CHAPTER 19

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Confessions

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[1] This chapter follows the organization of Chapter 9 of the TRIAL MANUAL (1984), published by the Public Defender Service for the District of Columbia and the Criminal Practice Institute.

Cross-References
Fruit of the poisonous tree, § 17.2A
The right to counsel, ch. 8
Witness's privilege against self-incrimination, ch. 33

§ 19.1 REFERENCES

30 K. SMITH, *MASSACHUSETTS PRACTICE* § 6 (3d ed. 2007 & Supp. 2011); 32 J. NOLAN, *MASSACHUSETTS PRACTICE* §§ 56-58 (3d ed. 2007 & Supp. 2011); LIACOS, BROWN & AVERY, *HANDBOOK OF* M*ASSACHUSETTS* E*VIDENCE* 575-656 (7th ed. 1999 & Supp. 2006); J. DRESSLER & A. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE, VOL.1: INVESTIGATION, ch. 21-25 (5d ed. 2010); BNA, *CRIMINAL PRACTICE MANUAL* 51:701, 51:801 (1996).

§ 19.2 PREVENTING INCRIMINATING STATEMENTS FROM BEING MADE[2]

At the first possible opportunity, counsel should emphatically advise the client not to speak with police officers, probation officers, or any other government agents without counsel present. Counsel should instruct the client to refuse to answer any police questions, whether about the charged offense or any others, on the advice of his attorney. The client should also be warned not to speak to anyone else about the details of the incident, particularly cell-mates or codefendants, as well as family members and friends. Counsel should explain that these precautions are necessary because any of these people may be subpoenaed and required to testify about the defendant's statements, however unwillingly.

If counsel is first contacted by telephone by a client in police custody, counsel should tell the officers in charge that he has told the client to say nothing without counsel present and specifically instruct them not to question the defendant until counsel can be present.[3] Counsel should also state that the defendant should not be put in a line-up, exhibited for identification, or subjected to any physical examination, personal inspection, or scientific test in counsel's absence, and request to be notified in order to be present at any such procedures.

If counsel knows ahead of time that his client will be coming in contact with the police or other government agents, counsel should make every effort to accompany the client in order to guard against potentially incriminating statements being made. If it is impossible for counsel to accompany the client to such a meeting, counsel should again explain to the client the need to remain silent and contact the official in charge to obtain an agreement that the client will not be interrogated in counsel's absence. Note,

[2] This section, in its original version, relied heavily on PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA, CRIMINAL PRACTICE INSTITUTE, TRIAL MANUAL ch. 9, § I (1984), and AMSTERDAM, TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES §§ 35, 97 (5th ed. 1988).

[3] *See infra* § 19.4D(2)(d)(3).

however, that reliance on any such agreement may be risky. *First*, despite the agreement the defendant may still waive his Fifth and Sixth Amendment rights to counsel, allowing for subsequent use of the statement.[4] *Second*, even if the existence of the agreement results in the suppression of statements, the Commonwealth may have gained other information that as a practical matter will never be successfully suppressed as a "fruit" of the suppressed statement, and even a suppressed statement might nevertheless be used to impeach the defendant if he testifies at trial.[5]

§ 19.3 PROCEDURAL ASPECTS

§ 19.3A. DISCOVERY OF THE DEFENDANT'S STATEMENTS

The defendant's written or recorded statements within the possession or control of the Commonwealth are subject to mandatory pretrial discovery by the defense.[6] Counsel should also inquire whether any interrogation or statement has been tape- or video-recorded. If so, the tapes may provide critical evidence bearing on suppression, such as the defendant's mental or physical impairment.[7] If not, the failure of the police to record the defendant's statements, especially if made in a place of custody, may be argued in support of suppression[8] and, if the statement is admitted at trial, as a basis to disregard or discount the statement.[9]

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[4] *See infra* §§ 19.4D(2)(3),E(3).

[5] *See infra* § 19.5A.

[6] Mass. R. Crim. P. 14(a)(1)(A), appearing in 442 Mass. 1518 (2004). *See supra* § 16.6C. Counsel should also obtain and scrutinize the arrest booking sheet for incriminating responses to "routine" booking questions. *See* Commonwealth v. Guerrero, 32 Mass. App. Ct. 263, 266–69 (1992) (although questions regarding occupation and employment status should not be asked unless fresh *Miranda* warnings are given prior to booking, conviction sustained because defense counsel failed to discover, or move to suppress, defendant's responses). *See infra* § 19.4D(1)(a).

[7] In Commonwealth v. Hooks, 375 Mass. 284, 288 (1978), the defendant's claim of marijuana intoxication was refuted by comparing his manner of testifying at the suppression hearing with his tape recorded speech at the police Station. *See also* Commonwealth v. Fernette, 398 Mass. 658, 664–65 (1986) (127-minute interrogation tape admissible even though it had been shut off several times during recording; better practice is to leave recorder on during the entire interview).

[8] Massachusetts law does not require written or electronic recording of custodial interrogations, and the S.J.C. has declined to follow the Alaska and Minnesota courts in holding that electronic recording, when feasible, is constitutionally required, or to create such a common law rule. *See* Commonwealth v. Garuti, 454 Mass. 48, 52-53 (2009) (rejecting constitutional requirement that interrogations be recorded); Commonwealth v. Groome, 435 Mass. 201, 219 n.26 (2001); Commonwealth v. Fernandes, 427 Mass. 90, 98 (1998); Commonwealth v. Diaz, 422 Mass. 269 (1996) (citing, with approval, State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994) and model rules); Commonwealth v. Fryar, 414 Mass. 732, 742 & n.8 (1993) (*Fryar I*) (discussing Stephan v. State, 711 P.2d 1156 (Alaska 1985)). *See also* United States v. Meadows, 571 F.3d 131, 146-47 (1st Cir.), *cert. den.*, 130 S.Ct. 569 (2009) (same under federal law). The S.J.C. has suggested that the failure to record is relevant to three issues: voluntariness, whether a defendant was properly advised of his rights, and whether any statement was made. *See* Commonwealth v. Boyarski, 452 Mass. 700, 712 n. 12 (2008) (lack of recording may be relevant on voluntariness and wiaver of rights); *Diaz, supra*, 422 Mass. at 273. *See also*

§ 19.3B. FILING OF PRETRIAL MOTIONS

Although Mass. R. Crim. P. 13(c)(2) requires the defendant to move before trial to suppress an inadmissible confession,[10] the courts have suppressed statements based on involuntariness and *Miranda* challenges raised for the first time during trial.[11] However, if prior to trial counsel is aware of a basis to challenge a statement under any theory, the better practice is to file a pretrial motion to suppress, supported by the affidavit required by Rule 13.[12] Further, where admissibility depends on whether the interrogator can be shown to be a government agent,[13] the Court has held that this must be shown before trial, at least if a suppression hearing was held.[14]

Commonwealth v. Pina, 430 Mass. 66 (1999) (upholding admissibility of confession despite failure of police to record the interrogation, to reduce defendant's statement to writing for his signature, or to preserve their handwritten notes; defense may argue these facts, which bear upon credibility of police testimony, before suppression motion judge and jury).

Moreover, when an unrecorded statement is admitted at trial against the defendant, the S.J.C. has mandated that – if the defendant so requests – the jurors be instructed to consider the unrecorded statement with "great caution and care." Commonwealth v. DiGiambattista, 442 Mass. 423, 441-42 (2004).

[9] *See* Commonwealth v. DiGiambattista, 442 Mass. 423, 441-42 (2004), discussed *supra* note 8.

[10] Failure to include the affidavit required under Mass. R. Crim. P 13(a)(2) can be fatal. *See* Commonwealth v. Luce, 34 Mass. App. Ct. 105, 112 (1993).

[11] Commonwealth v. Woods, 427 Mass. 169 (1998) (conviction reversed where defendant did not move to suppress before trial, but raised issue by motion in limine and objecton to testimony at trial); Commonwealth v. Iglesias, 426 Mass. 574, 579 (1998) (trial counsel, who failed to file pretrial motion to suppress, requested voir dire on issue of voluntariness; this was "proper method of challenging the admissibility of a defendant's statement"); Commonwealth v. Rubio, 27 Mass. App. Ct. 506, 511 (1989) (conviction reversed although defense raised *Miranda* issue for first time during trial; "When an objection is made at trial to the admission of a defendant's incriminating statement on the ground that it was obtained in violation of . . . *Miranda* . . . or was involuntary, or both, and no pretrial hearing as been held, the prudent thing for the judge to do is to stop the trial and conduct [a voir dire]"); Commonwealth v. Adams, 389 Mass. 265, 269–70 & n.1 (1983) (although the defendant should normally move to suppress objectionable statements before trial, even if he has not done so the Commonwealth must, on "seasonable objection," establish compliance with *Miranda;* defendant's noncompliance with Mass. R. Crim. P. 13(c)(2) excused because it was unclear that defendant was aware of police failure to give complete *Miranda* warnings).

[12] *See, e.g.*, Commonwealth v. Brown, 449 Mass. 747, 766-68 (2007) (in absence of pretrial motion, trial judge not required to hold a hearing concerning defendant's claim that his statement was involuntary where, in spite of insanity defense, Commonwealth's evidence did not present a live voluntariness issue). *See also* Commonwealth v. Watkins, 33 Mass. App. Ct. 7, 13 n.6 (1992) ("Given the uncertain status of a failure to follow the procedure prescribed by rule 13(c)(2)," trial judge should follow *Rubio*'s "prudent" advice, but hint that counsel's failure to follow the rule might be fatal if defense knew before trial of circumstances of interrogation).

[13] *See infra* § 19.4B.

[14] Commonwealth v. Rodwell, 394 Mass. 694, 699 (1985). In *Rodwell* the defendant had filed a pretrial motion to suppress under *Massiah*, but made an insufficient showing of his fellow prisoner's status as a government agent to obtain an evidentiary hearing. The defendant was not permitted to introduce additional evidence on that issue at trial. The S.J.C. upheld the

§ 19.3C. BURDEN OF PROOF AND BURDEN OF GOING FORWARD

Whether suppression is an issue at a pretrial hearing on a motion to suppress, or at trial, the same burdens of proof and production apply. The burden of going forward varies depending on whether the evidence implicates the voluntariness doctrine or *Miranda.* In the former instance the defendant bears the initial burden of producing some evidence of involuntariness;[15] in the latter, once defendant establishes that a statement subject to *Miranda* rules has been taken in the absence of counsel,[16] the burden of proof is on the Commonwealth.

§ 19.3D. THE HUMANE PRACTICE RULE; APPEAL

1. Voluntariness: The "Humane Practice" Rule

In *Jackson v. Denno* [17] the Supreme Court invalidated a procedure by which the jury alone decided whether a confession was involuntary. Thus, the Fourteenth Amendment due process clause requires a trial judge "to conduct a voir dire examination in the absence of the jury where the voluntariness of a confession is in issue and to make an affirmative finding of voluntariness before the jury are [sic] allowed to consider it."[18] The Massachusetts "humane practice," which antedates *Jackson,*[19] gives even more protection to the defendant. When it appears that a statement made by a defendant either to law enforcement officers *or to private citizens*[20] has been coerced, the defendant is entitled to three rights:

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trial court: the evidence should have been submitted before trial, and the fellow prisoner's status "was not a jury question," *Rodwell* should be read narrowly to bar *jury* consideration of government agent status or, at the most, to bar defendant's "second bite" at raising that issue, Any broader reading would be difficult to reconcile with Commonwealth v. Adams, 389 Mass. 265 (1983) and Commonwealth v. Rubio, 27 Mass. App. Ct. 506 (1989).

[15] There is a presumption of voluntariness that evaporates once the defendant has produced "some evidence" that the statement was involuntary. Commonwealth v. Tavares, 385 Mass. 140, 151, *cert. denied,* 457 U.S. 1137 (1982); Commonwealth v. Harris, 371 Mass. 462, 471 n.3 (1976).

[16] *See* Commonwealth v. Girouard, 436 Mass. 657, 666 (2002) (in asserting a *Miranda* claim, defendant bears burden to prove that he was in custody); Commonwealth v. Larkin, 429 Mass. 426, 432 (1999) (same).

[17] 378 U.S. 368 (1964) (holding that as a requirement of Fourteenth Amendment due process, when it appears that a confession has been coerced or made involuntary, the trial judge must conduct a voir dire to determine whether the confession was in fact made involuntarily).

[18] Commonwealth v. Harris, 371 Mass. 462, 469 (1976).

[19] The history of the practice is discussed in Commonwealth v. Harris, 371 Mass. 462, 473 (1976), and in Commonwealth v. Watkins, 425 Mass. 830, 835–36 (1997). *See also "The Humane Practice" – The initial inquiry by the judge,* 30 SMITH, MAPRAC § 6.74 (3d ed. 2007 & Supp 2011).

[20] Commonwealth v. Gallagher, 408 Mass. 510, 513–15 (1990) (defendant's pretrial motion and affidavit asserting that his statements to private citizens were made under influence of cocaine and alcohol entitled him to voir dire hearing on voluntariness); Commonwealth v. Allen, 395 Mass. 448, 456 (1985); Commonwealth v. Miller, 68 Mass. App. Ct. 835, 836-37 (2007) (reversed because trial judge declined to hold voir dire hearing on voluntariness of

1. A voir dire hearing on the issue of voluntariness conducted by the judge in the absence of the jury.[21] This device avoids prejudicing the jury's decision on the issue of guilt by exposure to a coerced confession.

2. A judicial ruling that the statement is voluntary before it may be considered by the jury.[22] Once the defendant has produced "some evidence" that the statement was involuntary, the Commonwealth must satisfy the judge of voluntariness beyond a reasonable doubt.[23]

3. If credible evidence of involuntariness is put before the jury, a jury instruction to disregard the statement unless the Commonwealth has satisfied the jury beyond a reasonable doubt that the statement is voluntary.[24]

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defendant's statements to in-house investigators of defendant's employer "[n]otwithstanding troubling evidence concerning isolation and coercive questioning" by those investigators). *Compare* Commonwealth v. Cutts, 444 Mass. 821, 831-33 (2005) (conflicting evidence on defendant's intoxication at time he made statements to civilian witnesses insufficient to trigger right to voir dire hearing on voluntariness); Commonwealth v. Watkins, 33 Mass. App. Ct. 7, 14–17, & n.8 (1992) (without more, defense counsel's argument that student-defendant cooperated with private university's attorney to avoid being "kicked out" of school did not entitle him to voir dire hearing on voluntariness).

[21] Commonwealth v. Hunter, 416 Mass. 831, 833–34 (1994); Commonwealth v. Harris, 371 Mass. 462, 469 (1976). But a trial judge who has heard a motion to suppress need not hold a second voir dire on hearing substantially similar testimony at trial. Commonwealth v. Bryant, 390 Mass. 729, 745 (1984). *See also* Commonwealth v. Brown, 449 Mass. 747, 765-66 (2009) (holding voir dire not required where defendant did not assert voluntariness claim pretrial and voluntariness not a live issue based on prosecution's evidence); Commonwealth v. Kirwan, 448 Mass. 304, 318 (2007) (evidence that defendant "consumed a number of beers," absent evidence of intoxication, insufficient to trigger right to a voir dire hearing on involuntariness).

[22] Commonwealth v. Harris, 371 Mass. 462, 469 (1976).

[23] Commonwealth v. Sperrazza, 399 Mass. 1001 (1987) (new trial ordered where trial judge found defendant's statement voluntary only by preponderance of the evidence); Commonwealth v. Tavares, 385 Mass. 140, 151, *cert. denied*, 457 U.S. 1137 (1982).

[24] Commonwealth v. Crawford, 429 Mass. 60, 65 (1999) (partially abrogated on other grounds), *citing* Commonwealth v. Tavares, 385 Mass. 140, 152 (1982); Commonwealth v. Harris, 371 Mass. 462, 471 n.3 (1976) (distinguishing cases where, after voir dire and judicial finding of voluntariness, defendants did not dispute finding before the jury); Commonwealth v. Anderson, 425 Mass. 685, 691 (1997) (voluntariness not "live issue" at trial where defendant raised issue before trial and testified at voir dire, but evidence was never put before jury and defendant did not request that the jury be instructed on voluntariness). It is improper for the judge to inform the jury as to his prior decision on the issue. *Tavares, supra*, 385 Mass. at 153. If the testimony raises no issue of voluntariness, still the judge should not instruct the jury that there is a presumption that a confession is voluntary. *Tavares, supra*, 385 Mass. at 151.

The jury's role in screening statements for voluntariness is "settled practice" but not constitutionally required. Commonwealth v. Watkins, 425 Mass. 830, 835 (1997); Commonwealth v. Alicea, 376 Mass. 506, 523 (1978) (citing Lego v. Twomey, 404 U.S. 477, 489–90 (1972)). The defendant is entitled to an instruction that each juror individually should determine whether the defendant's statement was voluntary and, if not convinced of this beyond a reasonable doubt, should not use the statement as evidence in drawing her own conclusion as to guilt. But the judge need not instruct the jurors that they must decide unanimously that the statement was voluntary before any juror could consider it as evidence. *Watkins, supra*, 425 Mass. at 834–36.

The "humane practice" applies whether the statement is a "confession" or an "admission."[25] Once voluntariness has become a "live issue" in the trial, the court must follow the practice sua sponte, even if the defendant does not move to suppress, request a voir dire, or object to admission of the testimony.[26]

Convictions have been upheld despite the trial judge's failure to instruct jurors that they must find voluntariness beyond a reasonable doubt, so long as they were instructed generally of the Commonwealth's burden to prove guilt beyond a reasonable doubt. *See, e.g.*, Commonwealth v. Doucette, 391 Mass. 443, 456 (1984) ("fail[ing] to give this instructions under the circumstances did not create a substantial risk of a miscarriage of justice."). *Compare* Commonwealth v. Hooper, 42 Mass. App. Ct. 730 (1997) (where defendant's mental condition at time of inculpatory statement questioned in examination of witness, argued in defense summation, and was subject of oral request for instruction, conviction reversed for failure to instruct jury on its role).

[25] A confession is a direct acknowledgment of guilt by the accused, and an admission is a "statement by the accused, direct or implied, of facts pertinent to the issue which, although insufficient in itself to warrant a conviction, tends in connection with proof of other facts, to establish the accused's guilt." Commonwealth v. Tavares, 385 Mass. 140, 150, 0.16, *cert. denied*, 457 U.S. 1137 (1982) (quoting LIACOS, MASSACHUSETTS EVIDENCE 296–97 (5th ed. 1981)). Although under earlier law admissions received less protection than confessions, see Commonwealth v. Mahnke, 368 Mass. 662, 679 n.24 (1975), *cert. denied*, 425 U.S. 959 (1976), the S.J.C. has applied the "humane practice" to both. Tavares, *supra*, 385 Mass. at 150. *Miranda* also applies to both confessions and admissions. Commonwealth v. Rubio, 27 Mass. App. Ct. 506, 513–14 n.8 (1989).

[26] *See* Commonwealth v. Harris, 371 Mass. 462, 470-73 (1976) (defendant's testimony that he was physically abused during police questioning by itself raised a "substantial claim of involuntariness" triggering judge's duty to follow "humane practice," and judge's failure to conduct voluntariness hearing, to rule on the admissibility of defendant's statement, and to instruct the jury on the voluntariness issue constituted reversible error); Commonwealth v. Benoit, 410 Mass. 506, 511 (1991) (noting possible requirement of voluntariness hearing "in some circumstances" even if not requested by defendant). *See also* Commonwealth v. Sunahara, 455 Mass. 832, 834-35 (2010) (if defendant raises voluntariness issue, judge must hold hearing and rule on admissibility, and if statement is admitted and voluntariness is a live issue at trial, judge must submit voluntariness issue to jury); Commonwealth v. Miller, 68 Mass. App. Ct. 835, 836-37 (2007) (trial judge's failure to hold voir dire hearing on voluntariness of defendant's statements to in-house investigators of defendant's employer "[n]otwithstanding troubling evidence concerning isolation and coercive questioning" by those investigators constituted reversible error). *Contrast* Commonwealth v. Brown, 449 Mass. 747, 765-66 (2009) (holding voir dire hearing not required where defendant did not assert voluntariness claim pretrial, and in view of prosecution's evidence at trial concerning statement, voluntariness not a live issue); Commonwealth v. Kirwan, 448 Mass. 304, 318 (2007) (evidence that defendant "consumed a number of beers," absent evidence of intoxication, insufficient to trigger right to a voir dire hearing on voluntariness); Commonwealth v. Serino, 436 Mass. 408, 412 (2001) (no duty to conduct voir dire sua sponte when defense counsel, before trial, informed judge that he did not intend to challenge voluntariness of statements); Commonwealth v. Nieves, 429 Mass. 763, 769 (1999) (involuntariness claim based on drug usage and withdrawal was not "live issue" where it would have been inconsistent with main defense at trial, that defendant intentionally gave false confession as part of agreement with victim's mother); Commonwealth v. Watkins, 33 Mass. App. Ct. 7, 14–17, & n.8 (1992) (without more, student-defendant's mere concern that his refusal to give statement to private university's attorney might result in his expulsion, does not amount to "the 'affirmative,' 'credible' evidence of involuntariness which triggers a *Harris* voir dire," quoting Commonwealth v. Brady, 380 Mass. 44, 50 (1980), referring to Commonwealth v. Harris, 371 Mass. 462, 571 n.3 & 472 (1976)); Commonwealth v. Benoit,

2. *DiGiambattista* Cautionary Instruction

Although expressing a strong preference that interrogations be electronically recorded, the S.J.C. has declined to impose such a requirement as a constitutional or common-law predicate to admissibility of statements resulting from custodial interrogation.[27] Instead, the Court has opted under its supervisory powers for a jury instruction counseling juror caution in reviewing unrecorded statements or admissions that resulted from custodial interrogation or questioning that occurred at a place of detention.[28] In the words of the Court:

> [W]hen the prosecution introduces evidence of a defendant's confession or statement that is the product of a custodial interrogation or an interrogation conducted at a place of detention (e.g., a police station), and there is not at least an audiotape recording of the complete interrogation, the defendant is entitled (on request) to a jury instruction advising that the State's highest court has expressed a preference that such interrogations be recorded whenever practicable, and cautioning the [jurors] that, because of the absence of any recording of the interrogation in the case before them, they should weigh evidence of the defendant's alleged statement with great caution and care. Where voluntariness is a live issue and the humane practice instruction is given, the [jurors] should also be advised that the absence of a recording permits (but does not compel) them to conclude that the Commonwealth has failed to prove voluntariness beyond a reasonable doubt.[29]

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410 Mass. 506, 512–17 (1991) (evidence of defendant's psychosis, intoxication, and physical injury not sufficient to raise "live issue" of voluntariness where no evidence that they affected defendant's mental condition at time of statement); Commonwealth v. Tavares, 385 Mass. 140, 150–51, (1982) discussing cases (voluntariness issue not raised by testimony of coercion or otherwise; judge had no obligation to submit issue to jury); Commonwealth v. Parham, 390 Mass. 833, 842 (1984) (defense counsel's "fleeting references" in closing to issues of voluntariness and intoxication were insufficiently focused to make question a "live issue"). *with* Commonwealth v. Harris, 371 Mass. 462, 470 (1976) (defendant's testimony that he was physically abused during police questioning by itself raised a "substantial claim of involuntariness" triggering judge's duty to follow "humane practice").

[27] *See* Commonwealth v. DiGiambattista, 442 Mass. 423, 441-47 (2004) (summarizing the arguments for and against such a recording requirement and the Court's holdings in this regard).

[28] Commonwealth v. DiGiambattista, 442 Mass. 423, 447 (2004). *See* Commonwealth v. Garuti, 454 Mass. 48, 52-53 (2009) (declining to revisit decision to rely on jury instruction as means to address concerns raised by unrecorded interrogation and statement). *See also* Commonwealth v. Jones, 75 Mass. App. Ct. 38, 45-46 (2009) (holding that defendant not entitled to a *DiGiambattista* instruction where statement resulted from a non-custodial interrogation at an office building).

[29] Commonwealth v. DiGiambattista, 442 Mass. 423, 447-48 (2004). *See* Commonwealth v. Zanetti, 454 Mass. 449, 469 (2009) (where apt, *DiGiambattista* instruction must be given on defendant's request even if interrogation occurred before decision was announced); Commonwealth v. Woodbine, 461 Mass. 720, 739-40 (2012) (where part of the interrogation was recorded and part was not but the recorded part was suppressed, defendant entitled to a *DiGiambattista* instruction concerning the unrecorded part that was introduced into

The Court went on to make clear that it did not intend this instruction to supplant the totality-of-the-circumstances test that a jury is to employ in assessing voluntariness under the humane-practice rule if that is a live issue. Rather, the Court suggested that the lack of a recording is an important factor to consider in deciding whether the prosecution has presented the jury with all of the relevant circumstances surrounding the taking of the statement.[30] Of course, the prosecution is free to bring to the jurors' attention any facts that explain why the interrogation and statement in question were not recorded.[31]

3. *Miranda v. Arizona*

The "humane practice" rule (requiring an instruction to the jury to ignore evidence of the defendant's statements unless it finds them voluntary beyond a reasonable doubt) does not apply to alleged *Miranda* violations.[32] Still, the government bears a "heavy burden" to prove beyond a reasonable doubt that uncounseled statements made during custodial police interrogation were properly obtained and, if *Miranda* applies, that the defendant validly waived his rights.[33] On "seasonable objection" by the defense the court should hold a voir dire and make explicit findings whether the defendant received the required warnings and validly waived his rights.[34] If over objection the trial court permits the jury to be present during the voir dire, it could be reversible error even if the defendant's statements are excluded.[35]

4. Appellate Review

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evidence even though the jury might infer from the instruction that the police made no effort to record the interrogation).

[30] DiGiambattista, 442 Mass. at 448.

[31] DiGiambattista, 442 Mass. at 448-49.

[32] "The threshold questions whether *Miranda* warnings were given and if they were given, whether the defendant waived his rights, are for the judge and not for the jury." Commonwealth v. Riveiro, 393 Mass. 224, 228 (1984).

[33] Miranda v. Arizona, 384 U.S. 436, 475–76 (1966); Commonwealth v. Nom, 426 Mass. 152, 158–59 (1997). The "beyond a reasonable doubt" standard is not constitutionally required. Commonwealth v. Day, 387 Mass. 915, 921 n.10 (1983) (prospectively imposing "beyond a reasonable doubt" as burden of proof for establishing knowing and intelligent waiver of constitutional rights). *Compare* Colorado v. Connelly, 479 U.S. 157, 167–69 (1986).

[34] Commonwealth v. Adams, 389 Mass. 265, 269–70 (1983). If defendant's pretrial motion to suppress was denied, his failure to object to admission of the statement at trial does not waive the issue on appeal. *See* Commonwealth v. Sherman, 389 Mass. 287, 290 n.2 (1983). *See also* Commonwealth v. Shine, 398 Mass. 641, 644 n.1 (1986) (despite lack of suppression motion the court, on defendant's request, held midtrial voir dire on admissibility of statements under both *Miranda* and voluntariness doctrines); Commonwealth v. Sires, 413 Mass. 306 (1992) (preferable, on retrial after 17 years, during which time standard of proof had changed, to hold new hearing on voluntariness, but not prejudicial to rely on transcript of first hearing).

In Commonwealth v. Medeiros, 395 Mass. 336, 343 (1985), the court held that despite the absence of explicit findings by the motion judge, denial of suppression motion implies findings of voluntariness and compliance with *Miranda*. *See also* Commonwealth v. Parham, 390 Mass. 833, 837–38 (1984) (*accord*).

[35] Commonwealth v. Riveiro, 393 Mass. 224, 228 (1984).

If an issue of coercion has been raised, evidence of voluntariness must affirmatively appear in the record;[36] so, too, must the judge's ruling appear "with unmistakable clarity."[37] If it is concluded that the defendant's "humane practice" rights were violated at the trial level, the defendant is usually entitled to a new trial.[38]

Although historically the admission of a coerced confession called for automatic reversal, the Supreme Court has applied the harmless error doctrine to such a violation under Fourteenth Amendment due process.[39] Counsel should still contend for automatic reversal under Massachusetts common law and article 12 of the Massachusetts Constitution Declaration of Rights.[40] The appellate court will apply the harmless error doctrine to claimed violations of *Miranda* [41] and *Massiah.*[42]

Regarding any constitutional challenge to the admissibility of statements, the appellate court must give substantial deference to the lower court's ultimate findings[43] and conclusions of law, but must also "make an independent review of the correctness of the judge's application of constitutional principles to the facts found.[44]

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[36] Commonwealth v. Parham, 390 Mass. 833 (1984).

[37] Commonwealth v. Tavares, 385 Mass. 140, 152, *cert. denied,* 457 U.S. 1137 (1982) (quoting Sims v. Georgia, 385 U.S. 538, 544 (1967)).

[38] *See* Commonwealth v. Hooper, 42 Mass. App. Ct. 730 (1997) (reversing conviction) failure to instruct jury on its role not shown to be harmless error); Commonwealth v. Harris, 371 Mass. 462, at 474 & n.6 (1976) (ordering new trial for erroneous failure to hold voir dire and make initial determination of voluntariness, even though Jackson v. Denno, 378 U.S. 368 (1964), might be satisfied initially by simply ordering voir dire; "[a]ny violation of a constitutional right gives rise to presumptive prejudice, which normally requires a reversal . . . in the absence of an affirmative showing by the Commonwealth that the error was harmless).

[39] Arizona v. Fulminante, 499 U.S. 279, 306–07 (1991).

[40] *See* Commonwealth v. Durant, 457 Mass. 574, 592 (2010) (because erroneous admission of involuntary statement resulted in a miscarriage of justice, no need to decide whether under article 12 such error is structural, requiring reversal without any showing of prejudice, or is subject to the federal harmless-error standard of review under *Fulminante*). *But see* Commonwealth v. Masskow, 362 Mass. 662, 668–69 (1972) (erroneous admission of confession allegedly made while insane was "harmless beyond a reasonable doubt"; confession was also admissible on issue of insanity).

