

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA)

v.)

THOMAS A. SHAY)

CRIMINAL NO. 92-10369-Z

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION TO SUPPRESS STATEMENTS

I. STATEMENTS MADE BY SHAY JR. ON OCTOBER 29, 1991, MUST BE
SUPPRESSED.

On October 29, 1991, Thomas A. Shay ("Shay Jr.") made certain statements to Officer William Bridgeforth en route to the homicide unit and made certain statements to officers at the homicide unit. The statements were made when Shay, Jr. was obviously distressed and vulnerable to pressure. As such, they are not voluntarily given statements within the meaning of the law.

A. FACTS.

On the evening of October 29, 1991, Shay Jr. hitchhiked to his father's house after hearing about an explosion. He was not permitted to cross police lines to see his father, about whose safety and well-being he was concerned. He was told to go to the Area E-5 police station. (Exhibit 15) A few days later, during a videotaped "news conference", Shay Jr. described the time he spent at the Area E-5 station as a "90 minute grill." (See video tape)

Officer William Bridgeforth was assigned by Sergeant Paul Joyce to transport Shay Jr. from Area E-5 to the Boston Homicide

Unit so that Shay, Jr. could be "interrogated."¹ Officer Bridgeforth testified that sometime between midnight and 1:00 A.M., he drove Shay Jr. to the homicide unit, where he "handed him over to homicide." Officer Bridgeforth was instructed to wait until the interview was concluded, and took Shay Jr. home sometime before dawn.

Officer Bridgeforth described Shay Jr. as "acting in a confused state of mind," (Exhibit 15) appearing to be "under the influence of liquor or drugs," "nervous," and "slow." Indeed, he reported that while he was waiting at the homicide unit to take Shay Jr. home, one of the officers who had been in the room with Shay Jr. came out and asked Officer Bridgeforth, "Is it me or . . . this guy seems like he's kind of retarded or does he seem like he's on something?" Officer Bridgeforth "agreed with him. I said, yeah, I thought that too."

Detectives Thomas and O'Malley questioned Shay Jr. at the Homicide Unit beginning at 2:30 A.M. (Exhibit 16) Detective Thomas testified that Shay Jr. appeared agitated, upset, concerned about his father's well-being, and stated that he wanted to speak to his father. Detective Thomas agreed that "we were the conduit to his father."² The detectives expressly

¹ We do not yet have Officer Bridgeforth's transcribed testimony. We are here quoting from Grand Jury testimony which Officer Bridgeforth adopted in his examination and from our notes of his testimony.

² We do not yet have Detective Thomas's transcribed testimony. We quote from our notes.

questioned Shay Jr. about a number of leads they were pursuing.³ Shay Jr. was not told he was free to leave or advised of his Miranda rights. Shay Jr. thought he had been "tricked" into going to Area E-5 and then to the homicide unit by a representation that the police would arrange for him to see his father. (See video tape of October 31, 1991)

B. THE OCTOBER 29 STATEMENTS WERE INVOLUNTARY.

On the night of October 28/29, the officers who questioned Shay Jr. knew that he was vulnerable to pressure to talk to them. They had observed his limited mental capacity and instability; they led him to believe that they were the means to seeing his father. Shay Jr. was first questioned by officers at Area E-5, then by two homicide detectives at 2:30 A.M., in the absence of an attorney and without Miranda warnings. His statements were involuntary.

An involuntary statement is inadmissible whether given in custody or not. The government has the burden of proving by a preponderance of the evidence that the confession was voluntary, and if given in custody, that Miranda warnings were knowingly, intelligently and voluntarily waived. Colorado v. Connelly, 479 U.S. 157, 168-69 (1986).

³ Shay Jr. was questioned about his father's lawsuit against the owners of the Dedham Service Center arising from an explosion that allegedly injured Shay Sr. The Government apparently seeks to use these statements to suggest Shay Jr. had a motive to kill his father, namely to collect the money his father would have gotten from this litigation.

The "suspect's state of mind is central to the voluntariness finding." United States v. Barone, 968 F.2d 1378, 1384 (1st Cir. 1992). Statements and waivers obtained through police exploitation of a known mental defect or condition must be excluded as involuntary. Colorado v. Connelly, 479 U.S. at 164-65; Moran v. Burbine 475 U.S. 412, 421-22 (1986). Moreover, whether a defendant evidences susceptibility to psychological pressure is relevant to the question of voluntariness. United States v. Jackson, 918 F.2d 236, 242 (1st Cir. 1990). See also Smith v. Kemp, 664 F.Supp. 500, 505 (M.D.Ga. 1987), aff'd, Smith v. Zant, 887 F.2d 1407 (11th Cir. 1989) (confession was involuntary given "length and circumstances of petitioner's detention, coupled with his heightened susceptibility to suggestion"). As one court noted, "The defendant's capacity for rational choice is an important factor in determining whether the conditions of questioning prevented the defendant from making a rational choice." Smith v. Duckworth, 910 F.2d 1492, 1497 (7th Cir. 1990); see also United States v. Jorgensen, 871 F.2d 725, 729 (8th Cir. 1989) (voluntariness depends on capacity of suspect to resist pressure to confess); Miller v. Fenton, 474 U.S. 104, 116 (1985) (admissibility turns on the techniques for extracting statements, as applied to the particular suspect).⁴

⁴ Procurement of statements through deception or trickery (here, the false promise that he could see his father only after he spoke to the police) alone renders such statements involuntary. See, e.g., United States v. Tweel, 550 F.2d 297 (5th Cir. 1977) (statements involuntary where government materially misled defendants as to nature of investigation); United States v. Prudden, 424 F.2d 1021, 1033 (5th Cir. 1970), cert. denied,

II. STATEMENTS MADE BY SHAY JR. ON OCTOBER 31, 1991, MUST BE SUPPRESSED.

Two statements were made by Thomas Shay Jr. on October 31, one at the police station before Miranda warnings were given, when the police claimed he was not formally under arrest, and the second, after he was finally arrested on unrelated, minor default warrants.

