

APPENDIX 5. SAMPLE OFFICE MEMOS AND ASSIGNMENT

Appendix 5.D. Sample Memo 3: 2dD Burglary and *Miranda*, Two Issues

PRIVILEGED AND CONFIDENTIAL MEMORANDUM

TO: Supervisor
FROM: Intern
RE: Anthony Cooper: Second-degree burglary charge for entering deli cellar and
admissibility of statements to police
DATE: June 1, 2026

I. QUESTIONS PRESENTED

A. May Defendant Anthony Cooper be charged with second-degree burglary under New York law when he unlawfully entered a cellar beneath a deli located in a mixed-use apartment building, where the cellar was accessible only through exterior sidewalk doors and was inaccessible from either the deli or the building’s residential areas.

B. Can Cooper successfully suppress his statements to police officers—including his statement, “Don’t shoot. I was only down there for a minute,” and his admission that he entered the cellar to “grab some food for [his] family”—when officers questioned him at the scene before administering Miranda warnings.

II. BRIEF ANSWERS

A. Probably not. To sustain a charge of second-degree burglary in New York, the prosecution must show that the burglarized premises constituted a “dwelling,” meaning a building usually occupied by a person lodging therein at night. People v. McCray, 16

N.E.3d 533, 536 (N.Y. 2014).¹ Although the cellar was located beneath a seven-story apartment building containing residences, it was physically separated from and entirely inaccessible to those residential areas. Because occupants could not enter the cellar from the apartments, the risks of fear, confrontation, and violence that justify enhanced penalties for dwelling burglaries were substantially diminished. Accordingly, the cellar probably was not part of a dwelling, so a court would reject a second-degree burglary charge against Cooper. Instead, the facts more closely support the charge of third-degree burglary based on Cooper's unlawful entry into a non-dwelling structure.

B. At least some of Cooper's statements would likely be suppressed. Police must provide Miranda warnings before subjecting a suspect to custodial interrogation. Miranda v. Arizona, 384 U.S. 436, 467 (1966); People v. Cabrera, 230 N.E.3d 1082, 1094 (N.Y. 2023). Here, six officers responded to the scene; most had their hands on their holstered firearms; and Cooper was ordered out of the cellar, frisked, and instructed to keep his hands in the air. Under these circumstances, a reasonable person would likely have believed he was not free to leave, making the encounter custodial. Therefore, statements elicited through police questioning before Miranda warnings, including Cooper's admission that he entered the cellar to obtain food, are likely inadmissible. However, Cooper's spontaneous statement, "Don't shoot. I was only down there for a minute," was not made in response to interrogation and would likely be admissible.

III. STATEMENT OF FACTS

A. Cooper enters and is trapped inside the cellar of the Always Sunny Deli.

In the early evening of June 28, 2024, Defendant Anthony Cooper, a twenty-four-year-old Black man, unlawfully entered the underground cellar of the Always Sunny Deli

¹ Legal writers generally use either *italics* or underlining to emphasize signals and case citations. This memo uses underlining for instructional purposes, but italics are more common in modern practice. Underlining originated during the typewriter era, when italics were unavailable, and the convention became embedded in legal citation. Today, either method is acceptable if used consistently, although students should defer to their supervising attorney's or professor's preferred formatting convention.

in Manhattan. [Police Report:1]. The deli, shown below, occupies the ground floor of a seven-story building, with residential apartments on the six upper floors. Id. The cellar, which is used by the deli for storage, is accessible only through two doors on the public sidewalk. [Hernandez:1]. The cellar doors are “basically adjacent” to the deli’s entrance, which is located about eight feet from the separate entrance for the building’s residents. Id.



[Police Report:2 (photo)]. There is no access or pathway from the cellar to any part of the residential units or to the deli itself. [Hernandez:1]. The cellar is off-limits to anyone except deli employees. Id.

A deli employee saw Cooper, who did not work for the deli, enter the cellar on a surveillance monitor. Id. The employee then closed and locked the cellar doors, trapping Cooper inside, and called the police. Id.

