Appendix A: Sample Documents

DOCUMENT A34: MOTION TO REDUCE DETENTION

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
Family Division -- Juvenile Branch

In the Matter of	:	Docket J-7676-54
	:	Social File 654321
*****	:	Magistrate Judge Name
	:	Further Initial: October 11, 2002
Respondent	:	

MOTION TO REDUCE DETENTION

*****, through undersigned counsel, respectfully moves this Court to reduce her detention and allow her to reside with her aunt and uncle, D. and D.M. in Bowie, Maryland. In support of this motion, counsel states the following:

1. ***** was presented at an initial hearing on October 5, 2002 on a preliminary allegation of assault with intent to kill. At that time, the government requested a 5-day hold on petitioning the case, but sought secure detention. The case was continued for further initial hearing on Friday, October, 11, 2002.

2. Because of the 5-day hold, the intake probation officer took no official position on detention but provided the Court with the following social factors: ***** is 17 years old; ***** resides with her mother, T.W., and her grandmother, C.W., in the District; ***** attends D.C. Street Academy where she has regular attendance; *****'s drug test results were not available; ***** presents no problems in the home; and ***** attends church regularly with her grandmother. Intake probation officer, Name, advised counsel that had the case been petitioned on October 5, the recommendation would have been for release to mother with intensive supervision.

3. The government sought secure detention in light of the nature and circumstances of the allegation and because there was information that the complainant's boyfriends wanted to hurt *****

4. The Court found probable cause and securely detained ***** at Oak Hill.

5. Since October 5, 2002, undersigned counsel has gathered significant new social information that was not available to the Court at the time of the initial hearing.

6. Most significantly, counsel was provided with a name and phone number for *****'s aunt and uncle who live in Bowie, Maryland. Counsel contacted D. and D.M. who expressed great willingness to allow ***** to live with them in Bowie. Mr. M. indicated that he has actually invited ***** to live with him in the past.

7. Counsel provided the new information to Probation, *****'s intake probation officer. Ms. Probation conducted a home study in Bowie, Maryland on Tuesday, October 8, 2002 and met with the uncle D.M. Ms. Probation advised counsel that the home visit went well with Mr. M. and advised counsel that the M.'s have a nice home. Mr. M. took time off from work to make himself available to Mr. Probation for the home study. Ms. D.M. will take time off from work to make herself available to the Court at the further initial hearing.

8. D. and D.M. reside at Address, Bowie, Maryland 20716. The M.'s have a beautiful home, which they are in the process of purchasing. Their neighborhood is in a very quiet residential location where there is very little activity and where children do not hang out in the streets. Mr. M. is a driver for Company and Mr. M. is a social worker with the District of Columbia Public Schools.

9. Placing ***** in Bowie will alleviate the government's concerns about *****'s safety. Mr. M. advised counsel that their home is not accessible to the District of Columbia by either bus or metro, therefore ***** can only get to the District if she is driven. Placement with the M.'s will also provide ***** with even greater structure and support than she had in the District, as the M.'s have a two-parent home, stable and professional careers, and will be great role models for ***** All of her family members describe ***** as a good child and know that ***** will abide by any rules or regulations the M.'s impose on her. As stated by Mr. M., "If I tells ***** to do something, ***** will do it without hesitation or back talk."

10. Mr. M. reports that he has spent a great deal of time with ***** over the years and that ***** always respects and obeys him. When she has visited the family or spent the night at their house, she helped with chores and followed the rules. Mr. M. describes ***** as a "good child" who has the love and support of an extended family. The M.'s will also insist that ***** attend church with them just as she attended church with her grandmother.

11. D.M. asked counsel to obtain school records and provided counsel with a list of three possible school options for ***** in the Bowie area. Ms. M. discussed Bowie Senior High, Bladensburg High School and a GED program at Eleanor Roosevelt in Greenbelt, Maryland. By attending school in Maryland, ***** will neither be a risk of danger or a threat of danger to the parties in this case.

12. ***** is also not a threat to anyone else in the District. She is 17 years old with no prior contacts with the court and no history of violence. ***** has a great deal of family support. Prior to her arrest, ***** lived with her mother, T.W., and grandmother, C.W. *****'s grandmother is a nurse. ***** attended church regularly with her grandmother at Church and sang in the choir. ***** has two older sisters and an older brother who care for her a great deal. Although she was not residing with her father, ***** has a great relationship with her father, J.M., who she sees every day. Mr. M. resides at Address and works for the District of Columbia.

13. Although the court found probable cause, there were many mitigating circumstances: 1) the altercation involved four girls (the complainants) ranging from 170-200 lbs and one respondent (*****); 2) ***** received extensive injuries and was treated at Howard University Hospital; 3) the complainants do not live in *****'s neighborhood but were present in *****'s neighborhood at the time of the altercation; and 4) one of the complainants in the present case is currently pending charges for stabbing *****. ***** was treated at Children's Hospital at that time.

14. Pursuant to DC Code Section 16-2310(a) and Juvenile SCR 106(a), children should only be detained if detention "is required to protect the person or property of others or of the respondent, or to secure the respondent's presence at the next court hearing." Furthermore, pursuant to Juvenile SCR 106(a)(5), even if detention appears to be justified, the person making the detention decision "may nevertheless consider whether the respondent's living arrangements and degree of supervision might justify release pending adjudication."

15. Because counsel has identified alternative living arrangements that will take ***** out of the District of Columbia and away from the conflict; because ***** has no prior contacts with the system; because ***** will be in a highly structured environment; and because the nature and circumstances of the offense alone do not justify detention, ***** should be released to her aunt and uncle.

Wherefore, for the foregoing reasons and any other that may be offered to the Court at the further initial hearing, ***** hereby moves this Court to release her to the custody of Mr. D. and D.M.

Respectfully Submitted,

_____

Attorney, 303030
Counsel for *****
Georgetown Juvenile Justice Clinic
111 F Street, N.W.
Washington, D.C. 20002
(202) 662-9592

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion, was served by hand on Assistant Counsel, Name, in person at 123 Fourth Street, N.W., Fourth Floor, Washington, D.C. 20001 on this 10th day of October, 2002.

_____

Attorney

Sample Motion for Pre-trial Discovery

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT, JUVENILE DIVISION

IN THE INTEREST OF:	)	
	)	
ABC	)	No.
	)	
A Minor.	)	

MINOR-RESPONDENT'S MOTION FOR PRE-TRIAL DISCOVERY

AND FOR BILL OF PARTICULARS

Now comes the Minor-Respondent, _____, by his attorney, _____, and moves this Honorable Court to enter an Order directing the People of the State of Illinois to disclose and produce certain evidence which is essential and material to the preparation of the defense.

The Minor-Respondent requests that such disclosure and production include the following:

1. A Bill of Particulars containing:

a) the exact time and date of the occurrence; and

b) the exact street address and physical description of the location of the occurrence.

2. A list of the names and last known addresses of persons whom the State may call as witnesses, or who are known to the State as occurrence witnesses, together with:

a) any written or recorded statements by these persons including those written or recorded statements of police officers;

b) any memoranda containing substantially verbatim reports of these persons' oral statements; and

c) a list of memoranda reporting or summarizing these persons' oral statements.

3. Any written or recorded statements and the substance of any oral statements or confessions made by the accused, or by a co-respondent, co-indictee, or co-arrestee to include:

a) a list of all witnesses to the making and acknowledgment of such statements; and

b) the date, time and place of the making of such statements.

4. The names and addresses or other identifying information of all persons known by the police or others of the State to have been present at, or witness to, the alleged offense, that the State does not intend to call as witness at trial, *People v. Williams*, 24 Ill. App. 3d 666 (3rd Dist. 1974).

5. Any and all written or recorded statements or reports made by any person to any police officer, to any State's Attorney, investigator or any law enforcement officer, in regard to the alleged offense, to and including those made by witnesses to be called by the Defense, *People v. Sanders*, 38 Ill. App. 3d 473 (1st Dist. 1976).

6. Any and all reports, including but not limited to arrest reports, case reports, and all supplementary case reports, made by any police department or security agency or any member thereof in regard to the alleged offense, in the possession of the State.

7. An itemization and indication with particulars, and an opportunity to inspect, any and all physical property, including but not limited to books, papers, documents, photographs or tangible objects, which is in the State's possession or control pertaining to this case, and/or that the State may use in any hearing or trial of this cause, or which were obtained from or belong to the accused, including but not limited to:

   a) date and time the property was acquired;

   b) location from which property was acquired;

   c) what person or persons first took the property into their possession; and

   d) reports made by law enforcement authorities pertaining to this property, including but not limited to inventory and scientific reports.

8. Any and all photographs related to the investigation or processing of the case, including but not limited to photographs taken of the respondent (*i.e.*, any "mug shots") and/or photographs taken of the scene of the arrest or incident.