First, the arrest was pretextual from the start, and the statements gleaned from it, inadmissible. (Section II.B) The police were prepared to use Milton default warrants, which they typically did not execute and cared little about, in order to get access to Shay Jr. to question him about the bombing case. They had no probable cause to arrest Shay Jr. on the Roslindale bombing, so they used the Milton default warrant as a pretext to get access to him. The case law, described below, suggests that an officer cannot use a minor traffic stop as a pretext to search a car, or a man, to gain evidence of a crime. Similarly, an officer cannot use a minor default warrant solely as a pretext to gain access to a man's statements. The case law that decries using one offense as a pretext to get access to a defendant's

400 U.S. 831 (1970) (silence equated with fraud where investigators remained silent as to nature of investigation). Lack of Miranda warnings is a factor bearing on the voluntariness of even a non-custodial confession. Davis, 384 U.S. at 740-41 (1966). Shay Jr. was questioned for a lengthy period of time in the absence of friends, relatives, or an attorney, and was not specifically informed that he had no obligation to answer questions or that he was free to leave. Davis v. North Carolina, 384 U.S. 737, 742-47 (1966); Mayfield v. Maloney, 749 F.Supp. 1151, 1153 (D.Mass.), aff'd, 923 F.2d 839 (1st Cir. 1990).

body, or his home or his car, likewise decries using a minor offense as a pretext to get access to the defendant's mind.

Second, Shay Jr. was effectively in custody (Section IIC) from the outset. The officers had the warrant in their pocket, ready to spring it at a moment's notice. They knew of its existence; he knew of its existence. The Boston Police consulted an expert about how to conduct a non-custodial, non-coercive interview. The Boston police officers ignored his suggestions. The police surrounded him in an obvious manner, waiting to pounce when the press conference was concluded. Their behavior was so blatantly coercive that there was a chorus of reporters shouting: "Is he under arrest? Is he under arrest?"

Third, apart from whether the statement given without the formality of an arrest was custodial or non-custodial (for purpose of triggering an obligation to give Miranda warnings), the statements given on the evening of October 31 were clearly involuntary. (Section IID) By October 31 the police had every reason to believe Shay Jr. was unstable and they exploited it. They had access to his mental records. They could see his behavior throughout a rambling, incomprehensible two hour press conference. The setting which was inherently coercive, the deployment of police, and the information concerning his default warrants, all made even more threatening and intimidating by the defendant's disturbed state of mind.

Finally, Shay Jr. cut off questioning when he asked if he could leave. (Section IIE) The officers ignored it and continued

to interrogate. The information gleaned after Shay Jr. cut off questioning must be suppressed.

A. FACTS.

By October 31, 1991, the investigation of the Roslindale bombing had focused on Shay Jr. as a suspect. (Testimony of Detective Thomas ("T. Thomas")) The day before, Detectives Thomas and Fogerty had run a "BOP" criminal record check on him, which revealed certain default warrants pending against Shay Jr. in Milton. (T. Thomas; T.p. 4-66)⁵ Detective Thomas testified that before October 31, the detectives had confirmed that they could put their hands on the warrants when needed. (T. Thomas)

Before the first contact with Shay Jr. on October 31, 1991, Boston homicide detectives and ATF agents were aware of Shay Jr.'s history of psychiatric problems, dating from early childhood, which included institutionalization at MacLean's and other institutions. As the evening progressed, the detectives learned other information about Shay Jr.'s mental capacity, including that he had been raped as a child and that he had lived for periods as a street person. (T. Thomas; T.p. 4-67, 68, 73, 74, 84) They knew that Shay Jr. wanted to see or talk to his father and that he viewed them as having control over that access.

On October 30, 1991, Gus Gary, an ATF Behavioral Science Arson Profiler, was given information about Shay Jr. and, based on that information, advised the Boston homicide detectives,

⁵ Transcript, hereinafter T., page, hereinafter p.

through ATF agent Boeh, on strategies for the interview of Shay Jr. planned for the following day. (T.p. 4-6, 61) Mr. Gary gave advice about how to elicit information in an interview that would be non-custodial from Shay Jr.'s point of view. (T.p. 4-21,22) It is significant that - point by point - Mr. Gary's advice on how to conduct a non-custodial, non-coercive interview was not followed by the officers involved. Moreover, he was not told about the planned use of the default warrants to arrest Shay Jr. if he refused to come or tried to leave or about how Shay Jr. would get to the room in which he would be questioned. (T.p. 4-24, 26)

Detectives Thomas and Fogerty testified that at 1:00 P.M. on October 31, 1991, they received an anonymous tip that Shay Jr. would be arriving at the bus station at 8:00 P.M. that evening. (T. Thomas; T.p. 4-37, 66) A plan for interrogating Shay Jr. was devised by Captain McNelly, and Detectives Thomas, Fogerty and O'Malley, in collaboration with the ATF. (T. Thomas; T.p. 4-38, 98) If Shay Jr. would not go with officers from the bus station to the homicide unit "voluntarily," or if he attempted to assert his right to leave or cut off questioning he would be arrested on the spot on the default warrants. (T. Thomas; p. 4-39, 72, 77) But for the Milton warrants, the detectives had no right to arrest Shay Jr. on charges connected to the bombing. (T.p. 4-86)