B. Cooper is questioned and ultimately arrested by responding police officers.

Within minutes, six police officers arrived at the deli in three cars. Id. at 1. They parked their cars in front of the cellar doors. Id. One officer opened the doors, identified herself as a police officer, and instructed Cooper to climb up. Id. Cooper complied and, upon stepping on the sidewalk, was surrounded by officers; all but one had their hands on

their holstered firearms. Id. Seeing the officers, Cooper raised his hands in the air and said, “Don’t shoot. I was only down there for a minute.” Id. An officer frisked Cooper for weapons, instructing him to keep his hands up. Id. The following exchange ensued:

Officer: Is there anyone else down there?

Cooper: No. I went in there by myself just a few minutes ago. I didn’t even end up taking anything.

Officer: Were the cellar doors open when you first approached the cellar?

Cooper: No. They were closed. I was able to open them, so they weren’t locked.

Officer: Why did you go inside the cellar?

Cooper: I have been without work for several months and have two young kids at home who need to eat. I am a single parent. I saw an employee bringing several boxes of fresh fruit and bread into the cellar. I noticed he didn’t lock the cellar’s doors, so I decided to go inside and grab some food for my family.²

Id. Cooper was then handcuffed and read his Miranda rights. Id.

IV. DISCUSSION

A. Cooper Did Not Commit Second-Degree Burglary Because the Deli’s Cellar Was Not a Dwelling.

Because the deli’s cellar is likely not a dwelling, Cooper should not be charged with second-degree burglary. A person commits third-degree burglary by unlawfully entering a building with intent to commit a crime. Penal Law § 140.20. Third-degree burglary rises to second-degree burglary when the building is a dwelling: a building typically occupied at night by someone who resides there. Penal Law §§ 140.00(3), 140.25(2).

Burglary of a dwelling is a more serious crime because it is “both more frightening and more likely to end in violence.” McCray, 16 N.E.3d at 536.³ Because those dual

² According to the police report, Cooper identified a shelter for unhoused families as his permanent address.

³ People v. McCray is a real case; the other cases cited in this section are based on real cases but have been edited for pedagogical purposes.

concerns arise when a person burglarizes a non-residential area “in close contiguity” to a dwelling, burglary of a non-residential area of a building generally qualifies as a dwelling burglary when the building contains a dwelling. Id. at 534, 536. For example, in McCray, the Court upheld the defendant’s second-degree burglary convictions, finding that a hotel employees’ locker room and a museum located in the same building as the hotel, both of which the defendant burglarized, were dwellings. Id. at 537. In that case, stairways connected the hotel’s residential floors to both the locker room and the museum. Id. at 534-35. As to the locker room, which could be accessed only from a floor adjacent to the first floor of guestrooms, the court explained that defendant’s burglary presented the same risks associated with a dwelling burglary because of his proximity to the guestrooms when he navigated the building’s stairways. Id. at 537. And although the museum was “much less near to the sleeping rooms,” in deeming it a dwelling the Court emphasized the “ease of access” from the museum to the hotel’s guestrooms via the shared stairway. Id.

On the other hand, burglary of a building’s non-residential area does not constitute a dwelling burglary when that area is “so remote and inaccessible from the living quarters that the special dangers inherent in the burglary of a dwelling do not exist.” Id. at 534. Thus, McCray recognized an exception to the general dwelling-burglary rule when a burglary “occur[s] in an area of a large building that is completely severed from its residential spaces.” Id. at 536 (observing that hypothetical burglar who breaks into commercial space of skyscraper that is remote and inaccessible from building’s residential apartments “create[s] virtually no risk that the people living in the apartments will even be conscious of his presence”). Later, in People v. Brass, the court invoked that exception in holding that a non-residential campus building was not a dwelling because it was a “considerable distance” from the residential buildings and lacked “ready access via connecting elevators, stairwells, or corridors.” 1464 N.Y.S.3d 621, 622 (N.Y. App. Div. 2022).

A building's non-residential area may nevertheless qualify as a dwelling even if it is removed from and inaccessible to the residential portion, so long as the non-residential area shares common space with the residential portion. In People v. Carto, the court held that office space in a 57-story mixed-use building constituted a dwelling, despite being inaccessible from the residential floors. 1642 N.Y.S.3d 785, 785 (N.Y. App. Div. 2021). Although the office was located five floors below the residential area and the two were not connected by elevator, they shared a common lobby. Id. The court rejected the argument that the non-residential space must be “instantly accessible” to qualify as a dwelling, emphasizing that a resident might have encountered the defendant in the lobby, thereby increasing the risk posed by the crime. Id.; see also People v. Quinn, 71 N.Y. 561, 563 (1878) (affirming second-degree burglary conviction where defendant burglarized shop on first floor of apartment building, despite no internal access between shop and residential units, because shop was “within the same four outer walls, and under the same roof” as residences, and building's private yard was accessible from both shop and living quarters).