9. Any and all medical reports, statements and results of any and all scientific, technical and laboratory tests, experiments, comparisons and physical or mental examinations made by experts or others in connection with this cause, including but not limited to fingerprints and ballistic tests, regardless of whether such items or reports will be introduced into evidence, and the names and addresses of persons who conducted such tests, experiments, comparisons or examinations.

10. Any and all records of prior criminal convictions of persons whom the State may call as witnesses at any hearing or trial in this cause, (S. Ct. Rule 412(a)(vi)), and records of arrests or dispositions other than by conviction, or of promises or negotiations for offers of immunity or other favorable treatment, which may be used for impeachment or to show bias in any State witness, *Giglio v. United States*, 405 U.S. 150 (1972), including juveniles, *Davis v. Alaska*, 415 U.S. 308 (1974). *People v. Galloway*, 50 Ill.2d 158 (1974).

11. A statement as to the State's intention to use prior convictions of the accused for purposes of impeachment, or evidence of arrests, acts or convictions for purposes of showing knowledge, intent, motive or identification, together with copies of documents to be used, and a bill of particulars for each arrest, act or alleged offense to be subjected to proof in this cause.

12. All material information pertaining to the identification of the Minor-Respondent as the perpetrator of the alleged crime, together with:

    a) time, date and place of all identification confrontations;

    b) if photographic identification, production of any photographs used, whether of Minor-Respondent or of other persons;

    c) the names of all persons present at any identification confrontation;

    d) any photographs taken of a line-up;

e) the names of any persons who confronted the accused and made no identification of accused or identified the accused in connection with crimes other than those involved in this cause; and

f) the names of all persons who confronted or identified persons other than the accused in connection with the alleged crime.

13. The complete testimony given before any State or Federal Grand Jury of persons the State may call as witnesses, or of any persons who testified at the request of the State before such Grand Juries about their knowledge of the subject matter of this case.

14. The complete testimony given in any preliminary or pre-trial hearings in this cause by persons the State may call as witnesses or who testified about their knowledge of the subject matter of this cause.

15. The prosecution shall inform defense counsel of an electronic surveillance, including but not limited to any wiretapping of conversations to which the accused was party, or of his premises.

16. If any evidence was acquired as a result of the execution of any search or arrest warrants or other legal process, a copy of such legal process shall be supplied to defense counsel in timely fashion for review of claims of violations of Minor-Respondent's constitutional rights.

17. The prosecution shall inform defense counsel of any information in this cause, and of the identity of any informants who are witnesses to the alleged occurrence, or are to be produced at any hearing or trial of this cause, these persons to be clearly and separately identified on the list of witnesses given. *United States v. Rovario*, 353 U.S. 33 (1957); *People v. Lewis*, 57 Ill.2d 232 (1974).

18. Full and timely evidence, items or information which may be material to the guilt or innocence of the accused, or would tend to mitigate against his punishment or is favorable to the defense at trial, *Brady v. Maryland*, 373 U.S. 83 (1963), must be tendered to defense or, for cause shown, to the Court, *United States v. Agurs*, 427 U.S. 97 (1976). Such includes:

a) names, addresses or other identifying information, of persons known whose testimony may be favorable to the defense;

b) physical property or scientific evidence known by the State that aids the defense; and

c) all items set forth in the preceding paragraphs of this motion.

WHEREFORE, Minor-Respondent requests that the State comply with the aforesaid Motion, and that this Court so Order.

Respectfully submitted,

_____

Counsel for Minor Respondent

Sample Motion to Compel Discovery

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

FAMILY COURT – JUVENILE BRANCH

IN THE MATTER OF	**:**	
	:	**Docket No. J-123-10**
UNKNOWN Z,	**:**	**Social File 08 JSF 1111**
	:	**Honorable Judge Scott**
RESPONDENT	**:**	**Trial Date: March, 2010**

MOTION TO COMPEL DISCLOSURE OF COMPLAINANT'S NAME AND DISMISS PETITION FOR FAILING TO PROVIDE ADEQUATE NOTICE AND POINTS AND AUTHORITIES IN SUPPORT OF

Respondent, Unknown Z, through undersigned counsel, respectfully moves this Court, pursuant to the Sixth Amendment, Superior Court Criminal Rule 16(a)(1)(C) and relevant case law, to compel the government to disclose the name and date of birth of the complainant to the defense or, in the alternative, to dismiss the petition against Unknown Z for failure to provide adequate notice. Counsel requests a hearing in advance of the trial date to address this issue. In support of this motion, counsel states:

1. Unknown Z was arrested on February 24, 2010, and charged with Robbery, Second Degree Theft and Destruction of Property (Misdemeanor). Trial is scheduled for March, 2010.

2. As of today, the government has not provided the defense with any information about the complainant in this case. Counsel has not even been informed of the correct initials of the complainant's name.
3. The complainant in each count of Docket No. J-123-10 is listed as "M.T." No indication of the name, age or sex of the complainant is given in the petition.
4. The PD 251 included in the government's initial discovery packet lists the complainant's initials as "M.S."
5. Because counsel has not been provided with any information about the complainant, Unknown Z has been unable to prepare an adequate defense against the government's charges in the instant case.

POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO COMPEL DISCLOSURE OF COMPLAINANT'S NAME AND DISMISS PETITION FOR FAILING TO PROVIDE ADEQUATE NOTICE

I. THE RESPONDENT'S SIXTH AMENDMENT RIGHT TO BE NOTIFIED OF THE CHARGES AGAINST HIM REQUIRES THE DISCLOSURE OF THE COMPLAINANT'S NAME.

The Sixth Amendment to the U.S. Constitution confers a right "to be informed of the nature and cause" of a criminal accusation. U.S. Const. amend. VI. This requires that a charging document provide notice of the charges, adequate for the preparation of the defense. *See Jones v. United States*, 526 U.S. 227 (1999). The District of Columbia Court of Appeals has acknowledged the Sixth Amendment rights of children charged in a juvenile proceeding, noting that "a charging document must be sufficient to put an accused on notice of the nature of the crime against which he must defend…The same is no less true for a juvenile facing an adjudication of delinquency." *In re D.B.H.*, 549 A.2d 351 (D.C. 1988). In this case, the petition that charges Unknown with taking and destroying the property of another individual refers to that individual only by his initials, thus denying Unknown adequate notice of the charges against him

and the opportunity to confront his accuser. Without this information Unknown Z is unable to adequately prepare a defense.

The name of the complainant in this case is critical to the preparation of an adequate defense for Unknown. In addition to the complainant's name, the petition also lacks critical information such as the complainant's date of birth and sex. Without providing this information, the petition is only a generic narration of the elements of the statute. Such a petition is not sufficient to meet the demands of the Sixth Amendment: the charging document must include "a statement of the facts and circumstances as will inform the accused of the specific offense, coming under general description, with which he is charged." *United States v. Nance*, 533 F.2d 699, 701 (D.C. Cir. 1976).

The Supreme Court has previously held that failing to give a defendant the name of the government's principal witness violates the defendant's right to confront his accusers. *Smith v. Illinois*, 390 U.S. 129 (1968). Though *Smith* deals with an accused's right to know the name of the government's witness prior to cross-examination, rather than at the time of the indictment, the court nonetheless stated that knowledge of the witness' name opens "countless avenues of in-court examination and out-of-court investigation." *Id.* at 131. This "out-of-court investigation" is the heart of the issue in the instant case. Without knowing the name of the complainant, Unknown cannot be expected to conduct an investigation and prepare an adequate defense. This Court must, therefore, compel the disclosure of the complainant's name to the defense in order to protect the rights given to the respondent under the Sixth Amendment.

II. PURSUANT TO UNITED STATES V. HOLMES, FUNDAMENTAL FAIRNESS REQUIRES DISCLOSURE OF THE COMPLAINANT'S NAME.

The fact that the government is not required to turn over witness names in noncapital cases does not mean that it cannot be ordered to do so in an appropriate case in order to maintain the "fundamental fairness" of the judicial system. *United States v. Holmes*, 343 A.2d 272, 277 (D.C. 1975). Where a defendant requests information about a government witness, he must

"make a clear showing of materiality and reasonableness." *Id.* at 278. A court must then balance "the public interest in protecting and encouraging witnesses for the government against the individual's need of the witness or witnesses for the preparation of his defense." *Id.* at 277.

Unknown's need for the complainant's name far outweighs the public interest in encouraging government witnesses to testify. In *Holmes*, the court held that the name and address of a passerby eyewitness was essential to the preparation of the defendant's case. In the instant case, Unknown's request is even more critical, as he is requesting the name of the government's chief witness – the individual who lodged these accusations against him. The complainant's name is material to preparing an adequate defense because without it Unknown is prevented from conducting any meaningful out-of-court investigation or successfully confronting the witness at trial: he cannot rebut the identification evidence presented against him, impeach the witness with any information obtained or seek to uncover possible witness biases. Moreover, it is reasonable to conclude that without intervention from the court, Unknown would be unable to identify and locate the complainant on his own.

