshrined in our Constitution that 'No person shall be compelled in any criminal case to be a witness against himself,' and that 'the accused shall have the Assistance of Counsel.'" *Miranda v. Arizona*, 384 U.S. 436, 442 (1966). In *Miranda*, the Supreme Court held that, in order "to use statements obtained during custodial interrogation of the accused, the State must warn the accused prior to such questioning of his right to remain silent and his right to have counsel, retained or appointed, present during interrogation." *Fare v. Michael C.*, 442 U.S. 707, 717 (1979) (citing *Miranda*, 384 U.S. at 473). "[S]pecifically, the 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.'" *Rhode Island v. Innis*, 446 U.S. 291, 297 (1980) (citing *Miranda*, 384 U.S. at 444). Moreover, warnings of an individual's rights are the only effective procedural safeguard: they are "an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will

[7] This portion of the interrogation was not videotaped and the government has not disclosed what occurred during this portion of the interrogation.

suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right." *Miranda*, 384 U.S. at 471-72.

Absent such safeguards, statements made during a custodial interrogation offend both the Fifth Amendment's guarantee that no person "shall be compelled in any criminal case to be a witness against himself," and the Sixth Amendment's guarantee to assistance of counsel. *See Id.* at 461-62, 472; U.S. CONST. amends. V & VI. Here, the defendant was subjected to custodial interrogation but was never advised of his *Miranda* rights. The statements he made to the police are therefore inadmissible and must be suppressed.

1) WARD WAS IN CUSTODY FOR PURPOSES OF *MIRANDA*.

The procedural safeguards mandated by *Miranda* are triggered "when the individual is first subjected to police interrogation while in custody *at the station or otherwise deprived of his freedom of action in any significant way.*" *Miranda*, 384 U.S. at 477 (emphasis added). To determine whether a person is in custody, "'the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.'" *In re I.J.*, 906 A.2d 249, 256 (D.C. 2006) (quoting *Berkemer v. McCarthy*, 468 U.S. 420, 422 (1984)).

In *Thompson v. Keohane*, the Court articulated a two-part custody test: first, the court must consider the circumstances surrounding the interrogation; second, in light of those circumstances, the court must consider whether "a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave." *Yarborough v. Alvarado*, 541 U.S. 652, 663 (2004) (citing *Thompson*, 516 U.S. 99, 112 (1995)). "The test is whether under all of the circumstances a 'reasonable man' innocent of any crime would have thought he was not free to leave." *Griffin v. United States*, 878 A.2d 1195, 1198 (D.C. 2005) (quoting *United States v. Gayden*, 492 A.3d 868, 872 (D.C. 1985)).

The courts have identified various factors to be considered in determining whether someone is in custody, including: the degree of police domination of the scene, location of the interrogation, whether the subject availed him or herself for the purpose of interrogation, separation of the subject from others, accusatory language by the police, and knowledge by the subject that he is a primary target of the investigation. Moreover, the Supreme Court has identified station house interrogations as "the standard against which all potentially custodial situations are to be measured. Police questioning of a suspect in . . . any police facility . . . raises significant concerns for which *Miranda* warnings are an appropriate prophylactic against compelled self-incrimination." *United States v. Turner*, 761 A.2d 845, 852 (D.C. 2000) (citing *Berkemer*, 468 U.S. at 438).

The Court of Appeals recently clarified the difference between 'seizure' for Fourth Amendment purposes, and 'custody' for Fifth Amendment purposes. Recognizing that the Fourth Amendment to the Constitution permits the police to briefly detain a suspect for investigative questioning without the encounter rising to the level of an arrest, "if those same tactics would cause a reasonable person in the suspect's situation to believe that his freedom of action has been curtailed to a degree associated with formal arrest, there is custody that triggers the additional protections of the Fifth Amendment." *In re: I.J. supra*, 906 A.2d at 260. In making the evaluation, this Court looks to the actions and words of the police to evaluate "whether there was any show of authority or other message conveyed which would cause the suspect to reasonably think he or she was not free to terminate the questioning and leave and that his or her freedom was being restrained" similar to an arrest. *Id.* at 261.

