

The Defendant is charged with Endangering the Welfare of a Child, in violation of Penal Law § 260.10(1), and two counts of Public Lewdness, in violation of Penal Law § 245. It is alleged, in sum and substance, that on March 15, 2008, at approximately 2:10 p.m. and 2:40 p.m., in a public men's room at the Roosevelt Field Mall ("the Mall"), the Defendant "did expose his penis and masturbate his penis with his hand in clear view of the victim, a 13 year old boy." (District Court Information, 3/15/08)

The Defendant was allegedly identified by the boy and held by Mall security until the police arrived following their notification. The Defendant was placed under arrest, at approximately 3:20 p.m. on the date of the alleged incident outside Nordstroms and escorted to a police substation on the Mall's lower level by two Nassau County Police Officers. At approximately 4:15 p.m., following questioning by a Nassau County Detective, the Defendant signed a three and one-half page statement regarding the alleged events.

The Defendant challenges the admissibility of this statement with a three prong attack. The Defendant alleges that the statement was the result of a custodial interrogation and that he was never advised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966). In the alternative, the Defendant argues that, even if he was advised of his rights, he was unable to make a knowing, intelligent and voluntary waiver thereof due to the fact that he suffers from an obsessive compulsive disorder ("OCD") which, combined with the effects the arrest and interrogation procedures had on his condition, prevented him from comprehending these rights. Finally, the Defendant argues that his statement was not voluntarily given, but the result of improper police conduct and coercion and his OCD.

Pursuant to stipulation of the parties, on July 29, 2009, July 30, 2009, August 12, 2009, October 1, 2009 and November 5, 2009 the court conducted a hearing pursuant to *People v. Huntely*, 15 N.Y.2d 72, 255 N.Y.S.2d 838 (1965) regarding the voluntariness of statements attributed to the Defendant following his arrest on March 15, 2008. More specifically, as agreed by the parties, the issues were limited to the questions of "classic coercion," the administration of the Defendant's *Miranda* rights and/or whether the Defendant waived same. Following the hearing both sides submitted memoranda of law.

The People bear the initial burden of proving the voluntariness of the Defendant's alleged statements beyond a reasonable doubt. *People v. Huntely*, supra.; *People v. Valerius*, 31 N.Y.2d 51, 334 N.Y.S.2d 871 (1972). The People need also establish the legality of the police conduct, that the Defendant was advised of his *Miranda* rights and that he waived same. *People v. Williams*, 279 A.D.2d 276, 719 N.Y.S.2d 227 (1st Dept. 2001) aff'd 97 N.Y.2d 735, 742 N.Y.S.2d 597 (2002); *People v. Miller*, 59 A.D.3d 1124, 873 N.Y.S.2d 415 (4th Dept. 2009) lv. den. 12 N.Y.3d 819, 881 N.Y.S.2d 26 (2009); *People v. King*, 234 A.D.2d 923, 653 N.Y.S.2d 464 (4th Dept. 1996) lv. den. 89 N.Y.2d 1012, 658 N.Y.S.2d 251 (1997) If the prosecution meets their burden, the burden of persuasion "shift[s] to defendant to establish that [his] statement was involuntary by reason of [his] diminished mental capacity (citations omitted)" *People v. Comfort*, 6 A.D.3d 871, 872, 775 N.Y.S.2d 127, 129 (3rd Dept. 2004); See also: *People v. Schompert*, 19 N.Y.2d 300, 279 N.Y.S.2d 515 (1967) and/or "to adduce evidence supporting his contention that he did not comprehend his rights (see, *People v. Love*, 85 A.D.2d 799, 445 N.Y.S.2d 607, aff'd 57 N.Y.2d 998, 457 N.Y.S.2d 238, 443 N.E.2d 486)." *People v. Zephir*, 226 A.D.2d 408, 640 N.Y.S.2d 584, 585 (2nd Dept. 1996) lv. den. 88 N.Y.2d 1072, 651 N.Y.S.2d 416 (1996)

In attempting to meet their burden, the People called Detective Sergeant Curt Beaudry and Police Officer James J. Flood to testify. In opposition, the Defendant testified on his own behalf and called Dr. Alexander Bardey to testify. After carefully listening to each of these witness, observing their demeanor on the witness stand, assessing their interest or

lack thereof, as well as their credibility, the court makes the following findings of fact:

The Defendant is a thirty three (33) year old school teacher, who is married, with two (2) children. He earned his Bachelor's Degree in education at St. John's University, his Master's Degree in mathematics at Adelphi University, completed his Administration and School District Certification at the College of New Rochelle and has taken other post-graduate studies at the College of St. Rose. In 2001 the Defendant first sought treatment for OCD, which involved the daily performance of many rituals, with a psychologist, Dr. Dustman. The treatment did not include any medication and involved behavior modification designed to stop the performance of the rituals. This treatment lasted for six (6) months. In 2002 the Defendant began treatment with a psychiatrist, Dr. Lawrence Rubin. Dr. Rubin has treated the Defendant since that time, initially with a prescription for Luvox, and more recently including a prescription for Klonopin.