Here, the cellar is likely not a dwelling because it is completely severed and inaccessible from the building's residences. The only entry to the cellar, which is off-limits to building residents, is through doors located on a public sidewalk, eight feet from the building's residential entrance. Nor do any stairways or emergency escape routes connect the cellar to either the deli or the six residential floors above. Thus, once Cooper entered the cellar, the only space he could access was the public sidewalk and neither the deli nor the apartments. This lack of access mirrors the circumstances in Brass, where a non-residential area did not qualify as a dwelling because it was a “considerable distance” from residential spaces and lacked “ready access” to them “via connecting elevators, stairwells, or corridors.” 1464 N.Y.S.3d at 622.

For these same reasons, this case is distinguishable from McCray, where non-residential areas were deemed dwellings because stairways connected them to residential areas. Likewise, it is distinguishable from Quinn because the cellar was not “within the

same four outer walls” or “under the same roof” as the building’s residences. Quinn, 71 N.Y. at 563. Here, the cellar is completely disconnected from residential areas and not under the same roof or within the same walls as the building’s residences. That said, both cases implicitly recognized that non-residential areas could qualify as dwellings even when access to residential ones is difficult or unlikely. But in this case, access from the cellar to the residents is not just difficult. It is impossible.

A prosecutor could argue that the cellar qualified as a dwelling because it shared common space with the building’s residences. After all, the cellar entrance was only eight feet away from the residential entrance, and a resident might have encountered Cooper entering or exiting the cellar. But unlike the shop Quinn, which shared a private yard with residences, and the office in Carto, which shared an internal lobby with residences, the cellar here shares no space with the building’s residences except a public sidewalk that is outside the building and accessible to the public. A resident seeing Cooper near the cellar would have no reason to suspect he was committing a crime, as he could have been a deli employee, a delivery worker, or simply a passerby. Even if his presence raised suspicion, the potential threat to residential areas was far less here than in Carto, where the defendant’s presence in a shared interior lobby heightened the risk to residents. Accordingly, the “risk [to residents] posed by the crime” was significantly more attenuated here. Carto, 1642 N.Y.S.3d at 785.

B. At Least Some of Cooper’s Statements to Police Officers Might Be Suppressed Because He Was Subject to Custodial Interrogation and Not Mirandized When He Made Them.

Miranda warnings protect a suspect’s right against self-incrimination during the “inherently compelling pressures” of “in-custody interrogation.” Miranda, 384 U.S. at 467. Police must give Miranda warnings before “interrogat[ing]” a person who is in “custody.” Cabrera, 230 N.E.3d at 1094. A suspect’s incriminating statements obtained during custodial interrogation are inadmissible at trial unless the suspect had been

informed of their Miranda rights before making those statements. Id. On the other hand, statements made outside interrogation or while the suspect wasn't in custody are admissible in the absence of Miranda warnings. Id. Here, Cooper was likely in custody during his encounter with police. Nevertheless, at least one of his statements—"Don't shoot. I was only down there for a minute"—is admissible because it was made spontaneously before police asked Cooper a single question. See People v. Corey, 175 N.Y.S.3d 830, 832 (App. Div. 2022) (holding that defendant's custodial pre-Miranda statement was admissible because it was "spontaneous and not the result of inducement, provocation, encouragement or acquiescence"). But the other statements he made to police about whether the cellar doors were open when he approached them and why he entered the cellar were likely obtained via interrogation before police administered Miranda warnings and are therefore inadmissible.

1. *Custody*

Not all police stops constitute "custody" for Miranda purposes. A suspect is in custody when a reasonable person in their position, innocent of any wrongdoing, would believe they were not free to terminate the encounter and leave. People v. Paulman, 833 N.E.2d 239, 243 (N.Y. 2005). This is an objective inquiry that considers the totality of the circumstances. J.D.B. v. North Carolina, 564 U.S. 261, 270-71 (2011).

