

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE )  
 )  
 v. )  
 ) I.D. No. 0205006776  
 DAVID SUMNER, )  
 )  
 Defendant. )

Date Submitted: July 10, 2003  
Date Decided: August 8, 2003  
Written Opinion Issued: August 18, 2003

O P I N I O N

*Upon Defendant's Motion to Suppress – GRANTED in part, DENIED in part.*

Allison L. Peters, Deputy Attorney General and Cynthia Kelsey, Deputy Attorney General, Carvel State Office Building, 820 North French Street, 7<sup>th</sup> Floor, Wilmington, Delaware 19801, for the State.

Anthony A. Figliola, Jr., Esquire, Figliola & Facciolo, 1813 Marsh Road, Suite A, Wilmington, Delaware, 19801 and Jan A.T. van Amerongen, Esquire, 1225 King Street, Suite 301, Wilmington, Delaware 19801, for Defendant.

JURDEN, J.

Before the Court is defendant David Sumner's ("Sumner") March 20, 2003 Motion to Suppress certain statements and evidence in the above capital murder case filed pursuant to Superior Court Criminal Rules 12(b) and 41(f). The Court held a suppression hearing on May 19, 2003. Given the gravity of the issues, the Court ordered expedited briefing. The Court has reviewed the briefs submitted by the parties, the transcript of the May 19 suppression hearing and has viewed twice, in their entirety, the four (4) interview video/audio tapes totaling 9 hours and 37 minutes that were entered into evidence as Court Exhibits<sup>1</sup> at the May 19 hearing.<sup>2</sup> For the reasons set forth below, Defendant's Motion to Suppress is **GRANTED** in part, **DENIED** in part.

## I. BACKGROUND

On May 8, 2002, Bernadito ("Tito") Anacay was found dead in his home of a gunshot wound to the head. During the initial investigation, detectives from the New Castle County Police Department ("NCCPD") learned that Sumner had been at the victim's home earlier that day. With this knowledge, NCCPD Detectives Williams and Lang "were told by [their] Unit Commander, Lieutenant Watson, to respond to Sumner's residence, at 20 Dorsey Lane, to contact him, to see if he was

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<sup>1</sup> Ct. Ex. 1-4.

<sup>2</sup> In addition, the Court reviewed the transcripts of the video/audio-taped interviews.

willing to come back [to the police station] and speak with the detectives regarding Bernadito.”<sup>3</sup>

At approximately 6:45 p.m. that same day,<sup>4</sup> the detectives knocked on the door at 20 Dorsey Lane. When Sumner answered the door, they identified themselves, explained that they “were investigating an incident involving Bernadito Anacay,”<sup>5</sup> and asked whether Sumner knew Tito. When Sumner confirmed that he knew Tito, the detectives “asked him if he would be willing to [go] to New Castle County Police Headquarters to talk to detectives about Bernadito.”<sup>6</sup> Sumner agreed. Before Sumner entered Det. Lang’s police car, Det. Williams patted Sumner down and removed a knife from a cloth sheath on his belt and two knives from his front pockets.<sup>7</sup> Det. Williams did not handcuff Sumner.<sup>8</sup> Det. Lang transported Sumner to the NCCPD headquarters.<sup>9</sup> At approximately

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<sup>3</sup> Hr’g Tr. Mot. Suppress (May 19, 2003) at 9-10.

<sup>4</sup> *Id.* at 11.

<sup>5</sup> *Id.* at 10.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 11. Det. Williams testified at the hearing that “[i]t’s policy before [NCCPD] transport anyone in a police vehicle that they’re padded [sic] down for weapons.” *See id.* at 12.

<sup>8</sup> *See* Hr’g Tr. Mot. Suppress at 11.

<sup>9</sup> *Id.*

7:14 p.m.,<sup>10</sup> Det. Abram began interviewing Sumner about his relationship with Tito, the circumstances of Sumner's visit to Tito's house that day and what Sumner had done that day.<sup>11</sup> After obtaining Sumner's pedigree information, Det. Abram asked Sumner if he knew Tito, to which Sumner responded, "yeah."<sup>12</sup> By 7:18 p.m., Det. Abram had established that Sumner was at Tito's house around 9:00 a.m. that morning.<sup>13</sup>

After speaking with Sumner for approximately fifteen minutes, Det. Abram asked Sumner if he had fired any weapons that day and whether he would allow the evidence officer to swab his hands.<sup>14</sup> Sumner responded "no," he had not fired any weapons that day, and "yes," he would allow the evidence officer to swab his hands.<sup>15</sup> Det. Abram then left the interview room. After approximately nine minutes, Det. Abram returned to the interview room and continued the interview. At 7:43 p.m., Det. Abram again left the interview room. When he returned at 7:47 p.m., the following dialogue took place between Det. Abram and Sumner:

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<sup>10</sup> All relevant time periods from the interviews at the NCCPD are taken from the time clock on the video/audio tape Court Exhibits 1-4.

<sup>11</sup> *See* Hr'g Tr. Mot. Suppress at 16-21. *See also* Ct. Ex. 1.

<sup>12</sup> Ct. Ex. 1 at 19:14 – 19:15.

<sup>13</sup> *Id.* at 19:18.

<sup>14</sup> *Id.* at 19:31 – 19:32.

<sup>15</sup> *Id.* at 19:31 – 19:32.

Det. Abram: Here, David, this is, what I'm requesting, OK, one of the evidence officers is going to come in here and he's gonna swab your hands. All right? And then also, he's going to take photographs of the shoes that you're wearing. All right? Is it, do you want to read this to see what you're signing?

Sumner: [READING THE CONSENT FORM] Yeah. Should I have a lawyer for this?

Det. Abram: Should you have a lawyer? That's, that's totally up to you.

Sumner: I don't know.

Det. Abram: Basically all the detective is going to do is, is come in here, he's going to swab your hands. OK? Um, and then also we're going to take some pictures of your shoes. All right? You're not under arrest. OK? It's just, we're doing our investigation. All right? That's why I'm giving you the opportunity to read that.

Sumner: [READING THE CONSENT FORM] What's, what's atomic absorption.

Det. Abram: It will determine whether or not a gun's been fired. OK? You remember when I asked you if you fired any weapons today. You said, no, it would be OK to swab your hands. OK? So, I mean, are you going to, are you going to, I mean, basically, if you read that, right, um, and if you agree to it, all they would need you to do is sign here, today's date and the time, and I'll give you the time if you don't have a watch on.

Sumner: [READING THE CONSENT FORM] Inducement, is that what that is, inducement?

Det. Abram: Where are you reading at? Yeah, it says, this written permission is being given by me, the above, which is you, named also voluntarily without threats, promises or inducements of any kind being offered by said officer. OK? I'm not making any promises to you. But I'm just telling you that you're not under arrest. OK? It's just that, you know, we're just interviewing people and, um, you're a friend of Tito's. And this is just things that we do during the course of our investigation. OK?

Sumner: I think I really should get a lawyer for this. I don't know...

Det. Abram: OK. I can't force you to do it. I'm not trying to force you to do it.

Sumner: I know, I'm...

Det. Abram: Do you want me to read it to you?

Sumner: I've already read it.

Det. Abram: OK, you understand what it says?

Sumner: I do. Yeah, I think I'd better wait for a lawyer. Is that possible?

Det. Abram: What, is what possible?

Sumner: You getting me...

Det. Abram: Yeah, I mean, I'm not going to force you to sign. If you're not going to sign it, I mean, I'm not going to force you to sign it. OK?<sup>16</sup>

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<sup>16</sup> Ct. Ex. 1 at 19:47 – 19:51.

After the above dialogue, Det. Abram left the interview room for approximately fifteen minutes, returned to interview Sumner for another seven minutes and again left the interview room at 8:14 p.m. Det. Abram did not return to the interview room until 9:31 p.m.

Det. Abram testified that he did not read Sumner his *Miranda* rights before interviewing him “[b]ecause he wasn’t a suspect at that point...he was just another person that [he] was interviewing that particular evening.”<sup>17</sup> Det. Abram also testified that, after Sumner refused to sign the consent-to-search form, he was still free to go, however, he did not express that to Sumner and Sumner did not ask.<sup>18</sup> Det. Abram testified that Sumner’s request for an attorney was in regard to the consent-to-search form.<sup>19</sup>

While Det. Abram was interviewing Sumner, Det. Shriner of the NCCPD made an application for a search warrant. The application referenced was made in regard to hand swabs, clothing and firearms found on Sumner’s person, in the residence at 20 Dorsey Lane, and in Sumner’s car, a silver 2000 Acura Integra.<sup>20</sup>

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<sup>17</sup> Hr’g Tr. Mot. Suppress at 17, 28.

<sup>18</sup> Hr’g Tr. Mot. Suppress at 30. *See also*, Hr’g Tr. Mot. Suppress at 33 (stating that Sumner never asked Det. Abram if he could leave and Det. Abram never telling him he could leave during the interview with Det. Abram).