On March 15, 2008 the Defendant left his job at the Boys and Girls Club of Oyster Bay and went to the Mall. He arrived at the Mall at approximately 1:30 p.m. and parked outside between Nordstrom's and Bloomingdale's, and entered Nordstrom's. The Defendant then shopped in the Mall in the vicinity of Nordstrom's; and, at some time around 2:50 p.m., entered the men's room in that area.

At approximately 3:00 p.m. the Defendant was exiting Nordstrom's when he was stopped by Mall security and asked his name. Almost immediately Police Officer James Flood and Police Officer John Dockswell arrived on the scene. Officer Dockswell went to talk to a woman who was standing in the area with her son; and, Officer Flood approached the Defendant. Officer Flood asked the Defendant for his identification and removed the Defendant's license from the Defendant's wallet after the Defendant had some difficulty producing the license. Officer Flood then asked the Defendant what he was doing at the Mall and if he was with anyone else. The Defendant responded that he had come to the Mall alone to buy sneakers and that he went to use the bathroom.

After about ten (10) minutes Officer Dockswell finished talking to the woman he had approached and came over to where the Defendant and Officer Flood were standing. At that time the Defendant was placed under arrest and handcuffed behind his back. The Defendant was not told why he was being arrested or what he was accused of, nor was he advised of his *Miranda* rights at that time. The officers, each standing on one side or the other of the Defendant, holding him at the elbow, walked the Defendant down to the police substation located in the lower level of the Mall. The Defendant was not advised of his *Miranda* rights during the approximate four (4) minutes it took to walk to the substation. The officers did not speak to the Defendant as they walked downstairs.¹ The Defendant was very upset and nervous at this time.

The police substation is located on the lower level of the Mall, on the same level as the Mall security office, a Post Office, and some stores. The front area of the substation is accessible from the public hallway. Everything was removed from the Defendant's pockets and he was handcuffed, by one hand, to a bench in the front room of the substation. Officer Flood sat at a desk opposite the Defendant, and Officer Dockswell sat at another desk in the room. The Defendant was neither told why he was arrested nor *Mirandized*. He was not questioned while sitting in this room. During this time, the Defendant's cell phone rang a few times before being turned off by one of the officers. The Defendant requested, but was not permitted to answer his phone. After about one hour Officer Flood moved the Defendant to a room in the rear of the substation, across a hall at the rear of the front room, and told the Defendant that detectives were coming to speak with him.

This rear room was approximately ten feet by fifteen feet, without windows and with two desks and a bench inside. The room was used as an office, as well as a place to store items such as paper, old chairs, tires, boxes and an old copy machine. The Defendant was placed on the bench in this rear room, with his left hand cuffed to the bench, and was left alone for about ten minutes. A police officer stood outside the open door of the room.

Detective Sergeant Curt Beaudry received a call sometime between 3:00 p.m. and 4:00 p.m from a Sergeant Curtis, who was located at the Mall, advising him that they had someone in custody for masturbating in front of a child. Upon receiving

the call, Detective Beaudry responded, alone, to the police substation at the Mall, where he met Detective McNally, Detective Sergeant Watson, Officer Flood and Officer Dockswell. The officers advised Detective Beaudry that they had someone in custody for masturbating in front of a child. Detective Beaudry then entered the rear room of the substation with Detective McNally and Detective Sergeant Watson, where he met the Defendant.

Upon entering the room, Detective Beaudry introduced himself and advised the Defendant that he had "to ask ... a couple of questions." (Transcript 7/29/09, p. 24 l. 4)² The Defendant appeared nervous to Detective Beaudry at this time. Upon request, the Defendant provided Detective Beaudry with his name and address. While sitting at a desk, Detective Beaudry read the Defendant his Miranda rights from the top half of a "Miranda rights card." After the rights were read the Defendant verbally indicated that he understood his rights and that he was willing to answer questions. Detective Beaudry then sat on the bench next to the Defendant, showed him the paragraph that was just read, gave the Defendant the opportunity to read the card to himself, and told him to write down his answers and sign his name. The Defendant then wrote the word "Yes" following the questions "Do you understand" and "Now that I have advised you of your rights, are you willing to answer questions" and signed his name. Detective Beaudry then read the paragraph at the bottom of the rights card to the Defendant, reiterating his rights, as they relate to providing written statements. The card was then handed back to the Defendant, who was again given the opportunity to read the card, and again signed his name at the bottom of the card. Detective McNally was in the room at the time the Defendant was read his rights and signed as a witness, along with Detective Beaudry. Detective Sergeant Watson was also in the room but did not sign the rights card. Detective Beaudry then returned to the desk; and, Detective McNally and Detective Sergeant Watson left the room as Detective Beaudry began questioning the Defendant.