Detectives Thomas and Fogerty testified that according to the plan, before Shay Jr.'s arrival, five police detectives and/or officers parked in three locations around the bus station,

including right in front. (T. Thomas; T.p. 4-40, 69) Officers Murray, Harris and McCarthy were stationed inside the bus station. Detectives Thomas and Fogerty testified that the officers inside and out communicated by way of two-way radios. (T. Thomas; T.p. 4-70) "All" the ATF agents were waiting back at the homicide unit. (T. Thomas)

Shay Jr. arrived sometime after 8:00 P.M. Officers Murray, Harris and McCarthy waited inside while Shay Jr. gave a lengthy press conference to about twenty reporters, during which he demonstrated considerable confusion and limited mental capacity. (see video tape) Officer McCarthy filmed the press conference and ensuing events. (T.p. 4-70) Although, as Shay Jr. testified, he expected reporters, but not police officers, to be at the station, (T.p. 5-124), when he arrived, he noticed unmarked police cars parked in front and noticed men inside who, although not in uniform, looked like (and in fact were) police officers. He began then to worry about being arrested on the warrants he knew were pending against him. (T.p. 5-112-114) Shay Jr. abruptly ended the press conference when reporters began questioning him about his criminal history, stating that he did not want to discuss that part of his life.⁶ (See video tape)

Officers Murray and Harris, whose instructions were to alert the officers waiting outside so that they could arrest Shay Jr. on the default warrants if he would not go with them

⁶ He plainly felt vulnerable because of his record and he was.

"voluntarily" (T.p. 4-99), then approached Shay Jr. Shay Jr. immediately asked, "What is this about? Are you arresting me?" Detective Harris, without answering the question, said, "You just gave them about a half hour, can't you give us ten minutes?" Shay Jr. was not told what it was about, but was told that he could speak to them in the car parked just outside. (T.p. 4-102, 104-05, 116, 120)⁷ Feeling that he had no choice, he agreed to the limited request to meet with the detectives for ten minutes in their car which was parked just outside. (T.p. 5-114)

As they walked to the car, members of the press asked the officers at least twice, in Shay Jr.'s hearing, if he was under arrest. (See video tape) No answer was given. (T.p. 4-116) What was otherwise said by the officers is inaudible, but Shay Jr.'s reluctance and apprehension is clear. As Shay Jr. was about to get into the car, the detectives changed the plan, now telling him that they were taking him to the homicide unit to get away from the press and the noise. (T.p. 4-121)

Once at the homicide unit, Shay Jr. was taken into a room with four and sometimes five officers, Boston Homicide Detectives Thomas, O'Malley and Fogarty, Captain McNelly and ATF agent Bowen, and was questioned for close to two hours. (T. Thomas; T.p. 4-61; Exhibit 22)

⁷ To be sure, Shay, Jr. knew about the pending charges even on October 29, as he testified. (T.p. 5-114) By October 31, however, given the number of officers, the media which reflected the police focus on Shay, Jr., and the circumstances described above, this fact had special significance. The setting was sufficiently ominous so that even the reporters shouted, "Is he being arrested?" at the conclusion of the press conference.

Beginning at 10:00 P.M., Shay Jr. was questioned for almost an hour regarding matters that might tie him to the bombing before he was arrested and read his rights. (Exhibit 22)

Detective Fogerty testified that Shay Jr. was not told at the outset that he was free to leave. (T.p. 4-61)⁸ Shay Jr. testified that he knew that he would be arrested. (T.p. 5-122, 123) The detectives knew that Shay Jr. wanted to see his father, so they deceived him into believing that his father was coming over. (T.p. 4-74)

At 10:40 P.M., Shay Jr. asked if he could leave. Shay Jr. testified that when he asked if he could leave, the detectives asked for a little more time and said they had more questions. (T.p. 5-123) At some point, they indicated that Shay Jr. could leave but continued to ask questions about matters pertaining to the bombing, for example, about how he had learned about explosives and remotes. Shay Jr. asked again if he could leave, was told he could, and walked out of the room. (Exhibit 22; T.p. 4-76-78) He did not believe he would get out the door without being arrested, (T.p. 5-127), and "stepped up the pace" in an attempt to leave the building. (T.p. 5-122)

According to the plan, which was in fact not to allow Shay Jr. to leave, Detective Thomas, at 10:48 P.M., "grabbed him at the door" and said, "'We can't let you go. I have a warrant on you out of Milton. You're under arrest.'" (T. Thomas) Once

⁸ Mr. Gary testified that whether an interview is custodial or not pivots on whether the subject is told he is free to leave or actually does leave. (T.p. 4-29)

back in the conference room, Shay Jr. was read his rights for the first time. (T.p. 4-82) Detective Thomas testified that the case he wanted to question Shay Jr. about was the bombing, and not the crimes for which the default warrants had issued. (T. Thomas) Shay Jr. was questioned about matters which might connect him with the bombing, including whether he had previously made a false bomb threat. (Exhibits 22, 23; T.p. 4-87)

B. SHAY JR.'S POST-ARREST STATEMENTS WERE THE FRUIT OF A PRETEXTUAL ARREST.

Although Shay Jr. was arrested pursuant to an apparently valid warrant, the detectives testified that the only purpose for the arrest had nothing to do with the default warrants. It was to question Shay Jr. about a crime for which the police had no probable cause to arrest, namely the bombing. The Boston Homicide detectives would not have arrested Shay Jr. on the default warrants, but for their desire to obtain statements regarding the bombing. Detective Fogerty testified that Boston Homicide has no practice of executing default warrants issuing from Milton. (T.p. 4-66) The arrest was therefore objectively unreasonable under the Fourth Amendment. Its fruits must be suppressed, whether there had been a search incident to an arrest, a car search or, as here, statements.