There is no question here that Ward was in custody from the moment MPD arrived on the scene at 1509 Swann Street since the police "deprived [Ward] of his freedom of action in []

significant ways." *Miranda*, 384 U.S. at 477. Indeed, the police ordered Ward to remain on the sofa, denied him free access to the restroom, prevented him from going to the hospital, escorted him to his room, ordered him to get dressed, deprived him of his phone and wallet, and then commanded him to go to the police station to be interrogated. He was taken from his home, separated from his roommates, and placed in a police car[8] for transport to the police station.[9] This is exactly the type of 'police dominated' circumstance where a reasonable person would believe that "his or her freedom has been restrained as in a formal arrest" constituting custody for Fifth Amendment purposes. *In re I.J.*, *supra*, 906 A.2d at 261.

The defendant unquestionably remained in custody at the police station and at the FBI offices for the next eleven hours. Under the clear holding of *Miranda* itself, the "protection which must be given to the privilege against self-incrimination [attaches] when the individual is first subjected to police interrogation *while in custody at the station*...." *Miranda*, 384 U.S. at 477 (emphasis added).

Every moment that Ward spent inside of the Violent Crimes Branch, it was made clear to him that he was not free to leave:

- The police held Ward in a locked interrogation room that required a password to exit – a password that was not provided to Ward.

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[8] As the Supreme Court made clear in *Rhode Island v. Innis*, a defendant can be "in-custody" for *Miranda* purposes in a variety of circumstances, including when placed in a police vehicle for transport to a police station. 446 U.S. at 298 ("It is also uncontested that the respondent was 'in custody' while being transported to the police station.").

[9] The exercise of physical control by police over Ward by ordering him to dress, telling him where to sit, and escorting him on any occasion he is permitted to move, weighs heavily towards a finding of custody. *See United States v. Mittel-Carey*, 493 F.3d 36, 40 (1st Cir. 2007); *see also United States v. Longbehn*, 850 F.2d 450, 452 (8th Cir. 1988) (finding custody where the defendant was transported under supervision in a police vehicle, and was continuously chaperoned while police searched his home). Moreover, removal of a suspect from the presence of family, friends, or colleagues during the interrogation is a strong indicator of police domination. *See Miranda.*, 384 U.S. at 451.

- When Ward needed to use the restroom he had to pound on the door to get the attention of an officer on the outside of the room who then escorted Ward to and from the restroom.

- The police never told Ward that he was free to leave the locked room or the police station.

- The police never told Ward that he was not under arrest.

- The police refused Ward's repeated requests to use a telephone.

- The police told Ward that he was to be polygraphed at the FBI offices.

- The police transported Ward to the FBI in a locked police vehicle from which he could not exit.

- The FBI polygrapher interrogated Ward in a closed room and never told him that he was free to leave.

- Instead of taking Ward home after the FBI interrogation, Sgt. Parson told Ward that although the police had planned to "release" him, the plan had changed and Ward was to be transported back to the Violent Crimes Branch. Ward was forced to return to the police station and subjected to continued interrogation.

Under these circumstances, no reasonable person would have thought he was free to leave and, by any measure, Ward was clearly in custody.

This obvious and logical conclusion is supported by a number of cases decided by the District of Columbia Court of Appeals on facts remarkably similar to those present here. One such case is *United States v. Allen*, 463 A.2d 1303 (D.C. 1981). In *Allen*, the defendant cabdriver picked up a passenger who was wanted by the police as a homicide suspect. When a police officer attempted to conduct a traffic stop on the cab, the passenger began a gun battle with the police. The defendant fled the cab during the gunfire and the cab collided with a parked car. After the passenger was subdued the police officers directed the defendant to wait in the back seat of a police cruiser which he could not open from the inside. The detective told the

defendant that "he would have to come" to the police station. *Id.* at 1305. He was frisked, placed in another police car, and taken to MPD's Homicide Office.