For the next approximately forty minutes Detective Beaudry asked the Defendant questions concerning his activities and conduct during that day. A few times the Defendant asked if he was in trouble and Detective Beaudry responded by indicating he "wasn't sure what was going on, [he] had to get a statement." (Transcript 7/29/09, p. 75, l. 20-22) The Defendant answered Detective Beaudry's questions responsively and, on occasion would ask Detective Beaudry to rephrase his question, substituting one word for another, i.e., use "stroking" in place of "masturbating." During these forty minutes the Defendant did not mention anything about his psychiatric condition. After listening to the Defendant's verbal statements and alleged admissions concerning the events of the afternoon, Detective Beaudry left the Defendant alone for approximately ten minutes to compare the Defendant's statements with the statements of the boy to whom the Defendant had allegedly exposed himself.

Upon returning to the room, while sitting at a desk, Detective Beaudry entered the Defendant's pedigree information on the top of a "Statement of Admission" form, again read the Defendant his Miranda rights, this time from the top of the Statement of Admission, and handed the form to the Defendant. The Defendant first looked at the form and then put his initials after the two paragraphs constituting his Miranda rights. Detective Beaudry then began to question the Defendant again and transcribed the Defendant's answers. After he wrote down a sentence Detective Beaudry would read the sentence to the Defendant and ask him if it was accurate. If the Defendant said "yes" Detective Beaudry moved on to the next question; if the Defendant asked for any changes to be made Detective Beaudry made these changes before moving on to the next question. On occasion the Defendant would ask that certain statements not be included in the written statement. These statements, which allegedly included the Defendant stating that he had homosexual tendencies, that he gets excited upon entering men's bathrooms and that he has masturbated in the bathroom previously, were omitted from the written statement. This question, answer and review procedure was followed until the three and one-half page written statement was completed.

Detective Beaudry then sat next to the Defendant on the bench and read the written statement to him. After each page Detective Beaudry handed the page to the Defendant, who

read the page, initialed any "cross outs" or "strike overs" and signed at the bottom. Detective Beaudry also signed each page. On the fourth page the Defendant initially signed on the line immediately below the last hand written line, so Detective Beaudry asked him to sign again following the word "truth," which was the last word of the statement. The Defendant signed there and at the bottom of the page, signing the last page a total of three times. Detective Beaudry then took the written statement and put it in his briefcase.

The entire interrogation process, from the moment Detective Beaudry first encountered the Defendant to the time he placed the written statement in his briefcase, took approximately one and one-half hours.

MIRANDA ADVISEMENT

The Defendant testified, and argues, that he was never read his Miranda rights; nor was he ever given the opportunity to read his rights to himself. When confronted with a Miranda rights card which bears his signature in two places and with an Statement of Admission which begins with the phrase, "I have been told by the Detective..." followed by the Miranda rights and initialed by the Defendant in two places, the Defendant testified that he signed four or five different papers that afternoon, without reading them. According to the Defendant he signed these papers because he was told the sooner he did so the sooner he would be released. Detective Beaudry testified that he never told the Defendant that he was going to be released.

Having listened to testimony of Detective Beaudry and of the Defendant, and having observed their demeanor on the witness stand, the court does not find the Defendant's testimony on this issue to be at all credible. The court finds, beyond a reasonable doubt, that the Defendant was orally advised of his Miranda rights two times and given the opportunity to read his Miranda rights two times before Detective Beaudry began to question him and was again read his rights and given the opportunity to read them a third time immediately before the preparation of the written statement.

The court further finds that the Defendant waived his Miranda rights, first by writing the word "Yes" two times, next to the questions, "Do you understand" and "Now that I have advised you of your rights, are you willing to answer questions" and then signing his name to the top half of the Miranda card, signing his name to the bottom half of the Miranda card following a reiteration of those rights, and finally by initialing the Miranda rights statement at the beginning of the Statement of Admission in two places.