<sup>19</sup> Hr’g Tr. Mot. Suppress at 40, 44-45, 65.

<sup>20</sup> State’s Answer Opp’n Def.’s Mot. Suppress, Ex A, Warrant.

Probable cause for the search warrant was based on witness interviews at the scene and Sumner's admission to Det. Abram that he had been at Tito's residence earlier that day.<sup>21</sup> The search warrant was signed at 9:00 p.m.<sup>22</sup> At 9:31 p.m., Det. Abram returned to the interview room with Det. Donovan. At 9:38 p.m., the evidence officer swabbed Sumner's hands pursuant to the search warrant.<sup>23</sup> At 9:47 p.m., Det. Donovan began his interview of Sumner.<sup>24</sup> The following eleven-minute dialogue then took place between Det. Donovan and Sumner:

Det. Donovan: Um, OK, um, like I said, all I want to do is sit down and talk to you. Being as you're a good friend of his. Being that you, um, were with him this morning. Um, that's why I want to sit down and go over everything, OK. Since you are at a police station and since we are talking about a case, a death investigation, I am going to read you your *Miranda* rights. It's just a right that you have. It's just something that I've got to get out of the way real quick before we talk. OK? You are not under arrest. Some people think because when they hear *Miranda*, um, when you get your rights read to you, they think that you're under arrest.

Sumner: You have the right to remain silent, right?

Det. Donovan: I'm sorry?

Sumner: It says, you have the right to remain silent.

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<sup>21</sup> State's Answer Opp'n Def.'s Mot. Suppress, Ex. A, Warrant, para. 6-10

<sup>22</sup> *Id.* at Ex. A.

<sup>23</sup> Ct. Ex. 2 at 21:31-21:28.

<sup>24</sup> *Id.* at 21:47.



Det. Donovan: Yes. Um, all I want to do is talk to you and find out what, what went on with you guys today and what he talked about and whatever and stuff like that. But, I can't talk to you, I mean, you know how it is.

Sumner: I've been dying to go home. I really do.

Det. Donovan: All right, well look...

Sumner: I mean, won't you guys be able to talk to me later? I'll be...

Det. Donovan: [DET. DONOVAN INTERRUPTS] I've got to, I, obviously, you know, you know what kind of case this is where it needs immediate attention. Um, we'll go over it. We'll get, I'll get through this quick. [SUMNER HAS HEAD ON TABLE AND IS NODDING IN THE AFFIRMATIVE] Um, and then we'll go from there. All right, brother? You can read and write the English language? Correct? OK. I'm going to read, read this and read it in your head as I read it out loud. All right? OK. You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him present with you while you're being questioned.

Sumner: That's what I've been trying to say to the last, the last detective. He wouldn't listen to me. So...

Det. Donovan: If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning if you wish one. If at any time during this interview, you wish to discontinue your statement, you have the right to do so. OK, do you understand each of these rights that I've explained to you?

Sumner: Yes, I do.

\* \* \*

Det. Donovan: Just mark yes or no. #1. OK, having these rights in mind, do you wish to talk to me now.

Sumner: I told you, I'm sorry. I mean, I've been dying to go home.

Det. Donovan: This, this is, OK, let me explain something to you. This issue, I know you're dying to go home, Dave. And so am I. But you are a good friend of his. I hope you can understand my end of it. Um...

\* \* \*

Det. Donovan: Well I'm going to talk to you and we're going to go from there. OK? I've talked to all of his family members. I'm talking to his, you know, his girlfriend, his ex-girlfriend.

\* \* \*

Det. Donovan: We were up and down the whole street. We've got to talk to you. I mean, obviously you've got to understand why I've got to talk to you, Dave. You were with him this morning so I have to talk to you. Um, and that's where I'm at. I just want to talk to you. That's all I want to do. I want to find out what you did and stuff like that. That's all I want to do, Dave. And, and, you know, without, without you, talking to me, then I don't, I have nothing to go on. I'm not here accusing you of doing anything.

Sumner: I know you're not accusing me. You're trying to find stuff out.

Det. Donovan: Yeah, and that's all, that's all I'm doing and that's all I want to do. Um, you know, you're not, you know, you're not in any trouble. OK? I mean, I'm more on the lines I feel consoling, console for your because your friend is deceased. [SUMNER CIRCLES MIRANDA WARNING No. 3 AND WRITES "NOT GIVEN"]<sup>25</sup> What does that mean?

Sumner: The last person I talked to wouldn't let me call a lawyer. Wouldn't let me do nothing.

Det. Donovan: OK. Listen to me. If you're telling, I'm reading you these rights Dave. Um, I'm, I mean, I'm flabbergasted right now as to why you would want a lawyer when you're just a friend of Tito's.

Sumner: I'm willing to answer questions but I've been up since like 4:30 this morning. I'm tired.

Det. Donovan: I understand that. Um, but what I'm telling you is, is I want to sit down and talk to you. Um, I don't...

Sumner: You can...

Det. Donovan: Apparently from what I understood from the other detective, Det. Abram, when, when he read you your consent to search, consent to search your hands and stuff like that, um, that is, that's when you had said, no you didn't want to sign it without a lawyer.

Sumner: Yeah.

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<sup>25</sup> On July 31, 2003, the Court *sua sponte* requested that the State provide a copy of the *Miranda* Warning Form that Sumner wrote on during interview two with Det. Donovan on Court Exhibit 2. On August 1, 2003, the State faxed a copy of the form to the Court. The Court's request and the copy of the form have been docketed by the Prothonotary. On the form, *Miranda* Warning No. 3 states "you have the right to talk to a lawyer and have him present with you while you are being questioned."

Det. Donovan: You never said that's why, that is why, look at me, Dave, that's why we said, OK, well we don't have to go, we don't, that's fine, we'll go get a warrant signed where a judge will say well you had the opportunity.

Sumner: I understand that.

Det. Donovan: So that, this has nothing that has nothing to do with me talking to you. OK? What, what we're dealing with here is, is that fact that I want to talk to you about, about your relationship with ...

\* \* \*

Det. Donovan: I can't, no, no, see the thing is, I can't, there is such a thing as a constitutional right. I can't question you, talk to you, interview you about any event that, that you did today without reading you your *Miranda* rights.

Sumner: I understand that.

Det. Donovan: OK?

Sumner: You've read them to me and...

Det. Donovan: I read them to you, now, what...

Sumner: So far you're still not going along with...

Det. Donovan: No...

Sumner: ...you have the right to remain silent. You're still asking me questions.

Det. Donovan: I'm not, have I asked you a question?

Sumner: Ummm...

Det. Donovan: I haven't asked you one question yet.

Sumner: Not really. Yeah.

Det. Donovan: I haven't asked you one question. I've done all the talking. OK? The thing is, is, you know, your friend is deceased and I want to get to the bottom of it and I want to find out who did this and hopefully with your help, maybe you could shed some light. You might not even think you're shedding light but you may. Um...

\* \* \*

Det. Donovan: OK. I'm the lead investigator. I was over at the scene so obviously you can understand why I would want to talk to you also because it's, I'm the one that's writing the report. Um, I just want to talk to you. I'm not saying, I'm not making you talk to me. Uh, I just, I just need to talk to you and I can understand, you can see why I need to talk to you, don't you?

Sumner: I understand why you want to talk to me. I've been here too long. I want to go home and go to bed.

\* \* \*

Det. Donovan: I'm sorry. I'm sure God can forgive you. What, what can we, you know, what I want to do is the quicker that we can get through this, the better off that we'll be. OK? Um, I don't know what else to say to you, um, other than I would like to talk to you.

Sumner: I'm giving you the right to talk to me but just not right now.

Det. Donovan: Well, I mean, this is what, I just want to talk about some things. It's not going to take that ...

Sumner: No means no! [POUNDS ON TABLE FOR EMPHASIS]

Det. Donovan: OK, you don't...

Sumner: I'm sorry.

Det. Donovan: All right, look at me, look at me, Dave. OK? I understand no means no. What I want to do is I'm going to read this to you. OK?

Sumner: I know. You've read it to me properly. I understand everything about it.

Det. Donovan: OK. Are you telling me that you don't want to talk to me.

Sumner: Just go ahead and start asking questions.

Det. Donovan: No, no. Are you telling me that you don't want to talk to me?

Sumner: Not right now.

Det. Donovan: OK. When is it convenient for you?

Sumner: Tomorrow morning.

Det. Donovan: OK. What is convenient for me is, is right now because I have a death investigation. OK? And I'd hope that you would understand that.

Sumner: I do.

Det. Donovan: OK?