At the police station, the defendant was given a PD 47, *Miranda* rights card, with the line "You are under arrest" crossed out and he indicated that he was willing to speak to the police. Over the next four hours the defendant was questioned and prepared a typewritten statement about his involvement with the passenger.[10] As the Court noted, "[d]uring the intervening four hours, [the defendant] consumed about three cups of coffee, but no food, and left the interview room only to go to the men's room approximately seven or eight times. On those trips, he was accompanied by [a police officer]." *Id.* at 1306.

While in the interview room, the police asked the defendant for consent to search his cab, which had been damaged in the shootout. The defendant signed a form granting his consent to search the car, leading the police to discover a .22 caliber gun under the floor mat and a small amount of marijuana. After discovering these items, the police told the defendant that he was being charged with possession of the gun and drugs. He was given another PD 47 form, this time informing him that he was under arrest.

The defendant in *Allen* moved to suppress his statements at the police station on the grounds that he was unlawfully seized by the police and was in custody at the time they were made. In affirming the trial court's order suppressing the statements, the Court of Appeals used language that applies with equal force to the instant case:

> Though [the defendant] was not formally arrested before he was taken to the police station, he nevertheless was told, "you have to come to homicide with us." Whether he would have appeared voluntarily at the police station, given the choice, is entirely speculative - he had no choice. In many respects, [the defendant] was treated more like a suspect than a mere witness. He was frisked before he was placed in the police car, and

[10] Apparently the police were attempting to determine the relationship between the defendant cabdriver and his passenger.

> from the moment he arrived at headquarters, he was constantly guarded. He was not even allowed to go to the bathroom alone. Furthermore, his hands were tested to determine if he had fired a gun. In our view, although [the defendant's] conduct could otherwise be characterized as "cooperative," these precautions are not consistent with the government's hypothesis that his acquiescence in accompanying the police was wholly voluntary. The conduct of the police amounted to a "show of authority" sufficient to restrain appellee's liberty.

Id. at 1309. The Court concluded that "although [the defendant] was not formally arrested and booked until the end of his four-hour detention at police headquarters, the circumstances render his detention at police headquarters "in important respects indistinguishable from a traditional arrest..." *Id.* (citing *Dunaway v. New York*, 442 U.S. 200, 212 (1979)).

If Allen was in custody under the facts of his case, then certainly the same is true of Ward here. Like Allen, Ward was told that he had to accompany the police to the station for questioning. Like Allen, Ward's freedom of movement was entirely restricted and controlled by the police. Like Allen, Ward was escorted to and from the bathroom. Like Allen, Ward was kept by the police in an interrogation room for a lengthy period (Ward's detention being nearly three times the length of Allen's).[11] Under all of these circumstances this Court should conclude that, like Allen, Ward was in custody.

The Court ruled similarly in *United States v. Gayden*, 492 A.2d 868 (D.C. 1985). In *Gayden*, the police developed the defendant as a suspect in a recent shooting. The police went to the defendant's home and asked him if he would accompany them to the police station for questioning, telling him that he did not have to go. The defendant nevertheless agreed, saying that he would be happy to clear everything up. The police drove the defendant to the homicide office and placed him in an interview room. The court noted that the "interrogation room was

[11] But unlike Allen, Ward was never told that he was not under arrest, never told that he had the right to remain silent, never told that he had the right to an attorney and never told that an attorney would be appointed for him if he could not afford to hire one.

approximately 8 feet by 8 feet and was furnished only with a desk, a couple of chairs and a typewriter; there were handcuffs in the room." *Id.* at 870.