KNOWING AND INTELLIGENT WAIVER OF MIRANDA RIGHTS

The Defendant argues that the cumulative effect of the arrest and interrogation procedures, particularly the Defendant's inability to contact his family, so exacerbated his OCD that he was unable to make a knowing and intelligent waiver of his Miranda rights. "In determining whether a suspect has made a knowing and intelligent waiver of his or her Miranda rights the Supreme Court has directed lower courts to review the totality of the circumstances surrounding the waiver (see 2 Ringel, Searches & Seizures, Arrests and Confessions, § 28.4)." *People v. Woods*, 89 A.D.2d 1022, 1024, 454 N.Y.S.2d 466, 468 (2nd Dept. 1982); See also: *People v. Fells*, 121 A.D.2d 394, 503 N.Y.S.2d 104 (2nd Dept.1986); *People v. Medina*, 123 A.D.2d 331, 506 N.Y.S.2d 226 (2nd Dept.1986)

The question before the court is not whether or not the Defendant suffers from OCD. The People do not contest this fact. Indeed, the Defendant's psychiatric history alone will not preclude him from making a knowing and intelligent waiver of his Miranda rights. *People v. Love*, 57 N.Y.2d 998, 457 N.Y.S.2d 238 (1982); *People v. Avilez*, 121 A.D.2d 391, 503 N.Y.S.2d 102 (2nd Dept.1986) *lv. den.* 68 N.Y.2d 767, 506 N.Y.S.2d 1050 (1986); *People v. Bostick*, 124 A.D.2d 811, 508 N.Y.S.2d 532 (2nd Dept.1986); it is but one factor to consider. *People v. Williams*, 174 A.D.2d 969, 572 N.Y.S.2d 127 (4th Dept.1991) *lv. den.* 78 N.Y.2d 1015, 575 N.Y.S.2d 823 (1991); *People v. Matthews*, 148 A.D.2d 272, 544 N.Y.S.2d 398 (4th Dept.1989) *app. dis.* 74 N.Y.2d 950, 550 N.Y.S.2d 285 (1989)

To make a knowing and intelligent waiver of his Miranda rights, the Defendant need not "understand the abstract concepts of the Miranda warnings," *People v. Dorsey*, 118 A.D.2d 653, 654, 499 N.Y.S.2d 806, 807 (2nd Dept.1986) *lv. den.* 67

N.Y.2d 1052, 504 N.Y.S.2d 1027 (1986); See also: *People v. Acuna*, 145 A.D.2d 427, 535 N.Y.S.2d 407 (2nd Dept.1988) lv. den. 73 N.Y.2d 974, 540 N.Y.S.2d 1008 (1989), or “comprehend the import of the Miranda warnings in the larger context of criminal law ... (People v. Williams, 62 N.Y.2d 285, 476 N.Y.S.2d 788, 465 N.E.2d 327)” *People v. Bucknor*, 140 A.D.2d 705, 706, 528 N.Y.S.2d 891, 893 (2nd Dept.1988) The Defendant’s psychiatric condition notwithstanding, “[a]n effective waiver of Miranda rights may be made by an accused ... so long as it is established that he understood the immediate meaning of the warnings (citations omitted).” *People v. Zuluaga*, 148 A.D.2d 480, 481, 538 N.Y.S.2d 628, 629 (2nd Dept.1989) lv. den. 73 N.Y.2d 1024, 541 N.Y.S.2d 778 (1989); See also: *People v. Nau*, 21 A.D.3d 567, 799 N.Y.S.2d 901 (2nd Dept. 2005) lv. den. 5 N.Y.3d 855, 806 N.Y.S.2d 175 (2005); *People v. Chirse*, 132 A.D.2d 615, 517 N.Y.S.2d 772 (2nd Dept.1987); *People v. Hernandez*, 46 A.D.3d 574, 846 N.Y.S.2d 371 (2nd Dept. 2007) lv. den. 11 N.Y.3d 737, 864 N.Y.S.2d 395 (2008); *People v. Jones*, 41 A.D.3d 736, 836 N.Y.S.2d 883 (2nd Dept. 2007) lv. den. 9 N.Y.3d 877, 842 N.Y.S.2d 789 (2007)

In support of his argument that he was incapable of making a knowing and intelligent waiver of his Miranda rights, the Defendant eschews the testimony of Police Officer Flood and Detective Sergeant Beaudry, relying exclusively on his own testimony and that of Dr. Bardey.