- Sumner: I'm totally sympathetic, really. I am. But...
- Det. Donovan: All right.
- Sumner: I've gone through a lot of shit today, just, just from being here, I've been, I don't know, it's messing with my head.
- Det. Donovan: I understand that. OK? Um, any time that we have a *Miranda* issue, it has to be a lock solid issue. It has to be a, I can't just infer that you want to talk to me. What I'm going to do...
- Sumner: I heard your statement saying that...
- Det. Donovan: Listen to me. I want to talk to you tonight. OK? I'm going to read these to you again. OK? I want you to answer my two questions at the end. If you agree to talk to me, then we will get right into it. OK? If you don't agree then I can't hassle you anymore. Not that I'm hassling you anyway but I can't, I can't keep going on with this. Like I said, you're not in any trouble. I just want to talk to you because I think it's important. I think it's important to my investigation and I would hope that someone would do the same for you if something had happened to you.
- Sumner: Let me sign it.
- Det. Donovan: OK? Now listen, you have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him present with you while you're being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning if you wish one. If at any time during this interview you wish to discontinue your statement, you have the right

to do so. OK? Do you understand each of these rights that I have explained to you?

Sumner: Mark, yes?

Det. Donovan: Do, no, do you, yes or no?

Sumner: Yes. I'm sorry. I said and marked yes.

Det. Donovan: Having these rights in mind, do you wish to talk to me now?

Sumner: You're pretty good with negotiating. I'm telling you what.

Det. Donovan: Yes or no?

Sumner: Yes.<sup>26</sup>

After Sumner signed the "Waiver of Rights" on the *Miranda* Warning Form, Det. Donovan questioned Sumner for an additional two hours and forty-four minutes, from 9:58 p.m. to 11:42 p.m., until Sumner stated, "I want to call a lawyer."<sup>27</sup> At various times during this portion of the interview, Sumner made the following statements:

At 10:00 p.m., Sumner: Would it be at all possible for me to go outside, with an escort, I don't care, just to go smoke a cigarette?

Det. Donovan: Man, I got in trouble with this not too long ago. As soon as we're done here, I'll walk you out and have a smoke

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<sup>26</sup> Ct. Ex. 2 at 21:47-21:58.

<sup>27</sup> *Id.* at 21:58-23:42.



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At 10:55 p.m., Sumner: Will it be all right if I leave?

Det. Donovan: [DONOVAN IS LEAVING THE ROOM TO "CHECK SOMETHING"] Yeah, hold on one second. Let me just...

\* \* \*

At 11:16 p.m., Sumner: I'm ready to go home and go to bed. Like I said, I've been up since 4:30 this morning, keep waking up and falling asleep, waking up and falling asleep, you know. I'm tired. I'm ready to go.

Det. Donovan: All right, well uh, let me make sure I can't think of anything else and then I'll...how did you get here again?

\* \* \*

At 11:26 p.m., Sumner: [SPEAKING TO THE CAMERA WHILE ALONE IN THE INTERVIEW ROOM] I am ready to leave.

\* \* \*

At 11:34 p.m., Sumner: I've been trying to do it the easy way. I just want to go home. I've been asking and asking and asking and I haven't been able to leave yet. I haven't been able to leave this room.

Det. Donovan: Well, right now...

Sumner: I'm sick and tired, claustrophobic.

\* \* \*

At 11:37 p.m., Sumner: Can we continue this tomorrow, please?

Det. Donovan: Dave.

Sumner: I'm tired.

\* \* \*

At 11:40 p.m., Sumner: I need to go smoke a cigarette.

Det. Donovan: OK. This is a no smoking facility, obviously. You know that.

Sumner: I'm sorry.

Det. Donovan: OK, but what I can do is, you have cigarettes on you?

Sumner: Yes.

Det. Donovan: OK. Would it make you, would it make you feel better if you smoked one right here?<sup>28</sup>

Sumner: I have to get outside. I've been cooped up in this frigging all...

Det. Donovan: All right, well listen. Obviously once we start going back and forth, this is what I want to tell you. OK? Let's get through this. After we get through this, we'll go, we'll have a smoke. We'll have two smokes. But let's just get through it. It's not gonna, listen, it's not...

Sumner: It is, it is...

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<sup>28</sup> The Court notes the ease with which Det. Donovan was willing to violate the law in order to keep Sumner in the room and continue his interview. *See* Clean Indoor Air Act, DEL. CODE ANN. tit. 16, §2901-08.

Det. Donovan: Hold on, it's not gonna go away, Dave. The evidence is overwhelming. It's not going to go away.

Sumner: I understand your side. Let me finish a sentence.

Det. Donovan: I just want you to tell me the truth.

Sumner: I'm telling you the truth. I went over there at 9 and left at 9:30. After that I don't know.

Det. Donovan: OK

Sumner: Geez. I've been trying to say that for how fucking long now?

\* \* \*

At 11:42 p.m., Sumner: [AT THIS POINT DET. DONOVAN HAD MOVED CLOSER TO SUMNER AND WAS SITTING FACT TO FACE] You're a little close, sir.

Det. Donovan: I'm asking you to help me. OK, to help yourself. All right? That's what I'm asking you to do. That's what you need to do.

Sumner: I want to call a lawyer.<sup>29</sup> [DET. DONOVAN REMAINS IN THE INTERVIEW ROOM]

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<sup>29</sup> Ct. Ex. 3.

Sumner: [ON HIS CELL PHONE] Hey, mom. [KNOCK ON DOOR, SGT. ROBINSON ENTERS THE ROOM] Not really, I mean, I want a lawyer. I'm getting upset with this crap. All right? All right. Hey. I'm up at the police station and I want to get out of here. Yep. Up on 13. I also, I also need a lawyer. OK. They think I did something wrong that I didn't do.

Sgt. Robinson: Hang the phone up.

Sumner: [ON HIS CELL PHONE] I have to hang, yeah, they want me to hang up the phone right now. All right. All right.

Det. Donovan: Dave, what we do, what we've got here is a warrant also for all of your clothing. Um, like I said, I'm not B.S.ing you. Obviously, we're probably not gonna talk from here. Short of me telling you that me and you are going to meet again, we're going to meet again. OK?

After Sumner asked for a lawyer at 11:42 p.m., Det. Donovan stopped the interview and Sgt. Robinson and Det. Abram entered the interview room to collect Sumner's clothing pursuant to the search warrant. Once Sumner's clothing was collected, the detectives took him to have his picture taken. Sumner was free to leave police headquarters at approximately 11:55 p.m. Det. Donovan testified someone called Sumner's father to come to NCCPD headquarters to pick him up

and that Sumner left NCCPD headquarters “sometime after 12:30 in the morning,” on May 9, 2002.<sup>30</sup>

At 3:09 a.m. on May 9, 2002, a warrant for Sumner’s arrest was signed. Det. Donovan testified at the hearing that when police arrived at the residence at approximately 3:44 a.m., “Det. Williams spoke to [Sumner’s] mother, or someone on the phone, and had [Sumner] come outside” because the police knew Sumner had a number of weapons. Sumner was taken into custody and placed in Det. Donovan’s vehicle along with Det. Abram.<sup>31</sup> Det. Abram testified that Det. Donovan was driving the police vehicle, Sumner was placed in the front passenger seat and Det. Abram was sitting in the rear passenger seat.<sup>32</sup> Det. Donovan testified that he did not read Sumner his rights at that time and he did not ask if Sumner had contacted an attorney.<sup>33</sup>

Det. Donovan testified that he did not ask Sumner questions, nor did he make any statements or comments to Sumner or Det. Abram in order to induce Sumner to speak during the ride to NCCPD.<sup>34</sup> Both Det. Donovan and Det. Abram

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<sup>30</sup> Hr’g Tr. Mot. Suppress at 112.

<sup>31</sup> *Id.* at 119.

<sup>32</sup> *Id.* at 25.

<sup>33</sup> *Id.* at 119.

<sup>34</sup> *Id.* at 100.

testified that during the ride back to NCCPD, Sumner told Det. Donovan that he wanted to tell him what had happened.<sup>35</sup> Det. Donovan testified that he told Sumner that “I couldn’t talk about anything. You know, if he wanted to talk, that I would be more than happy to talk with him once we got to headquarters.”<sup>36</sup> Det. Donovan and Det. Abram also testified that when they arrived at NCCPD in the sally-port area prior to going into the processing area, Sumner “mentioned again that he wanted to sit down and talk and explain what happened earlier that day.”<sup>37</sup>

Upon arrival at NCCPD, at 4:04 a.m. on May 9, 2002, the following dialogue took place between Det. Donovan and Sumner:

Det. Donovan: OK, Dave, what I want to do is obviously, since you told me on the way back that you wanted to talk, uh, um obviously you know what you’re being charged with. Obviously I’m sure you want to get some stuff off your, off your mind and then, uh, and I told you like I told you from the getgo, I will be with you from the beginning to the end. I haven’t pulled no punches with you. You know that. So far I’ve been pretty fair with you. Correct? [SUMNER NODS IN THE AFFIRMATIVE] OK. Um. What I am going to do though, um, is before we talk, we’re going, I’m

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<sup>35</sup> Hr’g Tr. Mot. Suppress at 25, 100-01.

<sup>36</sup> *Id.* at 101. Det. Abram testified that at no time during the ride back to NCCPD or upon arrival in the sally-port area did he make any statements or present any questions to Sumner in order to elicit comments or statements from Sumner. Det. Abram also testified that he did not hear any questions or comments made by Det. Donovan, which were meant to elicit statements or requests to talk to the police. *See id.* at 25.