[41] Commonwealth v. Ghee, 414 Mass. 313, 318–20 (1993) (admission of confession preceded by inadequate Miranda warnings was harmless beyond reasonable doubt in view of other overwhelming evidence of guilt); Commonwealth v. Perez, 411 Mass. 249, 259–61 (1991) ("very strong" independent evidence of guilt satisfies requirement that *Miranda* violation was "harmless beyond a reasonable doubt"); Commonwealth v. Ayala, 29 Mass. App. Ct. 592, 597 (1990) (omission of essential component of *Miranda* warning was not harmless error). *See also infra* § 19.5A(2), note 326 (application of harmless error doctrine to improper use at trial of defendant's claim or *Miranda* right to silence).

[42] Both the U.S. Supreme Court and the Massachusetts courts have applied the harmless error doctrine to *Massiah* violations. *See* Milton v. Wainwright, 407 U.S. 371 (1972); Commonwealth v. Rainwater, 425 Mass. 540, 551 (1997), *cert. denied,* 118 S. Ct. 892 (1998).

[43] The appellate court will "accept the motion judge's subsidiary findings of fact absent clear error." *See* Commonwealth v. Costa, 414 Mass. 618, 626 (1992) (quoting Commonwealth v. Yesilciman, 406 Mass. 736, 743 (1990)). *See generally supra* § 15.5.

[44] Commonwealth v. Fernette, 398 Mass. 658, 663 (1986) (voluntariness). *See also* Commonwealth v. Fryar, 414 Mass. 732, 742 (1993) (*Fryar I*). Commonwealth v. Shine, 398 Mass. 641, 651 (1986) *(Miranda);* Commonwealth v. Jackson, 377 Mass. 319, 325 (1979)

§ 19.3E. DECISION WHETHER DEFENDANT SHOULD TESTIFY AT THE PRETRIAL HEARING [45]

Whether the defendant should testify at the pretrial hearing is a strategic question depending on the circumstances of the particular case. In making this decision, counsel should consider several factors.

First, counsel should consider the degree of harm that could be caused at trial by the admission of a potentially incriminating statement. By taking the stand at the suppression hearing, the defendant exposes himself to cross-examination at least as to matters reasonably related to the subject matter of direct examination, and possibly as to all facts relevant to the crime charged.[46] Under the holding of *Simmons v. United States*,[47] testimony given by a defendant[48] at a hearing on his motion to suppress may not subsequently be introduced against him at trial on the issue of guilt. However, such testimony may be used to impeach the defendant's credibility at trial.[49] Is the case likely to go to trial, and, if so, is the defendant likely to testify?

Second, counsel should consider the extent to which the defendant's testimony at the pretrial hearing will determine the success of the motion to suppress. Counsel should weigh the extent to which the defendant's testimony will increase the chances of winning the motion, and the risk that the judge will not believe the defendant's testimony. A decision to have the defendant testify may be particularly desirable if the motion is based on the involuntariness of the confession or the defendant's inability to understand the *Miranda* warnings. In contrast, if the motion is based on grounds such as the failure to give *Miranda* warnings prior to a custodial interrogation or the illegality of a stop or arrest, it may be preferable to establish the necessary facts solely through police testimony or other witnesses.

Third, counsel should evaluate the risk that the defendant will reveal additional information about the offense that could subsequently be used against him at trial.

(Miranda). As to the distinction between normally binding "subsidiary" findings of fact and the "ultimate conclusions" which must receive independent review, compare Commonwealth v. Mahnke, 368 Mass. 662, 689-91 (1975), *cert. denied*, 425 U.S. 959 (1976) (majority opinion) *with id.* at 723–25 *(Mahnke*, dissenting opinion of Hennessy, J.).

[45] This section, in its original version, relied heavily on PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA, CRIMINAL PRACTICE INSTITUTE, TRIAL MANUAL § 9.4(D) (1984), and AMSTERDAM, TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES § 253(8) (5th ed. 1989).

[46] Commonwealth v. Judge, 420 Mass. 433, 444–46 & n.10 (1995).

[47] 390 U.S. 377, 394 (1968).

[48] Defendant's statements to his attorney, offered through his attorney at a midtrial voir dire hearing to prove the involuntariness of his confession, are inadmissible against defendant on the issue of guilt on retrial. Commonwealth v. Sperrazza, 404 Mass. 19, 20 (1989).

[49] *See* Commonwealth v. Rivera, 425 Mass. 633 (1997) (statements contained in defendant's affidavit in support of motion to suppress are admissible to impeach his trial testimony). Although the Supreme Court left open in *Simmons* the issue of the proper use of defendant's pretrial testimony for impeachment purposes, it has hinted in dicta that it may be used. *See* Commonwealth v. Rivera, 425 Mass. at 641, n. 4 (citing United States v. Salvucci, 448 U.S. 83, 93–94 (1980), and United States v. Kahan, 415 U.S. 239, 243 (1974)). *See also* Harris v. New York, 401 U.S. 222, 224–26 (1971), discussed *infra* § 19.5A(1).

Finally, counsel should consider the possibility that the defendant will testify at trial, and if so, the potential benefit to counsel from having the opportunity to observe the demeanor of the defendant while testifying, and the potential benefit to the defendant in gaining additional experience as a witness.

§ 19.3F. GOVERNMENT USE OF A VALID CONFESSION: THE CORROBORATION REQUIREMENT

Generally at common law, a conviction could not be based solely on evidence of an extrajudicial confession by the accused. In 1984 the Supreme Judicial Court adopted a modest version of the majority rule, in order to prevent "the possibility of conviction of crime based solely on statements made by a person suffering a mental or emotional disturbance or some other aberration."[50] The corroboration rule "requires only that there be some evidence, besides the confession, that the criminal act was real and not imaginary."[51] The independent evidence need not establish the defendant's identity as the cause of the "corpus delicti," or even that a criminal act was involved. It must show only "the fact of the loss or injury sustained," such as, in a homicide case, that the alleged victim is dead,[52] or in a larceny, that the property was stolen.[53] For crimes, like OUI, which do not require proof of harm to persons or property, that is, of a tangible "corpus delicti, the corroboration rule might instead require independent evidence that implicates the accused in the alleged criminal act.[54]

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[50] Commonwealth v. Forde, 392 Mass. 453, 457 (1984) (holding that an uncorroborated confession is insufficient to prove guilt). That factually innocent persons sometimes confess falsely to committing crimes has been well established, *see* Commonwealth v. Landenburg, 41 Mass. App. Ct. 23, 24–25 (1996); Leo and Ofshe, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENVER U. L. REV. 7979 (1997); Leo and Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation,* 88 J. CRIM. L. & CRIMINOLOGY 429 (1998).

[51] Commonwealth v. Forde, 392 Mass. 453, 457 (1984). *See also* Commonwealth v. Leonard, 401 Mass. 470, 473 (1988) (error to deny defendant's motion for a required finding of not guilty when there was no evidence besides the confession that the criminal act was committed).

[52] Commonwealth v. Forde, 392 Mass. 453, 457 (1984). *See also* Commonwealth v. Costello, 411 Mass. 371 (1991) (convictions for sexual offenses against child reversed where alleged victim's trial testimony denied that crimes occurred, and his earlier inconsistent statements were admitted only for impeachment; this left no evidence that "a crime was committed by someone" besides defendant's two extrajudicial confessions, which could not corroborate each other). *See infra* section 47.4 (corroboration in OUI context).

[53] *See* Commonwealth v. Landenburg, 41 Mass. App. Ct. 23 (1996) (defendant's confession to stealing merchandise from Lechmere store was insufficiently corroborated by evidence that the items were of a kind sold by Lechmere, were found precisely where he said that they were located, in an apartment where he had lived at the time, and that they might have been stolen by the method he described; absent evidence that identical items had been missing or taken from the store, confession might have been to an imaginary crime).

[54] This is the federal test, but Massachusetts courts have yet to embrace that approach. *See* Commonwealth v. Costello, 411 Mass. 371, 374 (1991) (requiring that a confession of child sexual abuse be corroborated by independent evidence showing only that someone committed the charged crime, that the crime was real, not imaginary). *But see* Commonwealth v. Manning, 41 Mass. App. Ct. 18, 21 & n.3 (1996) (noting that Massachusetts courts had not adopted federal approach, but holding defendant's admission at scene of single-car accident that he was

§ 19.3G. ADMISSIBILITY OF TAPE RECORDINGS AND TRANSCRIPTS

The best evidence rule does not apply to tape recordings. Therefore, the question of whether to allow introduction of an interrogation tape lies within the trial judge's discretion.[55] On the other hand, if the court admits any statements of the defendant which are part of a recorded interrogation, the verbal completeness rule gives the defendant the right to introduce "all that was said by him at the same time and upon the same subject."[56] However, he has no right necessarily to introduce the record of the entire interrogation.[57]

§ 19.4 GROUNDS FOR EXCLUDING INCRIMINATING STATEMENTS

§ 19.4A. INTRODUCTION

The principles supporting suppression apply not only to confessions and admissions, but to any statement — even "exculpatory" — or assertive nonverbal conduct of the defendant that tends to incriminate him.[58] However, once a defendant in custody has been warned of the right to remain silent, his subsequent silence may not be used as evidence of guilt.[59]

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operator and drunk, sufficiently corroborated by location and condition of both vehicle and defendant, by defendant's knowledge that car was a "rental," his cooperation with field sobriety tests, and failure of bystanders to dispute his identity as operator); *See, e.g.*, Commonwealth v. Feist, 71 Mass. App. Ct. 1121, 1121 n. 2 (2008) (Rule 1:28 opinion) (suggesting that the less-demanding *Forde*/*Costello* corroboration requirement could be limited to crimes involving tangible harms, employing the more demanding federal approach for crimes like OUI that do not involve such a "corpus delicti").

[55] Commonwealth v. Watson, 377 Mass. 814, 834–36 (1979). Massachusetts law does not require electronic recording of custodial interrogations. *See supra* § 19.3A.

[56] Commonwealth v. Watson, 377 Mass. 814, 827 (1979) (quoting Commonwealth v. Schnackenberg, 356 Mass. 65, 70–71 (1969)). *See* Commonwealth v. Leftwich, 430 Mass. 865, 871 (2000) (quoting *Watson*).

[57] Commonwealth v. Watson, 377 Mass. 814, 832 (1979). *See* Commonwealth v. Leftwich, 430 Mass. 865, 871-72 (2000) (citing *Watson*).

[58] *See, e.g.*, State v. Wethered, 110 Wash. 2d 466, 755 P.2d 797 (1988) (suspect's nonverbal act of handing over drugs in response to police questioning may be testimonial); Commonwealth v. Garcia, 379 Mass. 422, 427 (1980) (nonverbal act of pointing to hidden gun). *Cf.* Commonwealth v. Gonzalez, 443 Mass. 799, 802-03 (2005) (nonverbal conduct intended as an assertion treated as statement for hearsay purposes). On the use of defendant's silence as an "adoptive admission" or "prior inconsistent statement" *see infra* § 19.5A(2). *See also* Commonwealth v. Barnes, 20 Mass. App. Ct. 748, 752–53 n.5 (1985) (avoiding question whether defendant's consent in response to police request for a search is a "statement" covered by *Miranda*).

[59] Commonwealth v. Waite, 422 Mass. 792, 797 (1996) (defendant's post-arrest silence cannot be used against him); Commonwealth v. Mahdi, 388 Mass. 679, 694–98 (1983) (evidence of defendant's post-arrest, post-*Miranda* silence inadmissible to negate insanity defense); Commonwealth v. Andujar, 7 Mass. App. Ct. 777, 779–80 & n.1 (1979) (defendant's

Statements may be suppressed on several grounds that, while overlapping in some respects, are doctrinally distinct and serve different purposes. The five major doctrinal bases for suppression concern violations of: (1) due process ("involuntary" or "coerced" confessions);[60] (2) the Sixth Amendment/article 12 right to counsel (the *Massiah* doctrine); (3) the Fifth Amendment/article 12 privilege against compelled self-incrimination (the *Miranda* rules); (4) the Fourth Amendment/article 14 ban on unreasonable searches and seizures (the *Wong Sun* fruits doctrine); and (5) protective statutes, court rules, and other non-constitutional sources.[61] Of the latter, common law evidentiary rules may be particularly important.[62] These different grounds of attack do not exclude each other. For example, a confession might satisfy the *Miranda* rules, yet be "involuntary" under the due process test[63] or have been obtained in violation of the Sixth Amendment. Counsel should therefore argue all applicable grounds under both federal and state law.

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silence in the face of accusations could not be construed as an "adoptive admission"; even though after warnings he had chosen to give an alibi, he had the right to discontinue talk at any time and had no duty to respond to witness statement contradicting his alibi). On the use of defendant's silence to impeach his credibility, *see infra* § 19.5B(2). Arguably, even the silence of a suspect who is given *Miranda* warnings before he has been placed in "custody," *see infra* § 19.4D(1)(b), may not be used as evidence. *See* Commonwealth v. King, 34 Mass. App. Ct. 466, 468–69 (1993) (reversible error to admit testimony describing defendant's post-*Miranda* refusal to answer questions, even though defendant, who had been called to police station, was the focus of investigation and was immediately arrested after invoking *Miranda* rights, was not "formally . . . under arrest" at the time).

[60] Although at common law involuntary confessions were excluded from evidence because of their unreliability, they also offend due process. Commonwealth v. Harris, 371 Mass. 462, 468 (1976), citing cases.

[61] For example, a court has discretion to exclude a statement whose probative worth is outweighed by its potential prejudicial effect. *See* Commonwealth v. Lewin (No. 2), 407 Mass. 629, 631 (1990) (upholding exclusion of statement indicating defendant's willingness to plead guilty to manslaughter; while the statement arguably had "some features of an admission," it has "little unambiguous probative value").

[62] For example, the S.J.C. has not adopted *Miranda* warnings as a means of protecting state constitutional rights, but has provided additional protections under common law that are adjuncts to *Miranda* and go further. *See* Commonwealth v. Ghee, 414 Mass. 313, 318 n.5 (1993) (citing Commonwealth v. Snyder, 413 Mass. 521, 531–32 (1992)). *See also* Commonwealth v. Martin, 444 Mass. 213, 215 (2005) (adopting common-law rule excluding the fruits of *Miranda* violations, holding less protective *Miranda* fruits doctrine inadequate to protect broader article-12 right against compelled self-incrimination).

[63] Commonwealth v. Tavares, 385 Mass. 140, 145, *cert. denied,* 457 U.S. 1137 (1982), *citing* Coyote v. United States, 380 F.2d 305, 309–10 (10th Cir.), *cert. denied,* 389 U.S. 992 (1967). *See also* Commonwealth v. Tolan, 433 Mass. 634, 642-44 (2009) (considering separately the voluntariness of defendant's statement and of her *Miranda* waiver); Commonwealth v. Hilton, 450 Mass. 173, 178 (2007) (judge's determination that waiver of *Miranda* rights was involuntary not dispositive on the question of whether defendant's statement was voluntary); Commonwealth v. Jackson, 432 Mass. 82, 85-86 (2000) ("[t]he voluntariness of a Miranda waiver and the voluntariness of a statement are separate and distinct inquiries...."). However, "the 'totality of the circumstances' test under each analysis is the same." Id. *And see* Dickerson v. United States, 530 U.S. 428, 430 (2000) ("[c]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of Miranda are rare." *Id.* at 2329, *quoting* Berkemer v. McCarty, 468 U.S. 420, 433, n. 20 (1984).

However, the collateral consequences of suppression may differ depending on the ground of suppression. The courts give most sweeping protection against the use of coerced confessions, which are both unreliable and obtained by offensive methods.[64] Confessions taken in violation of the Sixth Amendment right to counsel may also enjoy modestly elevated protection.[65] Enjoying less (and rapidly diminishing) protection are statements that are fruits of Fourth Amendment violations and those taken in violation of the *Miranda* rules. Except when dealing with coerced confessions, the courts tend to rationalize the exclusionary rules primarily as devices to deter police violations.[66] This invites a cost-benefit analysis, in which the short-term cost to society of suppressing reliable evidence is often judged greater than the long-term deterrent benefits. Therefore, when the facts permit suppression on multiple grounds, defense counsel should seek suppression on grounds of involuntariness if at all possible in addition to suppression under the Fourth, Fifth or Sixth Amendments. And, defense counsel should be sure to ground their claims for suppression in the state as well as the federal constitution.

§ 19.4B. QUESTIONING BY PRIVATE CITIZENS

Except for the involuntariness doctrine, which applies to private as well as state coercion,[67] suppression depends on a showing that the underlying illegality was

[64] For example, coerced confessions may not be admitted even if made to private citizens, may not be used to impeach the defendant's credibility at trial, and are not subject to *Miranda's* "public safety" exception.

[65] For example, *Miranda's* "public safety" exception has not (yet) been applied to *Massiah* rights. *See infra* § 19.4.D.4.

[66] Indeed, the Supreme Court has come to view the exclusionary rule exclusively as a device to deter police misconduct, subject to cost-benefit analysis. *See, e.g.*, Davis v. United States, 564 U.S. --, --, 131 S.Ct. 2419, 2426 (2011) ("The [exclusionary] rule's sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations"); Herring v. United States, 555 U.S. 135, 129 S.Ct. 695, 702 (2009) ("To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system"); Kansas v. Ventris, 556 U.S. 586, 593-94 (2009) (employing cost-benefit, deterrence analysis to permit impeachment of defendant with statement taken in violation of his Sixth Amendment right to counsel). This understanding disregards the interest in judicial integrity that underlay the Fourth Amendment exclusionary rule as originally announced in Weeks v. United States, 232 U.S. 383 (1914), and the *Miranda* Court's thesis that statements taken in violation of the *Miranda* safeguards are constitutionally "compelled." Miranda v. Arizona, 384 U.S. 436, 456–58 (1966). *But see* Commonwealth v. Martin, 444 Mass. 213, 215 (2005) (rejecting *United States v. Patane*'s Fifth-Amendment refusal to suppress tangible fruits of *Miranda* violation, *see infra* §19.5B, stating that "[t]o apply the *Patane* analysis to the broader rights embodied in art. 12 would have a corrosive effect on them, undermine the respect we have accorded them, and demean their importance to a system of justice chosen by the citizens of Massachusetts in 1780"); Commonwealth v. Smith, 412 Mass. 823, 836 (1992) (quoting State v. Lavaris, 99 Wash. 2d 851, 857 (1983) (S.J.C. refuses to follow *Oregon v. Elstad*, *see infra* § 19.5B(3), saying "[t]he failure to administer the Miranda warnings . . . is itself an improper police tactic, and 'any confession obtained in the absence of proper . . . warnings is by definition "coerced" ' ")).

[67] *See infra* § 19.4C.

committed by law enforcement officials or those acting as their instruments or agents.[68] A private citizen is an "instrument or agent" of the police if he or she acts in response to official request, inducement, agreement, or manipulation. But the S.J.C. has been unwilling to recognize tacit inducements. Thus, simply acting "from an unencouraged hope to curry favor" does not qualify, even if the actor has been in prior contact with law enforcement officials, expects to receive a benefit, and in fact is later rewarded for his services.[69] The Court's literal approach makes it difficult to establish agency when prior cooperation exists but no explicit promise can be proved.

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[68] Commonwealth v. Brandwein, 435 Mass. 623, 631-32 (2002) (where psychiatric nurse, on own initiative, disclosed defendant's privileged and incriminating but uncoerced communications to police, defendant's subsequent confession was not suppressible "fruit of the poisonous tree" absent official misconduct); Commonwealth v. Bandy, 38 Mass. App. Ct. 329, 333 & n.4 (1995) (citing split authorities on whether probation officer is an agent of the police for purposes of the Sixth Amendment); Commonwealth v. Snyder, 413 Mass. 521, 531–32 & n.9 (1992) (although before interrogating student, school administrators intended to turn over to police drugs seized from his locker, they did not act as instruments or agents of police in obtaining confession; however, as a "matter of policy," perhaps school officials should warn students in such circumstances); Commonwealth v. A Juvenile, 18 M.L.W. 731, 1/8/90, p. 23 (Brookline Dist. Ct. No. 8909 JV 55) (school principal who called student into office to question him about his role in a nighttime breaking and entering to another school acted as representative of the State); Commonwealth v. A Juvenile, 402 Mass. 275, 278–79 (1988) (assistant director of DYS detention facility, who had duty to report to the police if he learned a juvenile had committed a crime, was "instrument of police"); Commonwealth v. Mahnke, 368 Mass. 662, 676–77 (1975), *cert. denied*, 425 U.S. 959 (1976). *(Miranda* rules do not apply to questioning by private citizen unless defendant can show he was "functioning as an instrument of the police . . . or acting as an agent of the police pursuant to a scheme to elicit statements from the defendant by coercion or guile"); United States v. Brown, 466 F.2d 493, 495 (10th Cir. 1972) (defendant's friend who asked him questions on police instructions was "instrument" of police); Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971) (defendant's wife not agent under Fourth Amendment); Massiah v. United States, 377 U.S. 201, 205–06 (1964), *discussed infra* § 19.4E. (codefendant acted as police agent).

[69] *See* Commonwealth v. Tevlin, 433 Mass. 305 (2001) (fact that fellow prisoner requested housing transfer in exchange for information, was told by trooper that this information would be presented to the District Attorney's office, and was later transferred, not sufficient to show agency). *Compare* Commonwealth v. Reynolds, 429 Mass. 388, 393-94 (1999) (promise to bring fellow prisoner's cooperation to the attention of prosecutors and the court was sufficient to form agency relationship; defense was entitled to evidentiary hearing to determine when witness became government agent); Commonwealth v. Gajka, 425 Mass. 751 (1997) (fellow prisoner); Commonwealth v. Harmon, 410 Mass. 425, 428–30 (1991) (fellow prisoner); Commonwealth v. Rancourt, 399 Mass. 269, 273 (1987) (fellow prisoner). *See also* Commonwealth v. Tynes, 400 Mass. 369, 372–74 (1987) (off-duty policeman in town outside his jurisdiction, wearing civilian clothes, who questioned intoxicated driver, and who did not indicate that he was police officer, arrest the defendant or communicate in advance with local police, was not their agent or instrument for *Miranda* purposes); Commonwealth v. Allen, 395 Mass. 448, 453–54 (1985) (hospital nurse who asked offense-related questions of defendant recovering from brain surgery, acted solely as medical professional and not as police proxy or agent under Fifth or Sixth Amendment; although police guard was present, overheard conversation and wrote it down, he did not prompt or suggest questions, nor was he obliged to warn the defendant of his presence or to keep silent); Commonwealth v. White, 353 Mass, 409, 415–16 (1967), *cert. denied*, 391 U.S. 968 (1968) (defendant's friends who visited him in prison at his initiation and out of concern for him were not police agents even though they knew he had confessed, expected him to confess again, and police facilitated the visit).

The defendant has the burden to establish the citizen's status as a government agent on a pretrial motion to suppress; it is not a jury question.[70]

§ 19.4C. INVOLUNTARINESS OF THE CONFESSION

"A confession, to be admissible, must be 'the product of a free intellect,'. . . 'free and voluntary,' . . . 'the product of a rational intellect and a free will,' . . . and a 'meaningful act of volition.' "[71] Confessions are "involuntary" or "coerced" if the suspect's will has been "overborne." At common law such confessions were excluded as unreliable and therefore "incompetent."[72] Basing a conviction "in whole or in part" on an involuntary confession also violates due process under the Fourteenth Amendment (and article 12 of the Massachusetts Constitution Declaration of Rights), "without regard for the truth or falsity of the confession . . . and even though there is ample evidence aside from the confession to support the conviction."[73] This rule of exclusion protects human dignity, basic fairness, and the privilege against self-incrimination, in addition to evidentiary reliability.[74]

Unlike the Fifth and Sixth Amendment protections,[75] the rule excluding coerced confessions — including the Commonwealth's "humane practice" — applies to coercive actions of private citizens as well as law enforcement agents.[76]

"Voluntariness" has two components: cognitive and volitional. Thus, to be admissible the defendant's statement must be the product of a "rational intellect" as well as a "free will."[77] As there is no "acid test" of voluntariness, the courts will "assess the totality of relevant circumstances to ensure that the defendant's confession

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[70] Commonwealth v. Rodwell, 394 Mass. 694, 699 (1985) (where defendant made insufficient showing pretrial to obtain evidentiary hearing on fellow prisoner's status as government agent, he may not introduce additional evidence at trial).

[71] Commonwealth v. Davis, 403 Mass. 575, 581 (1988) (citing federal cases).

[72] "[C]onfessions made by a party accused, under promises of favor, or threats of injury, are excluded as incompetent." Commonwealth v. Harris, 371 Mass. 462, 468 (1976) (quoting Commonwealth v. Morey, 1 Gray 461, 462 (1854)).

[73] Jackson v. Denno, 378 U.S. 368, 376 (1964), *quoted in* Commonwealth v. Harris, 371 Mass. 462, 468 (1976). *See also* Rogers v. Richmond, 365 U.S. 534, 540–41 (1961).

[74] Commonwealth v. Harris, 371 Mass. 462, 468 (1976); Commonwealth v. Mahnke, 368 Mass. 662, 681 (1975), *cert. denied*, 425 U.S. 959 (1976).

[75] *See infra* §§ 19.4D, & 19.4E.

[76] *See, e.g.,* Commonwealth v. Brown, 449 Mass. 747, 765-66 (2007) (considering voluntariness of defendant's statement to a civilian friend); Commonwealth v. Allen, 395 Mass. 448, 455 1985) (quoting Commonwealth v. Mahnke, 368 Mass. 662, 680–81 (1975), *cert. denied*, 425, U.S. 959 (1976) ("a statement obtained through coercion and introduced at trial is every bit as offensive to civilized standards of adjudication when the coercion flows from private hands")). The U.S. Supreme Court has not expressly decided the point. *But see* Colorado v. Connelly, 479 U.S. 157 (1986) (no due process violation absent police conduct causally related to the confession); Lopera v. Town of Coventry, 640 F.3d 388, 399 (1st Cir. 2011) (noting *Connelly*'s admonition that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary'"). . The court's duty to determine the voluntariness of statements to private citizens arises when the defendant introduces some evidence of physical or psychological coercion. Commonwealth v. Vasquez, 387 Mass. 96, 101 n.9 (1982).

[77] Commonwealth v. Allen, 395 Mass. 448, 455 (1985).

was a free and voluntary act and was not the product of inquisitorial activity which had overborne his will."[78] The "relevant circumstances" include

> promises or other inducements, conduct of the defendant, the defendant's age, education, intelligence and emotional stability, experience with and in the criminal justice system, physical and mental condition, the initiator of the discussion of a deal or leniency (whether the defendant or the police), and the details of the interrogation, including the recitation of *Miranda* warnings.[79]

With regard to some of these factors, such as how intoxication, mental illness or mental defect bears on the defendant's ability to make rational choices, counsel should consider introducing expert testimony at the voir dire on a motion to suppress, and perhaps at the trial,[80] keeping in mind that such evidence can be a "two-edged sword."[81] Discussion of some significant factors follows.[82]

1. Physical Brutality, Promises of Leniency, or Threats of Adverse Governmental Action

The use of physical brutality will render a resulting statement involuntary,[83] as will threats of harm[84] or promises of favor or benefit.[85] A nineteenth century Supreme

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[78] Commonwealth v. Mahnke, 368 Mass. 662, 680 (1975). *See also* Commonwealth v. Lopes, 455 Mass. 147, 167 (2009) (same). Although as noted above, *see supra* §19.4A, the voluntariness and *Miranda* issues are conceptually separate, the questions of whether a statement was voluntary and whether a waiver of *Miranda* rights was voluntary are each answered through the same totality-of-the-circumstances approach. *See generally* 30 K. SMITH, MAPRAC §6.52 (3d ed. 2007 & Supp. 2011). Of course, the focus of the two inquiries is different, and the fact that a judge employs the voluntariness factors to determine that a suspect's purported waiver of his *Miranda* rights was involuntary does necessarily mean that the suspect's ensuing statement was involuntary. *See* Commonwealth v. Hilton, 450 Mass. 173, 178 (2007).

[79] Commonwealth v. Mandile, 397 Mass. 410, 413 (1986).

[80] *See, e.g.*, Commonwealth v. Meehan, 377 Mass. 552, 565–67 (1979), *cert. dismissed*, 445 U.S. 39 (1980) (expert testimony on effect of valium and beer on defendant's judgment, memory, and ability to comprehend police questions). The S.J.C. has indicated that expert evidence should be presented to the trier of fact to aid in the evaluation of the effect of custodial interrogation on a mentally deficient defendant, Commonwealth v. Daniels, 366 Mass. 601, 608 & n.6 (1975). Indigent defendants should be given sufficient public funds for expert assistance. *Daniels, supra*, 366 Mass. at 609. *See also* Commonwealth v. Crawford, 429 Mass. 60, 65 (1999) (reversible error to exclude expert testimony concerning battered-woman syndrome and post-traumatic stress disorder on the issue of the voluntariness of defendant's confession to the police); Commonwealth v. Vazquez, 387 Mass. 96, 103–04 (1982) (reversible error for trial judge to exclude testimony of defense psychiatrist, offered on issue of insanity defense, as to whether defendant's statements were the product of a rational intellect).

[81] Commonwealth v. Cameron, 385 Mass. 660, 666 & n.5 (1982) (on basis of 45-minute interview, court-appointed psychiatrist testified that defendant had capacity to make valid waiver).

[82] Because the same factors are relevant to the validity of a defendant's waiver of *Miranda* rights (*see* Commonwealth v. Medeiros, 395 Mass. 336, 343 (1985)), cases decided under *Miranda* are included in the following discussion.