Weighing Unknown's need for disclosure against the government's interest in not revealing the complainant's name, it is clear that Unknown's interests must prevail. The government has no legitimate interest in refusing to disclose the complainant's name prior to trial. There has been no evidence presented that suggests there is any sort of physical danger to the complainant or a threat of obstruction of justice. Furthermore, because the complainant's identity will inevitably be revealed at trial, the government lacks a justifiable basis for failing to disclose the name during the pre-trial period. This non-disclosure can only be interpreted as an attempt to thwart defense counsel's case preparation. Because Unknown's request for the complainant's name is both material to the preparation of his defense and reasonable, and the government has no interest in refusing to disclose this information, fundamental fairness requires that this Court compel disclosure of the complainant's name.

III. THIS COURT SHOULD COMPEL DISCLOSURE PURSUANT TO SUPERIOR COURT CRIMINAL RULE 16(a)(1)(C) BECAUSE THE COMPLAINANT'S NAME IS MATERIAL TO THE PREPARATION OF UNKNOWN'S DEFENSE.

Superior Court Criminal Rule 16(a)(1)(C) provides that "upon request of the defendant, the prosecutor shall permit the defendant to inspect documents…which are within the possession, custody or control of the government, and which are material to the preparation of his defense." To qualify for discovery under this rule, an individual need only make a prima facie showing of materiality. *See, e.g., United States v. Johnson*, 577 F.2d 1304, 506 (5th Cir. 1988). Though the District of Columbia Court of Appeals has not defined "materiality" for these purposes, other courts have held that an item is considered material if "there is a strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment and rebuttal." *United States v. Felt*, 491 F.Supp. 179, 186 (D.D.C. 1979) (construing Fed. R. Crim. Proc. 16(a)(1)(C), which is nearly identical to Sup. Ct. Cr. R. 16(a)(1)(C)). Disclosure of the complainant's name is material to the preparation of an adequate defense for Unknown because it could not only play an important role in uncovering admissible evidence, but might also assist in impeachment and rebuttal.

In this case, Unknown is not making a blanket request for unspecified information. Rather, Unknown is requesting a very important and specific piece of information: the name of the individual who has lodged criminal accusations against him. Such information would undoubtedly enable Unknown to significantly "alter the quantum of proof in his favor." *United States v. George*, 786 F.Supp. 11, 13 (D.D.C. 1991) (court held that in order for a defendant to obtain discovery of documents in the hands of the prosecution, the documents need not directly relate to defendant's guilt or innocence). Many states recognize the relevance and importance of such information and thus require government disclosure of all witnesses' names. *See, e.g.,* MD CRIM. R. PROC. 4-263. Indeed, the name of the complainant is material, relevant and essential for adequate preparation of a defense. Without the complainant's name, Unknown is precluded not only from defending against the witness' substantive testimony, but he would not have the opportunity to impeach the complainant at trial either. Because the complainant's name is

material to Unknown's ability to thoroughly and fully prepare his case, it must be disclosed pursuant to Rule 16(a)(1)(C).

IV. THE GOVERNMENT'S FAILURE TO DISCLOSE THE COMPLAINANT'S NAME HAS PREVENTED DEFENSE COUNSEL FROM FULLY INVESTIGATING THE CASE, RESULTING IN A DENIAL OF UNKNOWN'S RIGHT TO EFFECTIVE COUNSEL.

It has long been recognized that the right to counsel guaranteed by the Sixth Amendment is the right to *effective* assistance of counsel. *See Yarborough v. Gentry*, 540 U.S. 1 (2003); *Wages v. United States*, 952 A.2d 952 (D.C. 2008). Unless an accused individual receives the effective assistance of counsel, "a serious risk of injustice infects the trial itself." *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980). While the accused usually bears the burden of proving a violation of his right to counsel, "there are circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *United States v. Cornic*, 466 U.S. 648, 658 (1984). For example, where defense counsel fails to investigate and search for witnesses, there has been a denial of the Sixth Amendment right to counsel. *Id.* at 659. In the instant case, the government's failure to disclose the complainant's name has impeded defense counsel's ability to thoroughly investigate Unknown's case, resulting in a denial of Unknown's Sixth Amendment right to counsel.

Disclosure of the complainant's name will help ensure that defense counsel can meet the obligation to thoroughly investigate and prepare Unknown's case. Courts have repeatedly recognized that adequate preparation of a case requires defense counsel to conduct a complete investigation and to have access to all relevant information. *See, e.g., United States v. Akers*, 374 A.2d 874, 878 (D.C. 1977). Additionally, the District of Columbia Court of Appeals has noted the obligations of defense counsel to interview witnesses who have knowledge of a crime. *Sykes v. United States*, 585 A.2d 1335 (D.C. 1991). Without the complainant's name, defense counsel is effectively prevented from meeting these obligations to thoroughly prepare Unknown's case.

V. DISCLOSURE OF THE COMPLAINANT'S NAME TO THE DEFENSE WILL NOT VIOLATE THE COMPLAINANT'S RIGHT TO PRIVACY BECAUSE ALL JUVENILE RECORDS ARE CONFIDENTIAL.

In the instant case, there is no need to balance the respondent's Sixth Amendment rights against the complainant's privacy interests because the records of this case are not available to the public. District of Columbia law requires that all juvenile case records be kept confidential. D.C. Code §16-2331(b). Therefore, providing the respondent with the complainant's name will not interfere with the complainant's privacy interests. This confidentiality extends to paperwork filed with the court by an arresting officer, as well as all "complaints, petitions and other legal papers filed in the case." D.C. §16-2331(a). These papers can only be made available to specific individuals connected with the proceeding at hand, unless authorized by the court or Attorney General in compliance with the statute. D.C. Code §16-2331(b). Because the law prevents the complainant's name from becoming available to anyone not directly connected with this case, disclosure of the complainant's name to the defense will not violate his right to privacy.

Moreover, there has been no assertion, allegation or even hint of threat to the witness. There has been no evidence presented that the complainant attends school with Unknown or that he lives in the same neighborhood. Because the complainant's name will inevitably be revealed at trial, Unknown is only requesting that the name be released in advance, so that he may adequately defend himself against the instant allegations.

WHEREFORE, for the aforementioned reasons and for any other reasons that may appear to the Court, Unknown Z respectfully requests that the Court grant this Motion to Compel Disclosure of the Complainant's Name or, In the Alternative, to Dismiss the Petition for Failure to Provide Adequate Notice.

Respectfully submitted,

_____

Counsel for Unknown Z

Street Address

City, State

Zip Code

Sample Motion to Suppress

SUPERIOR COURT
Family Division—Juvenile Branch

IN THE MATTER OF	**:**	
	:	**Docket No. 2010 DEL 000285**
JONATHAN LOPEZ	**:**	**Social File No. 09-JSF-12**
	:	**Hon. Judge Jones**
CLIENT	**:**	**Trial Date: October 17, 2010**

NOTE TO RECIPIENTS: What follows is a draft of a memorandum of law in support of a motion to suppress a juvenile statement in a fictitious case. It is a far from perfect draft, but is meant to provide a framework for such a pleading. Of course, before using any of the law contained within this motion, the cases should be Shepardized and the pleading should be edited to incorporate local law.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO SUPPRESS STATEMENT

I. ALL STATEMENTS ALLEGEDLY MADE AT THE SCHOOL AND AT THE POLICE STATION WERE OBTAINED IN VIOLATION OF JONATHAN'S FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION AND MUST BE SUPPRESSED PURSUANT TO *MIRANDA v. ARIZONA*.

The government may not use statements "stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). In order to use a statement that is the product of custodial interrogation, the government must satisfy the burden of proving not only that *Miranda* warnings were given, but also that "the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Id.* at 475.

A. All Statements Allegedly Made by Jonathan in the School Gym Were Obtained in Violation of *Miranda*.

1. Jonathan Was in Custody When Questioned in the School Gym.

Jonathan was in custody when a uniformed School Resource Officer, the school principal, and a teacher stopped him in the gym, demanded that he empty his pockets and then instructed him to remain on the bleachers. *See Miley v. United States*, 477 A.2d 720, 722 (D.C. 1984) (where officers asserted their authority over the defendant, making it clear that he was in custody). For purposes of *Miranda*, "[t]he [Supreme] Court agreed that 'the circumstances of each case must certainly influence' the custody determination, but reemphasized 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.'" *Yarborough v. Alvarado*, 541 U.S. 652, 662 (2004) (quoting *California v. Beheler*, 463 U.S. 1121 (1983) (*per curiam*)). Custody must be determined based on how a reasonable person in the suspect's situation would perceive his circumstances. *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2402 (2011); *Berkemer v. McCarty*, 468 U.S. 420 (1984).