The Defendant testified that he first sought treatment for OCD in 2001. The condition manifested itself by making it difficult for him to leave his house without performing a number of rituals, i.e. running his hands around the kitchen counter a fixed number of times before going out the door, stepping on two cracks or tiles right before the front door before leaving, brushing his teeth in a certain manner. If he did not perform these rituals he would feel like something bad was going to happen to him or his family. Over the years the Defendant was treated by a psychologist and a psychiatrist, first with behavior modification techniques and later with medication, adjusted up or down, depending upon what was going on in the Defendant’s life. According to the Defendant he had seen his psychiatrist a few times before the date of the alleged incident herein because he had a heightened sense of anxiety caused by an upcoming interview for an Assistant Principal’s job.

According to the Defendant, when he was first approached by the police on the date in question he began to experience an increasing level of anxiety. When he was placed in handcuffs he began to get nervous; when the officers took him by the arms and escorted him downstairs to the police substation his level of concern escalated; when no one would tell him why he was being arrested he began to experience a high level of anxiety, which got even higher as he was compelled to walk on certain tiles he would normally avoid. Of great significance to the Defendant was his claim that while on the way to the police substation, as well as while sitting in the substation, his cell phone rang a number of times and he could see that members of his family were trying to reach him, but the officers would not let him answer the phone, ultimately turning it off. The Defendant testified that this made him extremely anxious because, as part of his OCD, he needs to be able to contact his family and they need to be able to contact him at all times. According to the Defendant, if this is not possible “it really breaks down my mind[.]” (Transcript, 10/1/09, p. 24-25, l. 25-1) On this particular day, the Defendant claims, it got so bad that he suffered a “brain freeze” which caused him to think only of his family and rendered him unable to process any information. With that, the Defendant concluded that he never knowingly waived his Miranda rights.

Dr. Bardey testified that not everyone with OCD who is arrested would be unable to voluntarily waive their Miranda rights. Dr. Bardey was of the opinion, however, that given the Defendant’s inability to communicate with his family, his heightened level of anxiety, and his overwhelming desire to get out of the situation in which he found himself, the Defendant’s cognitive abilities were so distorted that he could not have knowingly and voluntarily understood and waived his Miranda rights. Dr. Bardey’s conclusion must be questioned for a number of reasons.

Dr. Bardey acknowledged that an important factor in reaching his opinion was the truthfulness of the Defendant’s reporting and the testimony upon which the opinion is based. Dr. Bardey further acknowledged that if the facts as related by the Defendant were not true his opinion may change. While

the court has already indicated that much of the Defendant’s testimony was not worthy of being credited, a number of areas affecting the Defendant’s credibility, as they relate directly to Dr. Bardey’s opinion, must be highlighted.

The Defendant testified that a “central part of his obsessive compulsive disorder is to have contact with [his] family, and ... [he] need[s] to be able to contact them, and being unable to contact them ... really breaks down [his] mind[.]” (Transcript 10/1/09, p. 24-25, l. 15-1) The Defendant further testified, however, that he only had a “brain freeze” one other time in his life, when he was a teenager and could not reach his father one day, but even then “[t]he only way it would be similar really is [he] couldn’t get in touch with a family member.” (Transcript 11/5/09, p. 17, l. 8-10) In fact, the Defendant testified that depending on the degree of anxiety from which he is suffering at a given moment he simply cannot process any information; but, March 15, 2008 was the only time in his life he could not process information.

The Defendant further testified that as a result of his inability to process information he “had no understanding of what was going on.” (Transcript 11/5/09, p. 24, l. 15-16) Nevertheless, the Defendant acknowledged that he understood that he was approached by police officers, that they restrained his hands behind his back, that he was handcuffed to a bench in the presence of police officers, that he was moved to a rear room and re-cuffed to a bench and that the rear room appeared to be used for storage. While the Defendant testified that as a result of his “brain freeze” he was unable to comprehend that he was not free to walk around when handcuffed to the bench, Dr. Bardey testified that the Defendant’s OCD would not have prevented the Defendant from understanding that he was not free to walk around when handcuffed to the benches in the police substation.

In terms of what allegedly started his “brain freeze” on March 15, 2008 the Defendant offered alternate theories. On the one hand he testified that his cell phone ringing after he was handcuffed “start[ed] the process or the ball rolling.” (Transcript 10/1/09, p. 111, l. 17) Alternatively, the Defendant testified that it was not the cell phone ringing which started the “brain freeze;” but, “[t]he handcuffs probably would have started it.” (Transcript 10/1/09, p. 115, l. 13) Offering a third explanation, the Defendant testified, “[t]o set off a brain freeze, it takes a numerous, couple of things. It’s not one isolated item that will trigger it.” (Transcript 10/1/09, p. 111, l. 14-16) The Defendant’s fourth explanation was that “[his] brain froze when the minute that Mr. Floor or Officer Flood shut that phone off.” (Transcript 10/1/09, p. 121, l. 1-2)

Whether or not the Defendant’s cell phone ringing during the walk to the substation triggered the “brain freeze,” the Defendant testified it was an important component of starting the “brain freeze;” yet, he did not tell Dr. Bardey about his cell phone ringing on the way to the substation. Similarly, while Dr. Bardey testified that he reached his opinion, in part, by reviewing the records of the Defendant’s treating psychiatrist, Dr. Lawrence Rubin, the Defendant testified that he never even mentioned having suffered a “brain freeze” to Dr. Rubin when relating the events of March 15, 2008.