Particularly coercive actions by police, such as handcuffing a suspect or holding them at gunpoint, generally lead to a conclusion that the suspect was in custody. See Cabrera, 230 N.E.3d at 1095 (recognizing that "there may be very few circumstances where a handcuffed person is not in custody for purposes of Miranda given the obvious physical constraint and association with formal arrest"); see also People v. Shivers, 233 N.E.2d 836, 839 (1967) ("[O]nce the officer . . . draw[s] his gun, the individual interrogated is actually deprived of his freedom."). On the other hand, courts typically find that a suspect was not in custody when police informed them that they were free to leave. See, e.g., People v. Kollar, 730 N.Y.S.2d 320, 321 (App. Div. 2001) (holding that suspect was not in custody when he voluntarily accompanied detectives to a police

station, was not retained in any way, and prior to questioning was informed that he was “free to leave if he so desired”).

Not every police command or action that restricts a suspect’s liberty is sufficient on its own to establish custody. See People v. Anthony, 925 N.Y.S.2d 313, 314 (App. Div. 2011) (holding that defendant was not in custody despite being patted down and asked accusatory questions about possessing firearm); People v. Dealma, 736 N.Y.S.2d 865, 865 (App. Div. 2002) (concluding that defendant instructed to “put up his hands” before being searched was not in custody). When considered in their totality, however, such actions may establish the suspect was in custody, especially when the police presence and conduct make ending the encounter impractical. For example, in People v. Trice, the court held that a suspect was in custody when he was surrounded by at least ten police cars and multiple officers, frisked, and instructed to place his hands on the hood of a police car. 183 N.Y.S.3d 583, 585-86 (App. Div. 2023). Similarly, in People v. Abdullah, the court held that a suspect was in custody when he was surrounded by four police officers, with one positioned between him and the exit; told to empty his pockets; prevented from retrieving his possessions; and asked accusatory questions about the crime that he was suspected of committing. 170 N.Y.S.3d 352, 352 (App. Div. 2022).

Although neither the Supreme Court nor any New York court has yet explicitly held that a suspect’s race is relevant to the objective custody inquiry, they have recognized that other immutable characteristics should be considered. Namely, in J.D.B., the Supreme Court held that a suspect’s age is a relevant factor in determining custody, reasoning that “[i]t is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave” and that there is “no reason for police officers or courts to blind themselves to that commonsense reality.” J.D.B., 564 U.S. at 264-65; see also Matter of Tateana R., 883 N.Y.S.2d 476, 478 (App. Div. 2009) (considering suspect’s young age as part of custody inquiry).

Race may be just as relevant as age in shaping a person’s response to a police encounter. See United States v. Knights, 989 F.3d 1281, 1295-97 (11th Cir. 2021) (Rosenbaum, J., concurring) (observing that “[f]or Black citizens, the fear of violence often overlays the entire law-enforcement encounter” and concluding, given ample data that Black Americans are far more likely than white Americans to be killed by police, that “Black Americans lived experiences make them materially less likely . . . to believe they have the freedom to leave an interaction with the police”). In other words, a suspect’s race can inform the analysis of the custody question. See United States v. Smith, 794 F.3d 681, 687-88 (7th Cir. 2015) (holding that race is not “dispositive” to custody inquiry but recognizing relevance of race in “everyday police encounters with citizens . . . around the country” and “empirical data demonstrating the existence of racial profiling, police brutality, and other racial disparities in the criminal justice system”); see also Aliza Hochman Bloom, Objective Enough: Race Is Relevant to the Reasonable Person in Criminal Procedure, 19 STAN. J. CIV. RTS. & CIV. LIBERTIES 1, 49 (2023) (“In a country where Black Americans have long experienced disproportionate and well-publicized violence in law enforcement encounters, a reasonable person who is a young, Black male, for example, is more likely to pause before declining a police officer’s request or attempting to leave the officer’s presence.”).

Here, a reasonable person in Cooper’s position, innocent of any wrongdoing, would not have felt free to end the police encounter and walk away. As soon as police arrived, they ordered Cooper to climb out of the cellar. R. at 1. This restriction on Cooper’s liberty was compounded when, once he reached the sidewalk, he was surrounded by six police officers and three police cars, frisked, ordered to keep his hands in the air, and questioned about why he entered the cellar. Id. Cooper’s concern about escalation is evident in his statement, “[d]on’t shoot.” Id. And any reasonable person surrounded by six police officers—five with their hands on their holstered firearms—would not have felt free to leave. These facts mirror those in Trice and Abdullah, where suspects were found to be in custody due in part to the heavy police presence during the encounter. Indeed,

just like the suspect in Trice, Cooper was frisked, and his movement further restricted when an officer directed him where to place his hands. Further, like in Abdullah, the heavy police presence and frisk was accompanied by accusatory questions about the crime that he was suspected of committing, reinforcing the inference that he was not free to leave.