While the custody analysis does not take into account the subjective mental state of the suspect to prevent officers from having to analyze a suspect's idiosyncrasies, age is different. *J.D.B.*, 131 S. Ct. at 2403. It is not an idiosyncrasy, but a fact with common sense implications. *Id.* As the Supreme Court recognized in *J.D.B.*, custodial interrogation is inherently coercive and can induce false confession, especially when the subject is a juvenile. Children like Jonathan are less mature and less responsible than adults; lack experience, perspective and judgment to

recognize and avoid poor choices; and are vulnerable or susceptible to outside pressures. *Id.* As long as age is known or objectively apparent to the officer, it is an appropriate consideration in determining whether a suspect was in custody at the time of interrogation. *Id.* at 2406.

In this case, there was no question that Jonathan was a child. The School Resource Officer and the principal clearly recognized him as a seventh-grade student at East High. In addition, the circumstances of Jonathan's seizure by the uniformed School Resource Officer, who was employed by the Metropolitan Police Department, clearly involved a restraint on freedom of movement associated with a formal arrest, as articulated in *Yarborough*. According to the information provided by the government, the School Resource Officer seized Jonathan in the school gym, conducted a search of his person and directly questioned him about the events concerning the underlying charges in this case. *See Dunaway v. New York,* 442 U.S. 200, 215 (1979). Further, the officer instructed Jonathan to sit on the bleachers while the officer stood directly in front of him. Jonathan did not feel free to leave the school gym prior to or during questioning by the officer and was therefore in custody.

Even where the circumstances of custody do not constitute an arrest under Fourth Amendment analysis, those circumstances may nonetheless indicate "custody" for Fifth Amendment purposes. The D.C. Court of Appeals in *In re I.J.* clearly stated that "although an encounter between the police and a suspect may not necessarily be deemed an arrest—requiring probable cause—within the meaning of the Fourth Amendment, the same encounter may nevertheless be custodial and require *Miranda* warnings when assessed against the different goals of the Fifth Amendment." 906 A.2d 249, 257 (D.C. 2005). Even if Jonathan was not

formally placed under arrest at the school gym, a reasonable person in his position would not have felt free to leave at the time of the first alleged statements.

2. Jonathan Was Questioned During Custodial Interrogation in the Gym Prior to the Administration of *Miranda* Warnings and Did Not Knowingly, Intelligently, and Voluntarily Waive his *Miranda* Rights.

After placing Jonathan in custody, the officer asked him direct questions about the incident underlying Jonathan's arrest, in the presence of the school principal and teacher, prior to advising him of his rights required by *Miranda*. Where the police interrogate an individual who is in their custody, an individual has a constitutional right to be warned, "[p]rior to any questioning . . . that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to an attorney, either retained or appointed." *Miranda*, 384 U.S. at 444. "[T]he 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 (1980) (quoting *Miranda*, 384 U.S at 444). *Miranda* warnings provide the necessary safeguards where the police must expressly advise a person that he or she has the right against self-incrimination. *Miranda*, 384 U.S. at 471. It is the government's burden to prove that the client did in fact waive his rights after he was properly given the warnings. *North Carolina v. Butler*, 441 U.S. 369, 375 (1979). In the absence of these specific warnings, statements elicited during custodial interrogations are presumptively coerced and must be suppressed. *See United States v. Patane*, 542 U.S. 630, 639 (2004); *see also Miley*, 477 A.2d at 724.

In this case, Jonathan could not have knowingly, intelligently, and voluntarily waived his *Miranda* rights before he was interrogated by the School Resource Officer in the gym, because he was never given *Miranda* warnings. The failure to show that the client understood the warnings and that the police obtained a valid waiver would render any statement in response to custodial interrogation inadmissible. *Lewis v. United States*, 483 A.2d 1125, 1128 (D.C. 1984) (finding no valid waiver where officers' *Miranda* warning included no reference to court-appointed counsel). Therefore, all statements allegedly obtained by the officer must be suppressed as a violation of Jonathan's Fifth Amendment right against self-incrimination.

B. All Statements Allegedly Made by Jonathan Inside the School Principal's Office Were Obtained in Violation of *Miranda*.

1. Jonathan Was Still in Custody When Questioned Inside the Principal's Office.

Jonathan was still in custody when he was questioned inside the principal's office. *See Miley*, 477 A.2d at 722. Similar to the circumstances in the school gym, Jonathan reasonably felt that there was a restraint on his freedom of movement that rose to the level associated with a formal arrest when *inside* the principal's office. *Yarborough*, 541 U.S. at 662; *Berkemer*, 468 U.S. 420. Moreover, the uniformed officer physically led Jonathan by his shoulder from the school gym to the principal's office and continued to maintain custody over Jonathan while directing him into the principal's office, shutting the door behind them, and holding him there for questioning. *See Dunaway*, 442 U.S. at 215. The principal's office was small, measuring no more than 13 by 13 feet, and was crowded with a desk, two chairs, the principal, two uniformed officers, Mark and Jonathan's girlfriend. Jonathan was ushered into the office ahead of the

resource officer, did not feel free to leave, and was therefore in custody prior to further interrogation.

2. Jonathan Was Questioned Prior to the Administration of *Miranda* Warnings During Custodial Interrogation Inside the Principal's Office.

Jonathan was again interrogated inside the principal's office prior to being warned of his Fifth Amendment right against self-incrimination. *Miranda*, 384 U.S. at 444. Custodial interrogation has been defined by the Supreme Court 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." *Id.* at 444. However, interrogation does not only apply to police practices that involve *direct* questioning of a defendant while in custody. *See Innis*, 446 U.S. at 298. Interrogation under *Miranda* also refers to "words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 301. This behavior is the functional equivalent of police interrogation within the meaning of *Miranda*. *Id.* at 302.

Here, the officer knew or should have known that the interaction with Jonathan's girlfriend would elicit statements from Jonathan. In Jonathan's presence, the officer asked his girlfriend about the underlying charges in this case, fully aware that her response would likely elicit statements from Jonathan. Thereafter, the officer continued to question Jonathan directly about the allegations after excusing his girlfriend from the office. Under the circumstances, the officer's interaction with Jonathan and with Jonathan's girlfriend constituted interrogation of Jonathan for the purposes of *Miranda*.

3. Statements Allegedly Obtained from Jonathan During Custodial Interrogation Inside the Principal's Office Must Be Suppressed Because He Did Not Knowingly, Intelligently and Voluntarily Waive His *Miranda* Rights.

Jonathan did not knowingly, intelligently and voluntarily waive his *Miranda* rights before he was subject to custodial interrogation inside the principal's office. *Miranda*, 384 U.S. 436. As stated in Section I(A)(2), statements made during custodial interrogation must be suppressed unless the prosecution can demonstrate that *Miranda* warnings were given prior to questioning. *Innis*, 446 U.S. 291. Unless the government can show that the client was given and understood the warning, the Court must presume that there was no valid waiver. *Lewis v. United States*, 483 A.2d at 1128; *Butler*, 441 U.S. at 375.

Here, not only did the officer fail to advise Jonathan of his *Miranda* rights, but the officer also clearly sought to obtain incriminating statements from Jonathan through coercive tactics and inappropriate behavior. While inside the principal's office, the officer pressured Jonathan to speak by telling him that he needed to tell what he knew to avoid less trouble.

All alleged statements made by Jonathan, both in response to the officer's pressure and in response to the girlfriend's statements following the officer's actions, were made as a result of custodial interrogation without a waiver of his rights as required by *Miranda*. As such, any and all unwarned statements given must be suppressed as the product of a Fifth Amendment violation.

C. <u>All Statements Allegedly Made by Jonathan at the Police Station Were Obtained in Violation of *Miranda*.</u>

1. Jonathan Was Subject to Custodial Interrogation While at the Police Station.

Jonathan was in custody when he was taken from school, handcuffed and transported to the police station for questioning. *See Miley*, 477 A.2d at 722; *United States v. Little*, 851 A.2d 1280, 1286-87 (D.C. 2004). There should be no dispute that Jonathan was in custody when he was formally arrested and transported to the Metropolitan Police Department. "'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.'" *Yarborough*, 541 U.S. at 662 (quoting *California v. Beheler*, 463 U.S. 1121).

The Supreme Court held that "*Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." *Innis*, 446 U.S. at 301. Here, the officer directly questioned Jonathan about the school incident after his arrest. Any questions even remotely related to the subject of his arrest are an interrogation for *Miranda* purposes. *In re I.J.*, 906 A.2d 249 (officer's question "what happened" amounted to interrogation while the defendant was in custody under *Miranda*). Because the officer questioned Jonathan after he was already under arrest, this constituted custodial interrogation.

2. Statements Allegedly Obtained from Jonathan During Custodial Interrogation Must Be Suppressed Because He Did Not Knowingly, Intelligently and Voluntarily Waive His *Miranda* Rights.