In addition to the Defendant’s credibility issues, the court does not find that Dr. Bardey’s conclusion is supported by the doctor’s own testimony.

Dr. Bardey testified that OCD is “a specific type of anxiety disorder ... [characterized by] the presence of either obsessions or compulsions.” (Transcript 11/5/09, p. 54, l. 2-9) He defined obsessions as “intrusive thoughts that enter the individual’s mind against their will on a repeated manner that causes them some distress.” (Transcript 11/5/09, p. 54, l. 9-11) Dr. Bardey indicated overriding concerns that something bad will happen is an example of an obsession. Dr. Bardey described compulsions as “behaviors, often referred to as rituals, that the person feels compelled to engage in over and over again in a way of warding off something bad happening, as a way of reducing their anxiety about how they feel and the world.” (Transcript 11/5/09, p. 54-55, l. 23-2) Dr. Bardey further testified that, in relation to a fear of something bad happening to a family member, that “there might be a number of rituals associated with that fear that are repeatedly done in order to reduce that fear or that concern.” (Transcript 11/5/09, p. 56, l. 22-23) Dr. Bardey explained that these rituals would be “fairly stereotypic[.] [i]n other words, it would be the same contact the same number of times.” (Transcript 11/5/09, p. 57, l. 1-2)

This description of the Defendant's condition notwithstanding, Dr. Bardey then testified that the Defendant's inability to make a knowing and intelligent waiver of his Miranda rights was borne of the Defendant being placed in "a situation that is considered extremely anxiety provoking and stressful ... that anybody would experience," (Transcript 11/5/09, p. 65-66, l. 21-1) exacerbated by his OCD, and not being "giv[en] permission to contact his family, use his cell phone which had become part of the rituals of his obsessive-compulsive disorder." (Transcript 11/5/09, p. 66, l. 8-10) The problem with this testimony is that the Defendant never testified that he had a ritual of calling his family at a specific time each day or calling them a specific number of times each day. The Defendant merely testified that, believing his family was trying to contact him he needed to speak with them to assure them that he was alright and to verify that they were alright. This is not ritualistic behavior, as defined by Dr. Bardey, who acknowledged that it is not the contact with his family per se which forms the ritual, but making contact at a given time or a given number of times which is the ritual. As Dr. Bardey himself explained, "[i]t's the ritual that's important. It's not the content of the conversation." (Transcript 11/5/09, p. 57, l. 5-7)

The court readily accepts that the Defendant found himself in a situation which would produced a feeling of great anxiety. The court further accepts that the Defendant would like to have found himself anywhere but handcuffed to a bench in a police substation facing interrogation, wishing to contact his family. The court does not find, however, that these feelings prevented the Defendant from making a knowing and intelligent waiver of his Miranda rights. If there be any doubt, one need only look to the following series of questions and answers:

Q. On this date, March 15th, 2008, on that day, would it be fair to say that you heard of what is known as Miranda warnings?

A.No.

Q. So you never heard of that, of you have a right to remain silent?

A.Yes. But I didn't know that was the - - what it was called.

Q. Okay. You didn't know - - well, you didn't know it was called Miranda warnings?

A.Correct.

Q. You never heard of that expression?

A.No.

Q. But you have watched - - you've - - you've either in schooling or in movies or whatever, books, you were aware that you have the right to remain silent?

A.Yes.

Q. And anything you say can be used against you?

A.Yes.

Q. And you have a right to hire an attorney?

A.Yes.