[83] *See* Commonwealth v. Collins, 11 Mass. App. Ct. 126, 131–33 (1981) (questioning of defendant while handcuffed nude on floor, with gun in his face, raised substantial question of

Court case, *Bram v. United States*, states that a confession must not be "obtained by any direct or implied promises, however slight, nor by the exertion of any improper

voluntariness, and obligated trial judge sua sponte to instruct jury on that issue); Commonwealth v. Harris, 371 Mass. 462, 466–67 (1976) (reversing for failure to hold voir dire on voluntariness of defendant's statements in light of his unrebutted testimony that police interrogated him in handcuffs, beating him between the legs and on his side with a "flexible" object); Commonwealth v. Mahnke, 368 Mass. 662, 683 (1975), *cert. denied*, 425 U.S. 959 (1976) (reporting suppression below of statements "induced by threats, duress, intimidation, fear, and . . . violence" by defendant while "held incommunicado . . . by his violent, law-breaking captors . . . in a remote hunting cabin, [and] subjected to continuous rough questioning and threats . . . designed to overcome his resistance") (citing Brown v, Mississippi, 297 U.S. 278 (1936) (police use of brutal torture to obtain confessions violates due process of law)).

[84] *See* Arizona v. Fulminante, 499 U.S. 279, 289 (1991) ("credible threat" of violence sufficient to support a finding of involuntariness); Commonwealth v. Hunt, 12 Mass. App. Ct. 841 (1981) (confession rendered involuntary by police threat to recommend high bail for defendant's wife, held as accomplice without probable cause); Commonwealth v. Miller, 68 Mass. App. Ct. 835, 840-43 (2007) (where there was proffered evidence that employer's loss-prevention personnel interrogated defendant in small room for nearly two hours, questioning her in a threatening manner, suggesting that if convicted D.S.S. might institute proceedings to take custody of her special-needs child, telling her that she could leave only if she signed papers confessing a theft, causing her to become agitated, distressed and incoherent, voluntariness was a "live issue" entitling defendant to a voir dire hearing and judicial determination of voluntariness). *But see* Commonwealth v. Raymond, 424 Mass. 382, 396 (1997) (police suggestion that defendant's mother might be charged as accessory was not coercive; "[w]hile police may not expressly bargain with the defendant over the release of other individuals or make threats of . . . charging others with no basis, . . . the police may bring to the defendant's attention the possibility that his relatives may be culpable") (citing Commonwealth v. Berg, 37 Mass. App. Ct. 200 (1994) (where probable cause existed to arrest both defendant and his mother, defendant's confession not involuntary though motivated by statement that both he and his mother would be charged if ownership of drugs was not known)).

[85] Commonwealth v. Knapp, 26 Mass. 495, 507–08 (1830). *See* Commonwealth v. Magee, 423 Mass. 381, 387–90 (1996) (suppression upheld where defendant requested psychological treatment from police, which they withheld during seven-hour interrogation, promising to give it to her if defendant told them about the death of her child); Commonwealth v. Lahti, 398 Mass. 829, 830–31, 833 (1986) (motion judge "clearly warranted" in suppressing as involuntary statements that were induced by a police promise that, if defendant waived his *Miranda* rights, his statements would not be used against him, and the police would recommend noncriminal diversion); Commonwealth v. Meehan, 377 Mass. 552, 565 (1979); *cert. dismissed*, 445 U.S. 39 (1980): Commonwealth v. Curtis, 97 Mass. 574, 577–79 (1867) ("No cases require more careful scrutiny than those of disclosures made by a party under arrest to the officer who has him in custody, and in none will slighter threats or promises of favor exclude the subsequent confessions"). *Compare* Commonwealth v. Felice, 44 Mass. App. Ct. 709 (1998) (promises to get psychiatric help for suspected arsonist did not render statement involuntary where promises were neither quid pro quo for a statement, nor "so manipulative that they overcame the [defendant's] free will"); Commonwealth v. Fournier, 372 Mass. 346, 348–49 (1977) (police promise, made in good faith and kept, not to disclose statement to particular officer did not render statement involuntary).

The terms of a plea or immunity agreement can also constitute "promises" rendering a statement involuntary. *See* Commonwealth v. Sperrazza, 399 Mass. 1001 (1987) (citing Gunsby v. Wainwright, 596 F.2d 654, 655–56 (5th Cir.), *cert. denied*, 444 U.S. 946 (1979)).

influence. . . ."[86] But the courts have since retreated from this strict standard.[87] Furthermore, defining a "promise of favor" is not always simple. The S.J.C. has said:

> An officer may suggest broadly that it would be "better" for a suspect to tell the truth, may indicate that the person's cooperation would be brought to the attention of the public officials or others involved, or may state in general terms that cooperation has been considered favorably by the courts in the past. What is prohibited . . . is an assurance, express or implied, that it will aid the defense or result in a lesser sentence.[88]

While an express assurance is clearly identifiable, what constitutes an "implied assurance" is less clear.[89]

2. Tricks or Artifice

Use of police trickery to obtain a confession casts doubt on both voluntariness of statements and on the validity of *Miranda* waivers.[90] Although the S.J.C. has

[86] Bram v. United States, 168 U.S. 532, 542–43 (1897).

[87] *See* Commonwealth v. Raymond, 424 Mass. 382, 395 n.11 (1997) (art. 12 does not incorporate *Bram* standard, which has been "modified").

[88] Commonwealth v. Meehan, 377 Mass. 552, 564 (1979), *cert. dismissed*, 445 U.S. 39 (1980). *Accord* Commonwealth v. Tolan, 453 Mass. 634, 642-43 (2009) (police suggestions that defendant would help herself by telling the truth did not constitute impermissible assurance that a confession would aid her defense or result in lesser punishment, *quoting Meehan*); Commonwealth v. Jordan, 439 Mass. 47, 52-53 (2003) (defendant understood that federal prosecutor's proffer-immunity letter not binding on Commonwealth, and ensuing questioning by Boston detectives concerning incident not result in involuntary statement); Commonwealth v. Raymond, 424 Mass. 382, 395–96 (1997) (police may suggest to defendant, inculpated by codefendant's statement, that he should tell his side of the story); Commonwealth v. Carey, 407 Mass. 528, 537–38 (1990) (police may tell defendant "better" to tell truth) (citing Commonwealth v. Shine, 398 Mass. 641, 652 (1986)). *See also* Commonwealth v. Philip S., 414 Mass. 804, 813–14 (1993) (repeated requests of juvenile by parent and police to "tell the truth" not coercive); Commonwealth v. Cunningham, 405 Mass. 646, 657–58 (1989) (not improper "psychological coercion" where defendant came to station house accompanied by priest, who urged him to tell the truth, and detective told defendant that if he had nothing to do with the crime, he had nothing to worry about if he told the truth).

[89] *Compare* Commonwealth v. Meehan, 377 Mass. 552, 564–65 (1979) (improper for officer, after emphasizing that he could make no promises, to tell defendant that confession would "probably help your defense; in fact, I am sure it would," and "the truth is going to be a good defense in this particular case") *with* Commonwealth v. Mandile, 397 Mass. 410, 413–15 (1986) (reversing suppression order where defendant received only the "slight" conditional promise that, "if he demonstrated good faith" by revealing the location of the weapon, the district attorney would *discuss* leniency; "not all inducements are coercive") (emphasis in original) *and* Commonwealth v. Williams, 388 Mass. 846, 855 (1983) (police promise to make defendant's cooperation known to district attorney's office and judge not coercive).

[90] *See* Miranda v. Arizona, 384 U.S. 436, 476 (1966) ("any evidence that the accused was threatened, tricked or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege"). *See* Commonwealth v. DiGiambattista, 442 Mass. 423, 434-39 (2004) (holding statement involuntary where officers confronted defendant with false evidence of his participation in the crime, minimized the seriousness of the crime and suggested defendant's need for counseling). *See also* Commonwealth v. Miller, 68 Mass. App. Ct. 835, 842-43 (2007) (threat by private, loss-prevention officer that as a result of alleged theft

condemned the tactic of making "deliberate and intentionally false statements to suspects in an effort to obtain a statement,"[91] such deception is only one relevant factor in the totality of circumstances bearing on voluntariness.[92] Also, the courts generally tolerate passive police deception of defendants. For example, officers have no obligation to advise a person of his status as a suspect, or that he is being questioned about a particular crime.[93] On the other hand, actively misleading the defendant as to the nature of the interview might result in a finding of involuntariness.[94]

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defendant might lose custody of special-needs child to D.S.S. a factor in assessing voluntariness of ensuing statement).

[91] Commonwealth v. Jackson, 377 Mass. 319, 328 n.8 (1979); Commonwealth v. Selby, 420 Mass. 656, 665 (1995). *See* Commonwealth v. Novo, 442 Mass. 262, 267-69 (2004) (upholding suppression of statement as involuntary where police repeatedly told defendant that a statement to the police would be his only opportunity to give his explanation of what happened).

[92] Commonwealth v. Tremblay, 460 Mass. 199, 211-12 (2011) (officer's acquiescence in defendant's request that portions of defendant's ensuing statements would be "off the record" – while incorrectly suggesting that the statements would not be admissible – was not so manipulative or coercive as to make the statement involuntary); Commonwealth v. Selby, 420 Mass. 656, 664–65 (1995) (deliberate, false statements to defendant that his palm print and fingerprints had been found at scene did not, in totality, render confession involuntary; "of the numerous varieties of police trickery . . . a lie that relates to a suspect's connection to a crime is the least likely to render a confession involuntary," quoting Moran v. Burbine, 475 U.S. 412, 421 (1986)); Commonwealth v. Edwards, 420 Mass. 666 (1995) (facts similar to *Selby, supra*); Commonwealth v. Shine, 398 Mass. 641, 651 (1986) (although officer admittedly "misled" defendant at station by saying he was not under arrest and was free to leave at any time, there was no evidence that he intended to or did deceive the defendant into making statements); Commonwealth v. Forde, 392 Mass. 453, 454–56 (1984) (officer's statement falsely implying that defendant's fingerprints had been found on the victim's body did not invalidate immediately subsequent *Miranda* waiver; distinguishing *Jackson*, supra, as resting on a failure to honor the defendant's assertion of the right to remain silent, the Court stated: "[t]he use of misinformation by the police does not in itself defeat a showing of voluntary waiver of rights"); Commonwealth v. Jones, 75 Mass. App. Ct. 38, 44-45, *rev. denied*, 455 Mass. 1105 (2009) (displaying false evidence of defendant's guilt, including apparent DNA evidence where none existed, did not render defendant's statements involuntary in the absence of other coercive tactics by police).

[93] *See* Commonwealth v. Doe, 37 Mass. App. Ct. 30, 32–33 (1994) (absent special circumstances, no obligation to advise confidential informant that he is being questioned as a suspect); Commonwealth v. Wills, 398 Mass. 768, 776–77 (1986) (statement voluntary although defendant believed he was being questioned As a stabbing victim and was not informed that he was suspected of homicide). The same rule applies to Miranda waivers, see Commonwealth v. Amazeen, 375 Mass. 73, 78 (1978). *See also infra* § 19.4D(2)(d).

[94] *See* Commonwealth v. Novo, 442 Mass. 262, 267-69 (2004) ("now-or-never" statements by police, telling defendant that talking to the police was his only opportunity to explain to the jury what happened, misled defendant concerning his right to testify at trial, requiring a finding that the resulting statements were involuntary); Commonwealth v. Carp, 47 Mass. App .Ct. 229, 233-34 (1999) (upholding suppression of statement to D.S.S. investigator, acting in tandem with police, by defendant whose "will was overborne in that he was lulled into a false sense of security" by investigator's failure to disclose that incriminating evidence would be given to police, and express representations that the interview was not a criminal investigation, that *Miranda* warnings were unnecessary, and that defendant did not need an attorney). *Compare* Commonwealth v. Morais, 431 Mass. 380, 384 (2000) (social worker's

3. Length and Circumstances of the Detention and Interrogation

Detention for an extended period of time, and deprivation of food and sleep, are factors tending to support a claim that the defendant confessed because his "will was broken."[95] Correspondingly, courts point to the brevity of custodial interrogation, and provisions of food and drink to the defendant, as indicia of voluntariness.[96] Degrading treatment, such as questioning the defendant while unclothed, is also considered coercive.[97]

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failure to inform defendant until the end of the interview that any incriminating evidence would be used against him did not, in totality of circumstances, require a finding of involuntariness).

[95] *Compare* Haley v. Ohio, 322 U.S. 596, 598–601 (1948) (confession by 15-year-old defendant questioned incommunicado from midnight to 5:00 A.M. violated due process) *with* Commonwealth v. Hunter, 426 Mass. 715, 723 & n.3 (1998) (police practice of waking up detained suspect at 1 A.M. for renewed questioning viewed with disfavor, but statement admissible in light of other circumstances); Commonwealth v. Morales, 461 Mass. 765, *7 (2012) (fact that defendant had trouble sleeping and was questioned two consecutive mornings did not make statements involuntary where he willingly responded to questions, answering clearly and intelligently without complaining of the conditions of confinement or his treatment); Commonwealth v. Makarewicz, 333 Mass. 575, 585–89 (1956) (upholding admissibility of confession by 15-year-old defendant, questioned intermittently by different officers between midnight and 10:00 A.M. with substantial breaks for rest, sleep, coffee, and doughnuts; defendant did not confess until confronted with physical evidence of guilt).

[96] *See, e.g.,* Commonwealth v. Tolan, 453 Mass. 634, 643-44 (2009) (while 11-hour interrogation was lengthy, it was not continuous; the officers allowed defendant to take several breaks, reminded her that at any point she was free to leave and/or to request an attorney, provided access to the restroom, offered her food and drink, and gave her pizza and a muffin); Commonwealth v. LeBeau, 451 Mass. 244, 255-56 & n.12 (2008) (defendant was questioned intermittently from midnight to 7:15 a.m. without sleep, but defendant never indicated he was tired or wanted a chance to sleep, saying he was interested in "clearing his name"); Commonwealth v. Davis, 403 Mass. 575, 580 (1968) (defendant at police station for nine hours but not fatigued, given drinks, cigarettes, and bathroom privileges, and refused offer of food); Commonwealth v. Mahnke, 368 Mass. 662, 699 (1975), *cert. denied*, 425 U.S. 959 (1976) (questioning not "unduly lengthy or prolonged" and defendant "neither dazed nor bewildered"). *But see* Commonwealth v. Fernette, 398 Mass. 658, 662 (1986) (even if defendant confessed when tired and hungry, considering the manner of his tape-recorded speech during interrogation, fact that defendant was not intoxicated, absence of police threats or harm, and testimony in court, the statement was voluntary under the totality of circumstances).

[97] *See* Commonwealth v. McNulty, 458 Mass. 305, 329 & n. 22 (2010) (fact that nude photo of defendant taken in front of male and female officers for evidentiary purposes did not make his subsequent statement involuntary, though such photos and the lack of clothing are factors relevant to voluntariness); Commonwealth v. Collins, 11 Mass. App. Ct. 126, 131–32 (1981) (although defendant was found nude, police were obliged to give him clothes to put on as soon as possible); Bram v. United States, 168 U.S. 532, 561–63 (1897) (defendant's nudity during interrogation a critical factor in conclusion of involuntariness); *see also* Malinski v. New York, 324 U.S. 401, 405 (1945) (if the confession is a product of persistent questioning while the defendant is stripped and naked, it is clearly involuntary); Culombe v. Connecticut, 367 U.S. 568, 622, 6 L.Ed.2d 1037 (1961) ("keeping of prisoners unclothed ... for long periods during questioning" characterized as an "obvious crude device" of coercion).

4. Youth of the Defendant, Limited Intellectual Capacity, and Lack of Education

A minor[98] or a mentally deficient adult[99] may "may make an effective waiver of his rights and render a voluntary, knowing and admissible confession."[100] But just as life experience, high intelligence, and advanced education are factors supporting a finding of voluntariness,[101] immaturity, little education, and mental deficiency are

[98] Commonwealth v. Williams, 388 Mass. 846, 852–53 (1983) (17-year-old defendant who had no relatives in this state, but who appeared older to officer did not demonstrate any factor other than age that might cast doubt on validity of waiver); Commonwealth v. Tavares, 385 Mass. 140, 145–46, *cert. denied*, 457 U.S. 1137 (1982) (upholding voluntariness of confession and validity of *Miranda* waivers by seventeen- year-old defendant who had been arrested previously, had completed tenth grade, been accepted into the armed forces, and was married and father of a child); Commonwealth v. Daniels, 366 Mass. 601, 605–06 (1975) (citing cases); Commonwealth v. Harris, 364 Mass. 236 (1973) (upholding as voluntary a premeditated false alibi given by 16-year-old defendant, alone with two police officers in lockup of court house, who had been in custody nearly 48 hours).

[99] Commonwealth v. Burton, 450 Mass. 55, 61-62 (2007) (upholding confession by defendant with "educational and mental deficits" where motion judge's finding of voluntariness was based on his review of "the defendant's school records, evaluation notes and his lengthy history of special education services"); Commonwealth v. Jackson, 432 Mass. 82, 86-87 (2000) (upholding admission of statements by defendant with low intelligence who had attended regular classes in public school, had never previously been diagnosed as mentally retarded, had held full time jobs, had had prior experience with the police, and -- by initially giving police an exculpatory story -- had demonstrated "cunning"); Commonwealth v. Hartford, 425 Mass. 378 (1997) (upholding admission of statements made by "cognitively limited" defendant with IQ of 73 who had lived independently, had driver's license, had held jobs, had prior experience with police, and had been found by Commonwealth experts not to be unduly vulnerable to coercion); Commonwealth v. Medeiros, 395 Mass. 336, 347–48 (1985) (waiver upheld of defendant with IQ of 70 and history of special education where police slowly explained and paraphrased each right and asked defendant whether he understood its meaning;" no evidence that police took advantage of his low intelligence either to coerce or trick him); Commonwealth v. Cameron, 385 Mass. 660 (1982) (upholding effectiveness of *Miranda* waiver and voluntariness of confessions made in "informal and relaxed" atmosphere by borderline mentally retarded defendant; police read rights to defendant three times, once rephrasing them in simple language, and each time defendant said he understood, citing Commonwealth v. Daniels, 366 Mass. 601, 606 (1975) (upholding admissibility of confession by defendant with IQ of 53; however, justice required new trial because confessions were sole evidence of guilt, and no expert evidence on effect of defendant's retardation on issues of voluntariness and waiver) (citing cases)). *See also* Commonwealth v. Dingle, 73 Mass. App. Ct. 274, 277 n. 3, 286 (2008), *rev. denied*, 453 Mass. 1102 (2009) (defendant's I.Q. placing him in lowest 1% of population and his reading at a 1.7 grade level, standing alone, do not require a finding that his statements were involuntary).

[100] Commonwealth v. Cameron, 385 Mass. 660, 665 (1982). *Cf.* Commonwealth v. Lopes, 455 Mass. 147, 168 (2009) (upholding murder confession of suicidal youth taken by his father to the police station, the Court noting that "[s]uicidal ideation and threats … do not necessarily negate the voluntariness of a confession").

[101] *See, e.g.*, Commonwealth v. Garcia, 443 Mass. 824, 833 (2005) (citing as factors supporting voluntariness finding that "defendant was a twenty-year old student at the time of questioning who had previous experience with the criminal justice system, including the recitation and written acknowledgment of his *Miranda* rights"); Commonwealth v. Corriveau, 396 Mass. 319, 330 (1985) (defendant was "an experienced and well-educated businessman"); Commonwealth v. Medeiros, 395 Mass, 336, 347–48 (1985) (defendant with subnormal IQ

factors that require special caution in assessing whether the defendant's statement was a "product of a rational intellect."[102] Moreover, "circumstances and techniques of custodial interrogation which pass constitutional muster when applied to a normal adult" may not suffice in these cases, which require special care and scrutiny both by the police and by the courts.[103] For example, the S.J.C. has indicated that expert evidence should be presented to the trier of fact to aid in the evaluation of the effect of custodial interrogation on a mentally deficient defendant.[104]

Special rules govern waiver of *Miranda* rights by juveniles. *See infra* § 19.4D(2)(d)(2).

5. Mental or Physical Illness of the Defendant

A statement is inadmissible if it "is not the product of a rational intellect;" therefore the defendant's physical and mental condition are obviously relevant to a consideration of voluntariness. If a statement is "attributable in large measure to defendant's debilitated condition, such as insanity, . . . drug abuse or withdrawal symptoms intoxication . . . or [brain concussion]," it is not voluntary.[105]

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lived independently and had previous experience with the law); Commonwealth v. Cameron, 385 Mass. 660, 665 (1982) (mentally deficient defendant "had some worldly experience in the Army" and had prior contact with the law); Commonwealth v. Fay, 14 Mass. App. Ct. 371, 374 (1982) (17-year-old defendant's school record showed he had done well in school and presumably possessed at least normal intelligence); Commonwealth v. Mahnke, 368 Mass. 662, 699 (1975), *cert. denied*, 425 U.S. 959 (1976) (an "intelligent and educated young man"); Commonwealth v. Daniels, 366 Mass. 601, 607 (1975) (retarded defendant had "twenty-six years of living experience and had been discharged into the community . . . by way of a 'half-way house'").

[102] *See*, e.g., Commonwealth v. Meehan, 377 Mass. 552, 567–68 (1979), *cert. dismissed*, 445 U.S. 39 (1980) (affirming suppression of confession by 18-year-old defendant with "poor educational background" whose judgment was impaired through intoxication, who was uninformed of his right to contact family or friends, and who was subjected to police deception and promises). *Compare* Commonwealth v. Prater, 420 Mass. 569 (1995) (upholding admissibility of confession by 19-year-old with IQ of 70, who confessed after effects of intoxication wore off); Commonwealth v. Moran, 75 Mass. App. Ct. 513, 520-21 (2009) (upholding admissibility of confession by a Guatemalan native who was only 21, spoke very little English, and had no experience in the criminal justice system where police twice advised defendant of his *Miranda* rights in Spanish, defendant indicated that he understood his rights and wished to speak to police, the defendant responded quickly and efficiently to the questions put to him, and the physical and psychological conditions of interrogation were not coercive).

[103] Commonwealth v. Daniels, 366 Mass. 601, 606 (1975). *But see* Commonwealth v. Philip S., 414 Mass. 804 (1993) (upholding waivers and confessions of juvenile under 13, in compliance with special rules for waivers by juveniles).

[104] Commonwealth v. Daniels, 366 Mass. 601, 608 & n.6 (1975); United States v. Shay, 57 F.3d 126 (1st Cir. 1995) (error under federal Rules to exclude expert testimony on defendant's mental disorder affecting credibility of defendant's inculpatory statements). Indigent defendants should be given sufficient public funds for expert assistance. *Daniels, supra*, 366 Mass. at 609. *But see* Commonwealth v. Soares, 51 Mass. App. Ct. 273, 279-82 (2001)(upholding motion judge's rejection of expert testimony on results of administering Gudjonsson Suggestibility Scale, as scientifically unreliable).

[105] Commonwealth v. Magee, 423 Mass. 381, 387 (1996) (defendant's physical and emotional condition, including suffering from lack of sleep and emotionally distraught,

Evidence that the defendant suffers from a mental illness triggers the court's duty to determine whether his statements were "the product of a rational intellect as part of the issue of voluntariness."[106] But the fact that a defendant suffers from a severe psychotic condition will not result in suppression unless "the disease rendered the individual incapable of understanding the meaning and effect of a confession or caused the individual to be indifferent to self-protection."[107]

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indicated that waiver was not knowing or voluntary); Commonwealth v. Libran, 405 Mass. 634, 640 (1989) ("If a defendant's mental impairment caused him to make admissions . . . the due process standard of voluntariness would be violated if the admissions were not suppressed") (dictum). *But see* Commonwealth v. Woodbine, 461 Mass. 720, 729 (2012) (statements voluntary where poorly educated inexperienced defendant in hospital for gunshot wound appeared oriented, responsive and not confused in spite of medication, was given his *Miranda* warnings and had asked to speak with detective); Commonwealth v. Auclair, 444 Mass. 348, 355 (2005) (upholding voluntariness finding where defendant with I.Q. of 82 was emotionally upset at time of questioning but no evidence that he acting irrationally); Commonwealth v. Druce, 453 Mass. 686, 700 (2009) (emotional upset unaccompanied by evidence of irrationality does not render a statement involuntary) (*quoting Auclair*); Commonwealth v. Wills, 398 Mass. 768, 776 (1986) (upholding finding that statements of hospitalized defendant suffering from stab wound in chest were voluntary beyond a reasonable doubt; his condition was stable, calm, and alert, he had no difficulty communicating and did not say he was in pain, ask for a doctor, or ask the police to leave); Commonwealth v. Allen, 395 Mass. 448, 455, 457–58 (1985) (statements of hospitalized defendant one week after surgery for self-inflicted gunshot wound to head were product of a rational intellect" where defendant appeared rational, alert, and "aware of what he was saying and of the meaning of his statements"); *distinguishing* Pea v. United States, 397 F.2d 627, 633–34 (D.C. Cir. 1967) (suppressing statements made shortly after similarly injured defendant shot himself, where defendant was intoxicated, had concussion, and was confused, lethargic and "indifferent to protect himself'). *See* also Commonwealth v. Mahnke, 368 Mass. 662, 699 (1975), *cert, denied,* 425 U.S. 959 (1976) (defendant was not "too sick or weak to resist questioning" and was "physically and mentally alert [and] . . . [a]side from . . . injury to his eye . . . showed no evidence of physical disability or impairment of physical or mental functions"); Commonwealth v. Masskow, 362 Mass. 662, 667–68 (1972) (even if admission of confession allegedly made while insane was error, the statement was also admissible on issue of insanity).

[106] Commonwealth v. Vazquez, 387 Mass. 96, 99 (1982) (quoting Commonwealth v. Johnston, 373 Mass. 21, 25 (1977)). *See also* Commonwealth v. Crawford, 429 Mass. 60, 65 (1999) (error to exclude, from voir dire and trial, defense expert testimony on effect of battered woman syndrome on voluntariness); Commonwealth v. Sheriff, 425 Mass. 186, 193 (1997) (duty triggered by evidence of insanity in days immediately before and after date statements were made); Commonwealth v. Hunter, 416 Mass. 831, 834–35 (1994) (voluntariness issue raised by motion for voir dire supported by affidavit that defendant was incompetent and that psychiatrist had doubts about defendant's competence to stand trial); Commonwealth v. Louraine, 390 Mass. 28, 38–40 (1983) (error for trial judge to admit evidence of chronic schizophrenic defendant's spontaneous incriminating statement to police, before he was placed in custody, without holding voir dire on voluntariness).

Once credible evidence is presented to the jury that the defendant was suffering from a mental illness at the time of the statements, the judge must instruct the jury on voluntariness according to the "humane practice." *Vazquez, supra*, 387 Mass. at 102–03 (citing Commonwealth v. Cole, 380 Mass 30, 41 (1980)). *Compare* Commonwealth v. Benoit, 410 Mass. 506, 514–15 (1991) (no "live issue" requiring instruction where evidence that defendant in psychotic episode on night of incident, but made statements during lucid interval).

[107] Commonwealth v. Vazquez, 387 Mass. 96, 100 n.8 99–101 (1982) (upholding denial of motion to suppress statements made by psychotic defendant where statements were

The U.S. Supreme Court in *Colorado v. Connelly* qualified the "rational intellect" test of voluntariness by also requiring, for suppression of a statement on federal constitutional grounds, police coercion or exploitation. Without improper "state action" in obtaining a statement from a defendant with impaired capacity to make "free and rational choices," admissibility is simply a matter of state constitutional or evidence law.[108] Thus far the Massachusetts courts have disregarded *Connelly*, whose reasoning is both unpersuasive and at odds with that of precedents in this state.[109]

6. Intoxication of the Defendant

"Special care must be taken to ensure that a defendant has not unknowingly relinquished his constitutional rights while under the influence of drugs and alcohol."[110] "Evidence of intoxication alone . . . does not compel a finding that statements were involuntary,"[111] but in combination with other factors it may weigh heavily against a

clear, detailed, and partially exculpatory, showing defendant's awareness of his position) (citing Pea v. United States, 397 F.2d at 634–35 (D.C. Cir. 1967)). *See also* Commonwealth v. Brown, 449 Mass. 747, 765-68 (2009) (evidence that defendant suffered from paranoid schizophrenia and was asserting an insanity defense did not require a finding that statements to acquaintances were involuntary where at the time of the statements defendant did not seem to be suffering from the effects of the mental illness but rather appeared to understand the questions put and gave understandable answers); Commonwealth v. Boyarsky, 452 Mass. 700, 715 (2008) (confession of inexperienced defendant suffering from diagnosed panic disorder held voluntary where defendant appeared calm during questioning, gave coherent detailed answers to non-coercive questions, expressed no desire to leave and agreed to talk with troopers after being advised of his Miranda rights); Commonwealth v. Davis, 403 Mass. 575, 578–81 (1988) (upholding admissibility of confession by nineteen-year- old defendant with history of manic depressive illness who confessed in the third person, attributing his criminal acts to his alter ego; defendant had above-average intelligence, had earned high school equivalency certificate, was alert and cooperative during questioning, and was found not to have been under the influence of a major psychosis at that time); Commonwealth v. Cifizzarri, 19 Mass. App. Ct. 981 (1985) (upholding admission of statements by chronic paranoid schizophrenic defendant who exhibited disturbed behavior, including signing the *Miranda* statement with a false signature). *See also* Blackburn v. Alabama, 361 U.S. 199, 205–08 (1960) (confession of insane defendant suppressed as "involuntary"); Commonwealth v. Harris, 371 Mass. 462, 468 (1976).