<sup>37</sup> Hr’g Tr. Mot. Suppress at 25, 101.

going to read you Miranda again. It protects you and it protects me. [SUMNER NODS IN THE AFFIRMATIVE] OK? Before I can ask you any questions or before you can tell me anything, I need to go over this again. Do you understand? [SUMNER NODS IN THE AFFIRMATIVE] We can't talk about anything until we go over this again. OK? [SUMNER NODS IN THE AFFIRMATIVE] All right. OK, and you can read and write the English language? [SUMNER NODS IN THE AFFIRMATIVE] OK. All right, Dave, um, I want you to read along in your head as I read it out loud. You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him present with you while you're being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one. If at any time during this interview, you wish to discontinue your statement, you have the right to do so. Do you understand each of these rights that I have explained to you? [SUMNER NODS IN THE AFFIRMATIVE] Yes? No?

Sumner: Yes.

Det. Donovan: OK. Having these rights in mind, do you wish to talk to me know?

Sumner: [MARKS THE MIRANDA WARNING FORM INDICATING "YES" TO BOTH QUESTIONS UNDER THE WAIVER OF RIGHTS SECTION AND SIGNS THE FORM]<sup>38</sup>

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<sup>38</sup> Ct. Ex. 4. *See also*, Ct. Ex. 5.

After Sumner signed the *Miranda* warning form, Det. Donovan continued to question Sumner for twenty-nine minutes, from 4:04 a.m. to 4:33 a.m.<sup>39</sup> At 4:33 a.m., Det. Abram entered the room and started asking Sumner questions regarding another incident, during which time Det. Donovan left the interview room.<sup>40</sup> At 4:42 a.m. the following dialogue took place between Det. Abram and Sumner:

Det. Abram: You don't know? OK. OK. I don't know if Det. Donovan has any more questions for you, but if he doesn't, somebody will be back in and we'll walk you down the hall. You'll have to be processed. OK? Then you'll eventually go to court. All right?

Sumner: I'm going to go to court tonight?

Det. Abram: Probably within a few hours. All right?

Sumner: Uh-huh. I need a lawyer.

Det. Abram: What's that?

Sumner: If I'm going to go to court, I need a lawyer, right?

Det. Abram: Well the judge will explain all of that to you. All right?

At 4:43 a.m. Det. Abram left the interview room and at 4:45 a.m. Det. Donovan returned to the interview room and continued his interview. The interview concluded at 4:46 a.m.

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<sup>39</sup> Ct. Ex. 4 at 4:04 – 4:33.

<sup>40</sup> *Id.* at 4:33.



## II. DISCUSSION<sup>41</sup>

Upon a through review of the video/audio tape exhibits, the suppression hearing transcript, and the briefing, the Court has identified several crucial issues in regard to the statements and the evidence obtained pursuant to the search warrant and the arrest warrant. First, was Sumner in the custody of the police during any of the interrogations? Second, if he was in custody, did the police advise him of his *Miranda* rights? Third, if the police advised Sumner of his rights, did Sumner assert his Fifth Amendment rights, or did Sumner waive his Fifth Amendment rights in a voluntary, knowing and intelligent manner? Fourth, if Sumner asserted his Fifth Amendment right, did he later reinitiate and waive the right? Fifth, because there was a break in custody, is *Edwards v. Arizona*,<sup>42</sup> inapplicable? Sixth, does a violation of Sumner's Fifth Amendment rights affect the validity of the search warrant or the arrest warrant? Finally, apart from the requirements of *Miranda*, were any of Sumner's statements involuntary, that is, made in response to government coercion, and therefore obtained in violation of the Due Process Clause of the Fourteenth Amendment? Having recounted the

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<sup>41</sup> For ease of reference the Court will refer to the first interview with Det. Abram as "Interview One," the second interview with Det. Donovan as "Interview Two," and the final interview after execution of the arrest warrant as "Interview Three."

<sup>42</sup> *Edwards v. Arizona*, 451 U.S. 477 (1981).

salient facts and delineated the issues above, the Court will now discuss each issue in detail.

#### A. Interview One with Det. Abram

Sumner alleges that during the interview with Det. Abram he was in custody, but not given his *Miranda* warnings.<sup>43</sup> Sumner maintains that “though the State contends [he] was not a suspect, he was not permitted to leave the station and was held while the police secured [a search warrant.]”<sup>44</sup> Sumner also argues that although Det. Abram testified Sumner was free to leave at any time, his statement to Sumner at 8:14 p.m., at the end of the interview, “[h]opefully we’ll be able to get you out of here soon,” contradicts Det. Abrams’ testimony that Sumner was free to leave at anytime.<sup>45</sup> Additionally, Sumner alleges that he invoked his right to counsel during the interview with Det. Abram but was not allowed to place a call.<sup>46</sup>

The State argues that the interview with Det. Abram was not a result of custodial interrogation, but instead routine questioning.<sup>47</sup> The State points to

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<sup>43</sup> Mot. Suppress para. 1-2.

<sup>44</sup> Def.’s Mem. L. Supp. Mot. Suppress at 1.

<sup>45</sup> *Id.* at 2.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

several facts that indicate that Sumner was not in custody for purposes of *Miranda* warnings. First, Sumner voluntarily agreed to accompany Det. Williams and Lang to NCCPD.<sup>48</sup> Second, Sumner was not placed in handcuffs.<sup>49</sup> Third, Sumner acknowledges that he agreed to go to NCCPD for the interview in Interview Two on Court Exhibit Two: They said “we need to bring you in, talk to you, ask you some questions. [SUMNER REPLIED] All right. No problem.”<sup>50</sup> Fourth, Sumner was not subjected to any psychological pressure or deception and was questioned by Det. Abram in a non-threatening manner.<sup>51</sup> Furthermore, the State argues that even if the Court finds that the statements in Interview One were obtained in violation of *Miranda* and orders them suppressed, the Court may permit admission of the statements for purposes of impeachment and may permit admission of the subsequent statements.<sup>52</sup>

In *Malloy v. Hogan*, the United States Supreme Court held that the Fifth Amendments guarantee that no person “shall be compelled in any criminal case to be a witness against himself” is incorporated in the Due Process Clause of the

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<sup>48</sup> State’s Ans. Opp’n Def.’s Mot. Suppress at 2.

<sup>49</sup> *Id.* at 3.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

Fourteenth Amendment and thus applies to the States.<sup>53</sup> In *Miranda v. Arizona*<sup>54</sup> the Court extended the right against self-incrimination to any person suspected of a crime who is subjected to custodial police interrogation.<sup>55</sup> Custodial Interrogation is defined as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.”<sup>56</sup> It is only in the context of “custodial interrogation” that the *Miranda* protections are triggered.

The ultimate inquiry is whether there was either a formal arrest or “restraint on freedom of movement of the degree associated with a formal arrest.”<sup>57</sup> The fact that the questioning occurs in a police station does not automatically lead to the conclusion that it is custodial.<sup>58</sup> In *Oregon v. Mathiason*, the Court held that,

A noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a “coercive environment.” Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law

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<sup>53</sup> 378 U.S. 1 (1964).

<sup>54</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>55</sup> 384 U.S. at 460-461.

<sup>56</sup> 384 U.S. at 444.

<sup>57</sup> *New York v. Quarles*, 467 U.S. 649, 655 (1984).

<sup>58</sup> *Oregon v. Mathiason*, 429 U.S. 492 (1977). *See also*, *California v. Beheler*, 463 U.S. 1121 (1983).

enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer Miranda warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody." It was that sort of coercive environment to which Miranda by its terms was made applicable, and to which it is limited.<sup>59</sup>

In *California v. Beheler*, the Court reiterated that "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."<sup>60</sup> In *Beheler*, the suspect, having made an incriminating statement to the police regarding a robbery-murder, agreed to accompany them to the police station for further questioning. He was informed that he was not under arrest. After brief questioning at the station, during which he made additional incriminating statements, Beheler was allowed to leave. The Court concluded that there had not been custodial interrogation because there was neither a formal arrest nor restraint on the suspect's freedom of movement of the degree associated with formal arrest, and thus the absence of *Miranda* warnings did not preclude the admissibility of the statements at trial. In the absence of a formal arrest, the determination of whether there has been a restraint on the suspect's freedom of movement equivalent to a formal arrest turns on whether a

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<sup>59</sup> 429 U.S. at 495.

reasonable person in the suspect's position would have believed himself in custody or deprived of his freedom in a significant way.<sup>61</sup>

In the present case, the Court finds nothing in the record that indicates that Sumner was "in custody" and should have been given *Miranda* warnings at any point prior to the time that the search warrant for the hand swabs was executed at the beginning of the Interview Two. At no time before or during Interview One was Sumner placed under formal arrest. Sumner went voluntarily to NCCPD, where Det. Abram interviewed him. The video/audio tape of Interview One shows that other than being in a room with a door which was closed, Sumner was not restrained in any way. He was not placed in handcuffs and the door to the interview room was not locked. Although all weapons were removed from Sumner's person before being placed in the police car, the video/audio tape shows that Sumner still had possession of his cellular phone.<sup>62</sup> The video/audio tape also shows that Det. Abram's manner of questioning Sumner was fairly relaxed, informal and non-threatening. Det. Abram testified and the video/audio tape

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<sup>60</sup> 463 U.S. at 1125 (citing *Mathiason*, 429 U.S. at 495).