While Jonathan was clearly advised of his rights at the police station, Jonathan did not knowingly, intelligently and voluntarily waive his *Miranda* rights before he was subject to custodial interrogation. *Miranda*, 384 U.S. 436. The question of whether the waiver is valid depends upon the totality of the circumstances. *Butler*, 441 U.S. at 374-75 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)) (waiver factors include the facts and circumstances of the case

such as the background, experience and conduct of the defendant). "[I]t is [also] appropriate for a court to consider the intellectual capacity and education of the accused." *Di Giovanni v. United States*, 810 A.2d 887, 892 (D.C. 2002) (citing *Sims v. Georgia*, 389 U.S. 404 (1967)). Juveniles, in particular, require a more cautious review of waivers. *In re Gault*, 387 U.S. 1, 45 (1967) (juvenile's confession requires "special caution" because of the increased susceptibility of youth to coercion due to "fantasy, fright or despair"); *In re F.D.P.*, 352 A.2d 378, 381 (D.C. 1976). Factors to consider include the juvenile's age, experience with law enforcement, education, background and intelligence, circumstances surrounding the statement itself, and whether the juvenile has the ability to comprehend his *Miranda* rights. *In re M.A.C.*, 761 A.2d 32 (D.C. 2000) (citing *Fare v. Michael C.*, 442 U.S. 707, 725 (1979)); *see also In re J.F.T.*, 320 A.2d 322, 325 (D.C. 1974); *Hawkins v. United States*, 304 A.2d 279 (D.C. 1973) (prior experience with law enforcement is a factor in understanding and voluntarily waiving *Miranda*).

Under the totality of the circumstances, Jonathan could not have executed a valid waiver of his Fifth Amendment rights before the investigator engaged in custodial interrogation. His young age, combined with his lack of experience with law enforcement, suggests that he did not have adequate prior knowledge of *Miranda* warnings before this case. Jonathan was 15 years old at the time of his arrest. An armed and uniformed officer placed Jonathan in handcuffs after more than an hour of questioning at school, transported him to the police station and then placed him in an interrogation room after denying his numerous requests to speak with his parents. *Cf. Gallegos v. Colorado*, 370 U.S. 49, 53-54 (1962) (the absence of an adult or counsel are critical factors in determining whether a minor's statement is involuntary); *Haley v. Ohio*, 332 U.S. 596, 599 (1948) (refusal to allow 15-year-old's mother access to him and absence of counsel

contributed to the involuntariness of his confession). Once at the police station, the officer insisted on speaking with Jonathan at length. The questioning was extensive. Under these circumstances, Jonathan would not have been able to waive his rights in any meaningful sense. These circumstances were exacerbated by Jonathan's low intellectual functioning. Although the officer claims to have advised Jonathan of his rights, he acknowledges that he never asked if Jonathan could read, and he never asked Jonathan to read the card out loud. Moreover, Jonathan never signed the card and never verbally acknowledged that he understood his rights.

Notwithstanding the Supreme Court's reminder in *Berghuis v. Thompkins* that *Miranda* does not invariably require an express waiver of the right to silence or the right to counsel, 130 S. Ct. 2250 (2010), the prosecution bears a substantial burden in establishing an implied waiver. *Butler*, 441 U.S. at 373; *Tague v. Louisiana*, 444 U.S. 469, 470-71 (1980); *Michael C*, 442 U.S. at 724. "A valid waiver will not be presumed simply...from the fact that a confession was in fact eventually obtained." *Miranda*, 384 U.S. at 475; *Butler*, 441 U.S. at 373. It is difficult in any case and even more difficult in a juvenile case, for the government to show that the client has made a valid waiver without the signature on the *Miranda* waiver card or any other verbal acknowledgement that the client understood his or her rights. *Cf. Butler*, 441 U.S. at 371 (defendant acknowledged receipt of his rights and willingness to talk when he stated "I will talk to you, but I am not signing any form"). Given the totality of the circumstances in the present case, the government cannot meet its burden to show that Jonathan knowingly, intelligently and voluntarily waived his *Miranda* rights prior to custodial interrogation, and all alleged statements made at the police station must be suppressed.

II. STATEMENTS ALLEGEDLY MADE AT THE POLICE STATION WERE OBTAINED IN VIOLATION OF JONATHAN'S FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION AND MUST BE SUPPRESSED PURSUANT TO *MISSOURI v. SEIBERT*.

In *Missouri v. Seibert*, 542 U.S. 600 (2004), the Supreme Court examined the "question first" technique often used by police officers. Under this practice, an officer first elicits a confession from a suspect without first advising the suspect of his *Miranda* warnings. *Id.* at 604. Clearly, such a confession would be inadmissible. After eliciting this preliminary confession, however, the officer follows with "mid-stream" *Miranda* warnings. *Id.* The officer then covers the same type of questioning, hoping that the suspect will speak freely, now that the suspect has already made incriminating admissions. The Court found that the "question first" interrogation technique used in *Seibert* was unconstitutional, because such an interrogation technique "is designed to circumvent *Miranda v. Arizona*." *Id.*at 618 (Kennedy, J. concurring). A statement made after mid-stream warnings is thus inadmissible.

The police violated the rule enunciated in *Seibert* in this case. First, as stated above, a School Resource Officer subjected Jonathan to un-*Mirandized* custodial interrogation during his initial detention in the school gym and again inside the principal's office. Only after Jonathan's alleged confession at the school was he formally arrested and transported to the police station for processing. Once Jonathan arrived at the police station it was then that an officer administered the *Miranda* warnings. Immediately after warnings were given, the officer resumed questioning. The officer indicated to Jonathan that he was going to ask him the "same questions" as the resource officer. As in *Seibert*, this use of a pre-warning statement to elicit post-warning statements is impermissible. 542 U.S. at 604. Therefore, Jonathan's statement to the officer while

at the police station must be suppressed as a violation of his Fifth Amendment right against self-incrimination pursuant to *Miranda* and *Seibert*.

III. ALL STATEMENTS ALLEGEDLY MADE BY JONATHAN WERE INVOLUNTARY AND MUST BE SUPPRESSED AS A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

Statements made to police that are not the "product of free will and rational choice" must be suppressed. *Mincey v. Arizona*, 437 U.S. 385, 398 (1978). Jonathan has a constitutional right to a fair hearing on this matter, at which the government bears the burden of proving the voluntariness of the statements by a preponderance of the evidence. *Lego v. Twomey*, 404 U.S. 477, 489 (1972); *Jackson v. Denno*, 378 U.S. 368, 377 (1964). The test used by courts to determine voluntariness is whether the defendant's free will has been overborne, given the totality of the circumstances. *Arizona v. Fulminante*, 499 U.S. 279, 288 (1991); Beas*ley v. United States*, 512 A.2d 1007, 1016 (D.C. 1986). The issue of free will must be addressed in light of the facts of the specific case. Coercive interrogation techniques as applied to, or independent of, the unique characteristics of the suspect must also be taken into consideration. *Colorado v. Connelly*, 479 U.S. 157, 163 (1985) (citing *Moran v. Burbine*, 475 U.S. 412, 432-434 (1986)).

Statements or admissions involving juveniles require special attention when evaluating voluntariness. *In re Gault*, 387 U.S. at 45. The Supreme Court has recognized that youth and inexperience make juveniles more vulnerable to interrogation techniques and that their confessions must be examined with "special care." *Haley*, 332 U.S. at 599 (refusal to allow 15-year-old's mother access to him and absence of counsel contributed to the involuntariness of his

confession); *see also In re Gault,* 387 U.S. at 45 (juvenile's confession requires "special caution" because of the increased susceptibility of youth to coercion due to "fantasy, fright or despair"); *In re Jerrell C.J.*, 699 N.W.2d 110, 117 (Wis. 2005) (relying on child and adult development research to conclude that being a child renders one "uncommonly susceptible to police pressures"). Juvenile confessions must not be "the product of . . . fright or despair." *In re Gault*, 387 U.S. at 55. The determination of voluntariness for juveniles involves the review of additional evidence such as "(1) the advice of rights provided orally and in writing; (2) the absence of coercive police conduct, promises, or signs of emotional disturbance during the interview; (3) the client's apparent and expressed understanding of his rights, and the absence of evidence to show otherwise; (4) his age; and (5) prior experiences with the legal system, gained from numerous arrests." *In re M.A.C.*, 761 A.2d 32, 39 (D.C. 2000) (citing *In re C.L.W.*, 467 A.2d 706, 709 (D.C.1983)).

Jonathan was interrogated on four separate occasions in this case: (1) after he was stopped in the school gym; (2) inside the principal's office; (3) while at the police station; and (4) while detained at the juvenile detention center. In each instance, Jonathan was away from home and away from his parents when questioned at different times by a uniformed school officer, a uniformed police officer, a detective and a probation officer about the underlying charges. His request to speak with his parents was promptly and repeatedly denied, and he was questioned without their presence. At school, Jonathan was frightened and intimidated by not only the officer, but also the principal and teacher who were initially present during the first interrogation. Jonathan was subjected to intense questioning for an extended time without any food or drink, and no breaks.