The defendant was interrogated in three stages. The first interrogation began at 11:40 a.m. during which the police told the defendant that he was free to leave. Disbelieving the defendant's story, the police left the defendant for about an hour and began the second interrogation at 2:20 p.m. ending about 45 minutes later. Again the defendant was told that he was free to leave. Still disbelieving the defendant, the police left him in the interrogation room while they discussed how to proceed. The Court noted:

> During the time [the detectives] were checking the first and second statements, Gayden remained in the interrogation room; no one questioned him further, and he was alone most of the time. The door to the interrogation room was unlocked and may or may not have been open while [the detectives] went in and out. The interrogation room was located behind the anteroom in the back of the building, and any stranger in the anteroom would have required permission to be there, and any unfamiliar person walking through the homicide branch would have been questioned by police officials. When Gayden left the interrogation room, he was taken through a back door by [the detective] to the locked bathroom across the hall.

Id. at 871.

The police then interrogated Gayden a third time, on this occasion utilizing a different detective. This detective accused Gayden of committing the shooting, falsely telling him that the victim had identified him as the culprit. After Gayden then confessed to the shooting, he was given his *Miranda* warnings and placed under arrest. *Id.*

The Court of Appeals affirmed the trial court's order suppressing Gayden's confession noting that at the point at which the third interrogation began (during which he confessed), the circumstances of Gayden's detention had "changed so significantly that he was no longer free to go." *Id.* at 873.

> When [the detective] confronted Gayden, he had been at the police station for over five hours. At this point Gayden's detention in the police station was in important respects

> indistinguishable from a traditional arrest. He has been subjected to incommunicado interrogation during much of the time at the station and had not left the interrogation room on his own at any time. When [the third] detective[s] confronted Gayden in an accusatory manner, there was a show of authority sufficient to restrain [Gayden's] liberty.
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> . . .
>
> [The] relevant inquiry is whether the police actions manifested to Gayden that he was not free to leave, and not whether the police told him that he was or was not under arrest. During the more than five hours that Gayden had been in the interrogation room, he had given two statements and could hardly have been unaware that the police were skeptical about his first statement and were checking his second. The location of the interrogation room and the presence of armed officers curtailed his freedom of movement, and as time passed, his sense of isolation from family and friends undoubtedly increased. On the basis of the constant company of the police and his observations upon entering the homicide office, Gayden could reasonably have concluded that he would need the detective's permission if he wanted to leave; this was unquestionably so by the time he was confronted with his guilt by two new police officers.

Id. at 873-74. Under these circumstances, the Court concluded, Gayden "must have understood that he was under arrest" when the third interrogation began, and affirmed the trial court's order suppressing the statements.

Ward suffered significantly greater police domination than Gayden:

- Ward was told that he was going to the police station for questioning; unlike Gayden who was asked.
- Ward was held captive in the police station twice as long as Gayden.
- Unlike Gayden, Ward was not told – at any time – that he was free to leave.
- Unlike Gayden, Ward was locked in the interrogation room at all times.
- Ward was told that he had to take a polygraph test and transported to the FBI.
- Ward was transported a second time back to the Violent Crimes Branch and his interrogation continued.

Any reasonable person in Ward's position would have felt as he did – that he was in police custody and not free to leave. The Court of Appeals in *Allen*, *Gayden*, and numerous other cases has held that in such a situation the defendant is in custody for Fourth and Fifth Amendment purposes. See e.g. *In re: I. J.*, 906 A.2d at 262 (D.C. 2006) (juvenile questioned

about possession of marijuana in detention facility was in custody where he was "confined in a room until the officer arrived, in a youth center – an environment with considerable overtones of authority and control"); *United States v. Turner, supra*, 761 A.2d at 852 (defendant was in custody where he was "detained in an unfamiliar police dominated environment being subjected to interrogation while undergoing invasive procedures upon his person").

2) WARD WAS INTERROGATED WITHIN THE MEANING OF *MIRANDA*

The Supreme Court explained in *Innis* that "the term 'interrogation' under *Miranda* 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. The latter portion of this definition focuses primarily upon the perceptions of the subject, rather than the intent of the police." 446 U.S. at 291. "In determining whether a query on the part of the investigating officer rises to the level of interrogation, the focus is not merely on the language employed by the officer, but the factual context in which it was spoken." *In re I.J.*, 906 A.2d at 264 (citing *In re E.G.*, 482 A.2d 1243, 1247-48 (D.C. 1984)).