[108] Colorado v. Connelly, 479 U.S. 157, 159, 163–67 (1986) (although schizophrenic defendant's statements to police were made in response to "voices" commanding him either to confess or commit suicide, in absence of "police overreaching" they were neither "involuntary" under Fourteenth Amendment nor obtained in violation of *Miranda).*

[109] *Connelly* characterizes the coerced confession exclusionary rule as serving a deterrent purpose. Colorado v. Connelly, 479 U.S. 157, 166 (1986). *Compare* Commonwealth v. Harris, 371 Mass. 462, 468 (1976), and Commonwealth v. Mahnke, 368 Mass. 662, 680–81 (1975), *cert. denied,* 425 U.S. 959 (1976), stressing concerns of reliability and fundamental fairness. *Connelly* also cites the admissibility of statements coerced by private parties. *Connelly, supra*, 479 U.S. at 166 et seq.; *compare* Commonwealth v. Allen, 395 Mass. 448, 456 (1985), holding the opposite. For persuasive arguments against the *Connelly* result see *Connelly, supra,* 479 U.S. at 174–88 (dissenting opinion of Brennan, J.) (pointing out, inter alia, the relevance of defendant's mental illness to *Miranda's* requirement that a waiver be "knowing and intelligent").

[110] Commonwealth v. Hooks, 375 Mass. 284, 289 (1978).

[111] Commonwealth v. Ward, 426 Mass. 290, 294-95 (1997) (upholding denial of suppression motion where, despite defendant's blood alcohol content of .39, he was heavy

finding that the defendant's statement or *Miranda* waiver was the product of a "rational intellect."[112] When a suspect is obviously impaired in speech, physical coordination, and mental ability as the result of intoxication, the police should not question him or attempt to obtain a waiver until he is "clearly capable of responding intelligently."[113]

7. Defendant's Use of Drugs

Courts treat the defendant's impairment from the effects of ingesting nonalcoholic substances similarly to impairment from alcohol.[114] In addition, a drug

drinking "tolerant" alcoholic, who showed ability to function rationally despite inebriation); Commonwealth v. Parker, 402 Mass. 333, 341 (1988) (upholding denial of suppression motion against claim that the defendants were "debilitated as a result of excessive drinking during the few days prior to the interrogation," where judge found that defendants were "sober and relaxed" during interrogation) (citing Commonwealth v. Lanoue, 392 Mass. 583, 587 (1984)); Commonwealth v. Shipps, 399 Mass. 820, 825–27 (1987) (glassy-eyed defendant "had been drinking [but] he was not drunk"); Commonwealth v. Doyle, 377 Mass. 132, 133–38 (1979); Commonwealth v. Hooks, 375 Mass. 288, 289 (1978) (intoxication one factor in totality of circumstances); Commonwealth v. Alicea, 376 Mass. 506, 508 & 515 (1978) (upholding voluntariness of confession and validity of *Miranda* waiver where defendant, although said to have been drinking, "understood his predicament and was carrying on rational discourse"). *See also* Commonwealth v. Benoit, 410 Mass. 506, 516 (1991) (evidence that defendant appeared intoxicated 70 minutes after his statement, and for the next eight hours, did not present "live issue" of voluntariness where no evidence when he consumed the alcohol).

[112] *See* Commonwealth v. Scherben, 28 Mass. App. Ct. 952, 953 (1990) (intoxication is a factor requiring "special care"; upholding suppression based on intoxication, defendant's emotional condition, number of officers present during questioning, and late time of night); Commonwealth v. Meehan, 377 Mass. 552, 565–67 (1979), *cert. dismissed*, 445 U.S. 39 (1980) (defendant, who had ingested quantities of valium and beer, testified that he was dazed and confused and unable to remember much of police questioning; transcript of interrogation showed "strings of questions answered with monosyllables;" along with his youth, inexperience, and other factors, impairment of defendant's judgment, memory, and comprehension from effects of drug and alcohol were entitled to weight) (quoting Commonwealth v. Daniels. 366 Mass. 601, 608 (1975); Commonwealth v. White, 374 Mass. 132 (1977), *aff'd by on equally divided court*, 439 U.S. 280 (1978) (where defendant had been arrested for drunk driving, failed breathalyzer test, had difficulty making telephone call, and "didn't know what he was doing," "the more prudent and constitutionally preferable course would have been for the police to withhold any further questioning 'until [he] was clearly capable of responding intelligently' "); (citing Commonwealth v. Hosey, 368 Mass. 571, 5 76–79 (1975) *(Miranda* waiver invalid where defendant had been arrested for drunkenness, was "rambling" during questioning and appeared "extremely high," "extremely emotional," and "detached from reality," and police encouraged waiver by indicating it would he difficult to get a lawyer then but possible "if he insisted")).

[113] Commonwealth v. Hosey, 368 Mass. 571, 579 (1975). The police may rely on the suspect's outward demeanor, and need not administer tests to measure the level of his intoxication. Commonwealth v. Pina, 430 Mass. 66, 71 (1999) (no obligation to test suspect who was known to the police as a drinker, had an odor of alcohol, bloodshot eyes, and had been in possession of beer and vodka). *Cf.* Commonwealth v. McNulty, 458 Mass. 305, 327-28 (2010) (voluntariness finding upheld in spite of claimed intoxication where defendant did not appear to be tired or under the influence of alcohol, appeared alternately scared and calm, and twice indicated in writing that he understood his *Miranda* rights).

[114] *See, e.g.*, Beecher v. Alabama, 389 U.S. 35, 38 (1967) (morphine); Townsend v. Sam, 372 U.S. 293, 307–09 (1963) ("truth serum"); Commonwealth v. Parham, 390 Mass. 833,

addict's statements may be involuntary if, at the time of interrogation, he was suffering from severe withdrawal symptoms,[115] was "unbalanced by great anticipatory fear of withdrawal,"[116] or was under the influence of methadone.[117]

8. Giving of *Miranda* Warnings

Although "evidence bearing on whether *Miranda* warnings were given is relevant in determining whether a confession is voluntary,"[118] the judge has discretion to exclude such evidence if the confession was made in a conversation where warnings were not required.[119]

§ 19.4D. THE *MIRANDA* PRINCIPLE

In *Miranda v. Arizona* [120] the Supreme Court held that statements[121] made in response to custodial police interrogation are presumed to be "compelled" within the meaning of the Fifth Amendment privilege against self-incrimination unless the defendant receives prophylactic warnings, including notice of the privilege against self-incrimination and the right to counsel.[122] A statement made without counsel is inadmissible unless the suspect has received the prescribed warnings and validly waived his constitutional rights.

838–839 (1984) (police, who asked defendant if he used narcotics and who observed no signs of intoxication or illness, were entitled to rely on his assurances of sobriety and understanding).

[115] *See* Commonwealth v. Allen, 395 Mass. 448, 455 (1985). *Compare* Commonwealth v. LeClair, 68 Mass. App. Ct. 482, 485 (2007) (*Miranda* waivers and ensuing statements voluntary where, in spite of asserted heroin withdrawal, defendant "remained 'alert and coherent,'" "lucidly answer[ing] the sergeant's questions"); Commonwealth v. Paszko, 391 Mass. 164, 175–77 (1984) (no per se rule excluding as involuntary statements made during drug withdrawal); Commonwealth v. Fielding, 371 Mass. 97, 100–13 (1976) (statements admissible where police and medical evidence contradicted defendants' claims that their withdrawal symptoms were so severe as to constitute "duress"; heroin withdrawal symptoms described at 111 n.18).

[116] Commonwealth v. Fielding, 371 Mass. 97, 110 n.15 (1976) (citing United States ex rel. Hayward v. Johnson, 508 F.2d 322, 327–28 (3d Cir.), *cert. denied,* 422 U.S. 1011 (1975)).

[117] Out of "abundance of caution" the defendants' statements made after receiving methadone were excluded by the trial judges in Commonwealth v. Fielding, 371 Mass. 97, 100 (1976).

[118] *See* Commonwealth v. Brown, 449 Mass. 747, 766-68 (2007) (statement by mentally ill defendant upheld, the Court citing defendant's waiving his *Miranda* rights twice and his apparent understanding of those rights); Commonwealth v. Edwards, 420 Mass. 666, 674 (1995) (valid waiver of *Miranda* rights is relevant circumstance supporting finding of voluntariness).

[119] Commonwealth v. Nadworny, 396 Mass. 342, 369–70 (1985).

[120] 384 U.S. 436 (1966).

[121] *Miranda* applies to both confessions and admissions. *See* Commonwealth v. Rubio, 27 Mass. App. Ct. 506, 513–14 n.8 (1989), (quoting Rhode Island v. Innis, 446 U.S. 291, 301 n.5 (1980), and Miranda v. Arizona, 384 U.S. 436, 476–77 (1966)).

[122] The complete required warnings are discussed *infra* at § 19.4D(2)(a).

The *Miranda* safeguards were designed to protect the privilege against self-incrimination.[123] Thus the *Miranda* right to counsel is derived from the Fifth Amendment, not the Sixth, and may be triggered by events ("custodial interrogation") occurring before the Sixth Amendment right to counsel attaches. *Miranda* rules apply to questioning by a law enforcement officer,[124] not by a private citizen, unless defendant can show the latter was "functioning as an instrument of the police . . or acting as an agent of the police pursuant to a scheme to elicit statements from the defendant by coercion or guile."[125]

In recent years, the Supreme Court decisions construing *Miranda* have substantially undercut the opinion's reasoning and scope.[126] Some state supreme courts have declined to follow suit, resorting to their own constitutions to buttress *Miranda* safeguards.[127] Although the S.J.C. has never held that *Miranda* warnings are required under the state constitution,[128] the Court has held that *Miranda* protects parallel article-12 rights and has construed the state constitutional privilege against self-incrimination as giving broader protection than the Fifth Amendment.[129] Also, the Court has provided

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[123] *See infra* ch. 33 (witness's privilege against self-incrimination).

[124] Miranda v. Arizona, 384 U.S. 436, 444 (1966). Grounded as it is in the Fifth Amendment, *Miranda* applies to federal, state and local officers, whether from Massachusetts or other American jurisdictions. For application of the parallel but broader article-12 protection in Massachusetts courts to confessions obtained as a result of article-12 violations committed by police of other jurisdictions, *see* Commonwealth v. Cryer, 426 Mass. 563, 568–60 (1998) (if Massachusetts and New Hampshire police were engaged in a combined investigation, art. 12 might apply to exclude confession tainted by New Hampshire police interference with defendant's access to counsel).

[125] Commonwealth v. Mahnke, 368 Mass. 662, 676–77 (1975), *cert. denied*, 425 U.S. 959 (1976) (police connection not established where investigating officer had vehemently opposed vigilante action by family and friends of victim, had threatened to prosecute any law breakers, and had no prior knowledge of plans to interrogate defendant). *See supra* § 19.4B.

[126] However, the Court reaffirmed the constitutional status of *Miranda* in Dickerson v. United States, 530 U.S. 428 (2000) (*Miranda* is a constitutional decision that cannot be overruled by Act of Congress).

[127] *See* Developments in the Law: The Interpretation of State Constitutional Rights, 95 HARV. L. REV. 1324, 1373–75 (1982).

[128] *See* Commonwealth v. Martin, 444 Mass. 213, 221 (2005) ("Insofar as [*Miranda*] adequately protects [article 12] rights, a separate rule is not required. To the extent that its application proves inadequate to that task, we have 'established certain State law principles as adjuncts to the *Miranda* rule'").

[129] *See, e.g.*, Commonwealth v. Martin, 444 Mass. 213, 219-20 (2005) (noting that "[article 12's] text, its history, and our prior interpretations conclusively establish that it provides greater rights than those enumerated in the Federal Constitution"); Commonwealth v. Mavredakis, 430 Mass. 848, 859 (2000) (holding that article 12 requires, as part of the *Miranda* warnings, that a suspect in custody must be informed if a lawyer is seeking access to render advice to the suspect); Commonwealth v. McNulty, 458 Mass. 305, 318 (2010) (article 12 requires, as part of *Miranda* warnings, that suspect in custody must be informed not only of his lawyer's availability and desire to advise him but also of his lawyer's telephone advice to not answer questions); Commonwealth v. Lydon, 413 Mass. 309, 313–15 (1992) (defendant's refusal to allow hands to be tested for presence of chemicals is inadmissible as compelled self-incrimination under art. 12 of Mass. Const. Declaration of Rights); Opinion of the Justices, 412 Mass. 1201, 1209–11 (1992) (refusal to submit to a requested breathalyzer test is both "testimonial" and "compelled" under art. 12, which gives broader protection than U.S.

additional protections under common law that are adjuncts to *Miranda* and go further.[130]

1. Prerequisite for Applicability of *Miranda* Protections: "Custodial Interrogation"

Miranda warnings are required before the onset of "custodial interrogation," a process distinguished from "general on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process."[131]

a. "Interrogation"

"Not all statements obtained by the police after a person has been taken into custody are to be considered the product of interrogation. 'Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence.' "[132] The chief compelling influence is "interrogation," defined for *Miranda*

Constitution's Fifth Amendment as construed in South Dakota v. Neville, 459 U.S. 553 (1983)). The S.J.C. has criticized or rejected some U.S. Supreme Court jurisprudence on the exclusionary rules. *See, e.g.*, Commonwealth v. Amendola, 406 Mass. 592, 599–601 (1990) (rejecting Fourth Amendment standing rule of United States v. Salvucci, 448 U.S. 83 (1990), and adopting "automatic standing" under state constitution); Commonwealth v. Fini, 403 Mass. 567, 571–73 (1988) (fruits of unconstitutional electronic eavesdropping inadmissible even to impeach defendant's credibility at trial); Commonwealth v. Lahti, 398 Mass. 829, 830–31 (1986), criticizing reasoning in United States v. Ceccolini, 435 U.S. 268 (1978); Commonwealth v. Mahnke, 368 Mass. 662, 721–22 (1975) (proposing rejection of rule in *Oregon v. Hass*, permitting use of certain statements obtained in violation of *Miranda* to impeach defendant's credibility at trial) (dissenting opinion of Kaplan, J.). *But see Mahnke, supra*, 368 Mass. at 678–79 n.23 (divided court accepting sub-constitutional status of *Miranda* rules, compared to Fourth Amendment requirements, as "only prophylactic rules which *themselves* safeguard rights of constitutional magnitude") (majority opinion). *Compare* Commonwealth v. Smith, 412 Mass. 823, 836 (1992) (refusing to follow Supreme Court's opinion undermining *Miranda* in *Oregon v. Elstad*, *see infra* § 19.5B(3): "[t]he failure to administer the Miranda warnings . . . is itself an improper police tactic, and 'any confession obtained in the absence of proper . . . warnings is by definition "coerced" ' ") (quoting State v. Lavaris, 664 P.2d 1234, 1237 (Wash. 1983)).

[130] *See* Commonwealth v. Ghee, 414 Mass. 313, 318 n.5 (1993) (citing Commonwealth v. Snyder, 413 Mass. 521, 531–32 (1992). *See also* Commonwealth v. Martin, 444 Mass. 213, 219-20 (2005); Commonwealth v. Smith, 412 Mass. 823, 836 (1992).

[131] Miranda v. Arizona, 384 U.S. 436, 477 (1966). The distinction is discussed in Commonwealth v. Doyle, 12 Mass. App. Ct. 786, 792–93 (1981).

[132] Commonwealth v. Brant, 380 Mass. 876, 883 (1980), *cert. denied*, 449 U.S. 1004 (1980), (quoting Miranda v. Arizona, 384 U.S. 436, 478 (1966)). Thus, spontaneous and unsolicited statements are admissible despite the lack of prior warnings. *See, e.g.*, Commonwealth v. Garcia, 379 Mass. 422, 427 (1980) (finding admissible the defendant's spontaneous exclamation to a police officer made before the officer had spoken to the defendant, taken him into custody, or even considered him a suspect); Commonwealth v. Smallwood, 379 Mass. 878, 885-, 887 (1980) (defendant's spontaneous statements to his brother in presence of officer were admissible despite lack of warnings).

purposes as "express questioning or its functional equivalent."[133] "Functional equivalent" means "any words or action on the part of the police (other than those normally attendant to arrest and custody[134]) that the police should know are reasonably likely to elicit an incriminating response[135] from the suspect."[136] Thus, for example, nonverbal police conduct such as showing physical evidence to the defendant may satisfy the test.[137] This is an objective test; interrogation is present "if an objective

[133] Commonwealth v. Rubio, 27 Mass. App. Ct. 506, 511 (1989) (quoting Rhode Island v. Innis, 446 U.S. 291, 300–01 (1980)).

[134] *See, e.g.*, Commonwealth v. Mahoney, 400 Mass. 524, 528–29 (1987) (questions at booking, asking defendant's name, address, age "or other information necessary to the booking procedure," do not constitute "interrogation" under *Miranda*). For differing views on whether "booking questions" constitute "interrogation," and on whether responses to them are "testimonial" and/or come within a "routine booking question" exception to *Miranda*, see Pennsylvania v. Muniz, 496 U.S. 582, 600–02 (1990) (Brennan, J., plurality) , 605–07 (Rehnquist, J., dissenting), and 610–12 (Marshall, J., dissenting); Commonwealth v. Acosta, 416 Mass. 279 (1993) (avoiding issue whether art. 12 of the state constitution allows the "routine booking question" exception to *Miranda*). *See also* Commonwealth v. Woods, 419 Mass. 366, 372–74 (1995) (question about employment status not within exception; unless warnings are given, police may not ask questions during booking that are designed to elicit incriminating admissions); Commonwealth v. Guerrero, 32 Mass. App. Ct. 263, 266–69 (1992) (questions regarding occupation and employment status are not pertinent to custodial responsibilities of police and should not be asked unless fresh *Miranda* warnings are given prior to booking). *But see* Commonwealth v. Dayes, 49 Mass. App. Ct. 419, 421 (2000) (where no significant lapse of time between warnings and booking, no need to give fresh warnings). CPCS Training Bulletin Vol. 2, no. 2 (June 1992) points out that the fresh warning requirement applies potentially to any "routine" question, such as — in many drug cases — "What is your address?" because, "if the content of the answer to a question ha[s] potential to incriminate, then the question . . . ought not to be asked without Miranda warnings," *Guerrero, supra*,32 Mass. App. Ct. at 267 (citing *Muniz, supra* 496 U.S. at 596–99).

See also Commonwealth v. Sheriff, 425 Mass. 186, 198–99 (1997) (raising possibility, without deciding, that questions for purpose of ascertaining [if] whether defendant is aware of his surroundings and can understand the *Miranda* warnings are in the same category as "routine booking questions").

[135] An "incriminating response" includes "any response, inculpatory or exculpatory, which the prosecution might seek to use against the suspect at trial." Commonwealth v. Torres, 424 Mass. 792, 796–97 (1997) (citing Rhode Island v. Innis, 446 U.S. 291, 301 n.5 (1980)).

[136] Commonwealth v. Rubio, 27 Mass. App. Ct. 506, 512 (1989) (quoting Rhode Island v. Innis, 446 U.S. 291, 301 (1980)). *See also* Arizona v. Mauro, 481 U.S. 520 (1987). In *Mauro* the defendant had been given warnings and invoked his right to counsel. The police allowed defendant's wife, also in custody, to speak with him in the presence of a police officer and a tape recorder. The Supreme Court ruled five to four that the police action was not the "functional equivalent" of interrogation: although the police knew Mauro might incriminate himself, there was no evidence that they instigated or participated in conversation. The Court also stressed the undesirability of a rule barring spouses' access to each other, and the legitimate security interest in monitoring the visit. *Compare* Commonwealth v. Williams, 388 Mass. 846, 853–55 (1983) (not "interrogation" for police, after defendant had invoked his right to remain silent, to question Jones, a co-arrestee, 25–30 feet away from defendant in the same room, and to accede to Jones's request to speak with defendant; "it was Jones' actions and influence alone, and not unfair police tactics, that prompted the defendant to make a statement").

[137] Commonwealth v. Rubio, 27 Mass. App. Ct. 506, 512–14 (1989) (showing arrested defendant cocaine seized from his apartment was "clearly confrontational and had the force of

observer (with the same knowledge of the suspect as the police officer) would . . . infer that the [officer's speech or conduct was] designed to elicit an incriminating response."[138] The intent of the authorities is not conclusive, but it "bears on whether they should have known that their words and actions were likely to evoke an incriminating response."[139] In seeking to discover the officer's "design" the courts ask whether the police were simply "investigating" an unsolved crime or were attempting to get an incriminating statement.[140] Relevant objective factors include whether the defendant has been arrested or, based on incriminating facts known to the police, was already the focus of suspicion;[141] whether the officers' conduct was of the sort not "ordinarily attendant to arrest and custody,"[142] and whether the officers' specialized

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an implicit question: 'Is this yours?' "). *Contrast* Commonwealth v. King, 17 Mass. App. Ct. 602, 609 (1984) (where, after booking, defendant asked police to show him the arrest warrant, read it, and confessed, police action was not "interrogation" and statement was "volunteered").

[138] Commonwealth v. Rubio, 27 Mass. App. Ct. 506, 512 (1989) (quoting White, *Interrogation Without Questions:* Rhode Island v. Innis *and* United States v. Henry, 78 MICH. L. REV. 1209, 1231–32 (1980). *See also* Commonwealth v. White, 422 Mass. 487, 501–502 (1996) (police request for and documentation of telephone number called by defendant during booking were not "interrogation"); Commonwealth v. D'Entremont, 36 Mass. App. Ct. 474, 478–80 (1994) (detective's statement to incarcerated defendant that she knew he had earlier refused to discuss the case without counsel but, if he changed his mind, she would be willing to speak with him, was not "interrogation"); Commonwealth v. Torres, 424 Mass. 792, 798 (1997) (error for motion judge to focus on subjective intent of police).

[139] Commonwealth v. Brant, 380 Mass. 876, 883 (1980), *cert. denied*, 449 U.S. 1004 (1980) (telling defendant who had asserted his right to silence that his codefendant had already made a statement to the police was "interrogation").

[140] The police in Commonwealth v. Rubio, 27 Mass. App. Ct. 506 (1989), had already arrested defendant and were not in the process of discovering or securing the seized cocaine; rather, they were "in the process of building a case against [him]." 27 Mass. App. Ct. at 513. *But cf.* United States v. Taylor, 985 F.2d 3 (1st Cir. 1993) (during transport of arrested, unwarned defendant, agent's response ("You can't be growing dope on your property like that") to defendant's question, "Why is this happening to me?" was neither premeditated nor designed to elicit a response but, at most, showed awareness that suspect might make incriminating statement, which is insufficient to constitute "functional equivalent" of interrogation); Commonwealth v. Dustin, 373 Mass. 612, 614, 616–15 (1977) (officer's innocent but misleading response to jailed defendant's question, "If I tell you something about the incident, will I be admitting my guilt?" not tantamount to interrogation). *See also* Commonwealth v. Diaz, 422 Mass. 269, 271 (1996) (officer's one-word response, "Why?," to defendant's volunteered statement was a "natural reflex action" not constituting custodial interrogation); Commonwealth v. Nom, 426 Mass. 152, 156–58 (1997) (although normally improper for police to ask suspect his reason for requesting an attorney, the question was not "interrogation" where designed to clarify "inconsistency" between suspect's request and his subsequent initiation of conversation; *see* dissenting opinion).

[141] In Commonwealth v. Rubio, 27 Mass. App. Ct. 506, 512-13 (1989), officers had arrested the defendant and knew that he lived in the apartment and that the apartment was being used for large scale drug trafficking. At the time of the defendant's incriminating statement, they "were in the process of building a case against [him]." *Id.* at 513.

[142] Commonwealth v. Rubio, 27 Mass. App. Ct. 506, 514 (1989).

duty or expertise would have caused them to attempt to obtain an incriminating statement.[143]

Police requests or instructions to the defendant to perform field sobriety tests, or to take a breathalyzer test, are not considered "interrogation" for purposes of the *Miranda* rule. That is because a defendant's response to such tests is considered "real" or "physical" evidence as opposed to testimonial communications.[144]

b. "Custody"

"The police are not required to give warnings every time they interview a witness, but only when the witness is in 'custody.'"[145] The *Miranda* Court defined custody as existing when a suspect has been arrested or "deprived of his freedom in any significant way."[146] Narrowed by later cases, the ultimate question now is whether, under all the circumstances, "from the perspective of a reasonable person in the suspect's shoes . . . there was . . . a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest . . . ."[147] Applying this test requires answering "essentially a subjective inquiry — whether, from the point of view of the person being questioned, the interrogation took place in a coercive environment — by reference to objective indicia."[148] The crucial question is whether "a reasonable person in the position of the person being questioned would not feel free to leave the place of

[143] In *Commonwealth v. Rubio*, 27 Mass. App. Ct. 506, 513 n. 7 (1989), the officers were members of a drug task force and knew the importance of "commit[ing] the defendant as early as possible to an admission or denial of ownership of the cocaine found in the pocketbook."

[144] *See* Commonwealth v. Cameron, 44 Mass. App. Ct. 912, 913 (1998) ("Because field sobriety tests have been held not to elicit testimonial or communicative evidence, they do not trigger the protections afforded by the Fifth Amendment to the United States Constitution or the self-incrimination provision of art. 12 of the Massachusetts Declaration of Rights.") (citing Commonwealth v. Brennan, 386 Mass. 772, 779 (1982) (field sobriety tests), and Vanhouton v. Commonwealth, 424 Mass. 327, 336 (1997) ("a recitation test . . . , performed during a roadside investigation of suspected drunk driving, is outside the protective sphere of the privilege against self-incrimination because there is no disclosure of subjective knowledge or thought processes in a constitutionally prohibited sense."). However, the police statements and questions must be limited to those "necessarily 'attendant to' the legitimate police procedure [and] . . . not likely to be perceived as calling for any incriminating response." Pennsylvania v. Muniz, 496 U.S. 582, 583 (1990).

[145] Commonwealth v. Bryant, 390 Mass. 729, 736 (1984). *See also* Commonwealth v. Simon, 456 Mass. 280, 287 (2010).

[146] Miranda v. Arizona, 384 U.S. 436, 444 (1966); Thompson v. Keohane, 516 U.S. 99, 112 (1995) (ultimate inquiry is whether there was a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest").

[147] Commonwealth v. Martinez, 458 Mass. 684, 695 n.12 (2011) (quoting Commonwealth v. Morse, 427 Mass. 117, 123 (1997) (citing Thompson v. Keohane, 516 U.S. 99, 112 (1995), and Berkemer v. McCarty, 468 U.S. 420, 440 (1985)).

[148] Commonwealth v. Bryant, 390 Mass. 729, 736 (1984). In J.D.B. v. North Carolina, -- U.S. --, --, 131 S.Ct. 2394, 2406 (2011), the Supreme Court held that when the interrogation is of a child and the police know the child's age or it is objectively apparent to them, the child's age is a factor which must be considered in the custody analysis.

questioning."[149] Unless the defendant was clearly under arrest, this calls for a case-by-case analysis, keeping in mind *Miranda's* underlying goal of protecting persons in police-dominated environments from "menacing" interrogation procedures.[150] Also, an interrogation that is noncustodial at the start may become custodial by virtue of changed circumstances,[151] including the suspect's self-inculpatory statements.[152]

In *Commonwealth v. Groome*,[153] the S.J.C. cited four factors relevant to "custody": "(1) the place of the interrogation; (2) whether the officers have conveyed to the person being questioned any belief or opinion that that person is a suspect; (3) the nature of the interrogation, including whether the interview was aggressive or, instead, informal and influenced in its contours by the person being interviewed; and (4)

[149] Commonwealth v. Morse, 427 Mass. 117, 124–25 (1997). "Although the officer may have an intent to make an arrest . . . this is not a factor in determining whether there is . . . 'in-custody' questioning. It is the officer's statements and acts, the surrounding circumstances, gauged by a 'reasonable man' test, which are determinative." *See* J.D.B. v. North Carolina, -- U.S. --, --, 131 S.Ct. 2394, 2406 (2011) (in questioning a child, the reasonable person is one of the child's age where the police know, or objectively should know, the child's age); Commonwealth v. Bryant, 390 Mass. 729, 739 n.11 (1984) (quoting Lowe v. United States, 407 F.2d 1391, 1397 (9th Cir. 1969)); Stansbury v. California, 511 U.S. 318 (1994); Commonwealth v. A Juvenile, 402 Mass. 275, 277–78 (1988) ("[T]he test is how a reasonable person in the [defendant's] position would have understood his situation"); Commonwealth v. Shine, 398 Mass. 641, 647–48 (1986) (trooper's uncommunicated intention to arrest suspect is "irrelevant" to custody issue) (citing Berkemer v. McCarty, 468 U.S. 420, 442 (1984)). By the same token, the officer's benign motivation is not controlling. *See* Commonwealth v. Damiano, 422 Mass. 10, 12-13 (1996) (police intention to place defendant in protective custody, and find out what he knew about roadside homicide, not determinative; handcuffed defendant in back seat of cruiser reasonably believed he was not free to leave).

"Custody" has been defined more narrowly for an incarcerated defendant who is questioned within the detention facility. *See* Commonwealth v. Smith, 456 Mass. 476, 479 (2010). In such cases, the ultimate question is whether the prisoner "is subject to some restraint in addition to those normally imposed on him by virtue of his status as an inmate." *Id.* (quoting Commonwealth v. Perry, 432 Mass. 214, 238 n. 18 (2000); Commonwealth v. Larkin, 429 Mass. 426, 434 (1999)). In *Larkin*, the SJC held that an incarcerated defendant, questioned in the jail's lawyer's interview room by state troopers was not "in custody" for *Miranda* purposes because he was not in the troopers' control. Rather, the defendant knew that he could end the interview at any time by signaling to a correctional officer who was within view, and who would immediately return the defendant to his cell upon request.

[150] Commonwealth v. Bryant, 390 Mass. 729, 740–41 n.14 (1984) (quoting *Miranda*, 384 U.S. at 457); *see also* United States v. Melendez, 228 F.3d 19 (1st Cir. 2000) (*Miranda* warnings not required before testimony of subpoenaed witness in criminal proceeding).

[151] *See* Commonwealth v. Alicea, 376 Mass. 506, 509, 513–14 (1978) (interrogation became custodial after witness identified defendant in station house show-up, and defendant was informed he would be charged and could help himself by confessing; at that point it would have been "cleaner practice" to inform suspect explicitly of his change in status and give him new warnings, but constitution not violated if neither is done). *See also* Commonwealth v. Lavendier, 79 Mass. App. Ct. 501, 505 (2011) (advising courts to look for a 'fundamental transformation in the atmosphere' on the part of the police" (citing Commonwealth v. Hilton, 443 Mass. 597, 611-12 (2005))).