<sup>61</sup> *Berkemer v. McCarthy*, 468 U.S. 420, 442 (1984) (stating, in part, that "[a] policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time"). *See also*, *Stansbury v. California*, 511 U.S. 318 (1994).

<sup>62</sup> Later interview tapes show that Sumner's cellular phone had a signal and that it was possible for him to receive and make calls from the interview room. *See* Ct. Ex. 3 (Sumner's cellular phone rings during the interview and Sumner makes a call to his mother).

shows that although Det. Abram did not tell Sumner that he was free to leave at any time, Sumner did not ask to leave. Like in *Berkemer*, where the policeman's unarticulated plan to detain the suspect had no bearing on the question of whether he was "in custody" at a particular time, the fact that Sumner remained at NCCPD, while a different detective unknown to Sumner was securing a search warrant, has no bearing on the determination of whether Sumner was "in custody" for purposes of *Miranda*. Because the Court finds that Sumner was not "in custody" during the questioning in Interview One, and because *Miranda* does not apply, the question of whether Sumner asked for counsel for the interview or for the review of the consent form is irrelevant at this point. Thus, the statements contained in Interview One, subject to the rules of evidence, will be admitted.

#### B. Search Warrant and Arrest Warrant

Sumner seeks to invalidate the search warrant and the arrest warrant based on the argument that "the warrants were [obtained as] a result of a constitutional violation,"<sup>63</sup> and that the items seized from his person, home and vehicle were "Fruits of the Poisonous Tree."<sup>64</sup> Specifically, Sumner argues that the State

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<sup>63</sup> Def.'s Mem. L. Supp. Mot. Suppress at 15.

<sup>64</sup> *Id.* at 14.

violated his rights by “detain[ing him] in excess of two hours,<sup>65</sup> refus[ing] his request for counsel, continu[ing] to question him after he requested counsel, mak[ing] him hang up when he was asking his mother to get him an attorney and ... seeking a warrant because he requested counsel.”<sup>66</sup> The State concedes that “the issuance of [the search] warrant occurred after [Sumner] refused to consent to the search of his person;” however the State argues “it is illogical and factually incorrect to say that the basis of the warrant came from statements following this refusal.”<sup>67</sup> The State maintains that Interview One was a voluntary non-custodial interview and that it was during the first few minutes of that interview that Sumner admitted that he was present at Tito’s house that morning.<sup>68</sup> The State argues that no other information from Sumner’s discussion with Det. Abram was used as the basis of the search warrant.<sup>69</sup>

After review of the Affidavit of Probable Cause for the search warrant, the Court finds that the only statement from the interviews used to establish a basis for probable cause was Sumner’s statement to Det. Abram at 7:18 p.m. in Interview

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<sup>65</sup> The Court directs counsel to *Foraker v. State*, 394 A.2d 208 (Del. 1978), which stands for the principle that title 11, section 1902 of the Delaware Code does not apply where the suspect goes voluntarily to the police station.

<sup>66</sup> Def.’s Mem. L. Supp. Mot. Suppress at 15.

<sup>67</sup> State’s Ans. Opp’n Def.’s Mot. Suppress at 8.

<sup>68</sup> *Id.* at 9.

<sup>69</sup> *Id.*



One that Sumner had been to Tito's home that morning. This statement was made prior to any of the possible violations that Sumner cites to, including the discussion regarding consent to swab Sumner's hands or any suggestion of a request for an attorney. The Court does not reach Sumner's "fruit of the poisonous tree" argument because, as stated in the previous section, the Court finds that Sumner was not "in custody" during Interview One and that *Miranda* does not apply. As a result, any evidence obtained pursuant to a validly obtained and properly executed search warrant is admissible. Furthermore, after review of the Affidavit of Probable Cause for the arrest warrant, the Court finds that because the prior search warrant is valid, the arrest warrant is valid.

#### C. Interview Two with Det. Donovan

Sumner argues that at the beginning of Interview Two he asked to speak with an attorney and expressed a desire to go home.<sup>70</sup> Sumner points to several places in the transcript of Court Exhibit Two and Three where he made statements to Det. Donovan such as, "you're still asking me questions," in an implied request for counsel, and "I don't want to talk to you now," in an implied invocation of his right to remain silent.<sup>71</sup> Sumner asserts, "after the obvious request to exercise his

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<sup>70</sup> Def.'s Mem. L. Supp. Mot. Suppress at 2.

<sup>71</sup> *Id.* at 2.

rights under *Miranda*, Donovan questioned [him] for hours.”<sup>72</sup>

The State concedes that when NCCPD executes the search warrant for the hand swabs that Sumner “has been deprived of his right to leave and has been held for execution of [the] search warrant.”<sup>73</sup> Given this fact, the State agrees, “*Miranda* warnings must be issued in order to protect [Sumner’s] right to silence and counsel.”<sup>74</sup> The State maintains that as Det. Donovan was reading Sumner his rights, “[Sumner] equivocally invoked his rights to counsel and/or silence, and while Det. Donovan attempted to clarify [Sumner’s] assertion in accordance with *Crawford v. State* and *State v. Harris*, the State takes the position to agree to refrain from using this statement in their case in chief, but instead intends to rely on the same only for purposes of [impeachment]....”<sup>75</sup>

The police may not conduct a custodial interrogation of a suspect without first reading a suspect the *Miranda* warnings.<sup>76</sup> If, after the *Miranda* warnings are read, the suspect attempts an invocation of *Miranda* rights that is not clear or is equivocal, our federal and state constitutions provide different levels of protection

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<sup>72</sup> *Id.* at 2.

<sup>73</sup> State’s Ans. Opp’n Def.’s Mot. Suppress at 3.

<sup>74</sup> *Id.* at 3.

<sup>75</sup> *Id.* at 3.

<sup>76</sup> *Miranda*, 384 U.S. at 468-471. See also, *Draper v. State*, 2002 Del. LEXIS 51, at \*6-7 (Del. Supr.).

for the suspect. Under the United States Constitution, the police may continue questioning the suspect and are not required to clarify.<sup>77</sup> Under the Delaware Constitution, however, the police must clarify the suspect's intention before continuing with the interrogation.<sup>78</sup>

### 1. Right to Counsel

Where a suspect equivocally invokes his right to counsel, “[f]urther questioning thereafter must be limited to clarifying that request until it is clarified.”<sup>79</sup> According to the Delaware Supreme Court, “the police should be entitled to attempt to determine the suspect’s intention...[w]hich may include...the repeating of *Miranda* warnings as a means of emphasizing the defendant’s constitutional right to counsel.”<sup>80</sup>

With regard to the Fifth Amendment right to counsel, the United States Supreme Court held in *Edwards v. Arizona* that an accused person in custody who has “expressed his desire to deal with police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to

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<sup>77</sup> *Davis v. United States*, 512 U.S. 452, 461-62 (1994).

<sup>78</sup> *See Crawford v. State*, 580 A.2d 571, 577 (1990).

<sup>79</sup> *Crawford*, 580 A.2d at 576 (citing *Thompson v. Wainwright*, 601 F.2d 768 (5<sup>th</sup> Cir. 1979)).

<sup>80</sup> *Id.* at 577 (“The clarification approach requires the interrogating officer to limit his questions to those designed to elicit definitive indications of intent when a suspect makes an ambiguous request for counsel.”) (emphasis added).

him, unless the accused himself initiates further communication with the police.”<sup>81</sup>

In *Smith v. Illinois*, the United States Supreme Court stated:

first, courts must determine whether the accused actually invoked his right to counsel...second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waive the right he had invoked...<sup>82</sup>

In *Oregon v. Bradshaw*, the Supreme Court reaffirmed the requirement that the accused initiate further discussion by stating, “before a suspect in custody can be subjected to further interrogation after he requests an attorney there must be a showing that the suspect himself initiates dialogue with the authorities.”<sup>83</sup> The Delaware Supreme Court summarized the controlling principle in *Wainwright v. State* as follows, “[i]f the police initiate further questioning after an accused requests the presence of counsel, resulting statements are excludable apart from the issue of waiver.”<sup>84</sup>

Applying the standards for assertion of the right to counsel explained above, the Court finds that that the following statements made to Det. Donovan during the

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<sup>81</sup> 451 U.S. 477, 484-85 (1981). *See also*, *Brank v. State*, 528 A.2d 1185 (Del. 1985).

<sup>82</sup> 490 U.S. 91, 95 (1984) (citations omitted).