Here, there is no question that the defendant was interrogated by the MPD and the FBI. He was directly questioned by several MPD detectives and the FBI examiner about the events of the night that Robert Wone was stabbed. The detectives openly challenged Ward's account of what happened and accused him of having been involved in killing Wone. The questioning went on through the night for almost eleven hours in total. This situation is precisely that against which the procedural safeguards of *Miranda* were designed to protect.

Notwithstanding the extreme duration of the custodial interrogation to which Ward was subjected, he was never advised of his *Miranda* rights. These warnings are "an absolute

prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead." *Miranda*, 384 U.S. at 471-72. *See also Longbehn*, 850 F.2d at 453 ("The requirement of *Miranda* warnings is not contingent either upon a defendant's actual or presumed knowledge of his rights or on his status but, rather, must be honored in *all* instances of custodial interrogation.") The detectives chose not to advise him that he had the right to remain silent. The detectives chose not to advise him that anything he said could be used against him in court. The detectives chose not to advise him that he had a right to an attorney, or the right to have one appointed for him. In short, the detectives chose to interrogate the defendant without advising him of his *Miranda* rights at any time, and consequently, all of his statements to the detectives were in violation of the Fifth and Sixth Amendments and must be suppressed.

3) WARD WAS RE-INTERROGATED AFTER ASSERTING HIS RIGHT TO COUNSEL, IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS.

Although he was in custody and not given his constitutionally mandated warnings, Ward nevertheless invoked his Fifth Amendment right to counsel. When told that he was about to be transported to the FBI for a polygraph examination, he asked Detective Norris whether he needed a lawyer. Rather than informing Ward that he had a right to counsel, he instead told Ward, "you don't need a lawyer." Tr. 54:1. Law enforcement officers then continued to interrogate Ward both at the FBI and at the Violent Crimes Branch.

In the case of *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981), the Supreme Court established a "per se" rule that "an accused who has invoked the Fifth Amendment right to assistance of counsel cannot be subjected to additional custodial interrogation until either (1) counsel is furnished or (2) the accused, with knowledge of the right, knowingly and intelligently relinquishes it." *Ruffin v. United States*, 524 A.2d 685, 700 (D.C. 1987). Thus, the inquiry

begins with the question: did Ward invoke his right to counsel when he asked Detective Norris, "Shouldn't I have a lawyer here with me?" The Court of Appeals has had the opportunity to consider this exact question.

In *Ruffin*, the defendant was in the middle of an interview by the police when Ruffin asked the officer if he thought that Ruffin needed a lawyer. The detective responded, "Why?" Ruffin then said, "[Because] of what [the detective] read" to him, *i.e.*, his right to counsel. The detective then explained to Ruffin why counsel was not necessary:

> [Y]ou said that . . . it was in self defense [and you] didn't have any reason not to answer questions because it was self-defense. And I said, well, if it is self-defense, you can answer questions, . . . it would only clarify your part, what your statement is [in] reference to what took place.

Id. The defendant went on to provide a written statement, which he moved to suppress on the grounds that it was obtained in violation of his Fifth Amendment right to counsel.

The Court of Appeals held the written statement should have been suppressed. Recognizing that Ruffin's invocation of his right to counsel was somewhat equivocal, the Court concluded that

> the appropriate response to an ambiguous or equivocal assertion of the right to counsel by an accused-typically, an indirect expression of interest in counsel-is a request by police interrogators for clarification. For example, in a case such as this, an appropriate response to the question, "Do you think I need a lawyer," would be to inform the suspect that the decision is one for him or her to make, and to then ask for the decision.