[152] *See* Commonwealth v. Hilton, 443 Mass. 597, 611-12 (2005). *But see* Commonwealth v. Bryant, 390 Mass. 729 (1984), discussed *infra.*

[153] 435 Mass. 201 (2001).

whether, at the time the incriminating statement was made, the person was free to end the interview by leaving the locus of the interrogation or by asking the interrogator to leave, as evidenced by whether the interview terminated with an arrest."[154] We consider each factor in turn.

(1) "*The place of the interrogation.*" Station house interrogation is the paradigm to which *Miranda* applies. In the "inherently coercive" atmosphere there, deprived of access to familiar surroundings, friends, and family, a defendant is easy prey to coercive investigative techniques ranging from physical brutality to psychological pressures including threats, promises, and deception.[155] But not every station house interrogation is "custodial."[156] A citizen who appears "voluntarily" at the police station,[157] even if he has been brought there in a police cruiser for questioning and given *Miranda* warnings,[158] might not be deemed to be in "custody." Whether a

[154] *Id*. at 211-12. As both the Appeals Court and the S.J.C. have noted, "rarely is any single factor conclusive." Commonwealth v. Becla, 74 Mass. App. Ct. 142, 147 n.3 (2009) (quoting Commonwealth v. Sneed, 440 Mass. 216, 220 (2003); Commonwealth v. Bryant, 390 Mass. 729, 737 (1984)). *See generally* Commonwealth v. Smith, 426 Mass. 76 (1997) (defendant not in custody under *Bryant* test when he came to police station on his own accord, told the police that he understood they were looking for him for a murder, and then went to the sergeant's office and told him that he was there to confess to the murder of his girlfriend); Commonwealth v. Philip S., 32 Mass. App. Ct. 720, 722–26 (1992) (concluding, under *Bryant* test, that fire station interrogation of juvenile suspected of arson was "custodial"), *cited with approval in* Commonwealth v. Philip S., 414 Mass. 804, 806 n.3 (1993). The Appeals Court used a slightly broader test, considering also the nature of the crime, in Commonwealth v. Seymour, 39 Mass. App. Ct. 672, 683 (1996) (citing Commonwealth v. Merritt, 14 Mass. App. Ct. 601, 604–05 (1982)).

[155] "The station house atmosphere is generally most conducive to successful interrogation because the investigator 'possess[es] all the advantages.' " Commonwealth v. Haas, 373 Mass. 545, 553 (1977) (quoting Miranda v. Arizona, 384 U.S. 436, 450 (1966)). *See also* Commonwealth v. Philip S., 32 Mass. App. Ct. 720, 722–26 (1992) (interrogations at fire station), *cited with approval in* Commonwealth v. Philip S., 414 Mass. 804, 806 n.3 (1993).

[156] Commonwealth v. Bookman, 386 Mass. 657, 660 (1982) ("Although an interview at an official place intimates a degree of coercion . . . it does not, in itself, brand an interrogation as custodial"); Commonwealth v. Meehan, 377 Mass. 552, 558 (1979), *cert. dismissed*, 445 U.S. 39 (1980).

[157] *See* Commonwealth v. Morales, 461 Mass. 765, *6 (2012) (holding stationhouse questioning "in a professional manner" about a reported missing person was not custodial where defendant agreed to accompany police to the police station, was there told he was not under arrest, and nothing conveyed to defendant suggested he was a suspect); Commonwealth v. Bly, 448 Mass. 473, 492 (2007). *See also* Commonwealth v. Smith, 426 Mass. 76 (1997) (defendant not in custody when he came to police station on his own accord, told the police that he understood they were looking for him for a murder, and then went to the sergeant's office and told him that he was there to confess to the murder of his girlfriend); Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (defendant appeared "voluntarily" and was explicitly told he was not under arrest, even though he was interviewed in closed office).

[158] Commonwealth v. Bookman, 386 Mass. 657. 661 n.5 (1982) (where police were instructed to "pick up [homicide suspect) and bring him to the station for questioning," found him at home, and he agreed to their request to come to station, was given *Miranda* warnings, and made statements, he was not "deprived of his freedom in any significant way"; although police should have told defendant he was free to leave, he was never arrested, handcuffed, or threatened, police were at investigative stage, and there was no evidence of involuntariness) (dictum). *See also* Commonwealth v. Alicea, 376 Mass. 506, 513 (1978) (upholding trial court

station house interrogation is "custodial" may thus depend on the other *Groome* factors, on how the defendant got to the station (did he come "voluntarily," or was he "brought" by police) and on whether the police purposely deferred questioning until he got there.[159]

If interrogation occurs outside the police station, "custody" is likely to be found when the police have resorted to formal arrest, force, threats, or other coercive techniques.[160] Otherwise, whether or not the conditions are "custodial" depends on whether they are police-dominated and thus, by analogy to the station house, "inherently coercive." In an environment physically and psychologically controlled by the authorities[161] the defendant will feel intimidated and compelled to speak; therefore, *Miranda's* prophylactic safeguards must apply. In the absence of such conditions, for

finding that defendant "brought" to station in police cruiser, read *Miranda* rights and questioned, was there as witness, and was not in "custody" until after he was identified as culprit).

The giving of *Miranda* warnings may be a "a step taken by the police out of abundant caution . . . [which] does not, by itself, establish a custodial interrogation." *Bookman, supra*, 386 Mass. at 660–61.

[159] *Compare* Commonwealth v. Smith, 412 Mass. 823, 827–28 (1992) (station house interrogation "custodial" where defendant, after accepting police ride to station, waited three hours before questioning, by which time police regarded him as a suspect and would have arrested him had he attempted to leave) *and* Commonwealth v. Haas, 373 Mass. 545, 552–54 (1977) (station house interrogation "custodial" where investigation had focused on defendant, police physically prevented him from entering his home, transported him to the station, and refused to answer his questions until they reached the station) *with* Commonwealth v. Corriveau, 396 Mass. 319, 326–29 (1985) (station house interrogation of defendant on whom homicide investigation had focused was not custodial even though police followed and stopped his vehicle, asked him to come to station, took him in police car, and refused to answer his questions en route; defendant conceded he knew he did not have to go to station, he was not touched or threatened, and police told him he was free to leave) *and* Commonwealth v. Bookman, 386 Mass. 657, 660–61 (1982) (no "custody" although police "picked up" defendant at home and brought him to police station for questioning, but he was not handcuffed or restrained, nor was there other evidence of coercion).

[160] For the distinction between "custodial interrogation" and "general on-the-scene questioning," see Commonwealth v. Doyle, 12 Mass. App. Ct. 786, 792-93 (1981).

[161] *See, e.g.,* Commonwealth v. Gallati, 40 Mass. App. Ct. 111, 112 (1996) (questioning of corrections officer behind closed doors in office of superior officer within the facility was in an "isolating and coercive" setting); Commonwealth v. A Juvenile, 402 Mass. 275, 277 (1988) (juvenile questioned at privately contracted detention facility to which he had been committed by DYS, where he was subject to constant supervision, and from which he was not free to leave, was in "custody"); Mathis v. United States, 391 U.S. 1 (1968) (IRS interrogation of jailed defendant was "custodial" even though he was in jail on matters unrelated to the interrogation). *But see* Commonwealth v. Larkin, 429 Mass. 426, 432-36 (1999) (incarcerated defendant questioned in jail's lawyer's interview room by state troopers was not "in custody" for *Miranda* purposes, because he was not in the troopers' control; defendant knew that he could end the interview at any time by signaling correctional officer who was within view, and immediately return to his cell); Illinois v. Perkins, 496 U.S. 292 (1990) (*Miranda* does not apply to incarcerated suspect by undercover agent posing as fellow inmate, because coercive pressures to confess absent). *Cf.* Minnesota v. Murphy, 465 U.S. 420, 429–34 (1984) (no *Miranda* warnings required for probationer called by probation officer to her office and questioned about suspected crime; interview compulsory but not "custodial").

example, in the defendant's home, or on a public street,[162] the courts are less likely to conclude that the defendant was in custody.[163]

(2) *"Whether the officers have conveyed to the person being questioned any belief or opinion that the person is a suspect."* A person who is aware that his interrogators suspect him of a crime or, a fortiori, that they have focused their suspicions exclusively on him, is more likely to believe that he is in custody than one who perceives that he is being interviewed as a witness.[164] But police focus on defendant is "material to the custody inquiry only to the extent that an officer's

[162] Thus, routine traffic stops are not normally considered as "custodial", even if police questioning results in damaging admissions. *See* Commonwealth v. Sauer, 50 Mass. App. Ct. 299, 301-02 (2000) (citing Berkemer v. McCarthy, 468 U.S. 420, 439 (1984)).

[163] *See* Commonwealth v. McGrail, 80 Mass. App. Ct. 339, 346 (2011) (holding that questioning at accident scene and subsequently at hospital, in an unsecured area surrounded by medical personnel, was not custodial; a reasonable person in such circumstances would have understood that he was held for medical care in light of the serious injuries sustained). *Compare* Commonwealth v, Bryant, 390 Mass. 729, 737–42 (1984) (informal, relaxed conversation with officer in defendant's home, in which the questioning was "unaggressive," the officer had indicated his willingness to leave, and defendant was a suspect but not the exclusive focus of the investigation, was not "custodial"), *with* Orozco v. Texas, 394 U.S. 325, 326-27 (1969) (questioning of defendant in his bedroom by four policemen at 4:00 A,M. raised "potentiality for compulsion" equivalent to station house interrogation and was "custodial"); Commonwealth v. Coleman, 49 Mass. App. Ct. 150, 154-55 (2000) (questioning of defendant in his home was "custodial": three police officers aggressively questioned defendant in small bedroom**,** blocking the closed door, and threatening to arrest him if he did not cooperate). *See also* United States v. Lanni, 951 F.2d 440, 442-43 (1st Cir. 1991) ("close case" but district court did not commit clear error in finding that four-hour home interview conducted by two FBI agents was not custodial); Commonwealth v, Shine, 398 Mass, 641, 647–49 (1986) (where defendant questioned by plainclothes trooper on city street, in girlfriend's presence, was unaware of trooper's status, and after questioning was left unrestrained while trooper made a telephone call, this was "far from the 'incommunicado interrogation . . . in a police-dominated atmosphere' " involved in *Miranda* and was not custodial interrogation, despite trooper's uncommunicated intention to arrest the defendant; his questions were "preliminary questions designed to determine the defendant's identity and what he knew about the crime").

[164] Commonwealth v. Morales, 461 Mass. 765, [*6] (2012) (in questioning defendant about a reported missing person, nothing conveyed to defendant suggested he was a suspect); Commonwealth v. Greenberg, 34 Mass. App. Ct. 197, 200–01 (1993) (focus was not on defendant where police had just begun investigation, had questioned another suspect earlier the same day, and defendant appeared to have alibi); Commonwealth v. Bookman, 386 Mass, 657, 661 n.5 (1982) (although police aware of facts that tied defendant to homicide scene, proceedings were in "investigative stage"). *But see* Commonwealth v. Bryant, 390 Mass. 729, 737–42 (1985) (informal, "noncustodial" interview in defendant's home did not become "custodial" when defendant suddenly confessed to homicide and, after fifteen-second silence, was asked if he "would like to tell . . . about it"; although his confession created probable cause and meant the officer would not have honored a request to leave, officer did not become "accusatorial" or "bear down" on defendant, and no evidence shown that defendant "was in fact restrained or reasonably perceived himself to be restrained"). The unanimous *Bryant* opinion cited at 740 n.13, Beckwith v. United States, 425 U.S. 341, 346–47 (1976) ("friendly" and "relaxed" interview in defendant's home, in which agents did not "press" him to answer; fact that investigation had "focused" on defendant did not make interrogation "custodial"; "[it] was the compulsive aspect of custodial interrogation, and not the strength or content of the government's suspicions at the time [of questioning] which led the court to impose the *Miranda* requirements").

suspicions influence the objective conditions of an interrogation, such that a reasonable person in the position of the [suspect] would not feel free to leave."[165] If the defendant is not aware of police suspicions, they are not relevant to "custody."

(3) *"The nature of the interrogation, including whether the interview was aggressive or, instead, informal and influenced in its contours by the suspect."* Questioning that is "relaxed," "informal," and polite is less intimidating and coercive than questioning in an abusive or disrespectful manner.[166] One should also consider such factors as the duration and conditions of interrogation (e.g., the size of the interrogation room, the number of interrogators, whether others were present, etc).[167]

(4) *"Whether, at the time the incriminating statement was made, the suspect was free to end the interview by leaving the locus of the interrogation or by asking the interrogator to leave, as evidenced by whether the interview terminated with the defendant's arrest."* The officer's offer to terminate the interview at defendant's will is, of course, an important factor weighing against a finding of custody.[168] Additionally, although one may question this logic, "the nonarrest of the suspect at the close of the interrogation is often deemed indicative of the lack of a custodial atmosphere during interrogation."[169] The converse, however, is not true: the fact that the defendant was

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[165] Commonwealth v. Morse, 427 Mass. 117, 123–24 (1997) ("it is questionable whether the second Bryant factor was ever relevant to the Miranda inquiry") (citing Stansbury v. California, 511 U.S. 318 (1994), and United States v. Ventura, 85 F.2d 708, 712 (1st Cir. 1996)).

[166] Commonwealth v. Morales, 461 Mass. 765, *6 (2012) ("professional," non-aggressive, non-threatening questioning at police station concerning a reported missing person held not custodial); Commonwealth v. Hilton, 443 Mass. 597, 613 (2005) (recognizing difference between "nonaccusatory interview" and "custodial interrogation"). *See also* Wayne R. LaFave et al., 2 Crim. Proc. § 6.6(f) (3d ed. 2010) (questioning that is "close and persistent, involving leading questions and the discounting of the suspect's denials of involvement" would lead "reasonable person [to] conclude he was in custody").

[167] *See* Commonwealth v. Coleman, 49 Mass. App. Ct. 150, 154 (2000) ("[T]here was a measure of physical oppressiveness caused by the presence and deployment of the three officers in a small room, with the way to the closed door shadowed by the questioner himself."); Commonwealth v. Magee, 423 Mass. 381, 385 (1996) (finding custody where "defendant was interviewed in a closed room at a police station by a succession of three law enforcement officers over a period of approximately seven hours"); Commonwealth v. Carnes, 457 Mass. 812, 819 (2010) (finding no custody where "entire questioning . . . lasted only about one hour and fifteen minutes" and defendant "was accompanied by his father and baby daughter"); Commonwealth v. McGrail, 80 Mass. App. Ct. 339, 346 (2011) (finding no custody where questioning occurred at accident scene and in unsecured area of hospital in presence of medical personnel and general public); United States v. Mittel-Carey, 493 F.3d 36, 40 (1st Cir. 2007) (custody found where defendant "was physically separated from his girlfriend and not allowed to speak to her alone").

[168] *See, e.g.*, Commonwealth v. Brum, 438 Mass. 103, 112 (2002) (no custody where "defendant was expressly told that he was free to leave"); Commonwealth v. Bryant, 390 Mass. 729, 738 (1984) (officer offered to leave defendant's home).

[169] Commonwealth v. Bryant, 390 Mass. 729, 742 n.15 (1984) (citing cases); Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (defendant permitted to leave station house after interview). *See also* Commonwealth v. Brum, 438 Mass. 103, 112 (2002); Commonwealth v. Greenberg, 34 Mass. App. Ct. 197, 200–01 (1993). *But see* Commonwealth v. Gallati, 40 Mass. App. Ct. 111, 115 (1996) (mere fact that corrections officer questioned in superior's office was not arrested is not conclusive of whether there was custodial interrogation).

arrested *after* making an incriminating statement does not, by itself, make the preceding interrogation "custodial."[170]

Although an arrested defendant is generally considered to be in Fifth Amendment "custody," the same is not necessarily true of persons subject to a Fourth Amendment "seizure" authorized by *Terry v. Ohio.*[171] For example, the Supreme Judicial Court has held that a motorist detained in open view on the street, who was asked questions and required to perform field sobriety tests, was not "in custody" for *Miranda* purposes.[172]

2. Waiver

Even if *Miranda* warnings are given, "[i]f the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant "voluntarily, knowingly and intelligently" waived his rights[173] Analysis of waiver under *Miranda* consists of the following steps: (1) Was defendant completely and accurately advised of his rights? (2) If so, did he affirmatively assert his rights? (3) If he did not, did he expressly or implicitly waive his rights? (4) If so, was his waiver made "voluntarily, knowingly and intelligently?"[174]

a. Was Defendant Completely and Accurately Advised of His or Her Rights?

Unless a person has been completely and accurately advised of his *Miranda* rights no finding is possible that he "knowingly, intelligently, and voluntarily waived [those] rights."[175] Thus, advising the suspect of each of the following four[176] rights is an

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[170] Commonwealth v. Bryant, 390 Mass. 729, 742 n.15 (1984); Commonwealth v. Ferrara, 31 Mass. App. Ct. 648, 654-55 (1991) (defendant who was present during search of his business premises, but unaware that warrant authorized search of his person, or that police had probable cause to arrest him, was not in custody).

[171] 392 U.S. 1 (1968).

[172] Berkemer v. McCarty, 468 U.S. 420, 442 (1984), *cited approvingly in* Commonwealth v. Tynes, 400 Mass. 369, 373 (1987); Commonwealth v. Vanhouton, 424 Mass. 327, 331 (1997) (*Miranda* custody is question solely of federal constitutional law). *Cf.* Commonwealth v. Damiano, 422 Mass. 10, 13 (1996) (defendant handcuffed in back seat of police cruiser on highway was in custody). Although, as *Berkemer* illustrates, Fourth Amendment "stops" under *Terry v. Ohio* might not amount to *Miranda* "custody," arrested persons are entitled to *Miranda* protection. Miranda v. Arizona, 384 U.S. 436, 444 (1966). *See also* Illinois v. Perkins, 496 U.S. 292, 294 (1990) *(Miranda* not implicated where incarcerated suspect unaware that questioner is undercover agent).

[173] Miranda v. Arizona, 384 U.S. 436, 444,475 (1966); *see supra*, § 19.3C.

[174] Miranda v. Arizona, 384 U.S. 436, 444 (1966).

[175] Commonwealth v. Adams, 389 Mass. 265, 266 (1983). *Miranda* warnings may be administered orally or in writing. Commonwealth v. Smith, 426 Mass. 76, 81 (1997); Commonwealth v. Seng, 436 Mass. 537, 540-41, 547 (2002) (inaccurate and incomplete warnings in defendant's native language, followed by complete warnings in English, rendered waiver invalid; in such circumstances, "the defendant would be confused by the discrepancy or omission").

[176] Although police sometimes give a fifth warning, that the suspect may "cut off questioning," *see* Commonwealth v. Westmoreland, 388 Mass. 269, 276 (1983), or exercise his

"absolute prerequisite" to questioning:[177] (1) that he has the right to remain silent; (2) that any statement he does make may be used as evidence against him; (3) that he has a right to the presence of an attorney during questioning;[178] (4) that if he cannot afford an attorney one will be appointed for him prior to any questioning[179] if he so desires. Thus, for example, where the police advised defendant that he had "the right to remain silent, the right to stop the questioning at any time, and the right to consult with an attorney whom the Commonwealth would provide for him if he could not afford to pay for one," but did not advise him that any statement he made could be used against him, it was reversible error to admit defendant's statements into evidence.[180] And "[e]ven an

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rights "throughout the interrogation," Miranda v. Arizona, 384 U.S. 436, 479 (1966), no such warning is required. Commonwealth v. Holley, 79 Mass. App. Ct. 542, 544 n.2 (2011); Commonwealth v. Smith, 426 Mass. 76, 81 (1997); Commonwealth v. Lewis, 374 Mass. 203, 204–05 (1978). That said, "if [an] officer gives the warning and gets it wrong, the incorrect statement of rights may affect the voluntariness of the defendant's confession." Commonwealth v. Novo, 442 Mass. 262, 271 (2004).

[177] Miranda v. Arizona, 384 U.S. 436, 444, 479 (1966). *But see* Powell v. Florida, -- U.S. --, --, 130 S.Ct. 1195, 1204-05 (2010) (upholding warnings informing the suspect that he had "the right to talk to a lawyer before answering any of [their] questions" and "the right to use any of [his] rights at any time [he] want[ed] during th[e] interview," the Court holding that "[i]n combination, the two warnings reasonably conveyed [the suspect's] right to have an attorney present, not only at the outset of interrogation, but at all times.); Duckworth v. Eagan, 492 U.S. 195, 205 (1989) (upholding otherwise standard warnings that included the sentence, "We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court"; warnings are valid as long as "in their totality" they "reasonably" convey to a suspect his rights"). *See also* Commonwealth v. Colby, 422 Mass. 414, 418 (1996) (upholding deficient warning under *Duckworth*, but noting defendant's failure to argue for stricter standard under state law); Commonwealth v. Ghee, 414 Mass. 313, 317–18 (1993) (although no prescribed set of words must be used to provide *Miranda* warnings, burden on Commonwealth to show that warnings advising defendant of his right to silence "in regard to this offense you are charged with" adequately conveyed that he did not have to talk about other offenses either; burden not met here, but harmless error). There is no requirement that the rights be given in writing. *See* Commonwealth v. Smith, 426 Mass. 76, 81 (1997). However, courts have repeatedly suggested that the police read from *Miranda* cards when giving the rights orally. *See* Commonwealth v. Dagraca, 447 Mass. 546, 551 n.7 (2006) (citing Commonwealth v. Lewis, 374 Mass. 203, 204–205 (1978); Commonwealth v. Ayala, 29 Mass. App. Ct. 592, 596 (1990)).

[178] *See* Florida v. Powell, -- U.S. --, --, 130 S.Ct. 1195, 1204-05 (2010) (upholding warnings informing the suspect that he had "the right to talk to a lawyer before answering any of [their] questions" and "the right to use any of [his] rights at any time [he] want[ed] during th[e] interview," the Court holding that "[i]n combination, the two warnings reasonably conveyed [the suspect's] right to have an attorney present, not only at the outset of interrogation, but at all times).

[179] *But see* Duckworth v. Eagan, 492 U.S. 195 (1989).

[180] Commonwealth v. Adams, 389 Mass. 265, 268–69 (1983); Commonwealth v. Dagraca, 447 Mass. 546, 552 (2006) *See also* Commonwealth v. Seng, 436 Mass. 537, 542-48 (2002) ("[W]here two sets of warnings are given and one is defective or incomplete and the circumstances are such that the defendant would be confused by the discrepancy or omission, a waiver so obtained is not voluntary."); Commonwealth v. Miranda, 37 Mass. App. Ct. 939, 940 (1994) (Rescript) (warnings inadequate which advised defendant of right to attorney, but failed to mention the right to the attorney's presence during interrogation); Commonwealth v. Coplin, 34 Mass. App. Ct. 478, 483 (1993) (form acknowledgment of warnings on line 48 of Boston

innocent misrepresentation of the *Miranda* rights of the defendant renders suspect a claim that he waived those rights."[181]

Once a defendant has waived his rights and made statements, subsequent interrogation sessions should be preceded by fresh warnings and waiver, unless the time lapse between the initial warnings and inculpatory statements was not significant.[182]

b. Did Defendant Affirmatively Assert His or Her Rights?

Interrogation must cease once the defendant asserts his right to remain silent or to consult an attorney. But not every reference by the suspect to counsel,[183] or refusal to

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Police Department booking sheet omits crucial element); Commonwealth v. Ayala, 29 Mass. App. Ct. 592 (1990). *But see* Commonwealth v. Bryant, 390 Mass. 729, 742–43 & n.16 (1984) (police omitted warning that defendant could have an attorney if he could not afford one but inquired into defendant's financial status and defendant replied that he could afford an attorney; considering also that defendant said he had received warnings on earlier occasions and that he understood his rights, court could infer that he did not believe attorney unavailable to him; S.J.C. also "emphasized" that compliance with *Miranda* "requires that a suspect . . . should be informed explicitly of his right to appointed counsel in the event of indigency, without regard to the suspect's actual financial status").

[181] Commonwealth v. Dustin, 373 Mass. 612, 615–16 (1977) (officer's innocent but misleading response to defendant's question, "If I tell you something about the incident, will I be admitting my guilt?" rendered resulting statements inadmissible). *See also* Commonwealth v. Lahti, 398 Mass. 829, 830–31 (1986) (suppressing statements where police inaccurately told defendant that, if he waived his rights, his statements would not he used against him and that if he did not confess everything he risked explusion from a diversion program and subsequent prosecution).

[182] *See* Commonwealth v. Silanskas, 433 Mass. 678, 686-87 (2001) (time lapse of one and one-half to two hours was not sufficiently "significant" to require renewed warnings). If there was a "significant" lapse of time between the initial warnings and the inculpatory statements, the ultimate question is whether defendant, "with a full knowledge of his legal rights, knowingly and intentionally relinquished them." *Id.* (citations omitted). *See also* Commonwealth v. Martinez, 458 Mass. 684, 692-93 (2011) (finding that "while six hours between the administration of *Miranda* warnings and a defendant's statement is certainly a lengthy period," no error in finding that defendant's waiver was "voluntary, knowing, intelligent, and therefore valid"); Commonwealth v. Coplin, 34 Mass. App. Ct. 478 (1993) (*Miranda* warnings given in entirety at time of arrest, repeated at station 30–45 minutes later without critical element; absent any manifestation of earlier understanding, the first warnings did not carry over to the later ones, so station house waiver invalid); Commonwealth v. Silva, 388 Mass. 495, 502 (1983) *(Miranda* warnings, "once given, are not to be accorded unlimited efficacy or perpetuity," but no need to re-warn 17-year-old defendant during three-hour time lapse after initial warnings (quoting Commonwealth v. Cruz, 373 Mass. 676, 687 (1977))); Commonwealth v. Valliere, 366 Mass. 479, 484–85, 487 (1974) (initial *Miranda* warnings found insufficient to support a waiver occurring over two hours later) (dictum); Commonwealth v. Bryant, 390 Mass. 729, 734–35 (1984) (where defendant had received full warnings and signed written confession five minutes earlier, admission of later statements in response to question that was preceded only by phrase, "[h]aving your rights in mind," did not raise a "substantial likelihood of a miscarriage of justice" under G.L. c. 278, § 33E).

[183] The Supreme Court has held that only an "unambiguous request" for counsel requires the cessation of questioning; a suspect's ambiguous or equivocal reference to counsel does not invoke the right. Davis v. United States, 512 U.S. 452, 458–59 (1994) ("Maybe I

speak,[184] is construed as an assertion of the right; each will be evaluated in context, including the defendant's willingness to talk before and after the reference.[185] While

should talk to a lawyer" not sufficient). State law precedents include: Commonwealth v. Hoyt, 461 Mass. 143, 151-52 (2011) ("I'd like to have an attorney" in response to post-warning question "Do you wish to speak with us now?" held to be unambiguous invocation of right to counsel even though immediately followed by, "I mean but I can't afford one. So I guess I'll have to speak with you now. I don't have an attorney," and, after being offered a phone book to call an attorney, "I'd have to wait until an attorney came, right?" and "I'll just talk to you without an attorney.");*Commonwealth v. Girouard*, 436 Mass. 657, 666 (2002) (request for counsel "if I am arrested," where defendant was not under arrest, was ambiguous); Commonwealth v. Contos, 435 Mass. 19, 30 (2001) ("[T]he phrase, 'I think I'm going to get a lawyer,' constituted, "[i]n normal parlance, . . . an acceptable and reasonable way to frame a request" for counsel.); *Commonwealth v. Sicari*, 434 Mass. 732, 744-47 (2001) (upholding finding that defendant's silence for thirty to forty minutes during police questioning amounted neither to invocation of right to silence or to an ambiguous attempt to do the same); *Commonwealth v. Magee*, 423 Mass. 381, 386–87 (1996) (waiver invalid where defendant, advised at five A.M. of her right to have an attorney present during questioning, and replied that she did not know an attorney to call or how to get one to the station at that hour; police response that she could call anyone she wished was "less than adequate"); *Commonwealth v. Judge*, 420 Mass. 433 (1995) (ambiguous request for counsel insufficient to overturn conviction where admission of confession deemed harmless error); *Commonwealth v. DiMuro*, 28 Mass. App. Ct. 223, 226–27 (1990) (defendant's stationhouse telephone call to, and conversation with, his attorney, required police before questioning to inquire specifically whether he wanted his lawyer present, but harmless error); *Commonwealth v. Todd*, 408 Mass. 724, 726 (1990) ("wondering aloud" about the advisability of having a lawyer did not amount to assertion of right); *Commonwealth v. Corriveau*, 396 Mass. 319, 331 (1985) ("[I]t's beginning to sound like I need a lawyer," was not an affirmative request to consult with an attorney; furthermore, defendant subsequently stated he neither wanted to leave nor to have a lawyer); *Commonwealth v. Pennellatore*, 392 Mass. 382, 387 (1984) ("I guess I'll have to have a lawyer for this" in conversation with booking officer while awaiting interrogation by homicide unit was not a request for attorney during interrogation, especially because defendant refused booking officer's subsequent repeated urgings to telephone his family). *See also* Fare v. Michael C., 439 U.S. 925 (1979) (juvenile's request to speak with his probation officer was not per se equivalent to a request for a lawyer); *Commonwealth v. Jackson*, 377 Mass. 319, 322–23 n.4 (1979) (raising and avoiding issue of whether defendant's request to speak to his parole officer was equivalent to request for counsel).