<sup>83</sup> 462 U.S. 1039 (1983) (quoting *Wyrick v. Fields*, 459 U.S. 42, 46 (1982)).

<sup>84</sup> 504 A.2d 1096, 1102 (Del. 1986).

first eleven minutes of Interview Two are ambiguous assertions of the right to counsel:

- Det. Donovan: You have the right to talk to a lawyer and have him present with you while you're being questioned." Sumner: "That's what I've been trying to say to the last, the last detective. He wouldn't listen to me."
- [CIRCLES MIRANDA WARNING No. 3 AND WRITES 'NOT GIVEN'] Det. Donovan: "What does that mean?" Sumner: "The last person I talked to wouldn't let me call a lawyer."

Having determined that the above statements are ambiguous assertions of the right to counsel, the Court looks at the detective's attempts to clarify Sumner's intention. While it is true that the police may clarify by again reading the suspect the *Miranda* warnings, the police may not obfuscate clarification through an abundance of interruptions and a feigned ignorance of the suspect's intentions. The Court concludes from the following statement made by the detective that he understood that Sumner was asserting his right to counsel, and not just in the context of signing the consent form:

- "OK. Listen to me. If you're telling...I'm reading you these rights Dave. Um, I'm, I mean, *I'm flabbergasted right now as to why you would want a lawyer* when you're just a friend of Tito's."<sup>85</sup>

Ignoring Sumner's request, the detective tried to direct Sumner's attention back to Det. Abram's perceived understanding of Sumner's request for an attorney for the

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<sup>85</sup> Ct. Ex. 2 at 21:47-21:58 (emphasis added).

signing of the consent form. Det. Donovan is a veteran police officer, has testified in this Court on numerous occasions, and could have simply asked Sumner, “are you requesting counsel for the questioning or was it just for the signing of the form?” Instead, the record shows that the detective made the decision to continue the interview and repeatedly silenced Sumner by speaking over Sumner when he attempted to clarify.<sup>86</sup>

## 2. Right to Silence

“Although *Crawford*, and the more recent decision in *Steckel v. State*,<sup>87</sup> dealt with the right to counsel, the right to remain silent is a constitutional right that is subject to the same level of protection as the right to counsel.”<sup>88</sup> In *Dodson v. State*, the Delaware Supreme Court held that defendant had invoked the right to silence where “[he] said he would make a statement, but not at that time.”<sup>89</sup> In *Dodson*, when the defendant declined to make a statement about a particular murder, the officer began questioning Dodson about a different homicide. After questioning Dodson for approximately forty-five minutes, the officer told him that he had given good information. He then asked Dodson about the initial murder

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<sup>86</sup> Ct. Ex. 2, 3 at 21:47-23:42.

<sup>87</sup> 711 A.2d 5 (1998).

<sup>88</sup> *Draper*, 2002 Del. LEXIS 51, at \*7 (citing *Dodson v. State*, 513 A.2d 761 (1986)).

<sup>89</sup> *Dodson*, 513 A.2d at 763-64.

and Dodson implicated himself. The Delaware Supreme Court concluded that the trial court erred in permitting introduction of Dodson's statement and reversed and remanded the case for a new trial. Similarly, in *Draper v. State*, the Delaware Supreme Court held that the defendant's repeated assertion that he wanted to speak with his mother before speaking to the police was an ambiguous invocation of the right to remain silent, and the police should have clarified the defendant's intent before continuing the interrogation.<sup>90</sup> Thus, the Supreme Court reversed and remanded the matter for further action consistent with its opinion.

With regard to the Fifth Amendment right to remain silent, the United States Supreme Court, in *Michigan v. Mosley*, held that "the admissibility of statements obtained after the person in custody indicates that he wishes to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.'"<sup>91</sup> Applying *Mosley* to the facts in *Dodson*, the Delaware Supreme Court held that it was "clear that the officer did not scrupulously honor the defendant's right to cut off questioning."<sup>92</sup> The Court stated that, "there was a 'significant and unacceptable nexus' between the officer's continued questioning

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<sup>90</sup> *Draper*, 2002 Del. LEXIS 51, at \*1.

<sup>91</sup> 423 U.S. 96, 104 (citation omitted). *See also*, *Dodson*, 513 A.2d at 763-63.

<sup>92</sup> *Dodson*, 513 A.2d at 764.

and Dodson's statement."<sup>93</sup> Thus, the police may not ask questions after invocation of silence in the *same* conversation or *too soon* after invocation.

Applying these standards for assertions of the right to remain silent, the Court finds that several of Sumner's statements made to Det. Donovan during the first eleven minutes of the interview are ambiguous assertions of the right to silence:

- Sumner: "You have the right to remain silent, right?" Det. Donovan: "I'm sorry?" Sumner: "It says, you have the right to remain silent."
- "I've been dying to go home."
- "Won't you guys be able to talk to me like later."
- "I told you...I've been dying to go home."
- "So far you're still not going along with...[Det. Donovan interrupts] you have the right to remain silent. You're still asking me questions."
- "I understand why you want to talk to me. I've been here too long. I want to go home and go to bed."
- "I'm giving you the right to talk to me but just not right now."
- Sumner: "No means no!"... Det. Donovan: All right, look at me, look at me, Dave. OK? I understand no means no. What I want to do is I'm going to read this to you. OK?

Having determined that the above eight statements are ambiguous assertions of the right to silence, the Court must now determine whether the detective clarified that

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<sup>93</sup> *Id.* (citing *Tucker v. State*, 411 A.2d 603 (Del. 1980)).



Sumner was asserting his right to silence. The Court finds that when the detective asked Sumner the following question and received the following answer, this served to clarify that Sumner had been trying to assert his right to silence:

- Det. Donovan: “Are you telling me that you don’t want to talk to me?”  
Sumner: “Not right now.”

The next question is whether Sumner’s “right to cut off questioning” was “scrupulously honored” by the detective when Sumner answered “not right now” after Det. Donovan asked him, “[a]re you telling me that you don’t want to talk to me?” The answer is “no.” Det. Donovan did not “scrupulously honor” Sumner’s “right to cut off questioning.” Det. Donovan interrupted Sumner as Sumner attempted to assert his right and then informed Sumner that he had not been questioning him, thereby suggesting that he was honoring Sumner’s right to silence:

- Sumner: So far you’re still not going along with...[DONOVAN INTERRUPTS] Det. Donovan: No... [SUMNER FINISHES HIS SENTENCE] Sumner: ... you have the right to remain silent. You’re still asking me questions. Det. Donovan: I’m not, have I asked you a question? Sumner: Ummm... Det. Donovan: I haven’t asked you one question yet.

Unlike in *Dodson*, where the defendant said he would make a statement but not at that time, and then the detective switched to questions about a separate homicide and returned to the homicide at issue after forty-five minutes, here the detective never left the topic of Tito’s murder and continued to chronicle the reasons why he

needed Sumner's statement now. The detective failed to honor Sumner's constitutional right and, as Sumner aptly characterized it, "negotiated" away Sumner's right to silence.<sup>94</sup>

Unfortunately, the constitutional violations do not end here. Later in the questioning, Sumner again makes several equivocal assertions of the right to remain silent when he states:

- At 11:26 p.m., [SPEAKING TO THE CAMERA] "I am ready to leave."
- At 11:37 p.m., "Can we continue this tomorrow, please?"

At no time after these assertions did the detective attempt to clarify Sumner's intention, he just continued talking and asking questions. The Court finds that by ignoring these assertions the detective again violated Sumner's Fifth Amendment right to silence.

Although the detective told Sumner that "there is a such thing as a constitutional right," he violated Sumner's constitutional rights to silence and counsel multiple times within the first eleven minutes of Interview Two.<sup>95</sup> It was not until 11:42 p.m., when Sumner unequivocally and vehemently stated, "I want to call a lawyer," that the detective finally ceased questioning Sumner and honored Sumner's right to counsel. Given the repeated violations of Sumner's

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<sup>94</sup> Ct. Ex. 2 at 21:58.

constitutional rights to silence and counsel, the statements contained in Interview Two are suppressed.

#### D. Interview Three

Sumner contends that the circumstances surrounding his release and arrest by the police suggest that his statements in Interview Three are not admissible. Specifically, Sumner points to the fact that he was released from NCCPD at approximately 12:45 a.m. on May 9, 2002, and was arrested less than three hours after his release at approximately 3:30 a.m. on that same date.<sup>96</sup> Sumner points to the fact that the same detective who had ignored Sumner's assertions of right to silence and to counsel earlier in the evening was the arresting officer.<sup>97</sup> Sumner argues that "once counsel is requested all interviews must stop until such time as counsel is provided."<sup>98</sup>

The State argues that "as a result of his release from custody, [Sumner] could again be interviewed at this time without a fresh set of *Miranda* warnings."<sup>99</sup> The State maintains that Sumner's "prior invocations at the station house do not

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<sup>95</sup> The Court does note however that at 11:42 p.m. when Sumner unequivocally stated, "I want to call a lawyer," Det. Donovan ceased all questioning of Sumner and honored Sumner's right to counsel.