The Defendant clearly "grasped that he ... did not have to speak to the interrogator; that any statement might be used to [his] disadvantage; and that an attorney's assistance would be provided upon request, at any time, and before questioning is continued." *People v. Williams*, 62 N.Y.2d 285, 289, 476 N.Y.S.2d 788, 790 (1984); See also: *People v. Hendrie*, 24 A.D.3d 871, 805 N.Y.S.2d 464 (3rd Dept. 2005) lv. den. 6 N.Y.3d 776, 811 N.Y.S.2d 343 (2006); *People v. Ferguson*, 285 A.D.2d 901, 729 N.Y.S.2d 799 (3rd Dept. 2001) lv. den. 96 N.Y.2d 939, 733 N.Y.S.2d 379 (2001); *People v. Marx*, 305 A.D.2d 726, 759 N.Y.S.2d 251 (3rd Dept. 2003) lv. den. 100 N.Y.2d 596, 766 N.Y.S.2d 172 (2003)

Based upon the foregoing, particularly the Defendant's age, education, intelligence, background and conduct, See: *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019 (1938); *People v. Nelson*, 171 A.D.2d 702, 566 N.Y.S.2d 943 (2nd Dept. 1991), the court finds that the Defendant's waiver of his Miranda rights was knowing and intelligent.

VOLUNTARINESS OF STATEMENT

The question remains whether the Defendant's statements were voluntarily or involuntarily made. Like the waiver of one's

Miranda rights, voluntariness is to be determined by looking at the totality of circumstances. *People v. Anderson*, 42 N.Y.2d 35, 396 N.Y.S.2d 625 (1977); *People v. Scott*, 224 A.D.2d 457, 638 N.Y.S.2d 475 (2nd Dept. 1996) lv. den. 87 N.Y.2d 1025, 644 N.Y.S.2d 158 (1996); *People v. Pouliot*, 64 A.D.3d 1043, 883 N.Y.S.2d 372 (3rd Dept. 2009) lv. den. 13 N.Y.3d 838, 890 N.Y.S.2d 454 (2009)

The Defendant's statements will be found to have been involuntarily made if they were the product of threats of physical force, improper conduct which impaired his physical or mental condition to the extent of undermining his ability to decide whether or not to make a statement, and promises or statements of fact which created a substantial risk that he may falsely incriminate himself. CPL § 60.45; *People v. Mateo*, 2 N.Y.3d 383, 779 N.Y.S.2d 399 (2004); *People v. Johnson*, 269 A.D.2d 405, 702 N.Y.S.2d 567 (2nd Dept. 2000) lv. den. 94 N.Y.2d 921, 708 N.Y.S.2d 361 (2000); *People v. Sylvester*, 15 A.D.3d 934, 788 N.Y.S.2d 786 (4th Dept. 2005) lv. den. 4 N.Y.3d 836, 796 N.Y.S.2d 591 (2005) "[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515, 522 (1986); See also: *People v. Mateo*, supra.; *U.S. v. Conley*, 859 F.Supp. 830 (W.D.Pa.1994) [cited by Defendant].

The Defendant lists various conduct of the officers with whom he interacted which he believes supports his claim that his statements were coerced. The court does not find credible the Defendant's testimony that he was threatened, that the police screamed at him, that the police used an unnecessary degree of force or that the Defendant was promised if he signed the written statement he would be released.

The approximate two and one-half hours that the Defendant was held at the police substation located in the Mall and the approximate one and one-half hours of questioning before the Defendant signed his statement "fall far short of the kind of persistent and overbearing interrogation which has been held to be objectionable." *People v. Robinson*, 31 A.D.2d 724, 725, 297 N.Y.S.2d 82, 84 (4th Dept.1969) [approximately seven hour in custody and questioning for approximately two and one-half hours]; See also: *People v. Abreu*, 184 A.D.2d 707, 585 N.Y.S.2d 222 (2nd Dept.1992) lv. den. 80 N.Y.2d 972, 591 N.Y.S.2d 142 (1992) [approximately twelve hours of detention and one and one-half to two hours of questioning]; *People v. Gerald*, 128 A.D.2d 635, 512 N.Y.S.2d 883 (2nd Dept.1987) [six hours in custody]

That the police did not tell the Defendant why he was being detained and interrogated is not indicative of police coercion, as "[b]efore questioning, the police were under no obligation to inform the defendant of the specific crime they were investigating (see *Colorado v. Spring*, 479 U.S. 564, 107 S.Ct. 851, 93 L.Ed.2d 954; *People v. Garcia*, 284 A.D.2d 106, 107, 726 N.Y.S.2d 27; *People v. Hall*, 152 A.D.2d 948, 543 N.Y.S.2d 820; *People v. Seaman*, 130 A.D.2d 875, 515 N.Y.S.2d 647).]" *People v. Myers*, 17 A.D.3d 699, 700, 793 N.Y.S.2d 537, 538 (2nd Dept. 2005) lv. den. 5 N.Y.3d 766, 801 N.Y.S.2d 260 (2005)