[184] Berghuis v. Thompkins, -- U.S. --, --, 130 S.Ct. 2250, 2260 (2010) (holding suspect's pre-waiver silence for two hours and 45 minutes did not constitute an unambiguous invocation of the right to silence, thus permitting police questioning during this period even though the suspect had never waived his rights). *Compare* Commonwealth v. Clarke, 461 Mass. 336, 343-44, 351-52 (2012) (distinguishing *Thompkins*, *supra*, and holding under both the Fifth Amendment and article 12 that suspect's shaking head back and forth in response to officer's question "So you don't want to speak" was a sufficiently unambiguous assertion of the right to silence, requiring the police to cease questioning the suspect) *with* Commonwealth v. Womack, 457 Mass. 268, 277 n.9 (2010) (finding silence in "response to but one question in a quick paced, though not lengthy, interview . . . did not amount to an invocation of [the] right to remain silent"). *See* Commonwealth v. Leahy, 445 Mass. 481, 488-89 (2005) (defendant who responded to question as to "whether he wanted to speak" by stating "Not right now, in a minute. I need to figure some things out" did not unequivocally assert his right to remain silent because statement "was fairly understood to be an indication that [he] wanted to collect his thoughts before deciding whether to begin answering further questions concerning the crime"); Commonwealth v. Sicari, 434 Mass. 732, 748–749 (2001) (thirty- to forty-minute period of silence in middle of lengthy interview not an exercise of right to remain silent); Commonwealth v. Raymond, 424

agreeing with the Supreme Court on this contextual approach, the S.J.C. has relied on article 12 to depart from the federal insistence that a suspect's invocation of the right to silence be free of all ambiguity,[186] at least in the "pre-waiver context," that is, when the suspect is said to invoke the right to silence prior to waiving it. The Court reasoned that permitting the police to continue interrogating a suspect who has yet to waive his rights until such time as the suspect invokes his right to silence "with utmost clarity" would "'turn[] *Miranda* upside down' by placing too great a burden on the exercise of a fundamental constitutional right."[187]

c. Did Defendant Expressly or Implicitly Waive His or Her Rights?

Despite the "heavy burden" placed on the government by *Miranda* to prove waiver, no explicit waiver — either written[188] or oral — is required.[189] Waiver is

Mass. 382, 393-94 (1997) (silence and shaking head "no" in response to post-waiver interrogation did not amount to assertion of right to silence); Commonwealth v. Selby, 420 Mass. 656, 660–62 (1995) (after valid *Miranda* waiver and statement, defendant's "No" response to question whether he had "anything further to add" was not assertion of right to remain silent); Commonwealth v. Pennellatore, 392 Mass. 382, 387–88 (1984) (where, in midst of tape-recorded questioning after *Miranda* waiver, defendant said "Can we stop please?" after which a can of soda was procured for defendant, and the questioning resumed, his request was not meant as an assertion of his right to silence or to stop the questioning permanently); Commonwealth, v. Westmoreland, 388 Mass. 269, 276–78 (1983) (considering defendant's subsequent conduct, including an immediate denial of guilt, "passing" on two questions, and voluntarily answering the others, his words "I'm not making any statement knowing that I am being held for this . . . murder" were not intended as assertion of right to silence); Commonwealth v. Bradshaw, 385 Mass. 244, 264–66 (1982) (defendant's mid-interrogation words, "I don't want to talk," were not intended as assertion of right to silence; defendant's responsiveness for remainder of interview gave "image . . . of a man who wanted to talk, not of one who was being forced to talk"); Commonwealth v. Mandeville, 386 Mass. 393, 402–04 (1982) (in light of defendant's subsequent responses to questioning, "[taking] the Fifth Amendment" to certain questions and answering others," his failure to respond to the standard question following recitation of the *Miranda* rights, "Having these rights in mind, do you wish to talk to us now?" did not indicate desire to remain silent); Commonwealth v. Boncore, 412 Mass. 1013 (1992) (rescript) (upholding suppression order where defendant, in response to police questioning, did not expressly invoke right to silence but instead was unresponsive, or replied "no comment," and then used telephone to request family to locate his brother, who was an attorney).

[185] Commonwealth v. Pennellatore, 392 Mass. 382, 387–88 (1984). *See also* Commonwealth v. Grenier, 415 Mass. 680, 688 (1993) (equivocal response to accusation of guilt, combining verbal and nonverbal elements, was not inadmissible as an "admission of guilt by silence"); Commonwealth v. DiMuro, 23 Mass, App. Ct. 223, 225–27 (1990) (where defendant called attorney on telephone from station-house after initial warnings, and received call in return, police who questioned defendant after giving him fresh warnings should have specifically asked if he was willing to be questioned without waiting for attorney to arrive).

[186] *See* Berghuis v. Tompkins, -- U.S. --, --, 130 S.Ct. 2250, 2262 (2010).

[187] Commonwealth v. Clarke, 461 Mass. 336, 350-51 & n.12 (2012) (noting the close relationship between the questions of waiver and invocation, the Court also declined to adopt the Supreme Court's approach to waiver, in which an uncoerced statement following the *Miranda* warnings is deemed a waiver as long as the suspect understood the warnings).

[188] Commonwealth v. Groome, 435 Mass. 201, 218 (2001) (where motion judge credits police testimony of verbal waiver, defendant's reluctance to sign waiver form not fatal), *citing*

generally implied from the defendant's simple acknowledgement that he understands, followed by his answering questions.[190] Even if the defendant has not explicitly acknowledged that he understands the rights, the courts have upheld statements made following an "expression of willingness" to talk.[191] However, as with the issue of invocation, *see* §19.4(D)(2)(b), *supra*, the S.J.C. has pulled back from the more forgiving federal approach, expressly rejecting the Supreme Court's willingness to find waiver based simply on the suspect's voluntary statement that follow apparently understood *Miranda* warnings. The S.J.C. characterized the federal approach as "revers[ing] the burden of proof applicable to waiver," on the one hand permitting a court to find that a suspect has waived the right to silence based on little more than his post-warning, uncoerced statement but on the other requiring a court to find that a suspect has not invoked that right unless he did so with "utmost clarity." Unwilling to join such a loosening of *Miranda*'s protections, the S.J.C. stated that "[a]s a matter of State law, we continue to impose a 'heavy burden' on the Commonwealth in proving waiver."[192]

d. Was Defendant's Waiver "Voluntary, Knowing, and Intelligent?"

The validity of a defendant's *Miranda* waiver is determined by a "totality of circumstances" test employing similar criteria to the due process "voluntariness" test discussed *supra.*[193] Although in theory the prosecution bears a "heavy burden" to show

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Commonwealth v. Philip S., 414 Mass. 804, 813 n.7 (1993) (written waiver by juvenile is "more persuasive" than police testimony of oral waiver, but is not essential).

[189] North Carolina v. Butler, 441 U.S. 369, 374–75 (1979); Commonwealth v. Valliere, 366 Mass. 479, 487 (1974) ("explicit statements that a defendant understood his rights and voluntarily relinquished them are not essential for a valid waiver"). *But see* Tague v. Louisiana, 444 U.S. 469, 470-71 (1980) (per curiam) (waiver not proven by officer's testimony that he read rights to defendant, where he made no effort to determine if the suspect understood, was literate, or "otherwise capable of understanding his rights").

[190] Berghuis v. Thompkins, -- U.S. --, --, 130 S.Ct. 2250, 2262-63 (2010) (where defendant understood his *Miranda* rights, defendant's answer to a detective's question after almost three hours of silence constituted waiver); Commonwealth v. McClary, 33 Mass. App. Ct. 678, 685 (1992) (defendant's answers to some questions, while stating that he "didn't want to say too much," constituted waiver); Commonwealth v. Corriveau, 396 Mass. 319, 330 (1985) (defendant's affirmative response to question whether he understood the *Miranda* rights suffices to show waiver); Commonwealth v. Silva, 388 Mass. 495, 502 (1983) (suspect's "willingness to talk is evidence of waiver"); Commonwealth v. Williams, 378 Mass. 217, 225 (1979) (defendant indicated that he understood and that he wanted to make a statement).

[191] Berghuis v. Tompkins, -- U.S. --, --, 130 S.Ct. 2250, 2262-63 (2010) (defendant held to have validly waived rights by answering question after sitting silent for two hours and 45 minutes); Commonwealth v. Santo, 375 Mass. 299, 303-05 (1978) (valid waiver by defendant who said he did not want to talk to his attorney, who had called, and then "expressed a willingness to discuss the offense").

[192] Commonwealth v. Clarke, 461 Mass. 336, 351 n.12 (2012) (citing *Commonwealth v. Dustin*, 373 Mass. 612, 614 (1977) reiterating *Miranda*'s imposition of a "heavy burden" on the government when it sought to prove waiver).

[193] Commonwealth v. Woodbine, 461 Mass. 720, 728 (2012) (holding both *Miranda* waiver and ensuing statement voluntary where, though the poorly educated, inexperienced suspect was hospitalized and medicated for a gunshot wound, he appeared oriented, responsive and exhibited no confusion, and he had asked to speak with the detective); Commonwealth v.

that the defendant waived his rights knowingly, voluntarily, and intelligently,[194] and "[e]very reasonable presumption against waiver will be indulged,"[195] in practice, once the defendant has signed a waiver form, the burden shifts to him to produce some evidence casting doubt on the waiver's validity.[196] Furthermore, if the trial judge finds that a voluntary waiver was made, "[his] subsidiary findings will not be disturbed, if they are warranted by the evidence, and his resolution of conflicting testimony will be accepted."[197]

The waiver test has two dimensions: volitional and cognitive. *First*, the defendant's relinquishment of his rights "must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception."[198] Thus, "[a]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will . . . show that the defendant did not voluntarily waive his privilege."[199]

Second, "the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon

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Jackson, 432 Mass. 82, 85-86 (2000) ("The voluntariness of a *Miranda* waiver and the voluntariness of a statement are separate and distinct inquiries, but the 'totality of the circumstances' test under each analysis is the same." (citation omitted)). *See supra* § 19.4C, citing cases on both voluntariness and *Miranda* doctrines.

[194] *See supra* § 19.3C; Commonwealth v. Silva, 388 Mass. 495, 500-01 (1983).

[195] Commonwealth v. Torres, 442 Mass. 554, (2004); Commonwealth v. Hooks, 375 Mass. 284, 288 (1983) (citing Commonwealth v. Hosey, 368 Mass. 571, 577 (1975)).

[196] *See, e.g.*, Commonwealth v. Shine, 398 Mass. 641, 651 (1986) (no evidence that defendant, who was advised of rights and signed waiver form, "was not sufficiently intelligent or educated to waive his rights"). *But see* Commonwealth v. Clarke, 461 Mass. 336, 350-51 & n.12 (2012) (declining to adopt the Supreme Court's approach to waiver, in which an uncoerced statement following the *Miranda* warnings is deemed a waiver as long as the suspect understood the warnings).

[197] Commonwealth v. Perry, 432 Mass. 214, 233-34 (2000) (quoting Commonwealth v. Santo, 375 Mass. 299, 303 (1978)). Although the lower court's findings of fact are accepted "in the absence of clear error" and its conclusions of law are viewed "with respect," its ultimate findings and conclusions of law, "especially those of constitutional dimensions," are open to independent appellate review. Commonwealth v. Selby, 420 Mass. 656, 657 (1995).

[198] Moran v. Burbine, 475 U.S. 412, 421 (1986). On occasion, the courts do not distinguish clearly between suppression of statements as "involuntary" or as the fruit of involuntary and therefore invalid waivers. *See, e.g.*, Commonwealth v. Lahti, 398 Mass. 829, 836 (1986) (affirming suppression under Fifth Amendment of testimonial fruits of defendant's "involuntary" statement, where police induced his "waiver of [*Miranda*] rights" by improper threats and promises). These two inquiries are interrelated but distinct. *See* Commonwealth v. Garcia, 379 Mass. 422, 428 (1980). *See also* Commonwealth v. Rainwater, 425 Mass. 540, 544 n.2 (1997) (police have "no business" advising defendant that he does not need a lawyer; they "must remain entirely neutral on the subject").

[199] Miranda v. Arizona, 384 U.S. 436, 475–76 (1966), *quoted* in Commonwealth v. Dustin, 373 Mass. 612, 614 (1977). *See* Commonwealth v. Jackson, 377 Mass. 319, 328 n.8 (1979) (condemning tactic of making "deliberate and intentionally false statements to suspects in an effort to obtain a statement;" such tactics "cast doubt" on validity of waiver).

it."[200] To satisfy this requirement, clearly the police must give the suspect the *Miranda* warnings and refrain from actively deceiving him,[201] but the courts have tended to require little if anything more.[202] He need not be told, for example, that he is a suspect,[203] or the nature of the crime that he will be asked about.[204] That the suspect actually understands the warnings is inferred, absent police misconduct or evidence of any special incapacity, "from the suspect's outward behavior, most notably his indication that he understands his rights, waives them, and wishes to talk."[205] The courts have applied this inference to suspects with limited ability to speak English.[206]

(1) *Waiver by persons with impaired capacity:* Waivers by persons who appear mentally or physically impaired require the police to observe special caution in taking an apparently valid waiver at face value. This includes persons who appear irrational, mentally retarded, or intoxicated from alcohol or chemical substances.[207]

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[200] Moran v. Burbine, 475 U.S. 412, 421 (1986). *See* Commonwealth v. Garcia, 379 Mass. 422, 429 (1980) (confession can be voluntary only if suspect actually understands the import of each *Miranda* warning).

[201] *But cf.* Commonwealth v. Shine, 398 Mass. 641, 651 (1986) (although officer "misled" defendant at station by saying he was free to leave at any time, no evidence that he intended to or did deceive defendant into making statements).

[202] Knowing waiver does not require that in hindsight "defendant would not have chosen to talk to the police. Rather, it means that police procedures must scrupulously respect the suspect's free choices, made with actual knowledge of his rights at the time of interrogation." Commonwealth v. Garcia, 379 Mass. 422, 431 (1980).

[203] Commonwealth v. Cunningham, 405 Mass. 646, 657 (1989) (citing Commonwealth v. Medeiros, 395 Mass. 336, 345 (1985) (defendant not told of risk of jeopardy under joint venture theory: no requirement that police explain all possible legal ramifications)).

[204] The police need not "inform a suspect of the nature of the crime about which he is to he interrogated [or give] new warnings if the questioning turns to a different crime." Commonwealth v. Medeiros, 395 Mass. 336, 345 (1985) (citing cases); Commonwealth v. Marquetty, 28 Mass. App. Ct. 690, 694–96 (1990). *See also* Colorado v. Spring, 479 U.S. 564 (1987) ("mere silence . . . as to the subject matter of an interrogation" is not "trickery' sufficient to invalidate *Miranda* waiver). However, the defendant's ignorance of the exact subject of interrogation is a relevant factor under the totality test, and may be fatal if it was the result of "deliberate trickery or deceit on the part of the police." *Medeiros, supra*, at 346 (dictum). And a waiver might be invalid if the police "surprised the accused by providing warnings with regard to one offense and then shift[ed] the interrogation to the subject of a totally unrelated crime." *Medeiras, supra*, at 346 (no surprise where defendant knew that theft and homicide were factually related).

[205] Commonwealth v. Woodbine, 461 Mass. 720, 728 (2012) (upholding *Miranda* waiver by hospitalized, poorly educated, unsophisticated suspect in part because suspect asked to speak to police); Commonwealth v. Garcia, 379 Mass. 422, 430, 426–32 (1980) (police entitled to rely on assurances by Spanish-speaking defendant, who was not fluent in English, that he understood the *Miranda* rights). *See also* G.L. c. 221, § 92A (hearing impaired arrestee's right to interpreter to explain *Miranda* rights, on pain of suppression).

[206] Commonwealth v. Nom, 426 Mass. 152, 158–59 (1997) (fact that defendant, a high school drop-out, signed a *Miranda* card, and acknowledged in writing that his statements were made voluntarily, together with educational level attained, supported validity of waiver).

[207] *See* Commonwealth v. Boyarsky, 452 Mass. 700, 714-15 (2008) (in holding *Miranda* waiver and ensuing statement both voluntary in spite of defendant's panic-attack syndrome, S.J.C. observed that "there is no per se rule against admitting statements of individuals with mental disorders . . . ; rather, a statement is inadmissible as a matter of law

(2) *Waiver by juveniles:*[208] Whether a juvenile has validly waived his *Miranda* rights is determined by examining "the totality of all circumstances — both the characteristics of the accused and the details of the interrogation."[209] However, where a defendant is a juvenile, courts must proceed with "special caution when reviewing purported waivers of constitutional rights."[210] In 1983 the S.J.C. adopted a protective "interested adult" rule requiring the Commonwealth to show in most cases that a parent (if "available") or interested adult[211] was present, understood the warnings, and had a meaningful opportunity to explain the juvenile's rights to him to ensure that he understood the significance of waiving them.[212] For a juvenile under the age of

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only if it would not have been obtained but for the effects of the confessor's mental impairment"); Commonwealth v. Druce, 453 Mass. 686, 700 (2009) (upholding *Miranda* waiver as voluntary where defendant, though suffering from mental illness and appearing "very agitated," was "coherent, responsive and rational," "able to recall facts in detail," and was "self-aware, aware of his surroundings"); Commonwealth v. Zagrodny, 443 Mass. 93, 100 (2004) (no basis to find invalid *Miranda* waiver where "taking into account the defendant's mental illness, his waivers were knowing, intelligent and voluntary"); Commonwealth v. Garcia, 379 Mass. 422, 430 n.4 (1980). *See supra* § 19.4C.

[208] In this waiver analysis, the S.J.C. applies the statutory definition of "juvenile," i.e., one under the age of 17. G.L. ch. 119, §52. *See* Commonwealth v. Mavredakis, 430 Mass. 848, 855 n.12 (2000) (defendant who was 17 years old was no longer juvenile and was not entitled to protections afforded juveniles respecting waiver of rights); Commonwealth v. Trombley, 72 Mass. App. Ct. 183, 186 (2008) (defendant who was 17 years old was not entitled to have mother present during interview with police). *See also supra* § 19.4C(4).

[209] Commonwealth v. King, 17 Mass. App. Ct. 602, 609 (1984) *quoting* Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973).

[210] Commonwealth v. Mark M., 59 Mass. App. Ct. 86, 89 (2003) *quoting* Commonwealth v. Berry, 410 Mass. 31, 34 (1991). *See also* Commonwealth v. MacNeill, 399 Mass. 71, 74 (1987).

[211] *See* Commonwealth v. Philip S., 414 Mass. 804, 809–10 & n.4 (1993) (whether adult is "interested" is determined objectively: should a reasonable official conducting the interview have known, in view of the facts known to her at that time, that the adult lacked capacity to appreciate the juvenile's situation or to give advice, or was actually antagonistic toward the juvenile; a mother who advised juvenile to tell the truth without seeking legal assistance was not thereby "antagonistic" or incompetent); Commonwealth v. McCra, 427 Mass. 465 (1998) (even though one of the victims was her sister, defendant's aunt was "interested adult"; no objective manifestations to police of animosity between aunt and defendant). Commonwealth v. Guyton, 405 Mass. 497, 502 (1989) (16-year-old defendant's statements suppressed despite consultation and consent to questioning by sister who was 13 days less than 18 years old; "A minor cannot satisfy the 'interested adult' requirement"); Commonwealth v. A Juvenile, 402 Mass. 275, 279 (1988) (employees of DYS facility where juvenile was committed were acting as DYS employees, not as "interested adults"); Commonwealth v. A Juvenile, 18 M.L.W. 731, 1/8/90 p. 23 (Brookline Dist. Ct., No. 8909 JV 55) (public school principal questioning 14-year-old student acted as state agent; *Miranda* violated). *Compare* Commonwealth v. MacNeil, 399 Mass. 72, 77–78 (1987) (although police did not search "extensively" for 16-year-old defendant's mother, his grandfather deemed sufficiently "interested").

[212] Commonwealth v. A Juvenile (No. 1), 389 Mass. 128, 133–34 (1983). The rule has common law origins and is not mandated under either the federal or state constitution. *A Juvenile (No. 1), supra*, 389 Mass. at 134–35; Commonwealth v. A Juvenile, 402 Mass. 275, 279 (1988). Although originally the S.J.C. expressly required "meaningful consultation" (*A Juvenile, supra*, 389 Mass. at 134), it later held that "no more than genuine *opportunity* [to

fourteen, no waiver can be effective without these protections.[213] For a juvenile who has reached fourteen and had no meaningful opportunity to consult an interested adult, his waiver is invalid *unless* the circumstances demonstrate a "high degree of intelligence, experience, knowledge, or sophistication on [his] part."[214] The ultimate question is "whether the juvenile has understood his rights and the potential consequences of waiving them before talking to the police."[215] In the analysis, active police obstruction of communication between the juvenile and his parent would weigh heavily against admissibility.[216]

(3) *Interference with defendant's access to counsel:* It is one thing for a suspect to be informed of and waive his right to counsel "in the abstract;" it is quite another to say that he has "knowingly" done so unaware that a particular attorney is attempting to counsel him.[217] In the years following *Miranda*, Massachusetts courts held that a

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consult] is required, Commonwealth v. MacNeill, 399 Mass, 71, 78–79 (1987) (emphasis supplied); *see also* Commonwealth v. Tevenal, 401 Mass. 225, 226–28 (1987). *But see* Commonwealth v. Berry, 410 Mass. 31, 37 (1991) (opportunity for a "*meaningful* consultation" with parent existed in this case, but would not if, "assessed by objective standards, the police should reasonably have known" that the adult was unwilling to consult, or was unable to do so for some reason, such as intoxication or mental incapacity) (emphasis supplied). At least with regard to juveniles over 14, the police have no obligation to inform the minor and the adult that they may confer in private, but neither may they deny them that right. *See* Commonwealth v. Ward, 412 Mass. 395, 396–97 (1992). However, privacy is the "most conducive means" to consultation desired under the rule. Commonwealth v. Philip S., 414 Mass. 804, 812 (1993). It is also better practice, but not required, for investigators expressly to advise the interested adult to use the opportunity to confer with the juvenile to discuss the juvenile's rights and the possible consequences of waiver. *Philip S., supra,* 414 Mass. at 811 n.5. The Commonwealth need not prove that the juvenile and his mother actually had such a discussion. *Philip S., supra.*

[213] Commonwealth v. A Juvenile, 389 Mass. 128, 134 (1983).

[214] Commonwealth v. A Juvenile, 389 Mass. 128 (1983); *see also* Commonwealth v. A Juvenile, 402 Mass. 275, 281 (1988) (waiver by over-14 juvenile who had no opportunity to consult with "interested adult" held invalid where no evidence of high degree of intelligence, experience, knowledge, or sophistication), *Compare* Commonwealth v. King, 17 Mass. App. Ct. 602, 610 (1984), upholding waiver by 16-year-old defendant with learning disabilities who had no opportunity to consult with his mother before questioning; defendant appeared mature and capable, had reached tenth grade in school, held a job, had previously asserted right to counsel, and was treated well at station. "[T]he defendant's criminal record indicates a level of experience well beyond his years." *But see* Commonwealth v. Guyton, 405 Mass. 497, 502–04 (1989) (extensive contact with police and other authorities does not by itself demonstrate unusual sophistication or knowledge about *Miranda* rights) (dictum).

[215] *See* Commonwealth v. MacNeill, 399 Mass. 71, 75–76 (1987) (upholding waiver of defendant who had only completed eighth grade and had never been arrested, but who was almost seventeen years old, appeared "bright," was not under influence of drugs or alcohol, and during one-hour interrogation in grandfather's presence was unemotional and "exhibited no unusual signs").

[216] *See* Commonwealth v. MacNeill, 399 Mass. 72, 77 (1987) ("deliberate police avoidance of a parent's participation . . . ordinarily would be highly suspect"); Commonwealth v. Cain, 361 Mass. 224, 227–29 (1972) (police obstruction of father's access to 15-year-old juvenile one factor leading to suppression on grounds of invalid *Miranda* waiver). *See also* cases on obstruction of access to counsel, discussed immediately below, which might apply by analogy.

[217] "To pass up an abstract offer to call some unknown lawyer is very different from refusing to talk with an identified attorney actually available. . . . A suspect indifferent to the

person in custody is "entitled to know of his counsel's availability" if he is to make a "knowing" waiver.[218] Therefore, an otherwise valid waiver of *Miranda* rights was vitiated if the police obstructed counsel's access to defendant by not informing the defendant of his lawyer's efforts.[219] In *Moran v. Burbine* (1986), however, the U.S. Supreme Court took a contrary view of *Miranda* requirements, upholding the validity of a waiver despite deliberate police failure to inform defendant of counsel's efforts to represent him.[220] But the S.J.C. declined to follow *Moran*, returning to its earlier reasoning and holding in *Commonwealth v. Mavredakis*,[221] that "art. 12 [of the Declaration of Rights] requires a higher standard of protection" than the Fifth Amendment.[222] The Court has laid down the following bright-line rules:[223]

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first offer may well react quite differently to the second." State v. Haynes, 288 Or. 59, 72 (1979), *cert. denied*, 446 U.S. 945 (1980), *quoted in* Commonwealth v. Sherman, 389 Mass. 287, 291 (1983).

[218] Commonwealth v. McKenna, 355 Mass. 313, 324 (1969). Once the defendant has become aware of counsel's availability, he may validly waive his *Miranda* rights even if the police ignore counsel's direction to cease questioning him; the defendant, not his lawyer, must assert his rights. *See* Commonwealth v. Curry, 388 Mass. 776. 782–883 (1983), *distinguishing* Brewer v. Williams, 430 U.S. 387 (1977), discussed *in*fra at § 19.4E(3), where defendant asserted right to counsel.

[219] Commonwealth v. McKenna, 355 Mass. 313, 324–25 (1969) (suppressing statements made after police ignored counsel's attempts to see defendant, despite defendant's signature on waiver form that recited "I do not want a lawyer at this time," and his non-acceptance of right to use the telephone); Commonwealth v. Sherman, 389 Mass. 287. 295–96 (1983) (where officer failed to inform defendant of public defender's request, made to him only a few hours earlier, to be present at interrogation, statements suppressed even though police never agreed to allow her to be present nor thwarted any attempt to contact the defendant, and counsel had neither been appointed in present matter, nor requested by defendant or family), *distinguishing* Commonwealth v. Andujar, 7 Mass. App. Ct. 777, 783–84 (1979) (valid waiver where defendant knew of counsel's request, not honored by police, that they refrain from questioning defendant); Commonwealth v. Bradshaw, 385 Mass. 244, 263–64 (1982) (statement admissible where attorney first called station after interrogation finished); *and* Commonwealth v. Hooks, 375 Mass. 284, 295 (1978) (statements admissible where no indication that police deliberately or negligently failed to advise defendant of attorney's request); Commonwealth v. Mahnke, 368 Mass. 662, 692 (1975); *cert. denied*, 425 U.S. 959 (1976) (statements inadmissible where police did not tell defendant that his lawyer was trying to speak with an officer or tell lawyer that defendant was being interrogated. *Contrast* Commonwealth v. Phinney, 416 Mass. 364 (1993) (no police obligation to volunteer fact that defendant was being questioned at police station to attorney who called, but who did not ask about defendant's whereabouts, state that he represented defendant in the investigation, or ask to be present); Commonwealth v. Mandeville, 386 Mass. 393, 401 (1982) (no Sixth Amendment violation for police to question defendant without his attorney where latter had told police six days before arrest that defendant did not want to speak to them at that time, and neither counsel nor defendant asked that the attorney's presence be secured at time of arrest).

[220] Moran v. Burbine, 475 U.S. 412 (1986).

[221] 430 Mass. 848, 858-61 (2000).

[222] *Id*. at 858. *Mavredakis*, however, does not recognize either a stationhouse right to counsel or a corresponding duty on the part of counsel " to call and direct police to halt questioning of their clients in order to provide an opportunity for consultation." Commonwealth v. Beland, 436 Mass. 273, 288 (2002).

[223] *See* Mavredakis, 430 Mass. at 861.

1. "When an attorney identifies himself[224]... to the police as counsel acting on a suspect's behalf,[225] the police have a duty to stop questioning and to inform the suspect of the attorney's request immediately."[226] 2. If the attorney tells the police that the suspect should not talk to the police until consulting with the attorney, the police must so inform the suspect.[227] 3. "The suspect can then choose whether to speak with the attorney, or whether to decline the offer of assistance." 4." On the suspect's acceptance of this assistance, the police must suspend questioning until the suspect is afforded the opportunity to consult with the attorney either on the telephone or in person."[228] 4. "The Commonwealth has the burden of proving that the suspect declined the offer of legal advice." 5. "The consequence of failure so to inform a suspect is that any waiver of rights that has been given becomes 'inoperative' for further admissions."[229]

3. Waiver After the Accused Asserts His or Her Rights

If the suspect asserts[230] his right to remain silent or his right to counsel, the police must immediately stop questioning him: "any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or

[224] This applies whether the attorney communicates by telephone or in person.

[225] The rule applies whether or not the lawyer has been formally appointed to represent the suspect. Commonwealth v. Vao Sok, 435 Mass. 743, 753 (2002).

[226] *See* Commonwealth v. Vao Sok, 435 Mass. 743, 753(2002) (finding error, but harmless, for police to contact assistant district attorney instead of stopping questioning immediately). Also, there is no need to "deliver verbatim to a [suspect] the message given by his attorney"; suspect's waiver was valid where he was notified of "specific offer of assistance by an identified attorney." *Id.* at 752-53. *But see* Commonwealth v. McNulty, 458 Mass. 305, 317-18 (2010), *infra* note 230.

[227] Commonwealth v. McNulty, 458 Mass. 305, 317-18 (2010). *See* Commonwealth v. Morales, 461 Mass. 765, *10 (2012) (*McNulty* violation where police declined to tell suspect, who was then in custody and leading the officers to murder victim's body, that his appointed counsel was instructing him not to talk to the police, instead telling the suspect that his lawyer wanted to talk with him and handing him a cell phone to call the lawyer, which the suspect declined to do).