Cooper might also argue that because he was caught red-handed inside the cellar, he was conscious of his own guilt and knew that his arrest was imminent. But a suspect's mere "awareness that the police already possess incriminating evidence against him generally is irrelevant in determining whether the interrogation was custodial." In re Kwok T., 371 N.E.2d 814, 818 (N.Y. 1977). Nevertheless, given the circumstances of the encounter described above, Cooper was likely in custody when questioned by the police.

In addition, as a Black man, Cooper might have felt an increased and justified fear of how the police would respond if he tried to end the encounter and walk away. Race, like age, can intensify the coercive nature of a police encounter and is relevant to whether a reasonable person would feel free to end a police encounter or feel compelled to stay out of fear of potential deadly consequences. Indeed, there is no question that Cooper felt in danger given the first words out of his mouth to police were "[d]on't shoot." R. at 1. Ultimately, if the circumstances of Cooper's arrest make it a close call as to whether he was in custody, a court might consider whether the coercive aspects of the encounter were felt more intensely by a Black man.

2. Interrogation

When a suspect is in custody, police must provide Miranda warnings only before the suspect is "subjected to interrogation." Rhode Island v. Innis, 446 U.S. 291, 300 (1980). "Interrogation" includes both direct questioning and any words or actions by the police "reasonably likely to elicit an incriminating response from the suspect." Id. at 301 n.5. On the other hand, police statements that are not designed to elicit incriminating responses from a defendant are not considered interrogation. See People v. Huffman, 41 N.Y.2d 29,

33 (1976). For instance, a brief, crime-scene inquiry to clarify a dynamic situation encountered by the police does not constitute interrogation and need not be preceded by Miranda warnings. People v. Adams, 640 N.Y.S.2d 37, 37 (App. Div. 1996).

In Adams, the court determined that police questioning at a crime scene did not constitute interrogation. Id. There, police officers who had just arrived at a crime scene asked the suspect whether he had any accomplices and whether they were armed. Id. The court explained that these questions did not amount to interrogation because they “intended to clarify the situation and not to elicit admissions.” Id.; see also People v. Valentin, 987 N.Y.S.2d 227, 227 (App. Div. 2014) (holding that police officer’s single question to suspect about “what happened” did not amount to interrogation when police, responding to report of “dispute with a knife,” encountered two wounded men and a dead body). But in Trice, where a state trooper questioned a suspect about whether he had left the scene of a car accident earlier that day, the court determined that the question constituted interrogation because it was intended to elicit an inculpatory response and “not merely designed to clarify the situation.” 183 N.Y.S.3d at 585-86.

Here, police officers asked Cooper three questions before reading him Miranda warnings. The first question—“Is there anyone else down there?”—was asked as soon as Cooper emerged from the cellar and exclaimed that he was “only down there for a minute.” Like the question in Adams aimed at determining the number of suspects at the scene, this question was similarly intended to “clarify the situation,” 225 A.D.2d at 506, because the police needed to know whether anyone else was inside the cellar to secure the scene. Although Cooper’s response to that question was inculpatory—he admitted he went inside the cellar—the question was not designed to elicit such a response, distinguishing the question from the one in Trice.

On the other hand, the police’s follow-up questions about “[w]hy” Cooper entered the cellar and whether the cellar doors were open when he first approached them were designed to elicit inculpatory responses and therefore constituted interrogation. These questions weren’t necessary to secure the crime scene, protect bystanders, or clarify the

situation. Rather, they were meant to elicit inculpatory responses from Cooper that could help establish his guilt of burglary, making them much more like the questions in Trice than the ones in Valentin and Adams. Because those questions constituted interrogation and were not preceded by Miranda warnings, Cooper's answers about how he encountered the doors and why he entered the cellar will likely be inadmissible.

V. CONCLUSION

For the reasons discussed above, the deli's cellar was likely not a dwelling and at least some of Cooper's statements to police are inadmissible.