Likewise, contrary to the Defendant's claim, "[t]he police were under no obligation to tell the [31]-year-old defendant's [family] of his whereabouts while he was being questioned (see *People v. Crimmins*, 64 N.Y.2d 1072, 1073, 489 N.Y.S.2d 879, 479 N.E.2d 224, *People v. Stitch*, 226 A.D.2d 838, 641 N.Y.S.2d 146);" *People v. Myers*, supra. at 700, 793 N.Y.S.2d 537, 538 (2nd Dept. 2005); nor would their alleged refusal to allow him to call his family, by itself, render his statement involuntary. *People v. Carbonaro*, 21 N.Y.2d 271, 287 N.Y.S.2d 385 (1967); *People v. Caruso*, 45 A.D.2d 804, 356 N.Y.S.2d 902 (3rd Dept. 1974)

The Defendant's suggestion that it was somehow coercive to have Detective Sergeant Beaudry write out the statement, rather than having the Defendant write out his own statement is equally without merit. The court does not find anything improper with Detective Sergeant Beaudry "read[ing] the statement aloud to defendant, one sentence at a time, and confirm[ing] that defendant understood each sentence and that it was correct, prior to defendant signing it." *People v. Pouliot*, supra. at 1043, 883 N.Y.S.2d 372 (3rd Dept. 2009) lv. den. 13 N.Y.3d 838, 890 N.Y.S.2d 454 (2009); See also: *People v. Woods*, supra. That Detective Sergeant Beaudry may have paraphrased some of the Defendant's statements, or used common words that the Defendant would not use in his everyday life, i.e. "nothin" instead of "nothing," or "pee" instead of "uri-

nate," or "number two" instead of "defecate," does not affect the voluntariness of the Defendant's statement, particularly where, as here the Defendant was given the opportunity to make corrections or changes and did so.

The Defendant's reliance on *U.S. v. Conley*, 859 supra. is also misplaced. In addition to being of no controlling authority on this court, in the case sub judice, unlike in *Conley*, id., no one ever promised the Defendant that any of his statements would be "off the record." Similarly, there is no evidence that anyone even agreed that certain statements made by the Defendant would be "off the record." The only testimony on this issue was provided by Detective Sergeant Beaudry,³ who merely testified that there were certain statements the Defendant asked not to be included in the written statement, so they were omitted.

Finding no inappropriate police conduct, suppression may still be had in that "rare case where it clearly appears that at the time of the confession the confessor was so intoxicated as to lack mental capacity[.]" *People v. Schompert*, supra. at 308, 279 N.Y.S.2d 515 (1967) cert. den. 389 U.S. 874, 88 S.Ct. 164 (1967); See also: *People v. Ginsberg*, 36 A.D.3d 627, 831 N.Y.S.2d 81 (2nd Dept. 2007) lv. den. 9 N.Y.3d 844, 840 N.Y.S.2d 771 (2007); *People v. Frejomil*, 184 A.D.2d 524, 584 N.Y.S.2d 181 (2nd Dept. 1992) lv. den. 80 N.Y.2d 903, 588 N.Y.S.2d 829 (1992) "The same criteria are applicable to admissions made by a defendant suffering from a mental disease." *People v. Adams*, 26 N.Y.2d 129, 137, 309 N.Y.S.2d 145, 150 (1970)

"The mere fact that a defendant suffers from a mental illness, and/or possesses limited intellectual capacity, is not sufficient to warrant the suppression of an otherwise admissible statement. Suppression should be granted only when it appears that a defendant was unable to appreciate the nature and consequences of his statement (citations omitted)." *People v. Alaire*, 148 A.D.2d 731, 738, 539 N.Y.S.2d 468, 475 (2nd Dept. 1989); See also: *People v. Pouliot*, supra.; *People v. Raffaele*, 41 A.D.3d 869, 841 N.Y.S.2d 311 (2nd Dept. 2007) lv. den. 9 N.Y.3d 925, 844 N.Y.S.2d 180 (2007) As discussed at length hereinabove, the evidence fails to disclose that the Defendant's OCD affected him to such a degree.

Based upon all of the foregoing, the Defendant's motion to suppress his statements is denied; and, the statements in question are admissible on the People's direct case at the time of trial.

This constitutes the decision and order of the court.

1. While the Defendant testified that he complained to the officers about how tightly they were squeezing his arms and that the officers responded with threatening comments, the court does not credit this testimony.

2. The Defendant testified that Detective Beaudry did not introduce himself and that he thought the detectives were Mall executives. The Defendant further testified that Detective Beaudry advised him "We're going to take your statement[]" and "they needed a statement for the mall." (Transcript 10/1/09, p. 32 l. 4 & 7) The court does not credit this testimony.

3. The Defendant denies that he ever asked for any statements to be "off the record."