Id. at 701. Because the detectives in *Ruffin* sought to persuade the defendant that he did not need counsel, their response failed to protect his Fifth Amendment rights as outlined in *Edwards*. Instead, the Court held, when faced with an unclear request for a lawyer, the police may not respond in the "form of an argument between interrogators and suspect about whether having counsel would be in the suspect's best interest." *Id.* at 701-02 (citations omitted). The police response must only seek "clarification without persuasion or inducement." *Id.*

As in *Ruffin*, the police here violated Ward's Fifth Amendment right to counsel when Detective Norris told Ward "you don't need a lawyer," in response to Ward's question "shouldn't I have a lawyer here with me?" Norris's response was not an attempt at clarification; it was an intentional effort to dissuade Ward from exercising his right to counsel – a right about which Norris failed to inform Ward and failed to honor when he asked about it. The statements Ward made in response to any interrogation after that point must be suppressed, just as they were in *Ruffin*. See also *Smith v. United States*, 529 A.2d 312, 316 (D.C. 1987) (where accused answers ambiguously to query concerning presence of counsel during questioning, interrogation must cease except for narrow questions designed to clarify statements concerning counsel).

B. WARD WAS SEIZED IN VIOLATION OF THE FOURTH AMENDMENT AND ALL FRUITS OF THAT SEIZURE MUST BE SUPPRESSED.

The Fourth Amendment guarantees "[t]he right of people to be secure in their persons." U.S. CONST. amend. IV. The Supreme Court has clarified that "not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (citing *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968)). In other words, Fourth Amendment scrutiny is only triggered when an encounter "loses its consensual nature." *Id.* "It is at that point where the ordinary expectation of citizen cooperation with law enforcement authorities ends and the rights of citizens against government compulsion begins." *Moore v. Ballone*, 658 F.2d 218, 227 (4th Cir. 1981) (citing *Dunaway v. New York*, 442 U.S. 200, 217-18 (1979); *Brown v. Illinois*, 422 U.S. 590, 600-02 (1975)). Thus, the court must consider whether "a reasonable person would have believed that he was not free to leave" or "to decline the officers' requests" to determine

whether that person has been "seized" in violation of the Fourth Amendment. *In re I.J.*, 906 A.2d at 258 (internal citations omitted); *Bostick*, 501 U.S. at 439.

Here, for all of the reasons discussed in Section A.1. above, Ward was seized in violation of the Fourth Amendment from the moment MPD officers ordered him to sit and not to move. He was physically constrained by MPD at his home, not permitted to dress himself without a police escort, separated from his roommates, escorted by MPD to the police station, and locked in an interrogation room at the police station for hours. He was then transported to the FBI in a locked police car, interrogated at the FBI, and against his wishes returned to the Violent Crimes Branch. Any reasonable person in Ward's position would have believed he was not free to leave.

Given Ward's seizure in violation of the Fourth Amendment, all fruits of that seizure must be suppressed, specifically his statements to the police and to the FBI. *Allen, supra,* 436 A.2d at 1309-10.

III. CONCLUSION

For the foregoing reasons, defendant respectfully moves this Court to suppress all statements made to the police because they occurred in violation of the Fourth, Fifth and Sixth Amendments.

Dated: February 26, 2010

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendant Dylan Ward's Motion to Suppress Statements and Incorporated Memorandum was served by hand, this 26th day of February, 2010, upon:

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

UNITED STATES OF AMERICA, **v.** **DYLAN M. WARD,** **JOSEPH R. PRICE,** **and** **VICTOR J. ZABORSKY,** **Defendants.**	**Criminal Nos. 2008-CF1-26996** **2008-CF1-27068** **2008-CF1-26997** **Judge Lynn Leibovitz**

ORDER

Upon consideration of Defendant Dylan Ward's Motion to Suppress Statements and in consideration of the entire record herein, it is hereby

ORDERED this __ day of ____ ____ ____, 2010 that Defendants' Motion is GRANTED.

JUDGE LYNN LEIBOVITZ

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