The failure to send for a 15-year-old's parents and the failure to see to it that he has the advice of a lawyer or friend during an interrogation contribute to the involuntariness of his statement because of the increased coercive effect from police that the youth may experience. *See Gallegos*, 370 U.S. at 53-54 (the absence of an adult or counsel are critical factors in determining whether a minor's statement is involuntary); *Haley*, 332 U.S. 596.

The officer began questioning 15-year-old Jonathan at the school without ensuring that Jonathan's parents, a lawyer or another adult adviser were present to advise him, and instead convinced Jonathan that he was "trying to help." Further, when Jonathan repeatedly asked the officer to allow him to telephone his father, the officer consistently refused or ignored his request. Despite Jonathan's requests for support, the officer continued to question Jonathan and persuaded him to make a written statement without any advice from his parents, a lawyer or adviser. Finally, when Jonathan refused to answer any more questions before speaking with his father and a lawyer, the officer brought him a telephone and left the room, giving Jonathan the impression that he could seek the support of his parent in private. The officer further exploited Jonathan's youth and vulnerability by listening in on Jonathan's conversation with his father via intercom, and then using the statements he allegedly overheard during the private conversation to detain Jonathan overnight. The officer used Jonathan's youth to coerce him into making statements and kept him from the advice and support of his parents or counsel. Therefore, all statements allegedly obtained by the officer at the school and at the police station must be suppressed as a violation of due process.

Because he had no prior experience with law enforcement or the legal system, Jonathan was confused about the events that had transpired, and he did not understand why he was being

questioned. Additionally, Jonathan's young age, developmental immaturity and low IQ level would render any statements he gave in response to police questioning involuntary. Jonathan suffers from dyslexia and other severe learning disabilities and is currently a special education student. His IQ level borders on mental retardation, indicating that he has serious cognitive limitations and further suggests his inability to execute a valid *Miranda* waiver in any meaningful sense. As a result, the statements must be suppressed for all purposes at trial, including for purposes of impeachment. *See Mincey*, 437 U.S. at 398.

The circumstances of the officer's interrogation of Jonathan both at the school and then at the police station clearly indicate that his statements were involuntary. Jonathan's age and cognitive limitations at the time of each and every one of the statements, combined with the officer's refusal to ensure that he had the advice of a parent, lawyer or another adviser while continuing to question him, rendered Jonathan's statements to the officer involuntary in violation of the Due Process Clause of the Fifth Amendment. These statements must be suppressed as evidence against him at trial.

IV. THE ALLEGED STATEMENTS OVERHEARD BY OFFICERS WHILE JONATHAN WAS ON THE PHONE AT THE POLICE STATION WERE OBTAINED IN VIOLATION OF JONATHAN'S FOURTH AMENDMENT RIGHT TO PRIVACY AND FIFTH AMENDMENT RIGHT TO COUNSEL AND MUST BE SUPPRESSED

Even if the officers terminated their interrogation of Jonathan after he asserted his right to counsel in this case, the officers' conduct in listening to Jonathan's phone call with his father after placing Jonathan in a police surveillance room, providing him with a phone and instructing him to call his parents as he had been asking to do for hours, was tantamount to interrogation in

violation of his rights under *Miranda* and *Innis*, and violated a reasonable expectation of privacy created by the officer when he left Jonathan alone.

1. The Officer's Conduct Constituted a Search and Seizure in Violation of Jonathan's Fourth Amendment Rights.

The facts in this case present an issue of first impression for this Court – the use of electronic surveillance (i.e., an intercom) to eavesdrop on a conversation between a juvenile and his parents that was pre-arranged by the police in a stationhouse interview room. First, Jonathan has a reasonable expectation of privacy in a phone call, especially when the officer has left the room and shut the door before allowing him to make the phone call. *See generally*, *Katz v. United States*, 389 U.S. 347, 353 (1967) ("The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment.") Although police interrogation rooms are traditionally areas where people are watched and monitored in some form or fashion, whether it be by two-way glass, video-taping or audio recording, *see, e.g.*, *Montana v. Meredith*, 226 P.3d 571 (2010), the police officer here created a reasonable expectation of privacy for Jonathan in his conversation with his father. *See, e.g.*, *Cox v. Florida*, 26 So.3d 666 (Fla. Dist. Ct. App. 2010) (officer's misrepresentations that the defendant's conversation with his co-defendant in an interrogation room was private created a reasonable expectation of privacy in the room, and defendant's statements were rendered inadmissible); *Florida v. Calhoun*, 479 So.2d 241 (Fla. Dist. Ct. App. 1985) (suppressing videotaped jailhouse conversation between inmate and brother because statements were made while the defendant had a reasonable expectation of privacy and after

assertion of *Miranda* rights); Here, Jonathan was 15 years old, had never been arrested before this alleged incident and repeatedly requested an opportunity to speak with his father, but was denied. When the officer did finally allow Jonathan to call his father, he brought a phone into the interview room, told Jonathan to take the time he needed and left the room, shutting the door behind him. The officer's conduct led Jonathan to believe that the conversation was private. The officer's intentional use of the intercom to listen to Jonathan's conversation constituted an illegal seizure within the Fourth Amendment. When law enforcement deliberately fosters an expectation of privacy, especially for the purpose of circumventing a defendant's right to counsel, subsequent jailhouse conversations and confessions are inadmissible. *Cf. Cox*, 26 So.3d at 677 (finding violation of 6th Amendment right to counsel).

As discussed in Part VII, neither the anonymous tip on the school hotline, nor the illegally obtained statements made by Jonathan at the school provided the police with the requisite probable cause to seize evidence from him. As such, the statements must be suppressed as a violation of Jonathan's Fourth Amendment right to privacy.

2. The Officer's Conduct Constituted Custodial Interrogation After Jonathan Asserted His Right to Counsel and Thus Violated Jonathan's Fifth Amendment Right to Cease Questioning at Any Time.

Once *Miranda* warnings have been given and the individual states that he wants an attorney, all interrogation must cease until an attorney is present. *Edwards v. Arizona*, 451 U.S 477, 482-84 (1981). As stated in Section I (B)(2), custodial interrogation has been defined by the Supreme Court 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." *Miranda*, 384 U.S. at 444. Interrogation under *Miranda* also refers to not only direct questioning

by officers while the suspect is in custody, but also "words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Innis*, 446 U.S. at 301. This behavior is the functional equivalent of police interrogation within the meaning of *Miranda*. *Id.* at 302. Any statements deliberately elicited by police through such words or actions after a suspect has invoked his or her right to counsel is a violation of his Fifth Amendment right absent any counsel present. *See Minnick v. Mississippi*, 498 U.S. 146 (1990).

Here, after Jonathan invoked his right to counsel, the interrogating officer gave Jonathan a phone to call his parents and created an atmosphere of privacy by leaving the interview room and shutting the door. The officer then listened to the conversation Jonathan had with his father over an intercom. The officer's actions were the functional equivalent of interrogation. Although not every case in which an officer allows a defendant to make a phone call will constitute interrogation, the facts and circumstances of Jonathan's interrogation are quite different from those in which police-facilitated phone calls have been found not to constitute interrogation. Here, Jonathan was never told that he was on speakerphone or intercom, *cf. State v. Herrera*, 672 S.E. 2d 71 (N.C. Ct. App. 2009) (holding that defendant was not interrogated when police placed phone call to defendant's grandmother and defendant made incriminating statements to her when he knew he was on speakerphone), *abrogated on other grounds by State v. Flaugher*, 713 S.E.2d 576 (N.C. Ct. App. 2011), and he was never told or otherwise made aware that a police officer would be able to hear his conversation, *cf. United States v. Smith*, 138 F. App'x 217 (11th Cir. 2005) (holding that an officer's offer allowing the suspect to make a phone call cannot be considered interrogation when officer was present in the room at the time of the statements and

even advised the suspect to wait for his lawyer before making incriminating statements). Moreover, the officer's conduct in the case was clearly designed to elicit a statement from Jonathan. Here, during an interrogation at the police station for quite some time, Jonathan tells some, but clearly not enough, information to satisfy the police. Mid-way through his conversation with the police, Jonathan not only requested to speak with his father, but also asserted his right to counsel. It was at this point that the officer brought a phone into the room and created the false impression that Jonathan would have privacy. The officer – who was well aware of Jonathan's strong desire to speak with his parents – engaged in conduct that was the functional equivalent of custodial interrogation after Jonathan had already invoked his right to counsel. Therefore, all statements made by Jonathan while on the phone with his father must be suppressed in violation of his Fifth Amendment rights.