<sup>96</sup> Def.'s Mem. L. Supp. Mot. Suppress at 3.

<sup>97</sup> *Id.* at 3.

<sup>98</sup> Mot. Suppress para. 8.

<sup>99</sup> State's Ans. Opp'n Def.'s Mot. Suppress at 4.

carry over through his release from custody to a subsequent custodial interrogation.”<sup>100</sup> Thus, because Sumner “was read his *Miranda* warnings and waived [the] same before interview three began [and a]s this interview began only after his release from prior custody, his prior invocation is irrelevant and his statements therein are appropriately admitted.”<sup>101</sup> Furthermore, the State argues that even if Sumner’s prior invocations at the station house did carry over, Sumner, without any prompting by the detectives, indicated that he wished to speak to the police, thus initiating further communication with the police.<sup>102</sup> The State argues that even if the police violated Sumner’s right to counsel or right to silence in Interview Two that does not mean that Interview Three is inadmissible under the “fruit of the constitutional violation” doctrine.<sup>103</sup> The State asserts that the statements in Interview Three were “made by [Sumner]...hours after his release to his family” and after Sumner “was warned that the police suspected him for this offense and despite any *Miranda* violation in the prior statements, it was clear during those conversations that [Sumner] was fully appraised and informed of his

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<sup>100</sup> *Id.* at 4.

<sup>101</sup> *Id.* at 4.

<sup>102</sup> State’s Ans. Opp’n Def.’s Mot. Suppress at 4.

<sup>103</sup> *Id.* at 3.

legal rights...and that he then chose...to initiate the conversation and waive his rights.”<sup>104</sup>

The holding in *Edwards* stands for the proposition that an accused person in custody who has “expressed his desire to deal with police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication with the police.”<sup>105</sup> The test is as follows:

first, the court must determine whether the accused actually invoked his right to counsel...second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waive the right he had invoked....<sup>106</sup>

As a matter of Delaware law, “[i]f the police initiate further questioning after an accused requests the presence of counsel, resulting statements are excludable apart from the issue of waiver.”<sup>107</sup>

The majority of Delaware cases involving an *Edwards* issue deal with

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<sup>104</sup> *Id.* at 4.

<sup>105</sup> 451 U.S. 477, 484-85 (1981). *See also, Brank*, 528 A.2d 1185.

<sup>106</sup> *Smith*, 490 U.S. at 95 (citations omitted). *See also, Bradshaw*, 462 U.S. 1039 (holding “before a suspect in custody can be subjected to further interrogation after he requests an attorney there must be a showing that the ‘suspect himself initiates dialogue with the authorities.’”).

<sup>107</sup> *Wainwright*, 504 A.2d at 1102.

situations where police custody is continuous.<sup>108</sup> In order for *Edwards* to apply, most courts have generally upheld a continuous custody requirement, however, the United States Supreme Court has not ruled on this issue.<sup>109</sup> Such a bright-line rule would seem consistent with the Supreme Court's approach in *Miranda* and its progeny; however, it seems logically inconsistent with the desire to ensure a voluntary waiver of rights. In *State v. Brotman*, this Court, after examining several Circuit Courts of Appeal decisions, held:

a break in custody dissolves a defendant's *Edwards* claim. If the police release the defendant, and if the defendant has a reasonable opportunity to contact his attorney, then we see no reason why *Edwards* should bar the admission of any subsequent statements. A break in custody after the invocation of Fifth Amendment rights ends the need for the *Edwards* rule.<sup>110</sup>

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<sup>108</sup> See *Wainwright*, 504 A.2d 1096; *Dodson*, 513 A.2d 761; *Brank*, 528 A.2d 1185; *Crawford*, 580 A.2d 571.

<sup>109</sup> See e.g., *United States v. Hines*, 963 F.2d 255, 256-57 (9<sup>th</sup> Cir. 1992); *United States v. Skinner*, 667 F.2d 1306, 1309 (9<sup>th</sup> Cir. 1982), *cert. denied*, 463 U.S. 1229 (1983); *United States v. Fairman*, 813 F.2d 117, 124-25 (7<sup>th</sup> Cir. 1987), *cert. denied*, 483 U.S. 1010 (1987); *McFadden v. Garraghty*, 829 F.2d 654, 660-61 (4<sup>th</sup> Cir. 1987); *United States v. Geittmann*, 733 F.2d 1419, 1425 (10<sup>th</sup> Cir. 1984).

<sup>110</sup> 1991 WL 138421, at \* 7 (Del. Super.). Other states have examined whether the defendant had a reasonable opportunity to contact an attorney. See *State v. Furlough*, 797 S.W.2d 631 (Tenn. Crim. App. 1990) (Defendant asserted her right to counsel, the interrogation was terminated. Later that afternoon the officer asked the defendant to come to the police station for further questions. The court stated that "each case must be judged on its particular facts" and that the reasonable test should be applied to determine whether defendant had an opportunity to consult and attorney. The court held that the defendant had reasonable opportunity to contact an attorney.); *Willie v. State*, 585 So.2d 660 (Miss. 1991) (In dicta, the court recognized that there was a possibility that a break in custody may be of such short duration that the *Edwards* or *Roberson* protection does not disipate.).

In *Brotman*, approximately twenty-three days had elapsed from the time the defendant had expressed a desire to consult an attorney and the statement he subsequently gave to the police.<sup>111</sup> During that time, the defendant was free to go about his business and talk to an attorney if he had wished to do so.<sup>112</sup>

Under the specific facts of this case, the break in custody does not dissolve Sumner's *Edwards* claim. Approximately three hours after Sumner left the NCCPD headquarters he was arrested. The Court agrees that it is conceivable that a defendant could reasonably obtain counsel within a three-hour time frame, however, it is inconceivable that in the three-hour time frame in which Sumner was released, 12:45 a.m. to 3:44 a.m., he could reasonably have obtained counsel. Thus, because the break in custody was for a short period of time in the early morning hours, the Court finds that *Edwards* applies.

Since the break in custody did not sever the causal link between Sumner's invocation of an *Edwards* request for counsel during custodial interrogation and Sumner's subsequent statement, the Court must apply *Edwards*. Weighing all of these facts together, and considering the earlier violations of Sumner's right to counsel and right to silence, the Court concludes in this case that the police

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<sup>111</sup> *Brotman*, 1991 WL 138421, at \*8.

<sup>112</sup> *Id.*

reinitiated further discussions with Sumner and did not properly clarify that Sumner no longer required counsel.

Sumner unequivocally invoked his right to counsel to the detective at the end of Interview Two by saying, “I want to call a lawyer.” At that time, Sumner was released and returned home in the early morning hours. It is clear that approximately three hours later, the same detective who had ignored all but one of Sumner’s invocations, again made contact with Sumner by arresting him. Det. Abram and Det. Donovan testified that Sumner told them twice on the return trip to NCCPD that he wanted to talk to them. Having presided over the hearing and having viewed the video/audio tapes in full, the Court does not find the testimony of the detectives on this point credible.<sup>113</sup> The Court reaches this conclusion for several reasons. First, even though the detectives considered Sumner dangerous enough to call ahead in order to have him come out of the house,<sup>114</sup> Sumner was placed in the *front* passenger seat of Det. Donovan’s car with Det. Donovan driving and Det. Abram in the back passenger seat. Second, based on what transpired on the video tape in Interview Two, the Court cannot conclude that the prior violations of *Miranda* by Det. Donovan were a mere mistake. Given the

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<sup>113</sup> *See, Tyre v. State*, 412 A.2d 326, 330 (Del. 1980) (stating the trier of fact “is the sole judge of the credibility of the witnesses and responsible for resolving conflicts in the testimony.”)

<sup>114</sup> Hr’g Tr. Mot. Suppress at 119 (stating “Det. Williams spoke to [Sumner’s mother, or someone on the phone, and had [Sumner] come outside” because the police knew Sumner had a number of weapons).



conduct the Court witnessed on the videotape, the Court can only conclude that there was relentless effort to obtain a confession without much concern for the defendant's rights.

Third, based on what actually transpired during Sumner's interrogation earlier that night compared with the detective's characterization on the videotape of what was transpiring, particularly in light of the same detective's highly unusual and peculiar decision to seat a suspected murderer next to him in the front seat, the Court finds it probable that the police "talked" to Sumner in the police car the same way the detective "talked" to Sumner in Interview Two after he invoked his right to silence.<sup>115</sup> If the detective who conducted Interview Two truly believed he was not asking Sumner questions, the Court finds his perception flawed. Moreover, because the detective characterized his conduct in Interview Two as not asking questions, the Court views his assertion that he did not ask Sumner questions in the police car after his arrest with skepticism. Because of Sumner's previous request for counsel, the unreasonableness of obtaining counsel between 12:45 a.m. and 3:44 a.m., and Sumner's subsequent purported willingness to speak with Det. Donovan upon return to NCCPD headquarters, the police had a duty to clarify.<sup>116</sup>

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<sup>115</sup> See Ct. Ex. 2 at 21:47-21:58.