"A pretextual [arrest] occurs when the police use a legal justification to make the [arrest] in order to . . . interrogate a person for an unrelated serious crime for which they do not have the [probable cause] necessary to support a[n] [arrest]." United States v. Guzman, 864 F.2d 1512, 1515 (10th Cir. 1988).

The proper inquiry as to whether the arrest was objectively reasonable is "not whether the officer could validly have made the [arrest], but whether under the same circumstances a reasonable officer would have made the [arrest] in the absence of invalid purpose." United States v. Smith, 799 F.2d 704, 709 (11th Cir. 1988).

The stop was unreasonable not because the officer secretly hoped to find evidence of a greater offense, but because it was clear that an officer would have been uninterested in pursuing the lesser offense absent that hope. . . [W]hat turns this case is the overwhelming objective evidence that [the officer] had no interest in investigating possible drunk driving charges: he began the pursuit before he observed any "weaving" and, even after he stopped the car, he made no investigation of the possibility of intoxication.

Id. at 710. Under these circumstances, the court concluded that "a reasonable officer would not have stopped the car absent an additional, invalid purpose." Id. at 711. See also United States v. Smith, 802 F.2d 1119, 1124 (9th Cir. 1986) (whether an arrest is a mere pretext "turns on the motivation or primary purpose of the arresting officers . . . to search for evidence of some other unrelated offense for which police lack probable cause to arrest"); United States v. Miller, 821 F.2d 546, 549 (11th Cir. 1987) (a reasonable officer would not have stopped the defendant without some other motive than the traffic violation where trooper testified the stop would have been made whether there was a traffic violation or not); U.S. v. Crotinger, 928 F.2d 203, 206 (6th Cir. 1991) (relying on Smith); United States v. Skillern, 947 F.2d 1268, 1275 (5th Cir. 1991) (inventory search requires probable cause if it is not consistent with reasonable,

standardized police procedures and is a pretext to disguise an impermissible search for evidence), cert. denied, 112 S.Ct. 1509 (1992).

Like the Fifth, Sixth, Ninth, Tenth and Eleventh Circuits, the First Circuit incorporates into its assessment of whether an arrest was objectively unreasonable on one hand, or pretextual on the other, the usual police practice and whether the officer would have made the arrest absent improper motive. See United States v. McCambridge, 551 F.2d 865, 868, 870 (1st Cir. 1977) (there was "no evidence that the stop was pretextual" since the officer had just arrested another person for following too closely when he arrested the defendant for the same thing, the officer testified that occasionally he arrested people (rather than just citing them) for following too closely, and the officer was not aware of the outstanding warrant at the time of the stop). In United States v. Miller, 589 F.2d 1117 (1st Cir. 1978), cert. denied, 440 U.S. 958 (1979), the court distinguished the facts at bar from the situation where officers having "mere suspicions carefully lie in wait" until a minor traffic infraction gives them a "pretext to confirm their suspicions." Id. at 1128. See also United States v. Beltran, 917 F.2d 641, 643 (1st Cir. 1990) (police may not use an arrest warrant as a pretext for a search for which they lack probable cause).

Miranda warnings alone cannot purge the taint. See, e.g., Brown v. Illinois, 422 U.S. 590, 602 (1975). Factors in addition to Miranda warnings to be considered in each case are the

"temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct." Id. at 603-04.

The illegality, moreover, had a quality of purposefulness. The impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknowledged . . . that the purpose of their action was 'for investigation,' or for 'questioning.'

Id. at 605.

Shay Jr.'s statements following arrest on October 31, 1991, must therefore be suppressed. The only purpose for his arrest was the improper one of obtaining statements about a crime for which there was no probable cause to arrest. The detectives have conceded that the arrest was pretextual; it would not have been made if not for their mere suspicions about Shay Jr.'s connection to the bombing. They had no practice of executing default warrants from Milton. Shay Jr.'s statements immediately followed the invalid arrest and there were no intervening circumstances to purge the taint.

C. SHAY JR.'S PRE-ARREST STATEMENTS ON OCTOBER 31 WERE GIVEN IN CUSTODY WITHOUT MIRANDA WARNINGS.

Mr. Gary's advice on how to maximize information was followed,⁹ but significantly, his advice on how to keep the

⁹ He advised that "props" such as file folders and pictures of bomb components should be displayed in order to convince Shay Jr. that the detectives already had evidence against him. (T.p. 4-15, 16) Switches and remote control devices were bought for that purpose. (T.p. 4-81, 82) Shay Jr. was shown one of the remotes and proceeded to draw a diagram of a remote control car and explain how it worked. (Exhibit 22; T.p. 4-55, 56) Mr. Gary advised that certain questions should be asked which were designed to elicit incriminating statements. (T.p. 4-

interrogation non-custodial was not.¹⁰ An accused in custody has an absolute right to remain silent and to have an attorney present during questioning. Unless he is advised of those rights, his statements must be excluded. United States v. Porter, 764 F.2d 1, 6 (1st Cir. 1985), cert. denied, 481 U.S. 1048 (1987). The Supreme Court first defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or deprived of his freedom of action in any significant way." Miranda, 384 U.S. at 444. "Among the factors to be considered are whether the suspect was questioned in familiar or at least neutral surroundings, the number of law enforcement officers present at the scene, the degree of physical restraint placed upon the suspect, and the duration and character of the interrogation." United States v. Striefel, 781 F.2d 953, 961 n.13 (1st Cir.