V. ALL STATEMENTS MADE TO POLICE AT THE JUVENILE DETENTION CENTER TWO WEEKS AFTER HIS ARREST AND AFTER JONATHAN'S REQUEST FOR A LAWYER WERE OBTAINED IN VIOLATION OF HIS FIFTH AMENDMENT RIGHT TO COUNSEL AND MUST BE SUPPRESSED PURSUANT TO *MIRANDA*.

A. All Statements Allegedly Made by Jonathan at the Detention Center Were Obtained in Violation of *Miranda*.

1. Jonathan Was Subject to Custodial Interrogation While at the Juvenile Detention Facility.

Jonathan was clearly subject to custodial interrogation when he was interviewed at the detention facility. *See Miley*, 477 A.2d at 722; *Little*, 851 A.2d at 1286-87. Jonathan's probation officer and a Metropolitan Police Officer questioned Jonathan not only about uncharged allegations but also specifically about the drug offense. Although the officer initiated the discussion under the pretense of discussing uncharged allegations, the officer ultimately asked

Jonathan about the charged drug offense. Such questioning constituted custodial interrogation pursuant to *Miranda* and *Innis*.

2. Statements Allegedly Obtained from Jonathan During Custodial Interrogation at the Detention Facility Must Be Suppressed Because He Did Not Knowingly, Intelligently and Voluntarily Waive His *Miranda* Rights.

Although Jonathan was advised of his rights at the detention center, Jonathan did not knowingly, intelligently and voluntarily waive his *Miranda* rights before he was subject to custodial interrogation. *Miranda*, 384 U.S. 436. As discussed at length in section I(C)(2), the question of whether the waiver is valid depends upon the totality of the circumstances. *Butler*, 441 U.S. at 374-75 (waiver factors include the facts and circumstances of the case such as the background, experience and conduct of the defendant). For many of the same reasons as articulated above, Jonathan did not make a knowing, voluntary or intelligent waiver of his *Miranda* rights at the juvenile detention center two weeks after his arrest. At the detention center, Jonathan was visibly upset and immediately dropped his head on the desk when the officers explained why they wanted to speak with him. Jonathan had been in custody for over two weeks after expressly advising the officer that he wanted a lawyer. Notwithstanding Jonathan's emotional state and refusal to speak for three and half hours, the police officer and the probation officer did not let him return to his cellblock and persisted in their efforts to get him to talk.

Any statement that Jonathan made in direct response to the officer's question about the drug allegation three and half hours after the police arrived must be suppressed because Jonathan did not make a valid waiver of his *Miranda* rights. As noted above, although *Miranda* does not require an express or written waiver of the *Miranda* rights, the government cannot meet its

burden to show that Jonathan – a 15-year-old juvenile – knowingly, intelligently, and voluntarily waived his rights. The circumstances surrounding the interviewed combined with Jonathan's low intellectual capacity, limited experience with law enforcement and separation from his parents all undermine any assertion that Jonathan executed a waiver of his rights. *See Haley*, 332 U.S. at 599; *Di Giovanni*, 810 A.2d at 892; *In re F.D.P.*, 352 A.2d at 381; *In re M.A.C.*, 761 A.2d 32 (2000) (citing *Michael C.*, 442 U.S. 707 at 725); *In re J.F.T.*, 320 A.2d at 325; *Hawkins*, 304 A.2d 279.

B. Jonathan Unambiguously Invoked His Right to Counsel During Custodial Interrogation.

The officer's interrogation of Jonathan at the detention center two weeks after his arrest was obtained in violation of Jonathan's Fifth Amendment right to counsel. All police questioning must cease when a suspect unambiguously invokes his right to counsel. *Davis v. United States*, 512 U.S. 452 (1994). Although the police are not required to clarify a suspect's ambiguous request for an attorney and may continue questioning, *id.* at 459-60; *Burno v. United States*, 953 A.2d 1095, 1099-1100 (D.C. 2008); *Riley v. United States*, 923 A.2d 868, 882 (D.C. 2007), when an individual makes a *clear* invocation of his right to counsel, any statement obtained thereafter must be suppressed as a violation of the *Miranda* doctrine. *In re G.E.*, 879 A.2d 672 (D.C. 2005).

Jonathan unambiguously invoked his right to counsel while at the police station on the day of his arrest when he stated to the officer, "I want to talk to my father and a lawyer." This is a clear and explicit invocation of his right to counsel, requiring that the officer stop all questioning. Notwithstanding this clear assertion of his rights, the officer resumed his interrogation when he visited Jonathan two weeks later with Jonathan's probation officer.

"[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." *Edwards*, 451 U.S. at 484-85. The police, or any government agent, may not question the suspect any further until counsel has been made available to him. *Id.* The *Edwards* decision presumes the involuntariness of any statement made by a suspect during custodial interrogation following the suspect's request for counsel. *Maryland v. Shatzer*, 130 S.Ct. 1213, 1220 (2010) (citing *Arizona v. Roberson*, 486 U.S. 675, 690 (1988)). Any subsequent statements made in response to interrogation, without an attorney present, violates the suspect's Fifth Amendment privilege against self-incrimination. *Minnick*, 498 U.S. at 153 (citing *Oregon v. Bradshaw*, 462 U.S. 1039, 1043 (1983)).

The *Edwards* presumption of involuntariness ends when there is a break in custody. Whether or not there was a break in custody depends on if the suspect regained a "sense of control or normalcy" after he was first taken into custody for the charges of which he is accused. *Shatzer*, 130 S.Ct. at 1221 (citing *Minnick*, 498 U.S. at 148-49). The coercive effects associated with custodial interrogation are dispelled when a suspect is released from pre-trial custody and allowed to return to his normal life for a significant period of time before a second interrogation. *See id.* at 1222-23 (finding 14 days sufficient to dissipate coercive effects of prior custody and holding that police may re-interrogate a suspect after 14-day break, even if suspect invoked his *Miranda* right to counsel during the former custodial interrogation). In *Shatzer*, the Court held that release back into the general prison population for the conviction of an unrelated crime is equivalent to being returned to "normal life" and does not create the coercive, custodial pressures

identified in *Miranda*. *Id.* at 1221. Here, Jonathan was not in custody on an unrelated charge, but was held solely in connection with the alleged drug offense about which he was interrogated. Jonathan was never released from pre-trial custody in this case and was not allowed to return to his normal life or regain any sense of control or normalcy to dispel the coercive nature of custody as defined by *Miranda*. Because the detective directly asked Jonathan questions about the underlying charges in this case while Jonathan was still in custody at the detention facility and had previously invoked his right to counsel, any statements elicited by the detective while interviewing Jonathan at the detention facility must be suppressed in violation of his Fifth Amendment right to counsel under *Miranda*.

VI. THE ALLEGED STATEMENTS MADE BY JONATHAN TO OFFICERS AT THE JUVENILE DETENTION CENTER WERE OBTAINED IN VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL AND MUST BE SUPPRESSED PURSUANT TO *MASSIAH v. UNITED STATES*.

The Sixth Amendment requires that police cease all questioning after a defendant has been indicted. *Massiah v. United States*, 377 U.S. 201, 204 (1964) (citing *Spano v. New York*, 360 U.S. 315(1959)). Confessions deliberately elicited by a government agent after formal indictment must be suppressed as a violation of the defendant's Sixth Amendment right to counsel. *Id.* The Constitution guarantees a defendant the aid of counsel after indictment – anything less would deny the defendant "effective representation by counsel at the only stage when legal aid and advice would help him." *Id.* (quoting *Spano*, 360 U.S. at 326). Therefore, any direct or "secret interrogation" of the defendant after indictment, without the presence of counsel, is a violation of the defendant's fundamental rights. *Id.* at 205.

Jonathan was arraigned and appointed counsel for the drug charges in this case. Jonathan was then ordered to remain at the detention center, pending his trial date. As stated above, a detective and probation officer came to the detention facility to question Jonathan, post-arraignment. The detective told Jonathan that he was there talk to about a separate offense, unrelated to the drug charges in this case. However, the detective quickly changed the interview and directly asked Jonathan questions about the drug charges for which he had already been arraigned. The detective and probation officer deliberately elicited incriminating statements from Jonathan about the underlying charges in this case, without the presence of counsel. While the detective initiated the interview, giving the impression that he was there for a different purpose, it is clear that he violated Jonathan's fundamental right to counsel when he directly questioned Jonathan about the charges in this case. Therefore, any statements made by Jonathan to the detective and probation officer at the detention facility must be suppressed as a violation of Jonathan's Sixth Amendment right to counsel.

VII. THE ALLEGED STATEMENTS MADE BY JONATHAN TO OFFICERS WHILE DETAINED MUST BE SUPPRESSED AS A VIOLATION OF D.C. SUPERIOR COURT RULE (JUVENILE) 105(e).