<sup>116</sup> See, e.g., *Knight v. State*, 690 A.2d 929, 931 (Del. 1996) (After the suspect asserted his right to counsel, the interview was terminated. Approximately twenty minutes later, the detective received a message that the suspect wanted to talk to the officers. The officers went back to the

They should have clarified the ambiguity created by Sumner's subsequent request by acknowledging that Sumner had previously requested counsel, clarifying that he no longer wanted counsel, and confirming that Sumner wanted to reinstate the conversation. Under the facts, particularly what transpired during Interview Two, it was not enough that the detective merely read Sumner his rights and Sumner signed the waiver.

#### E. Due Process Clause of the Fourteenth Amendment

Balancing the conflicting goals of the legitimate interest of the police in obtaining information about a crime from a suspect against the concern of a democratic society in protecting the individual from government coercion and overreaching, courts have long recognized that a statement obtained by police which is not the product of a voluntary choice by the defendant is inadmissible against him under the Due Process Clause of the Fourteenth Amendment.<sup>117</sup> The due process approach is an independent consideration when reviewing the admissibility of statements made by defendants to law enforcement officials.<sup>118</sup> This approach recognizes that "certain interrogation techniques, either in isolation

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interrogation room and after a short discussion to determine that the suspect had changed his mind and did not want a lawyer, the officers began questioning him again.).

<sup>117</sup> *Brown v. Mississippi*, 297 U.S. 278 (1936).

<sup>118</sup> *Colorado v. Connelly*, 479 U.S. 157, 163 (1987). *See also DeJesus v. State*, 655 A.2d 1180, 1196-97 (Del. 1995) (applying the due process analysis).

or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned.”<sup>119</sup>

The United States Supreme Court has held that “[c]oercive police activity” is a “necessary predicate to a finding that a confession is not ‘voluntary’ within the meaning of the Due Process Clause of the Fourteenth Amendment.”<sup>120</sup> Upon a finding of “coercive police activity,” a court must then determine if the conduct was sufficient to overcome the will of the accused, given particular vulnerabilities and the conditions of the interrogation, and resulted in an involuntary statement.<sup>121</sup>

The question of voluntariness is a factual issue to be determined under the totality of the circumstances.<sup>122</sup> One set of factors to be considered is the suspect’s peculiar characteristics and vulnerabilities, such as age, level of education, mental stability, state of sobriety and familiarity with the criminal justice process.<sup>123</sup>

While the physical or mental condition of the accused remains a pertinent concern as it relates to his vulnerability to government coercion, “mere examination of the

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<sup>119</sup> *Miller v. Fenton*, 474 U.S. 104, 109 (1985).

<sup>120</sup> *Connelly*, 479 U.S. at 166 (“absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law”); *DeJesus*, 655 A.2d at 1197; *Marine v. State*, 607 A.2d 1185 (Del. 1992), *cert dismissed*, 505 U.S. 1247 (1992).

<sup>121</sup> *See Connelly*, 479 U.S. 157 (1987).

<sup>122</sup> *Schneekloth v. Bustamonte*, 412 U.S. 218, 227 (1973); *Shipley v. State*, 570 A.2d 1159, 1168 (Del. 1990).

<sup>123</sup> *Shipley v. State*, 570 A.2d 1159.

confessant's state of mind can never conclude the due process inquiry."<sup>124</sup>

Another set of factors to be considered is the manner in which the police conducted the interrogation, such as length of the suspect's detention, the duration and intensity of the questioning, the use of trickery, deception, threats, or promises of leniency, the deprivation of access to family, friends, or nourishment, whether the police gave the suspect *Miranda* warnings, and whether the suspect was subjected to any physical or psychological mistreatment. The prosecution must prove by a preponderance of the evidence that a confession was voluntary.<sup>125</sup> This Court recognizes the difficulty and public necessity of securing a confession from a person suspected of committing violent crimes of the type alleged here. However, poised between the public outcry associated with immediate justice and the admirable efforts of a public police force in solving violent crimes, are often the constitutional rights of those who demand them most. In fact, it is often in this context that the NCCPD proves its value to this community, its citizens and the State of Delaware as a whole.

With that said, however, this Court finds that in the case at bar, the cumulative conduct of the NCCPD was coercive police activity. The police activity with respect to Sumner's interrogations which culminated in his confession

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<sup>124</sup> *Connelly*, 479 U.S. at 165.

<sup>125</sup> *Lego v. Twomey*, 404 U.S. 477, 488 (1972); *State v. Rooks*, 401 A.2d 943, 949 (Del. 1979).

violated the Due Process Clause of the Fourteenth Amendment. Having studied the videotapes of Sumner's interrogation, the Court concludes that the technique employed in Interview Two was, by design, a coercive and systematic attempt to negotiate away Sumner's constitutional rights leading to an admission of guilt; not a violation in one overarching action, rather a game of constitutional inches. Repetitive interruptions and attempts to prevent Sumner from clarifying statements about silence and counsel merely buttress the litany of relentless, systematic prodding leading to the end game of Sumner's confession.

First, prior to the successful "negotiation" of Sumner's waiver of his Fifth Amendment right, during Interview Two, Sumner waited in an interview room alone, for significant periods of time throughout the evening. Sumner was exhausted, having been awake since 4:30 a.m. that morning. Although Sumner made clear that he was tired and wanted to go home, the police ignored him and kept questioning even though Sumner said he was willing to speak to the police the following morning. The Police refused to stop the interrogation. The questions continued for hours.

Next, Sumner was essentially bullied through his *Miranda* warnings. The inquisition culminated with an "in your face approach" at which time the suspect told the detective, "You're too close sir." Ultimately, Sumner was interrogated until he stated he wanted to call a lawyer. He called his parents and asked for a

lawyer. When he called his mother to tell her he needed a lawyer, the police ordered him to get off the phone.<sup>126</sup> Only after Sumner unequivocally asked for a lawyer did the police relent.

Third, shortly after being allowed to go home, and in what appears to be a continuation of the effort to wear Sumner down, Sumner was arrested at 3:44 a.m. At that hour, detectives called Sumner's mother on the telephone and instructed her to send Sumner out of the house for arrest on the front lawn. The police testified they made the arrest in this manner because they feared that Sumner had weapons in his house. Yet despite this claimed concern, they placed a suspected murderer in the *front seat* of Det. Donovan's unmarked police car. Det. Donovan must have realized that it would be virtually impossible for Sumner to contact a lawyer during the 12:30 a.m. to 3:44 a.m. intermission. Given the totality of the evening's events, Det. Donovan's testimony regarding Sumner's sudden call to conscience and willingness to talk while in the front seat of a police car, at 3:44 a.m., with Sumner probably wondering how to negotiate a right to counsel, is not compelling or convincing in light of his earlier actions and seeming disregard for Sumner's Constitutional rights.

This alone, however, is not the end of the inquiry. The Court concludes that the totality of the evening and early morning events leading to the confession was

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<sup>126</sup> Ct. Ex. 3.

calculated to overcome the free will of Sumner. The Court now turns to the characteristics of the suspect in encountering Det. Donovan's inquisition. Telltale is the fact that Sumner was not overtly subject to any particular infirmities that would lead to a confession given vulnerabilities related to any of Det. Donovan's strategies of interrogation. Det. Donovan is a well-trained, exceptionally experienced and talented police officer in the NCCPD. At every turn, Det. Donovan calculated a strategy to inch Sumner closer to talking. While this in itself is commendable, Det. Donovan's conduct was, on this occasion, overzealous and unfortunately resulted in a violation of Sumner's constitutional rights.

It is clear that Sumner was totally exhausted, he was offered a drink but none was brought to him, he was not offered the use of the men's facilities and, being a smoker, was not permitted to exit the building to smoke a cigarette. His prior experience in unsuccessfully negotiating his right to silence with Det. Donovan probably led him to believe that such a tiring negotiation would again occur with respect to his right to counsel, particularly in light of Det. Donovan's earlier pronouncement that he was "flabbergasted" Sumner would want a lawyer if he was "just a friend of Tito's." Just before four in the morning, he was ordered out of his parent's house and arrested on his front lawn. He did not have a reasonable opportunity to obtain counsel. There is no evidence he had gotten any sleep between the time he left the station house and the time he was arrested. Sumner

was placed at the mercy of Det. Donovan in the front passenger seat of his police car, and there were no recording devices to memorialize what happened next. The entirety of this interlude smacks of a calculated marathon designed to secure a confession at all costs and the totality of the circumstances surrounding Det. Donovan's quest for a confession culminated in a violation of the Fourteenth Amendment Due Process Clause. Consequently, the State is prohibited from using the statements in Interview Two and Interview Three in its case-in-chief or for impeachment purposes.

### III. CONCLUSION

For the foregoing reasons, Defendant's Motion to Suppress is **GRANTED** in part, **DENIED** in part.

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Jan R. Jurden, Judge