24-26) As recommended, Shay Jr. was asked if he was the kind of person who would make a bomb to hurt someone or to get the attention of someone. (T.p. 4-59) Although Detective Fogerty "did not recall" asking Shay Jr. how he might do on a polygraph, this was one of the questions recommended by Gary and Shay Jr. stated he would take one. (T.p. 4-24, 65)

¹⁰ Contrary to Gary's advice that there should be only two interviewers and that no interviewer should sit across a barrier such as a table from the subject, (T.p. 4-14), there were either four (according to Fogerty), (T.p. 4-61), or five (according to Thomas) interviewers at a table that seats six. Shay, Jr. was seated with Detective Fogerty across from him and Detective O'Malley on one side and Detective Thomas on the other. (T.p. 4-61, 62; Exhibit 24) Shay, Jr. was not told he did not have to answer questions. He was not warned about the nature of the interrogation. He was not warned of his rights to remain silent or to have an attorney present or that his statements would be used against him. (T.p. 4-82)

1986). The relevant inquiry is "how a reasonable man in the suspect's position would have understood the situation." Berkemer v. McCarthy, 468 U.S. 420, 442 (1984). The inquiry is to be undertaken from Shay Jr.'s point of view, considering the totality of the circumstances.

From Shay Jr.'s point of view, he was in custody on October 31. He testified that he did not feel he had a choice about going with the police and did not feel free to leave the homicide unit. (T.p. 5-112) His belief was reasonable. The police concede that they and not Shay Jr. initiated contact. Apprehensive about the warrants, he asked many times whether he was under arrest, an inquiry echoed by the reporters on the scene. After agreeing only to a ten-minute conversation in the police car, Shay Jr. was brought to the Homicide Unit. The pre-arrest portion of the interview began at 10:00 at night and lasted for close to an hour. (T.p. 4-82) It took place in a police-dominated atmosphere--in a conference room at the Boston Police Homicide Unit, while Shay Jr. was alone and questioned by five detectives and agents. Detective Fogerty testified that he had his jacket off, with his revolver visible as he sat across from Shay Jr., and that he thought Detective Thomas' weapon was visible. (T.p. 4-89, 90) Shay Jr. was questioned for at least 50 minutes before he was arrested and read his rights, after being effectively in the custody of police since he left the bus station.

Shay Jr. "knew" that he would be arrested and that he was not free to leave. He was fearful of arrest on the warrants as soon as he realized the police had come to meet him at the bus station.¹¹ That he asked if he could leave two or three times reveals his subjective belief that he was not free to do so. (T.p. 4-50) After being told finally that he could leave, the detectives persuaded him to stay and continued to question him, confirming his belief. (T.p. 4-77, 78) He asked again if he could leave, and although he was told he could, he was not in fact permitted to do so. (Exhibit 22)

Furthermore, his perception was reasonable. Mr. Gary's advice on how to conduct a non-custodial interview was not followed. While he advised that Shay Jr. should be told at the outset that he could leave anytime he might choose and that he must know he was free to leave, (T.p. 4-22, 23), Detective Fogerty testified that Shay Jr. was not told this. (T.p. 4-61); See also footnote 10.

Questioning under circumstances similar to or far less coercive than these have been held to amount to custodial

¹¹ That Shay Jr. was not worried about the warrants and did feel free to leave on October 29, in contrast to October 31, is entirely reasonable. On the night of the bombing, his only concern was his father. (T.p. 5-115) He walked to the Roslindale police station. Only two detectives questioned him at the homicide unit. On October 31, the police came to meet him, persuaded him not so subtly or honestly to go with them, and there were between four and five interviewers at the homicide unit (against Gus Gary's advice for a non-custodial session). Shay Jr. testified that the difference in the number of interviewers was one of the reasons he perceived the two situations differently. (T.p. 5-124)

interrogation. See United States v. Carter, 884 F.2d 368, 371-72 (8th Cir. 1989) (questioned at workplace for an hour, "isolated from others who might lend moral support," not told he was free to leave or did not have to answer questions); United States v. Olsen, 609 F.Supp. 1154, 1157 (D.Me. 1985) (questioning was in custody where postal employee taken to private office behind closed door on federal premises with two officers, detained beyond normal working hours, and was told they had a case against him); Quartararo v. Mantello, 715 F.Supp. at 457-58 (defendant was in custody where police pulled him over, asked him to come to the station, told him they expected cooperation, took him in a police cruiser to the station, and did not tell him he was free to leave).¹²

Whether a defendant was actually permitted to leave has been held to indicate the reasonableness or unreasonableness of a defendant's subjective belief that he was in custody. In Mayfield v. Maloney, 749 F.Supp. 1151 (D.Mass. 1990), aff'd, 923 F.2d 839 (1st Cir. 1990), the questioning was held not to have been custodial where the defendant came on his own to the station, was told at the outset he was free to leave, and was in

¹² In Oregon v. Mathiason, 429 U.S. 711 (1977), the Supreme Court held that pre-arrest questioning at a police station was not custodial on the facts before it. Factors which the Court found relevant to its holding, which were clearly not present in the instant interrogation, were that the defendant had called the officer to arrange the interview, was given a choice about where to meet, was affirmatively told he was not under arrest, the interview lasted a total of thirty minutes, and he actually was permitted to leave after he confessed. Id. at 714.

fact free to leave. Id. at 1155; see also United States v. Gordon, 638 F.Supp. 1120, 1134 (W.D.La. 1986) (interrogation in the morning rendered custodial by the defendant's arrest that afternoon where she was in fact prevented from leaving by FBI agents who arrested her), aff'd, 812 F.2d 965 (1987); United States v. Griffin, 922 F.2d 1343, 1349-56 (8th Cir.