[228] According to the Court, if the attorney telephones and informs the police that he will appear to consult with the suspect, the suspension of questioning will apply "only so long as the attorney appears at the station within a reasonable time." Arguably, however, the suspect's "acceptance" of the attorney's assistance amounts to an assertion of the right to counsel sufficient to trigger the safeguards of Edwards v. Arizona. *See infra* sec. 19.4D(3).

[229] These rules are expressly grounded in *Miranda*'s warning-and-waiver requirements, and the failure to inform a suspect of his attorney's attempt to contact him is not relevant to the voluntariness of the suspect's statement. Commonwealth v. Vao Sok, 435 Mass. 743, 755-57 (2002).

[230] *See supra* § 19.4D(2)(b).

otherwise."[231] Whether "questioning" has resumed after the suspect's assertion of his rights is decided by applying the test of "interrogation," *supra* § 19.4D(1)(a).[232]

The Supreme Court has distinguished between invocation of *Miranda*'s right to silence and its right to counsel, offering more protection to the suspect who invokes his right to counsel. Turning first to the right to silence, in *Michigan v. Mosley*[233] the Supreme Court upheld a waiver by a defendant who had initially asserted his right to silence but was subsequently interrogated and confessed. The Court held that the admissibility of such statements depends on whether the person's "right to cut off questioning was scrupulously honored."[234] Applying that test in *Mosley*, the Court held that Mosley's right was "scrupulously honored" because, upon his initial assertion of the right to remain silent, "the police had immediately ceased interrogation. Questioning was resumed 'only after the passage of a significant period of time and the provision of a fresh set of warnings,' and the second interrogation was restricted 'to a crime that had not been a subject of the earlier interrogation.'"[235] Where, however, questioning is resumed at a time and under circumstances suggesting an effort to "undermine [his] decision to remain silent and to persuade him to confess"[236] the ensuing waiver will be invalid.[237] The S.J.C. recognizes a presumption that a statement

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[231] Miranda v. Arizona, 384 U.S. 436, 474 (1966), *quoted in* Commonwealth v. Dustin, 373 Mass. 612, 615 (1977).

[232] *See, e.g.*, Commonwealth v. Chadwick, 40 Mass. App. Ct. 425 (1996) (police officer's uninvited explanation of rape charges, after defendant invoked right to counsel, invited a response by the defendant and therefore constituted interrogation); Commonwealth v. Torres, 424 Mass. 792, 795–798 (1997) (remanded for determination whether, under proper objective test, conversation about defendant's family was "functional equivalent of interrogation:); Commonwealth v. D'Entremont, 36 Mass. App. Ct. 474, 478–80 (1994) (detective's statement to incarcerated defendant that she knew he had earlier refused to discuss the case without counsel but, if he changed his mind, she would be willing to speak with him, was not "interrogation"; therefore, by responding positively, defendant "initiated" the ensuing conversation under the rule of *Edwards v. Arizona*, *infra*).

[233] 423 U.S. 96, 103–04 (1975).

[234] *Id* at 104. *See also* Commonwealth v. Woodbine, 461 Mass. 720, 730 (2012) (police scrupulously honored right to silence by breaking off questioning when suspect said he "d[id] not want to say anything right now," returning 17 hours later and resuming questioning only after administering a fresh set of *Miranda* warnings); Commonwealth v. Torres, 424 Mass. 792, 796 (1997); Commonwealth v. Brant, 380 Mass. 876, 884 (1980), cert. *denied*, 449 U.S. 1004 (1980).

[235] Commonwealth v. Brant, 380 Mass. 876 (1980), *quoting* Michigan v. Mosley, 423 U.S., 96, 106 (1975). *Compare* Commonwealth v. Doe, 37 Mass. App. Ct. 30, 35 (1994) (because no fresh warnings given, *Miranda* violated by renewed questioning more than 48 hours after defendant had requested time to think about whether to cooperate).

[236] Commonwealth v. Jackson, 377 Mass. 319, 326, 342–29 (1979) (waiver invalid where police, by deliberately deceiving defendant into believing that his accomplice had confessed, obtained waiver and confession after defendant had twice refused to speak). Although police trickery will not necessarily render a subsequent waiver involuntary, *see supra* § 19.4C(2), it is more likely to do so if used after the defendant has exercised his right to silence or counsel. *See* Commonwealth v. Edwards, 420 Mass. 666, 671 (1995) (use of false statements to obtain suspect's waiver is "disapproved of and may indicate that any subsequent waiver was made involuntarily").

[237] *Compare* Commonwealth v. Clarke, 461 Mass. 336, 344-45 (2012) (holding that police questioning intended to clarify officer's response to defendant's pre-invocation question

made following the violation of a suspect's *Miranda* rights is tainted, and "require[s] the prosecution [to] show more than the belated administration of *Miranda* warnings in order to dispel that taint."[238]

While the flexible *Mosley* test applies to renewed questioning after the suspect has asserted the *right to remain silent,* suspects who assert the *right to counsel* receive greater protection, under the prophylactic rule of *Edwards v. Arizona*,[239] which bars interrogation "until counsel has been made available . . unless the accused himself initiates further communication, exchanges, or conversations with the police."[240]

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did not scrupulously honor defendant's invoked right to silence); Commonwealth v. Callender, 81 Mass. App. Ct. 153, 157-61 (2012) (holding defendant's invocation of the right to silence not scrupulously honored where (1) there was only a 35-minute time gap between invocation and renewed questioning, (2) although different officers renewed the questioning they did so in the same room, (3) the officers first asked defendant if he wanted to talk and then engaged in "administrative questions" and actions such as giving him a soda and encouraging him to "get it off his chest" before perfunctorily administering fresh *Miranda* warnings, (4) officers questioned defendant about the same crime, and (5) despite knowing at the outset that defendant had invoked his right to silence, officers approached him in a manner inconsistent with respect for that invocation) *with* Commonwealth v. Woodbine, 461 Mass. 720, 730 (2012) (police scrupulously honored right to silence by breaking off questioning when suspect said he "d[id] not want to say anything right now," returning 17 hours later and resuming questioning only after administering a fresh set of *Miranda* warnings). For discussion of the showing required to overcome the exclusionary presumption, *see infra* § 19.5B(3). *See* United States v. Barone, 968 F.2d 1378 (1st Cir. 1992) (repeated efforts over several days to persuade jailed defendant to discuss murder, and failure to repeat warnings, showed that government failed to "scrupulously honor" defendant's right to remain silent; finding that defendant's statements were, at end, made voluntarily was "irrelevant"); Commonwealth v. Gallant, 381 Mass. 465, 466–68 (1980) (one-minute interval between defendant's assertion of right to silence and police revelation that his brother had confessed, for the "obvious purpose of eliciting a response"); Commonwealth v. Taylor, 374 Mass. 426, 428–29, 436 (1978) (statements suppressed where police persuaded defendant to speak about the same crime five minutes after he asserted the right to silence); Commonwealth v. Brant, 380 Mass., 876, 883–86 (1980), *cert. denied,* 449 U.S. 1004 (1980) (immediately telling defendant who had asserted his right to an attorney that his codefendant had already made a statement, and then allowing the two suspects to converse privately for fourteen minutes, violated defendant's right to cut off questioning; waiver was invalid despite evidence that defendant might have had independent motives for confessing). *Compare* Commonwealth v. Atkins, 386 Mass. 593, 596–99 (1982) (defendant's rights "scrupulously honored" where before flight from California to Boston he asserted his right to silence, requested during flight to speak with prosecutor hut was asked to wait, and on arrival in Boston made a telephone call before questioning resumed). *See also* Commonwealth v. Dustin, 373 Mass. 612, 615–16 (1977); Brewer v. Williams, 430 U.S. 387, 404–05 (1977).

[238] Commonwealth v. Torres, 424 Mass. 792, 799 (1997) (*quoting* Commonwealth v. Smith, 412 Mass. 823, 836 (1992)).

[239] 451 U.S. 477, 484–85 (1981) (defendant who asserted the right to counsel following his arrest could not validly waive by responding to police-initiated custodial interrogation on the next day, even though he was readvised of his rights). *Compare* Wyrick v. Fields, 459 U.S. 42 (1982) (no suppression where defendant had initiated polygraph examination that led to incriminating statements

[240] Edwards v. Arizona, 451 U.S. 477, 484–85 (1981). Massachusetts closely follows *Edwards* and its progeny. *See* Commonwealth v. LeClair, 445 Mass. 734, 738 (2006). *See also* Commonwealth v. Nom, 426 Mass. 152, 156–58 (1997) (although normally improper for police to ask suspect his reason for requesting an attorney, it was not "interrogation" where designed to clarify "inconsistency" between the request and suspect's subsequent initiation of conversation).

Absent the defendant's initiation, "it is presumed that any subsequent waiver . . . is itself the product of the 'inherently compelling pressures' and not the purely voluntary choice of the suspect."[241] The Court defines "initiation" as conduct that indicates the defendant's "willingness and a desire for a generalized discussion about the investigation," rather than "merely a necessary inquiry arising out of the incidents of the custodial relationship."[242] If the defendant does initiate the conversation, the police must give him fresh warnings in order to establish a knowing and intelligent waiver at that point.[243] In *Arizona v. Roberson*, the Court extended *Edwards's* "bright line, prophylactic" rule to police-reinitiated interrogation which occurs in the context of an independent investigation of a different crime.[244] It also interpreted *Edwards* to prohibit

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The *Mosley-Edwards* distinction is based on language in *Miranda* that "[i]f an individual states that he wants an attorney, the interrogation must cease until an attorney is present." Miranda v. Arizona, 384 U.S. 436, 474 (1966). Just from a policy perspective, this *Mosely-Edwards* distinction makes sense. Assuming that the choice between right to silence and right to counsel is not mere happenstance, a suspect who invokes the right to silence would seem to be one who is not intimidated by the police and is capable of deciding on his own whether or not to assert his fifth amendment right. As long as the police do not harass him, that is, as long as they scrupulously honor his invocation, he seems sufficiently protected. However, the suspect who invokes the right to counsel would seem to be one who is not comfortable dealing with the police on his own and wishes to interpose a lawyer between himself and his potential interrogators. In that instance, *Edwards*' bright-line, hands-off protection makes sense.

[241] Arizona v. Roberson, 486 U.S. 675, 681 (1988). *See* Commonwealth v. Chadwick, 40 Mass. App. Ct. 425, 428–29 (1996) (in light of "corrupting" incentive for police to circumvent *Edwards*, once a suspect asks for a lawyer, "discussion of the charge should cease unless that suspect changes his mind"); Commonwealth v. Perez, 411 Mass. 249, 256–59 (1991) (assuming, without deciding, that *Edwards* bars police-initiated interrogation after a lapse of six months from the time defendant invoked the right to counsel, but error harmless).

[242] Oregon v. Bradshaw, 462 U.S. 1039 (1983) (holding that defendant's question, "Well, what is going to happen to me now?" was "initiation" of the ensuing incriminating conversation). The Court distinguished Bradshaw's inquiry from a request for water or to use the phone. *See also* United States v. Fontana, 948 F.2d 796, 805–06 (1st Cir. 1991) (similar facts). *See* Commonwealth v. Jackson, 447 Mass. 603, 613 (2006) (holding no *Edwards* violation where police immediately stopped questioning when defendant stated he wanted to talk to an attorney; defendant later made unsolicited statement to officer about the crime; defendant given and waived *Miranda* warnings before questioning resumed); Commonwealth v. LeClair, 445 Mass. 734, 739 (2006) (holding that after invoking his right to counsel, defendant initiated conversation with the police by twice asking if he heeded a lawyer and then whether he was "most likely in big trouble"); Commonwealth v. Rankins, 429 Mass. 470, 473 (1999) (defendant left interrogation room after invoking right, then voluntarily returned and was again given his *Miranda* rights, answering some questions but not all). *See also* Commonwealth v. Nom, 426 Mass. 152, 157 (1997); Commonwealth v. Judge, 420 Mass. 433, 448-449 (1995); Commonwealth v. D'Entremont, 36 Mass. App. Ct. 474, 478-481 (1994); United States v. Fontana, 948 F.2d 796, 805-806 (1st Cir. 1991) (ruling that the defendant initiated conversation when he asked the police officer what was going to happen to him and the officer then obtained a written waiver of the defendant's *Miranda* rights).

[243] Commonwealth v. Nom, 426 Mass. 152, 156–58 (1997).

[244] Arizona v. Roberson, 486 U.S. 675, 684–685 (1988). In *Roberson* the defendant had asserted his *Miranda* right to counsel when arrested for burglary; the Court suppressed a statement made three days later regarding a different burglary, in response to questions by a different officer who did not know that defendant had previously asserted his right to counsel. *Compare* McNeil v. Wisconsin, 501 U.S. 171 (1991) (representation by counsel at initial court

police-reinitiated interrogation without counsel *present*, even if the accused has consulted with his attorney in the interim.[245] However, *Edwards-Roberson* protection is not world without end, the Supreme Court holding that if there is a break in custody of at least 14 days, the rule no longer holds.[246]

4. Questioning Regarding Uncharged Crimes

As demonstrated in the preceding section, a defendant who claims the *Miranda* right to counsel receives heightened protection against new police-initiated questioning, even if the latter concerns a different, unrelated crime. In that sense, the Fifth Amendment *Miranda-Edwards-Roberson* right is not "offense specific." "Once a suspect invokes the Miranda right to counsel for interrogation regarding one offense, he may not be reapproached regarding any offense unless counsel is present."[247] In contrast, the Sixth Amendment right to counsel *is* "offense specific." Thus, even if a defendant's Sixth Amendment right to counsel had attached and been invoked with regard to one charge, this does not affect police-initiated interrogation regarding a different, unrelated, uncharged offense.[248] According to the courts, the distinction derives from the different purposes of the two rights. A defendant's claim of the right to counsel in the context of questioning subject to *Miranda* signifies his felt need for the assistance of counsel to help him withstand the pressure of custodial interrogation; this need does not "disappear" in the face of police-initiated questioning on an unrelated charge. But defendant's assertion of the Sixth Amendment right to counsel signifies his wish to be represented in proceedings following the initiation of formal charges regarding a specific offense, and applies only to interrogation about that offense.[249]

5. "Public Safety" Exception to *Miranda*

The Supreme Court established a "public safety" exception to *Miranda* in *New York v. Quarles*.[250] *Quarles* allows into evidence a defendant's statements, otherwise

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appearance on armed robbery charge did not constitute "assertion" of counsel for purposes of *Miranda-Edwards-Roberson*, so no Fifth Amendment bar to subsequent police-initiated interrogation on different charge).

[245] Minnick v. Mississippi, 498 U.S. 146, 149–52 (1990).

[246] *See* Maryland v. Shatzer, -- U.S. --, 130 S. Ct. 1213 (2010). *See also* Commonwealth v. Galford, 413 Mass. 364, 368–71 (1992) (if defendant has been released, *Edwards* does not apply).

[247] McNeil v. Wisconsin, 501 U.S 171, 177 (1991). *See* Commonwealth v. Rainwater 425 Mass. 540, 545–46 (1997).

[248] *See* Commonwealth v. Rainwater 425 Mass. 540, 544 (1997) (following appointment of counsel at arraignment for one auto theft, no violation of Sixth Amendment or other constitutional rights for police to question defendant, in absence of counsel, regarding a number of other, uncharged auto thefts) (citing *McNeil* and Maine v. Moulton, 474 U.S. 159, 180 n.16 (1985) (no violation of Sixth Amendment *Massiah* rights for police to question defendant indicted for crime X regarding unindicted crime Y and to introduce statements at trial for crime Y)).

For discussion of Sixth Amendment interrogation rights, *see infra* § 19.4E.

[249] McNeil v. Wisconsin, 501 U.S. 171, 177–78 (1991).

[250] 467 U.S. 649 (1984).

barred for failure to give *Miranda* warnings, if the statements were in response to police questions "reasonably prompted by a concern for the public safety."[251] The rationale for this exception is that statements made in violation of *Miranda* are not necessarily "involuntary," and that therefore the needs of public safety may be weighed against the prophylactic values of *Miranda*[252] The availability of the exception does *not* depend on the motivation of the police officers involved. The test is whether, under the circumstances, there is "an objective reasonable need to protect the police or the public from any immediate danger."[253] The Court stated that this exception to *Miranda* was intended to be "narrow," and will be "circumscribed by the exigency which justifies it."[254]

The SJC has followed *Quarles* by adopting the "public safety exception."[255] While the Court initially left open the question of whether this exception should apply only to situations of imminent public danger, as opposed to danger to the police, the

[251] New York v. Quarles, 467 U.S. 649, 656 (1984).

[252] New York v. Quarles, 467 U.S. 649, 657 (1984). While the public-safety exception seemed to rest on a characterization of *Miranda* protections as "prophylactic" and thus sub-constitutional, *id*. at 654, the Supreme Court has since held that *Miranda* and its protections are full-fledged constitutional rights. *See* Dickerson v. United States, 530 U.S. 428, 443-44 (2000). At the same time, the Court reaffirmed *Quarles*' public-safety exception to those protections. *Dickerson*, 530 U.S. at 443-44.

[253] New York v. Quarles, 467 U.S. 649, 659 n.8 (1984).

[254] New York v. Quarles, 467 U.S. 649, 658 (1984).

[255] Commonwealth v. Clark, 432 Mass. 1 (2000) (where defendant was apprehended on dark roadside in residential section, after gun battle with police, his response to question whether there was anybody else with him was admissible under public safety exception). *See also* Commonwealth v. Loadholt, 456 Mass. 411, 422-423 (2010) (police officer's demand to know the location of the firearm prior to giving the *Miranda* warnings came within the public safety exception to the *Miranda* requirement; trooper found live round of hollow point ammunition in the defendant's pocket upon the execution of an arrest warrant, and was therefore faced with imminent threat to a tenant, her child, and other police officers inside the apartment; the apartment had not been cleared at the time the officer found the bullet, and the officers did not know if other individuals were present inside the apartment); Commonwealth v. McCollum, 79 Mass. App. Ct. 239, 255 (2011) (where validly conducted protective sweep of apartment in which police found defendant uncovered a holster, police questions concerning presence and location of weapon within public-safety exception); Commonwealth v. White, 74 Mass. App. Ct. 342, 345-346 (2009) (in stopping suspect following a violent home invasion, the officer's telling the suspect, "you better tell us if you have anything because we're going to find it," prompting admission that she had a gun in her waistband, was within public-safety exception); Commonwealth v. Dillon D., 448 Mass. 793, 798-799 (2007) (questioning 13-year-old with a bag of bullets at a school was within public-safety exception); Commonwealth v. Guthrie, 66 Mass. App. Ct. 414, 416-418 (2006) (asking juvenile who fled with a gun the location of the gun was within public-safety exception); Commonwealth v. Kitchings, 40 Mass. App. Ct. 591 (1996) (officer frightened for his own safety not required to give warnings before asking "Where is the . . . gun?").

Court has subsequently endorsed including police safety – principally arising from the threat posed by possible hidden guns – within this exception to *Miranda*'s warning-and-waiver requirements.[261] These cases leave room for counsel to argue that, as an exception to *Miranda*'s protection of Fifth Amendment and article 12 rights, *Quarles* must be limited to circumstances posing a particular and immediate danger to the public and police, such as an unfound firearm that the police have good reason to believe is nearby.[262] Counsel should also advocate confining the *Quarles* exception to *pre-Miranda* questioning, and not to other *Miranda* violations such as improper questioning after the defendant has asserted his *Miranda* rights.[263]

§ 19.4E. SUPPRESSION UNDER THE SIXTH AMENDMENT RIGHT TO COUNSEL: THE *MASSIAH* PRINCIPLE

Once a "critical stage" of criminal proceedings arrives, the defendant has a federal (or state) constitutional right to counsel.[264] When the right has attached and been asserted, the state has an "affirmative obligation to respect and preserve the accused's choice" and to refrain from conduct that "circumvents and . . . dilutes the

[261] *Compare* Commonwealth v. Bourgeois, 404 Mass. 61, 66 (1989) (specifically reserving on the question of whether *Quarles* applies to situations threatening police as opposed to general public safety) *with* Commonwealth v. Loadholt, 456 Mass. 411, 418, *cert. granted*, 131 S.Ct. 159 (2010) (vacated and remanded on other grounds), S.C., 460 Mass. 723 (2011) (reinstating prior holding) (in holding that defendant's post-arrest answers to police questions about the location of a gun in a private residence came within the *Quarles* public-safety exception, the SJC stated "[i]n the heat of a potentially dangerous situation involving a firearm, the police should not be required to gamble with their own personal safety or the safety of members of the general public").

[262] *Loadholt* is a good example. There, the Court noted that upon arresting the defendant, whom the officers knew had a history with firearms, the arresting officer found a hollow point bullet in his pocket. The apartment in which the arrest occurred had not yet been cleared, and defendant's accomplice was still at large. The arrest occurred in a child's bedroom, and the officers did not know if other individuals were in the apartment. In these circumstances, the Court opined, the officer could reasonably conclude that "there was an immediate need to question the defendant about the presence of a firearm that outweighed the administration of *Miranda* warnings." Commonwealth v. Loadholt, 456 Mass. 411, 419, *cert. granted*, 131 S.Ct. 159 (2010) (vacated and remanded on other grounds), S.C., 460 Mass. 723 (2011) (reinstating prior holding). *Compare* State v. Hazley, 428 N.W.2d. 406, 411 (Minn. App. 1988) *(Quarles* does not apply to missing accomplices in the absence of evidence that the accomplice presents a danger to the public requiring immediate police action); In Interest of B.R., 133 Ill. App. 3d. 946, 479 N.E.2d 1084 (1st Dist. 1985) (questions about gun not justified in absence of exigent circumstances present in *Quarles);* People v. Cole, 165 Cal. App. 3d 411, 211 Cal. Rptr. 242 (1st Dist. 1985) (dissent argues against extension of *Quarles* to kitchen knife); State v. McCarthy, 218 Neb. 246, 353 N.W.2d 14 (1984) (public safety exception inapplicable to questions regarding whereabouts of homicide suspect). *See generally* Annot., *What Circumstances Fall Within "Public Safety" Exception,* 81 L. ED. 2d 990 (1986), collecting cases.

[263] *See* State v. Miller, 300 Or. 203, 709 P.2d 255 (1985) (public safety exception does not extend to questioning after defendant has asserted right to have counsel present).

[264] See *supra* § 8.1A. Commonwealth v. Woods, 427 Mass. 169, 174 (1998) (The Sixth Amendment and art. 12 provide a right to counsel at every "critical stage" of the criminal process). *See also* Commonwealth v. Sargent, 449 Mass. 576, 579 (2007).

protection."[265] Statements elicited by government agents[266] in violation of the right to counsel are suppressible under *Massiah v. United States.*[267] Arguments to suppress statements elicited in violation of *Massiah* should be kept distinct from arguments based on the Fifth Amendment right to counsel under *Miranda*. Also, counsel should cite and argue the state constitutional right to counsel, which gives greater protection to defendants than does the Sixth Amendment.[268]

1. "Critical Stages" of the Proceeding

In *Kirby v. Illinois*, the Court held that the right to counsel begins "at or after the initiation of adversary judicial criminal proceedings — whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[269] These are pretrial procedures "that would impair defense on the merits if the accused is required to proceed without counsel."[270] *Kirby* constituted a retreat from an earlier, more expansive definition of "critical stage."[271]

Following *Kirby*, the Massachusetts courts have refused to apply the right to counsel to the stages of arrest and booking,[272] even when the proceedings were initiated by the ex parte issuance of a complaint and arrest warrant.[273] But intentional police

[265] Maine v. Moulton, 474 U.S. 159, 171 (1985).

[266] *See supra* § 19.4B.

[267] 377 U.S. 201 (1964) (suppressing indicted defendant's incriminating statements to codefendant who, unbeknownst to the former, had permitted police to install radio transmitter in his automobile); Commonwealth v. McCarthy, 348 Mass. 7, 11–12 (1964) (suppressing postindictment statements obtained in violation of *Massiah).*

[268] *See* cases cited *supra* at § 8.1B; Commonwealth v. Tlasek, 77 Mass. App. Ct. 298, 302 & n.6 (2010) (observing that art. 12 provides broader protection than does the Fifth and Sixth Amendments, but declining to consider defendant's potential art. 12 right-to-counsel claim because, despite raising it below, defendant did not assert it on appeal). *See also* Commonwealth v. Rainwater, 425 Mass. 540, 554 (1997) (declining to construe art. 12 more liberally than the Supreme Court has construed the Sixth Amendment with respect to the "offense specific" nature of *Massiah* rights).

[269] Kirby v. Illinois, 406 U.S. 682, 689 (1972), *quoted in* Commonwealth v. Smallwood, 379 Mass. 878, 884 (1980). *See* Fellers v. United States, 540 U.S. 519, 523 (2004) (once indictment returned, even though defendant has not yet appeared before a court, Sixth amendment right to counsel attaches); Commonwealth v. Torres, 442 Mass. 554, 570 (2004) (same).

[270] Kirby v. Illinois, 406 U.S. 682 (1972) *quoting* Gerstein v. Pugh, 420 U.S. 103, 122 (1975).

[271] At one point the Supreme Court spoke as if the Sixth Amendment right to counsel would protect unindicted suspects subjected to custodial police questioning. *Compare* Escobedo v. Illinois, 378 U.S. 478, 492 (1964)(suppressing on Sixth Amendment grounds confession of unindicted suspect in custody on whom investigation had "focused") *with* Kirby v. Illinois, 406 U.S. 682, 689 (1972) *(Escobedo* limited to its facts).

[272] Commonwealth v. Mahoney, 400 Mass. 524, 528–29 (1987) (no right to counsel at videotaped booking after OUI arrest); Commonwealth v. Mandeville, 386 Mass. 393, 401 (1982).

[273] *See* Commonwealth v. Torres, 442 Mass. 554, 571 & n.13 (2004); Commonwealth v. Beland, 436 Mass. 271, 285-286 (2002) (where there has been no indictment, the right to counsel does not attach prior to arraignment even though a criminal complaint and an arrest

obstruction of communication between an unindicted arrestee and his lawyer might violate the defendant's right to due process[274] or, under post-*Kirby* Massachusetts cases, his right to counsel.[275]

2. Statements "Deliberately Elicited" by the Government

Massiah excludes statements that have been "deliberately elicited" by government agents.[276] "Deliberate elicitation" includes not only actual interrogation, but any government conduct, whether open or surreptitious, that "intentionally creates a situation likely to induce [a defendant] to make incriminating statements without the

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warrant has been issued); Commonwealth v. Patterson, 431 Mass. 767, 776 n.10 (2000); Commonwealth v. Ortiz, 422 Mass. 64, 67 n.1 (1996) (citing Commonwealth v. Smallwood, 379 Mass. 878, 884–85 (1980) ("The complaint and arrest warrant procedure in Massachusetts does not amount to an adversary judicial proceeding, nor does anything occur at this stage which could impair a defense")); Commonwealth v. Jones, 403 Mass. 279, 286–87 (1988) (accord). Other language in *Smallwoad* at 885 might support a different result if a show-cause hearing has been held, on *statutory* grounds. The Court has not extended the constitutional right to counsel to that stage and is unlikely to do so. *See* Commonwealth v. Lyons, 397 Mass. 644 (1986).

However, because counsel serves important functions at the show-cause hearing, such as summonsing witnesses, advising the client on the perils of self-incrimination, and asking questions to show the absence of probable cause, *see supra* § 4.2.B, arguably such a proceeding qualifies as the commencement of "adversary proceedings" in Massachusetts. At least arguments under *Massiah* and art. 12 (right to counsel and due process) of the Mass. Const. Declaration of Rights should have force if the police elicit a statement from a defendant who they knew was represented by counsel at a show-cause hearing. *Compare* People v. Jackson, 217 N.W.2d 22 (Mich. 1974), Blue v. State, 558 P.2d 636 (Alaska 1977), *and* Commonwealth v. Richman, 320 A.2d 351 (Pa. 1974), rejecting *Kirby* on state constitutional grounds.

[274] *See supra* § 19.4D(2)(d)(3).

[275] *See* Commonwealth v. Curry, 388 Mass. 776, 781–84 (1983) (deciding the Sixth Amendment issue although the proceedings had not reached a "critical stage" and distinguishing Commonwealth v. Mahnke, 368 Mass. 662, 691–93 (1975), *cert. denied,* 425 U.S. 959 (1976), because no evidence here of purposeful interference with arrestee's access to counsel); Commonwealth v. Cote, 386 Mass. 354, 359–60 & n.9 (1982) (no evidence that police "purposeful[ly] interfered with the defendant's access to a specific attorney who the police knew represented the defendant"); *Mahnke, supra,* 368 Mass. at 691–93, 715–22 (dissenting opinion of Kaplan, J.) (police obstruction of counsel's access to unindicted arrestee described as violating constitutional right to counsel). *But see* Commonwealth v. Beland, 436 Mass. 273, 286-88 (2002) rejecting argument that a limited pre-indictment right to counsel exists during police questioning for a suspect for whom counsel has been appointed or retained.