Pursuant to D.C. Superior Court Rule (Juvenile) 105(e), "[n]o person shall be permitted to interview a client held in the facility without the parent, guardian, custodian or attorney being present" unless the parent or guardian is informed of the purpose of the interview and gives written permission. Rule 105(e)(1). A client in detention may only be interviewed by police when he or she may have "information pertaining to any criminal offense committed in the

facility or in transit to or from the facility and with which the client is not currently charged…" D.C. Superior Court Rule (Juvenile) 105(e)(2).

After Jonathan was questioned by the police officer at the station, he was arraigned and detained pending his trial date. Two weeks after Jonathan was detained, Jonathan's probation officer, along with a detective, interviewed Jonathan in the detention facility. Jonathan was not only questioned about the underlying drug charges in this case, but he was also questioned about an unrelated offense. The probation officer and detective did not receive parental consent to interview Jonathan, nor were Jonathan's parents or attorney present at the facility at the time of questioning. Additionally, the detective and probation officer questioned Jonathan about an offense that did not occur within the detention facility or even in transit to the facility. Therefore, any and all statements elicited by the detective and probation officer at the detention facility must be suppressed as a direct violation of Rule 105(e)(1).

VIII. ALL STATEMENTS MUST BE SUPPRESSED AS FRUIT OF JONATHAN'S ILLEGAL SEIZURE PURSUANT TO THE FOURTH AMENDMENT.

A. Jonathan Was Illegally Arrested and Searched Without an Arrest Warrant.

Warrantless seizures are considered "*per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." *Katz*, 389 U.S. at 357. Absent a warrant, the government bears the burden of establishing that the arrest of a client fell within one of the time-honored exceptions to the warrant requirement. *Id.* In this case, the arresting officer did not have a warrant to seize and search Jonathan at school. Because the government cannot justify the warrantless seizure, all subsequent statements made by Jonathan

during custodial interrogation must be suppressed under the exclusionary rule. *See Wong Sun v. United States*, 371 U.S. 471, 484-86 (1963).

1. Jonathan Was Placed Under Arrest and Searched.

Under the Fourth Amendment, a person is seized when an officer's actions would lead a reasonable person to believe he is not free to leave. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). "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." *Terry v. Ohio*, 392 U.S. 1, 20 n. 16 (1968); *see also In re D.T.B*, 726 A.2d 1233, 1235 (D.C. 1999). A seizure may escalate to an arrest where the "investigatory" detention has all the characteristics of a formal arrest, requiring that there be probable cause to justify the police conduct. *Dunaway*, 442 U.S. at 215-16. In this case, Jonathan was placed in custody when first approached and detained by the resource officer, principal, and teacher in the school gym. According to the information provided by the government, the resource officer seized Jonathan in the school gym, demanded that he empty his pockets and directly questioned him about the events concerning the underlying charges in this case. *See id.* at 215. The resource officer's actions amounted to a formal arrest, where Jonathan was clearly seized, searched and not free to leave. There can be little dispute that the officer conducted a full search when he ordered Jonathan to empty his pockets.

B. The Officer Did Not Have Probable Cause to Arrest and Search Jonathan.

Should the police act without an arrest warrant, it is the government's burden to prove that police conduct was justified and that there was sufficient evidence for probable cause. *See id.*, 442 U.S. 200; *Malcolm v. United States*, 332 A.2d 917, 918 (D.C. 1975). "Probable cause

exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Brinegar v. United States*, 338 U.S. 160 (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

Under the totality of the circumstances, the arresting officers had no probable cause to search Jonathan in this case. The resource officer approached Jonathan after receiving an anonymous tip. The anonymous tip did not provide the officer with reasonable articulable suspicion to search Jonathan or seize his possessions. A student has a legitimate expectation of privacy both in his person and in the personal possessions he carries, and the legality of a search or seizure by school officials will be evaluated based upon reasonableness. *New Jersey v. T.L.O.*, 469 U.S. 336, 340-42 (1985); *see, e.g., In re Gregory M.*, 627 N.E.2d 500, 502 (N.Y. 1993); *Commonwealth v. J.B.*, 719 A.2d 1058 (Pa. 1998). Although *T.L.O.* allows for lower standard of "reasonableness" for searches by school officials, even that lower standard of reasonableness was not met in this case. The vague anonymous tip provided at some unknown time without specific details regarding the suspect could not provide reasonable grounds for search by the school principal. More important, the lower standard for justification of a search only applies to a search by school officials, not by the local police department. In this case, although the principal was present, the uniformed School Resource Officer, who was employed by the local police department, conducted the search and seizure. The police must be held to the higher standard of probable cause, which was not satisfied here.

An anonymous tip alone "seldom demonstrates the informant's basis of knowledge or veracity" and can provide reasonable suspicion only if it is reasonably corroborated. *Florida v.*

J.L., 529 U.S. 266, 270 (2000). Reasonable suspicion must be based on what the officers knew before they conducted the search, and the fact that the allegation subsequently proved to be correct does not provide reasonable suspicion. *Id.* at 271; *see also People v. Sparks*, 734 N.E. 2d 216, 223 (Ill. App. Ct. 2000). The anonymous tip received by the officer was not reliable, and he made no attempt to corroborate it before searching Jonathan. On its face, the tip provides no additional detail that would readily indicate its veracity or the informant's basis of knowledge, and the officer did not personally observe Jonathan engage in any criminal behavior that would warrant further investigation. The officer simply assumed that the content of the tip was true without further investigation. Even if the officer later found Jonathan by the bleachers with a bag of white powder, there was no reasonable basis for suspecting him before the officer's search. Further, the tip spoke only of bags of white powder that appeared to be cocaine, so there was no reliable assertion of illegality in the tip for the officer to go on, as *J.L.* requires, only the officer's personal suspicions of Jonathan. *See id.*at 272. Because the anonymous tip provided no reliable basis for suspecting Jonathan of any illegal activity, Jonathan was arrested based on the officer's suspicions. *Brinegar*, 338 U.S. at 175 (probable cause may not be based on mere suspicion). Without probable cause to believe that Jonathan committed any crime, all statements made by Jonathan, subsequent to his seizure, must be suppressed as fruit of his illegal arrest.

WHEREFORE, for the foregoing reasons, and any others that may appear to the Court at a hearing on this matter, Jonathan respectfully requests that this Motion be granted and that the Court suppress statements obtained in connection with this case.

DOCUMENT A37: MOTION *IN LIMINE*

VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF ALBEMARLE

Case Number: ******-****

COMMONWEALTH OF VIRGINIA

v.

******

MOTION IN LIMINE

Comes now the respondent, ******, by and through his attorney, ******, Assistant Public Defender for the County of Albemarle, and moves this Honorable Court to prohibit the Commonwealth from introducing any evidence relating to or testimony regarding the following: any statements made by the respondent to members of the Albemarle County Police Department following his arrest on October 13, 2003 regarding his contact with ******. The respondent further moves this Court to prohibit the Commonwealth from making reference to such evidence or testimony during voir dire or opening statement or during any stage of these proceedings until the Court rules upon its admissibility. As grounds for this motion, the respondent states the following:

1. The respondent is charged with six counts of aggravated sexual battery in violation of Virginia Code §18.2-67.3(1) and two counts of animate object sexual penetration in violation of Virginia Code §18.2-67.2. The events are alleged to have occurred between August 28, 2000 and August 27, 2001.

2. Detective ***** of the Albemarle County Police Department arrested ***** on October 13, 2003. The respondent was taken to the Albemarle County Police Department where Detective ***** interrogated him.

3. ***** answered Detective *****'s questions freely and voluntarily. ***** acknowledged that he knew ***** and her family. ***** denied any criminal behavior.

4. The Commonwealth seeks to offer as evidence the juvenile's "self-serving" statement as substantive evidence in their case in chief.

5. These statements are hearsay and the declaration does not fall within any of the recognized exceptions to the hearsay rule.

6. There is no recognized hearsay exception for self-serving declarations because such statements are considered inherently unreliable.

7. *****'s statements to Detective ***** is not a statement against his penal interest and therefore does not meet the criteria to be considered as an exception to the hearsay rule under the declaration against interest exception.

DOCUMENT A37

8. *****'s statement does not fall within the hearsay exception of the party admission rule because the statements are not offered as evidence against ***** but rather to corroborate evidence of another commonwealth witness.

9. These statements are not against *****'s interest at the time of trial.

10. The recording of *****'s interrogation shows Detective ***** offering his opinion and thoughts about the case which are irrelevant to the matter now before the court, nor does his opinion and thoughts tend to prove or disprove a material fact. There is no probative value of this testimony or evidence and it is highly prejudicial against the respondent.

WHEREFORE, the respondent, *****, prays this Honorable Court will prohibit the Commonwealth from making any reference to, introducing, or otherwise making use of the above-mentioned evidence or testimony until the Court rules upon its admissibility.

Respectfully Submitted,
*****

_____
Counsel
Organization
Address
Phone