1990) (questioning was in custody where the defendant was the focus of the investigation, the police initiated contact, he was not told the questioning was voluntary, that he was free to leave, or that he was not considered to be under arrest, and the atmosphere was police dominated; that he was placed under arrest at the end of questioning confirmed the reasonableness of his belief he was in custody). In this case, Shay Jr. was aware from the outset that the warrants would be used to prevent him from leaving, which is in fact what happened.¹³

D. ALL STATEMENTS AND THE WAIVER OF RIGHTS ON OCTOBER 31 WERE INVOLUNTARY.

Shay Jr.'s statements and his waiver of rights after arrest on October 31 were involuntary. See Part I.B., supra. In addition to what Officer Bridgeforth and another officer or

¹³ Where a statement is taken in custody without Miranda warnings, a second confession after warnings may be suppressible whether or not the first confession was voluntary if the police "exploit the unwarned admission to pressure [the suspect] into waiving his right to remain silent [as to the second statement]." Oregon v. Elstad, 470 U.S. 298, 316 (1985). Exploitation of the unwarned confession exists here, where there was no passage of time between the unwarned and warned portions of the October 31 statement and the officers knew the defendant was a target when they began questioning. U.S. v. Carter, 884 F.2d 368, 373 (8th Cir. 1989).

detective observed about Shay Jr.'s mental state on October 29, Detectives Thomas and Fogarty testified that by October 30, Boston Homicide and the ATF had learned about his history of psychiatric problems. The ATF and Boston Homicide collaborated to devise a way of obtaining statements from him. Shay Jr. was then questioned by armed police officers, in the absence of an attorney or anyone to lend him advice or support for a total of well over two hours. (T. Thomas T.p. 4-82, 83, 118) He was not given his rights under Miranda or told the true purpose of the questioning until he was arrested after an hour of questioning.

On October 31, the police were well aware that what Shay Jr. wanted most was to see his father, and that he viewed the police as being in control of whether he could see his father. (video tape; T.p. 4-76) During the pre-arrest portion of the interrogation, Shay Jr. was told his father was coming over, which Detective Fogarty testified was a lie, (T.p. 4.74), apparently designed to keep him there longer "voluntarily." During the post-arrest portion, Detective Murray told Shay Jr. that his father had called and said that he still loved him, which was also a lie, (T.p. 4-112-13), designed to elicit statements by exploiting his particular vulnerability.¹⁴

¹⁴ These deceptive ploys contributed to the involuntariness of Shay Jr.'s statements. See Woods v. Clusen, 605 F.Supp. 890, 897 (E.D.Wis. 1985), aff'd, 794 F.2d 293 (7th Cir. 1986) (confession involuntary where police pretended they had an airtight case against him by showing him photographs of the victims and telling him they had his fingerprints which was a lie); Quartararo v. Mantello, 715 F.Supp. 449 (E.D.N.Y.) (statements involuntary where detective stated he had reason to believe the defendant had been at the scene of the

E. SHAY JR.'S STATEMENTS AFTER HE ASKED TO LEAVE ON OCTOBER 31 WERE TAKEN IN VIOLATION OF HIS RIGHT TO CUT OFF QUESTIONING.

At 10:40 P.M. on October 31, 1991, Shay Jr. asked if he could leave, effectively invoking his right to cut off questioning. (Exhibit 22) See Coppola v. Powell, 878 F.2d 1562, 1565 (1st Cir.) (invocation of the right does not require any special combination of words and the privilege is not limited to those formally in custody or charged with a crime), cert. denied, 110 S.Ct. 418 (1989). The police ignored him. Id.

In Michigan v. Mosley, 423 U.S. 96 (1975), the Supreme Court held that once a suspect in custody invokes his "right to cut off questioning," the government must "scrupulously honor" that right. Id. at 103-04. If not, the statement is presumed to violate the Fifth Amendment and is therefore inadmissible, without inquiry into voluntariness. Shay Jr.'s right to cut off questioning was not scrupulously honored: no time elapsed between interrogations, the interrogation continued at the same location, no warnings were provided or waived, the questioning focused on the same crime as that about which Shay Jr. had cut off questioning, and the officers attempted to persuade Shay Jr. to change his mind after asserting his right to remain silent. Id. at 104-05. See also United States v. Barone, 968 F.2d 1378, 1384 (1st Cir. 1992) (suspect's right to cut off questioning was not scrupulously honored where defendant said he did not wish to talk

murder on the evening it occurred, and told him his confederate was "burying him"), aff'd, 888 F.2d 126 (1989).

about the homicide and police continued to speak to him for the purpose of changing his mind and failed to provide new Miranda warnings); Christopher v. State of Fla., 824 F.2d 836, 839-47 (11th Cir. 1987) (police did not scrupulously honor right to cut off questioning where they continued to question about the same crimes; the fact the suspect answered their questions is irrelevant).

III. SHAY JR.'S STATEMENTS ON JUNE 4 AND 11, 1992, MUST BE SUPPRESSED.

A. FACTS.

While Shay Jr. was represented by counsel, the Government interviewed him on June 4 and June 11 without counsel's presence. Both statements offend the Fifth and Sixth Amendments.

From November 1, 1991, until June 12, 1991, William McPhee ("McPhee") represented Shay Jr. in connection with all crimes for which he was charged or being investigated, including as a subject of the federal grand jury investigation of the Roslindale bombing. (T.p. 5-64, 65) On March 23, 1992, Shay Jr. was arrested in San Francisco, by ATF officers investigating the bombing, on a federal warrant for flight to avoid prosecution. (T.p. 5-7) Soon after his arrest, Shay Jr. invoked his right to counsel. (T.p. 5-31) That same day, McPhee instructed Assistant United States Attorney Paul Kelly ("AUSA Kelly") that Shay Jr. was not to be questioned by government agents on any subject. (T.p. 5-69, 70) AUSA Kelly responded that the government would not question Shay Jr. further. (Exhibit 29). Shay Jr. has been

in continuous custody since his arrest in San Francisco. (T.p. 5-10, 11)

Agent Kerr and AUSA Kelly accepted telephone calls from Shay Jr. thereafter. On April 20th, 1992, AUSA Kelly informed McPhee of these calls, and assured McPhee that he would not accept any more phone calls from Shay Jr. (T.p. 5-8, 11, 12, 63) Nonetheless, Agent Kerr continued to accept Shay Jr.'s collect calls. (T.p. 5-32-35)

On May 4, 1992, AUSA Kelly proposed a deal for Shay Jr. which would involve a proffer. (Exhibit 30; T.p. 5-74) McPhee communicated AUSA Kelly's proposal to Shay Jr. He explained to Shay Jr. what a proffer was and that statements made during a proffer would be immunized, at least from direct use. (T.p. 5-75, 76) At that time, AUSA Kelly's proposal was declined, but thereafter AUSA Kelly told McPhee it was always something they could discuss. (T.p. 5-76, 100)

On June 4, 1992, Shay Jr. was brought to the lockup in the federal courthouse for the purpose of giving handwriting exemplars which had been subpoenaed for the federal grand jury investigation of the bombing. McPhee had informed AUSA Kelly that he would be there around mid-day, as he had an obligation in another court in the morning. (T.p. 5-101) That afternoon, McPhee telephoned to say he would not be able to make it. (T.p. 5-14, 78) He asked to speak to Shay Jr. (T.p. 5-38, 78) He did not ask that Shay Jr. be brought to AUSA Kelly's office for the phone call, (T.p. 5-78), but that is where Shay Jr. was brought.

(T.p. 5-39) McPhee instructed Shay Jr. to cooperate in the taking of handwriting exemplars only (T.p. 5-103), and not to speak to anybody, as he did in every conversation with his client. (T.p. 5-79, 103) McPhee then spoke to AUSA Kelly, (T.p. 5-16), giving his permission to go ahead with the handwriting exemplars. (T.p. 5-81) McPhee did not give permission for the government to question his client. Nor did he amend his previous instructions that Shay Jr. should not be questioned on any subject. (T.p. 5-110)

AUSA Kelly then asked Shay Jr. what was said during his conversation with his attorney. (T.p. 5-16, 39, 41) It was Agent Kerr's testimony that Shay Jr. reported that McPhee had authorized his talking to them. (T.p. 5-16) Shay Jr. was then questioned without Miranda warnings for over four hours about the bombing, including the receipt and his relationship with Trenkler. (T.p. 5-17, 43, 45) At Agent Kerr's request, Shay Jr. drew a diagram of magnets and a box he had seen in Trenkler's car. (T.p. 5-44) Agent Kerr was aware that there had been discussions about a proffer before June 4. (T.p. 5-46, 47)

Between June 4 and June 11, Agent Kerr accepted between three and five collect phone calls from Shay Jr. (T.p. 5-49), knowing that AUSA Kelly had promised McPhee he would not accept any calls from Shay Jr. By June 4, Agent Kerr had read all of Shay Jr.'s psychiatric records and had seen the bus station tape. (T.p. 5-47, 48) He realized that Shay Jr. lacked confidence and self esteem and needed attention and love. (T.p. 5-48, 49) He

led Shay Jr. to believe he was his friend and listened while Shay Jr. talked about, among other things, his interest in being hypnotized. (T.p. 5-25, 27) Shay Jr. told Agent Kerr he wanted to meet as soon as possible, having discussed a proffer with AUSA Kelly on June 4. (Exhibit 30)

By letter to McPhee dated June 8, 1992, AUSA Kelly stated that, on June 4, 1992, Shay Jr. had "spoken freely and asked questions," but failed to mention that he and the agents had asked questions. (T.p. 5-82, 83) AUSA Kelly further stated in his letter that Shay Jr. had expressed an interest in visiting with him again for a "proffer session of sorts," that AUSA Kelly was interested in doing so with McPhee present, and would like to schedule it for the upcoming Wednesday or Thursday (June 10 or 11). (Exhibit 30) By June 11, McPhee had not responded to AUSA Kelly about arranging a proffer session. (T.p. 5-83)

On June 10, 1992, AUSA Kelly wrote to McPhee asking for confirmation of whether he still represented Shay Jr. (Exhibit 31) By June 11, the next day, McPhee had not responded. (T.p. 5-84)

AUSA Kelly and Agents Kerr and D'Ambrosio went ahead with the proffer session on June 11 without McPhee's knowledge or consent. (T.p. 5-26, 84, 85) McPhee testified that, had he known, he would have taken remedial steps, such as insisting on permission from himself or successor counsel "before going on with any type of proffer from someone in Mr. Shay's delicate psychiatric condition." (T.p. 5-85) According to the

government's report of that statement, some of the session was spent with Shay Jr. "acting foolish and appearing not to fully appreciate the seriousness of the interview." (T.p. 5-57) The session lasted for approximately four hours. (T.p. 5-29)

On June 12, 1992, AUSA Kelly again wrote to McPhee, disclosing that he had already questioned his client in his absence and requesting to be notified whether McPhee still represented Shay Jr. (Exhibit 32) McPhee testified that he still represented Shay Jr. on June 11. Although McPhee and Shay Jr. were going through a troubled period, it was no different from other similar times where McPhee remained Shay Jr.'s lawyer. (T.p. 5-85, 86) He did not cease acting as Shay Jr.'s lawyer until June 12 when he learned the government had questioned Shay Jr. without his knowledge and consent, and did not notify AUSA Kelly until a week or so thereafter. (T.p. 5-87, 88, 111; Exhibit 28)

AUSA Kelly's letters show that he knew McPhee still represented Shay Jr. on June 11, and that he knew Shay Jr. should not go unrepresented. Nonetheless, Shay Jr. was questioned that day without counsel present and without counsel's knowledge or consent. Shay Jr. was given Miranda warnings. He apparently stated that he waived them, with the understanding that he was participating in a proffer session.

B. THE STATEMENTS WERE TAKEN IN VIOLATION OF SHAY JR.'S FIFTH AMENDMENT RIGHT TO COUNSEL.

Once a suspect in continuous custody "has expressed his desire to deal with the police only through counsel [he] is not

subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." Edwards v. Arizona, 451 U.S. 477, 484-85 (1981). There can be no reinterrogation without counsel, even with Miranda and an otherwise valid waiver, whether it concerns the same or a different offense, or the same or different law enforcement authorities. Arizona v. Roberson, 486 U.S. 675 (1988).

The government, and not Shay Jr., initiated these conversations. The government initiates interrogation when its agents use questions, statements or actions reasonably likely to elicit statements. Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980). Shay Jr.'s statements on June 4 were elicited by AUSA Kelly's impermissible first question to Shay Jr. about what his attorney had said to him. Both statements were elicited by AUSA Kelly's ongoing discussions with Shay Jr. through McPhee about a deal according to which his statements made during a proffer would be immunized. The June 11 statements were initiated by AUSA Kelly's direct discussion with Shay Jr. on June 4 about setting up a proffer session for the following week. (Exhibit 30) The statements were therefore elicited by the government and amount to "reinterrogation." United States v. Gomez, 927 F.2d 1530, 1537 (11th Cir. 1991)(issue under Edwards is whether there was interrogation, which can be statements as well as questions;

officer's statement about sentencing and the benefits of cooperation was deliberate elicitation).¹⁵

Furthermore, the government was fully aware of Shay Jr.'s psychiatric problems and need for attention. Agent Kerr established a relationship with Shay Jr. on that basis; that dynamic was used to elicit Shay Jr.'s statements. The intentions of law enforcement officials and their knowledge of special susceptibilities of the subjects at the time of the questioning are relevant to whether statements are elicited by the government. Innis, 446 U.S. at 301-02 & n.8.

Once "counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney." Minnick v. Mississippi, 111 S.Ct. 486, 491 (1990) (emphasis added). The Court's emphasis on "presence" derives from the Miranda Court's recognition that counsel's presence "would insure that statements made in the government-established atmosphere are not the product of compulsion." Id. at 490. (citations omitted).

"[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

¹⁵ The Assistant United States Attorney was forbidden by the disciplinary rules from communicating with Shay Jr. as a party he knew to be represented without McPhee's prior consent. DR 7-104(A)(1). Even if AUSA Kelly thought that Shay Jr. was unrepresented, he was forbidden from advising Shay Jr. regarding a proffer, since Shay Jr.'s interests were in conflict with those of the United States. DR 7-104(A)(2).

further police-initiated custodial interrogation even if he has been advised of his rights." Edwards, 451 U.S. at 484. If police resume interrogation, any statement is inadmissible even if the defendant knowingly, voluntarily, and intelligently waived his fifth amendment rights. Minnick v. Mississippi, 111 S.Ct. 486, 492 (1990).

C. SHAY JR. DID NOT WAIVE HIS RIGHTS ON JUNE 4 AND HIS WAIVER OF JUNE 11 WAS NOT KNOWING, INTELLIGENT, OR VOLUNTARY.

Even if this Court were to determine that Shay Jr. and not the government initiated further conversation on June 4 or June 11, after he had invoked his right to counsel on March 24, the government must prove a valid waiver. Smith v. Illinois, 469 U.S. 91, 95 (1984). "The burden of proving that a waiver of the right to counsel was effected 'is on the government and is a heavy one." United States v. Chapdelaine, 616 F.Supp. 522, 529-32 (D.R.I. 1985), aff'd, 795 F.2d 75 (1st Cir. 1986), quoting United States v. Montgomery, 714 F.2d 201, 203 (1st Cir. 1983). Even if the interrogation was a consequence of the defendant's invitation, the government must offer substantial evidence that he knowingly and intelligently waived the rights which he had earlier unhesitatingly claimed. Smith, 469 U.S. at 95.

This the government has not done. On June 4, Shay Jr. was not even read his rights and therefore could not have waived them. Due to ongoing discussions through McPhee about a proffer, Shay Jr. also understood the June 4 statement to be immunized at the time he made it. On June 4, AUSA Kelly

discussed with Shay Jr. a proffer session for the following week. Shay Jr. understood this to mean that his statements on June 11 were immunized. He therefore had no understanding of the true consequences of giving statements.

A waiver must be "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Moran v. Burbine 475 U.S. 412, 421 (1986). And when "even a mild promise of leniency" occurs while a suspect is alone, in custody, and without counsel, it may render the confession itself involuntary because "defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess." Brady v. United States, 397 U.S. 742, 754 (1970). Interrogation violates the constitution when misrepresentation distorts the alternatives among which the person is being asked to choose. Weidner v. Thieret, 866 F.2d 958, 963 (7th Cir. 1989), cert. denied, 112 S.Ct. 883 (1992).¹⁶

D. BOTH THE JUNE 4 AND JUNE 11 STATEMENTS WERE INVOLUNTARY.

AUSA Kelly and the ATF agents knew that Shay Jr. was incapable of giving a voluntary statement or of voluntarily waiving his rights. Besides the knowledge of Shay Jr.'s instability of which the government was aware since the investigation began, AUSA Kelly and Agent Kerr had obtained and

¹⁶ The strictures of the Fifth Amendment apply whether the statements are inculpatory, exculpatory, or something in between. United States v. Doe, 786 F.Supp. 1073, 1077 (D.P.R. 1991)

read all of Shay Jr.'s psychiatric records before June 4, 1992.
Shay Jr.'s behavior and words while he made these statements
indicated they were involuntary. (T.p. 5-57)

Respectfully submitted,

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