[276] For the meaning of "government agents," *see supra* § 19.4B; Commonwealth v. Murphy, 448 Mass. 452, 465-68 (2007) (holding under both the Sixth amendment and article 12 that a federal "informant at large," that is, one who has been promised consideration for cooperation but without a specific target, constituted a government agent for purposes of the right-to-counsel protection); Commonwealth v. Howard, 446 Mass. 563, 569 (2006) (holding state trooper assigned to district attorney's Sexual Abuse Intervention Network as part of victim advocate team, who even though she was not working as a police investigator had a duty to report incriminating responses to the prosecution, was a government agent for Sixth Amendment purposes); Commonwealth v. Hilton, 443 Mass. 597, 616-17 (2005) (holding court officer was governmental agent for Sixth Amendment purposes under same reasoning).

assistance of counsel"[277] or that "knowingly circumvent[s] the accused's rights to have counsel present in a confrontation between the accused and a state agent."[278] While indicting a defendant for one crime does not prevent the police from seeking evidence from him about new or additional crimes, "incriminating statements pertaining to pending charges are inadmissible at the trial of those charges . . . if, in obtaining this evidence, the State . . . knowingly circumvented the accused's right to the assistance of counsel."[279]

3. Waiver of *Massiah* Protections

Although for a time it was uncertain whether the Fifth Amendment waiver standards defined in *Miranda* and elaborated in subsequent cases[280] also applied to waiver of Sixth Amendment rights under *Massiah*, it is now well-settled that they do. One who is formally charged – and thus has a Sixth Amendment right to counsel – but who has not requested, retained or been appointed an attorney may validly waive that

[277] United States v. Henry, 447 U.S. 264, 274 (1980) (although FBI agent instructed defendant's cellmate, a paid informant, to pay attention to anything said, but not to initiate conversations with defendant or question him about the crime, FBI agent "must have known that cellmate would take affirmative steps — in this case conversing with the defendant — to obtain incriminating information). *Compare* Kuhlmann v. Wilson, 477 U.S. 436, 459 (1986) (no violation of Sixth Amendment when police put jailhouse informant in close proximity to defendant, instructing him only to listen to defendant and ask no questions; the defendant must demonstrate "some action, beyond merely listening, that was designed . . . to elicit incriminating remarks"); Commonwealth v. Bandy, 38 Mass. App. Ct. 329, 333 & n.4 (1995) (no violation where defendant failed to show that probation officer's comment to defendant during indigency interview was not inadvertent). *See* Commonwealth v. Murphy, 448 Mass. 452, 468-470 (2007) (holding that informant's actions, including providing defendant with a shank and contacting a potential witness to discourage his testimony against defendant, created an atmosphere of trust that, together with informant's questioning of defendant, deliberately elicited defendant's statements); Commonwealth v. Hilton, 443 Mass. 595, 618-19 (2005) (court officer's "reflexive response," "Excuse me," to defendant's saying that she hoped her son "would forgive her" was an "inadvertent remark" that did not deliberately elicit the defendant's ensuing statements, but the court officer's subsequent follow-up questions did deliberately elicit defendant's answers).

[278] Maine v. Moulton, 474 U.S. 159, 176 (1985) (suppressing statements made to cooperating, wired codefendant at meeting initiated by the defendant: "knowing exploitation . . . of an opportunity to confront the accused without counsel being present is as much a breach . . . as is the intentional creation of such an opportunity"). *See* Fellers v. United States, 540 U.S. 519, 524-25 (2004) (federal agents who served an arrest warrant on defendant at his home and then told him they were there to discuss his involvement in the drug distribution scheme and his involvement with certain co-conspirators deliberately elicited defendant's ensuing statements in circumvention of his Sixth Amendment right to counsel); Commonwealth v. Anderson, 448 Mass. 548, 553-54 (2007) (police detective and assistant district attorneys who, at defendant's request, interviewed defendant in a Maine prison concerning just-issued Massachusetts murder indictment, deliberately elicited his statements thus implicating the Sixth Amendment).

[279] Maine v. Moulton, 474 U.S. 159, 160 (1985).

[280] *See supra* § 19.4D(2), (3).

right through an effective *Miranda* waiver.[281] This is so whether he initiates contact with the police or the police approach him unsolicited.[282]

In contrast, the Supreme Court held in *Michigan v. Jackson*[283] that once a defendant formally requested an attorney, ordinarily at arraignment or initial presentment, a bright-line protective rule forbade police or other law enforcement from contacting that defendant unless the defendant initiated contact and expressed a desire to speak with the officer(s).[284] As with the similar bright-line rule in *Edwards v. Arizona*,[285] which forbids police-initiated contact with a suspect who has asserted his *Miranda* right to counsel, the rationale was that having asked for and received appointment of counsel, one is entitled to rely on the lawyer to deal with the government.[286] *Jackson*'s protection could of course be waived, but it would have to be after the defendant initiated the contact and be based on a knowing, voluntary and intelligent waiver of counsel such as required by *Miranda*.[287]

In *Montejo v. Louisiana*,[288] the Supreme Court backtracked, over-ruling *Jackson*'s bright-line rule.[289] Noting that at least in Montejo's case – he was in custody and thus protected by the *Miranda-Edwards* rule – he and others like him could receive *Jackson*'s protection simply by repeating his request for counsel to his would-be interrogators.[290] As to those not in custody, the Court conceded that *Miranda* would not apply but asserted that in a non-custodial context, there is less likelihood of a coerced waiver, which as the Court saw it was the principal vice at which *Jackson* was aimed.[291] This blithe dismissal of *Jackson*'s Sixth Amendment protection – a protection founded in the concern that an unrepresented defendant is no match for the prosecutorial forces formally arrayed against him – seems open to challenge.[292] Not only does *Edwards* not reach all those protected by the Sixth Amendment right to counsel, but it seems at least questionable that an unaided layperson formally charged with a crime will find it easy, as the Supreme Court suggests, to "shut his door or walk

[281] Patterson v. Illinois, 487 U.S. 285 (1988) (indicted defendant who did not affirmatively request lawyer, and for whom no lawyer had yet been retained or appointed, validly waived right to counsel in response to *Miranda* warnings); Commonwealth v. Torres, 442 Mass. 554, 572 (2004) (same, citing *Patterson*). *See* Commonwealth v. Anderson, 448 Mass. 554, 557 (2009).

[282] *See* Patterson, *supra* note 286; Torres, *supra* note 286.

[283] 475 U.S. 625, 636 (1986).

[284] *See* Michigan v. Jackson, 475 U.S. 625, 636 (1986). *See also* Commonwealth v. Anderson, 448 Mass. 548, 555 (2007).

[285] 451 U.S. 477, 484–85 (1981). *See supra* § 19.4D(3).

[286] *Id*.

[287] *See* Commonwealth v. Anderson, 442 Mass. 554, 572 (2007).

[288] 556 U.S. 778 (2009).

[289] *Id*. at --, 129 S.Ct. at 2091.

[290] *Id*. at 2090;

[291] *Id*. at 2090

[292] *See* Commonwealth v. Tlasek, 77 Mass. App. Ct. 298, 301-02 (2010) (noting that by waiving his Sixth Amendment rights – unexpectedly reduced as they were by *Montejo* – through his *Miranda* waiver the defendant had not necessarily waived his article 12 right to counsel but declining to consider the separate article-12 claim because defendant had not asserted that claim on appeal).

away" when the police come knocking.[293] After all, he or she has asked for a lawyer and maybe even has one, yet here the police are, wanting, maybe pressing, to talk with him. However, to date, the Massachusetts courts have not turned to article 12 as a means to restore *Jackson*'s protection, in part because defense counsel have not asserted that article-12 claim.[294]

With or without the added protection of *Jackson*'s bright-line rule, the courts require the prosecution to show, beyond a reasonable doubt, that there has been a voluntary, informed and intentional relinquishment of the right to counsel.[295] And while a valid *Miranda* waiver will suffice, that waiver must comply with any article 12 extensions of *Miranda*'s waiver requirements, including the *Maverdakis-McNulty* rule requiring that, as part of his *Miranda* warnings, the defendant be told if defense counsel has requested to be present for the questioning and/or advised that the defendant should not talk to the police.[296] The Supreme Judicial Court has declined, however, to expand article 12's protection by imposing a bright-line rule requiring police and other government actors to communicate only through counsel with a defendant who has invoked this right.[297] In doing so, the Court underscored its insistence that any purported waiver of this right to counsel by an unaided layperson, particularly a person in custody, be treated with great suspicion, describing as "onerous" the prosecutor's burden of demonstrating beyond a reasonable doubt that the waiver was voluntary, knowing and intelligent.[298] As with *Miranda* waivers, this Sixth Amendment waiver inquiry focuses on the totality of the circumstances, taking into consideration the defendant's age, education, intelligence, physical and mental stability, experience with the criminal justice system, and custodial status.[299]

4. Questioning Regarding Uncharged Crimes

Unlike Fifth Amendment *Miranda* protections, the *Massiah* right to counsel is "offense specific."[300] Therefore, even if a defendant's Sixth Amendment right to counsel has attached and been invoked with regard to one offense, police may still question him, without counsel, regarding unrelated, uncharged offenses.[301]

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[293] *Id*. at 2090. *But see* Commonwealth v. Anderson, 448 Mass. 548, 557 (2009) (declining to extend article 12's right to counsel to require that once invoked, all further communications with the police or prosecution without exception be through counsel).

[294] *See* Commonwealth v. Tlasek, 77 Mass. App. Ct. 298, 301-02 (2010) (declining to consider a *Jackson* claim under potentially broader art. 12 right to counsel because defendant did not assert that right on appeal). As noted, in Commonwealth v. Anderson, *supra* note 298,the SJC declined to adopt an article-12 bright-line rule requiring all post-invocation communications be through counsel, but this was prior to *Montejo*'s over-ruling of *Jackson*'s similar though lesser protection.

[295] *See* Commonwealth v. Anderson, 448 Mass. 548, 554 (2009).

[296] *Id*. at 757.

[297] *Id*. at 756-57.

[298] *Id*. at 557.

[299] *Id*. at 557 & n. 12.

[300] *See supra* § 19.4D(4).

[301] *See* Commonwealth v. Rainwater, 425 Mass. 540, 544 (1997) (despite appointment of counsel at arraignment for single auto theft, police may question defendant, in absence of counsel, regarding other related but uncharged auto thefts), (citing McNeil v. Wisconsin, 501

In an exception to the "offense specific" rule, police may not initiate questioning about a different crime if such questioning "is intended to, or does undermine, the charged person's right to be assisted by counsel in respect to the charged crime."[302] The S.J.C. followed lower federal courts in narrowly construing this exception to apply only to crimes that are so "inextricably related" to the charged crime that they could not be proved separately.[303] Subsequently, in *Cobb v. Texas*, a divided Supreme Court further narrowed the exception by confining it to crimes that would be considered the same offense under the test in *Blockburger v. United States*.[304] Because the state constitutional right to counsel has been construed to give broader protection than the Sixth Amendment protection,[305] counsel can still argue, under article 12, for retention of the "inextricably related" exception.[306]

The offense specific nature of *Massiah* leaves clients vulnerable to post-arraignment police interrogation without the aid of counsel. So long as the police limit their questions to "different" offenses, they may approach and interrogate defendants without implicating their Sixth Amendment rights. As a precaution, therefore, counsel should strongly advise clients to decline to answer law enforcement questions about any offense, charged or uncharged.[307]

U.S. 171, 175 (1992)); Maine v. Moulton, 474 U.S. 159, 180 n.16 (1985) (no violation of Sixth Amendment *Massiah* rights for police to question defendant indicted for crime X regarding unindicted crime Y and to introduce statements at trial for crime Y); Commonwealth v. Gaynor, 443 Mass. 245, 256-257 (2005); Commonwealth v. Tlasek, 77 Mass. App. Ct. 298, 301 n.4 (2010); Commonwealth v. St. Peter, 48 Mass. App. Ct. 517, 522-523 (2000). However, in questioning defendant about uncharged offenses, police have the duty "to stay clear of any inquiry into a crime in which the right to counsel has attached." *Rainwater, supra*, 425 Mass. at 550. Should the police violate that duty by questioning defendant about charged as well as uncharged offenses, incriminating statements regarding the latter might be suppressible as fruits of the *Massiah* violation. *But see* Rainwater, *supra,* 425 Mass. at 550–51 (rejecting fruits argument, on facts of case, as harmless error).

[302] Commonwealth v. Rainwater, 425 Mass. 540, 557 (1997).

[303] *See* Commonwealth v. Rainwater, 425 Mass. 540, 548 n.6 (1997), *cert. denied* 522 U.S. 1095. In *Rainwater*, after arraignment on single charge of auto theft, defendant was questioned about a number of other auto thefts that had occurred in the same neighborhood as the charged theft, within the same short period of time, and showing an identical method of operation. Despite these similarities, the court held that the thefts about which defendant was questioned were not sufficiently related to the theft charge on which defendant had been arraigned, so as to bar police initiated questioning. Under *Rainwater,* "inextricably related" offenses must arise from the same predicate facts, and reveal an identity of time, place, and victims. *Rainwater, supra*, 425 Mass. at 546–49, 556–59.

[304] Cobb v. Texas, 532 U.S. 162, 173 (2001). In *Blockburger* the Supreme Court adopted the test of *Morey v. Commonwealth*, discussed *infra* sec. 21.2D(1) & (2).

[305] *See* cases cited *supra* at sec. 8.1B.

[306] In *Rainwater*, 425 Mass. 540, 554 (1997), the S.J.C. explicitly declined to construe art. 12 more liberally than the Supreme Court had construed the Sixth Amendment with respect to the "offense specific" nature of *Massiah* rights. But the S.J.C. might be dissuaded from adopting the Supreme Court's virtual evisceration of those rights in *Cobb*. *See, generally,* Texas v. Cobb, 532 U.S. 162, 177 ff. (dissenting opinion of Justice Breyer).

[307] One practitioner reports giving printed cards to every new client, with instructions to hand the card to any law enforcement agent seeking to question him. The card asserts the client's unwillingness to talk to anyone about any criminal conduct, charged or uncharged, or to

§ 19.4F. 4TH AMENDMENT EXCLUSIONARY RULE: STATEMENTS THAT THE FRUIT OF UNREASONABLE SEARCHES & SEIZURES

Like other testimony or physical evidence derived from unconstitutional searches and seizures, statements that are the "fruit" of such violations may be suppressed.[308] *See supra* § 17.2A.[309] Suppression serves the same policies that underlie the Fourth Amendment exclusionary rule generally.

§ 19.4G. STATEMENTS OBTAINED THROUGH VIOLATION OF A NONCONSTITUTIONAL RIGHT

A statement might be suppressible if it was obtained in violation of some legal protection outside the federal or state Constitution. Counsel should consider moving to suppress statements obtained by violations of the following rights.

1. Arrestee's Right to Use Telephone

The S.J.C. has suppressed statements obtained as a consequence of denying the arrestee's statutory right to use a telephone.[310] Even though the statute contains no

consent to searches, tests, lineups etc., and instructs the agent to call the lawyer. *See* C.P.C.S. Training Bulletin, at 6–7 (Sept. 1997).

[308] *See* Brown v. Illinois, 422 U.S. 590, 604-05 (1975); Wong Sun v. United States, 371 U.S. 471 (1963); Commonwealth v. O'Connor, 21 Mass. App. Ct. 404, 406 (1986); Commonwealth v. Dasilva; 56 Mass. App. Ct. 220, 228 n.9 (2002). *Compare* Commonwealth v. Marquez, 434 Mass. 370 (2001), adopting rule of New York v. Harris, 495 U.S. 14 (1990) (statements made outside home following in-house arrest in violation of Payton v. New York, 445 U.S. 573 (1980), not suppressible as fruit of *Payton* violation); Commonwealth v. Cruz, 442 Mass. 299, 307-08 (2004) (defendant's voluntary statements at police station – four hours after police unlawfully entered his apartment and secured his agreement to come to the station and after two *Miranda* waivers – were not suppressible fruits of the unlawful entry, citing *Marquez*, the Court noting that had the statements been the fruit of anything seized during the unlawful entry of the apartment, the statements would have been suppressed);Commonwealth v. Alicea, 376 Mass. 506, 512–14 (1978) (defendant "brought" to station in police cruiser, read *Miranda* rights and questioned, was only there as witness, and was not arrested until after identified as culprit; statements not suppressible fruit of Fourth Amendment violation); Commonwealth v. Fielding, 371 Mass. 97, 113–15 (1976) (statements made three hours after arrest on invalid warrant were voluntary; police conduct not deliberate or motivated by desire to procure statement). *See generally infra* § 19.5B.

[309] *See also supra* § 2.1B(4), concerning the right of one arrested without a warrant to a judicial determination of probable cause. A confession obtained in violation of Jenkins v. Chief Justice of the District Court Dep't, 416 Mass. 221 (1993), is arguably suppressible. *See* Commonwealth v. Jackson, 447 Mass. 603, 614 (2006) (declining to consider defendant's *Jenkins* claim to suppress statements because defendant had waived his Jenkins right to a probable-cause determination within 24 hours of his arrest).

[310] *See* G.L. C. 276, § 33A (police shall, within one hour of arrestee's arrival at station, permit him to use telephone "for the purpose of allowing [him] to communicate with his family or friends, or to arrange for release on bail, or to [retain] the services of an attorney," and must notify him of such right "forthwith upon his arrival"); Commonwealth v. Daniels 366 Mass. 601, 610 (1975) (notice that defendant could use telephone to "call anybody" sufficient compliance with statute so that confession is admissible, but preferable for police to recite the

express penalty for its violation, the Court found suppression necessary as a prophylactic measure to prevent incommunicado detention of arrestees without access to friends and counsel.[311] However, the Court has confined this remedy to instances of intentional deprivation of the right.[312]

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purposes for which a call could be made). The court has differentiated between the defendant's right to be notified of his right to use a telephone and the defendant's right to actually use the telephone. The former has to be executed forthwith on arrival at the police station; the latter within an hour of arrival. Commonwealth v. Carey, 26 Mass. App. Ct. 339, 342–43 (1988).

In several cases, the S.J.C. has refused to suppress evidence obtained by police from defendant's exercise of his right to use a telephone. *See* Commonwealth v. Williams, 456 Mass. 857, 866-67 (2010) (defendant's use of officer's cell phone, which recorded the numbers called, did not violate the statute, which mandates only that a suspect have a right to make a telephone call, not a private call); Commonwealth v. White, 422 Mass. 487, 500 at n.16 (1996) (citing cases). Also, the statute does not apply to suspects who are already incarcerated on another matter, Commonwealth v. Perry, 432 Mass. 214, (2000), or who are arrested in another state. *See* Commonwealth v. Scoggins, 431 Mass. 571, 577 n.5 (2003) (statutory right to phone call not applicable to officers of another state). *See also* Commonwealth v. Haith, 452 Mass. 409, 413-14 (2008) (assuming without holding that the statutory right to a telephone call applied when Massachusetts troopers took custody of a suspect previously arrested in another state, prior to the suspect's transportation back to Massachusetts, the failure to advise defendant of that right was not intentional and thus did not require suppressing ensuing statements).

[311] Commonwealth v. Jones, 362 Mass. 497, 503 (1972). *But cf.* Commonwealth v. Carey, 26 Mass. App. Ct. 339, 343 (1988), holding that it was no violation to require defendant to wait to use telephone until after booking, but still within statutory one-hour period; had police interfered with defendant's communication with a lawyer instead of with family, and thereafter interrogated him, result might differ, but "communication with family is not on the same footing."

Although the statutory violation must cause harm to the defendant (Commonwealth v. McGaffigan, 352 Mass. 332, 335 (1967)), a showing of intentional or willful misconduct shifts the burden to the government to show beyond a reasonable doubt that the evidence obtained is untainted by the deprivation. *Jones, supra*, 362 Mass. at 503. *See also* Commonwealth v. Meehan, 377 Mass. 552, 556 (1979), *cert. dismissed*, 445 U.S. 39 (1980) (even in absence of intentional police misconduct, noncompliance with statutory mandate is a factor in deciding whether a confession, vulnerable on other grounds, should be suppressed).

[312] *See* Commonwealth v. Jackson, 447 Mass. 603, 616 (2006) (defendant not advised of statutory telephone-call right until four hours after arrest at the police station; denial not intentional but due to defendant's pre-booking request to talk to police resulting in prolonged "interview," following which defendant advised of and made call during booking); Commonwealth v. Leahy, 445 Mass. 481, 490-91 (2005) (intentional violation required for suppression); Commonwealth v. Caze, 426 Mass. 309, 310-11 (1997) (where experienced police officers isolated and questioned defendant without informing him of his statutory right, confession would probably have been suppressed but for overwhelming independent evidence of guilt); Commonwealth v. Johnson, 422 Mass. 420, 429 (1996) (no intentional violation where defendant not questioned during prebooking delay, which was designed to allow arresting officers to attend booking, rather than to get confession); Commonwealth v. Parker, 402 Mass. 333, 341 (1988) (no suppression even though defendants not informed of right to use telephone until two or three hours after arrest; defendants were informed of *Miranda* rights and had "access" to a telephone, but did not request to make a call. Suppression is warranted "only where police intentionally deprive defendant of telephone calls." Parker, *supra,* 402 Mass. at 341, citing Commonwealth v. Jones, 362 Mass. 497, 502–03).

2. Right to Interpreter During Police Interrogation

By statute, violation of a hearing-impaired arrestee's right to an interpreter to explain *Miranda* rights requires suppression of any statements made by the defendant in response to police questioning.[313]

3. Prompt Arraignment

In federal proceedings the *McNabb-Mallory* rule[314] requires suppression of statements taken more than six hours after arrest but before presentment unless the court finds that the delay beyond six hours was not unreasonable or unnecessary. The Supreme Judicial Court established a similar six-hour safe harbor in *Commonwealth v. Rosario*.[315] Under *Rosario*'s "bright line" rule, the police may delay arraignment for up to six hours in order to question a defendant, whether arrested pursuant to a warrant or not.[316] An otherwise admissible[317] statement is not to be excluded on the ground of unreasonable delay in arraignment, if (1) the statement was made within six hours of the arrest[318] or (2) (at any time) the defendant validly waived his right to be arraigned

[313] G.L. c. 221, § 92A; Commonwealth v. Kelley, 404 Mass. 459, 461–63 (1989).

[314] *See* Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943). In Corley v. United States, 556 U.S. 303, 323 (2009), the Supreme Court held that the *Mallory-McNabb* rule was modified by 18 U.S.C. § 3501 (1968). Under the revised rule, in federal cases a defendant's voluntary confession within six hours of his arrest is admissible, subject to the Rules of Evidence. This six-hour safe harbor can be expanded if reasonably necessary due to distance to the magistrate and available means of transportation. If the confession occurs beyond this six-hour safe harbor but before presentment to the magistrate, the confession must be suppressed unless the court finds that under the *Mallory-McNabb* line of cases the delay was neither unreasonable nor unnecessary.

[315] Commonwealth v. Rosario, 422 Mass. 48 (1996). *See supra* §§ 2.1B(4), 7.1.

[316] Commonwealth v. Rosario, 422 Mass. 48 (1996); Commonwealth v. Ortiz, 422 Mass. 64 (1996) (applying six-hour safe harbor rule to arrested but unarraigned defendant's statements regarding crime for which a complaint was pending against the defendant).

[317] Admissibility requires valid waiver of *Miranda* rights, voluntariness, and compliance with G.L. c. 276, § 33A (access to telephone). Commonwealth v. Rosario, 422 Mass. 48, 56 (1996).

[318] This time period applies day or night, Commonwealth v. Jackson, 447 Mass. 603, 609 n.13 (2006), and whether or not the court is in session (Commonwealth v. Rosario, 422 Mass. 48, 56–57 (1996)). It may be tolled in cases where the defendant is temporarily disabled from responding to interrogation or when some "emergency" forces delay or suspension of interrogation. *Rosario, supra. See* Commonwealth v. Siny Van Tran, 460 Mass. 535, 561-62 (2011) (six-hour safe harbor tolled overnight where murder suspect arrested at 11 p.m. in Boston after long transoceanic flight from Asia through San Francisco and Washington, D.C., with the resulting concern that if his interrogation began immediately suspect's will might be overcome by exhaustion); Commonwealth v. Morganti, 455 Mass. 388, 400 (2009) (even if *Rosario*'s six-hour rule applies to arrests outside the Commonwealth, its spirit not violated where defendant arrested by California authorities, Massachusetts trooper had to fly to California and the ensuing interview did not exceed six hours). *See also* Commonwealth v. Barnes, 40 Mass. App. Ct. 666, 669 (1996) (where no evidence that police either knew of attorney's agreement to represent defendant, or interfered with defendant's access to counsel, statement made during six-hour period was admissible).

without unreasonable delay.[319]Even deliberate flouting of Rule 7(a)(1)'s requirement of a prompt arraignment by police for the purpose of getting a confession will not result in suppression unless the delay either undermined the voluntariness of defendant's statements, or was so "outrageously long" as to call for judicial disapproval.[320]

4. Special Rights of Juveniles

Although no reported cases apparently require suppression of statements obtained in violation of protections provided by G.L. c. 119, the exclusionary rule arguably should apply to protect juveniles from overbearing police tactics. Thus, suppression should be sought of statements obtained as the fruit of violating the summons requirements for juveniles under twelve years of age,[321] the right of a juvenile's parents and probation officer to notice of his arrest,[322] and a juvenile's right to release from protective custody to the custody of his parents.[323]

5. Right to Show-Cause Hearing

Evidence acquired in violation of the defendant's right to notice and an opportunity to be heard prior to the issuance of process under G.L. c. 218, § 35A, might require suppression.[324]

6. Restrictions on Electronic Recording and Wiretaps

Statements obtained through warrantless electronic recording in violation of G.L. c. 272, § 99, are inadmissible in the government's case in chief[325] as well as for

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[319] *See* Commonwealth v. Morales, 461 Mass. 765, *8 (2012) (confessions made outside six-hour safe harbor admissible where defendant voluntarily executed a written waiver of his *Rosario* rights); Commonwealth v. Morgan, 460 Mass. 277, 280 (2011) (same).

[320] *See* Commonwealth v. Butler, 423 Mass. 517, 524ff. (1996) (vacating suppression of pre-*Rosario* statement although police deliberately delayed presentment of defendant from midnight Thursday to Monday morning; delay was not so egregious as to put voluntariness of statements and waivers in doubt).

[321] G.L., c. 119, § 54; Mass. R. Crim. P. 6(a)(2).

[322] G.L., c. 119, § 67; Mass. R. Crim. P. 7(a)(1).

[323] G.L., c. 111B, § 10, discussed in Commonwealth v. Shipps, 399 Mass, 820, 828–30 (1987) (valid waiver under analysis of Brown v. Illinois, 422 U.S. 590 (1975), although police violated statute by misinforming juvenile's mother that she could not pick up her son).

[324] *See supra* § 4.2B(5); Commonwealth v. Lyons, 397 Mass. 644, 646–48 (1986) (unintentional violation of right to show-cause hearing did not require suppression of identification based on photograph taken following defendant's arrest; suppression might result if the evidence sought to be suppressed were less "objective" than a photograph, or obtained by willful or deliberate police misconduct).

[325] G.L. c. 272, § 99P; Commonwealth v. Tavares, 459 Mass. 289, 290, 303 (2011); Commonwealth v. Picardi, 401 Mass. 1008 (1988). *But see* Commonwealth v. Crowley, 43 Mass. App. Ct. 919 (1997) (citing Commonwealth v. Santoro, 406 Mass. 421, 423 (1990) (statute merely gives defendant standing to seek discretionary suppression; state action required)); Commonwealth v. Rivera, 445 Mass. 119, 125 & n.7 (2005) (same, citing *Santoro* and *Crowley*). *See also supra* § 5.6E.

impeachment purposes.[326] Evidence obtained as the result of wire or electronic communications intercepted in violation of Title III of the federal Omnibus Crime Control and Safe Streets Act of 1968[327] must be suppressed, even if the Commonwealth is the innocent recipient of a communication unlawfully intercepted by a private party.[328] Subject to the limitations of the conventional fruits doctrine, the exclusion required by Section 2515 of Title III includes evidence derived from such unlawful interceptions.[329]

7. Prosecutor's Violation of Professional Responsibility Rules

Arguably, a statement should be excluded if it was obtained by the prosecutor's violation of a disciplinary rule of professional responsibility. The Supreme Judicial Court has rejected this argument on one occasion, but may have left the door open to its application in other circumstances. [330]

§ 19.4H. STATEMENTS MADE DURING COURT-ORDERED PRETRIAL MENTAL EXAMINATION

Statements made in the course of a state-ordered psychiatric examination are privileged from use in any court proceeding or preliminary proceeding and in any legislative or administrative proceeding. However, if the patient was warned beforehand that the communications would not be privileged, the communications are admissible "only on issues involving the patient's mental or emotional condition but not as a confession or admission of guilt."[331] Also, a defendant's request for drug

[326] Commonwealth v. Fini, 403 Mass. 567, 573 (1988).

[327] 18 U.S. Code §§ 2510 et seq.

[328] Commonwealth v. Damiano, 444 Mass. 444, 452 (2005) (rejecting the "clean hands" exception permitting prosecutorial use of unlawful interceptions if the government is the innocent recipient of such communications not the interceptor). Although there is a circuit split on this issue, the First Circuit has similarly rejected this "clean hands" exception to §2515's provision for suppression of evidence derived from unlawful interceptions. *See* United States v. Vest, 813 F. 2d 477, 481 (1st Cir. 1987).

[329] Commonwealth v. Damiano, 444 Mass. 444, 453-59 (2005) (holding that the unlawfully intercepted communication and marijuana seized from defendant during his arrest that resulted from the unlawful interception should have been suppressed, but that narcotics seized as the result of a consented-to search of defendant's home and stationhouse statements made by defendant after being Mirandized were too attenuated from the unlawful interceptions to be considered fruits of that violation).

[330] *See* Commonwealth v. Vao Sok, 435 Mass. 743, 754 (2002) (where prosecutor instructed police to continue polygraph test of represented suspect in violation of Disciplinary Rule forbidding ex parte communication with represented parties, but no prejudice resulted, Court refused to apply prophylactic exclusionary rule).

[331] *See generally supra* § 16.7B; G.L. c. 233, § 20B; Commonwealth v. Lamb, 365 Mass. 265 (1974) (psychotherapist-patient privilege applies in G.L. c. 123A, Sexually Dangerous Person, examinations; because defendant was not warned that his communications would not be privileged, it was error to admit psychiatric testimony); Department of Youth Servs. v. A Juvenile, 398 Mass. 516, 524–26 (1986) (reversing extension of juvenile delinquent's DYS commitment past age eighteen because examining psychiatrist failed to give *Lamb* warnings, even though examination was not court-ordered and psychiatrist testified on

dependency evaluation under G.L. c. 111E, §§ 10–l1, and his statements made in the course of the examination, are inadmissible against him in court proceedings.[332]

§ 19.4J. Statements Made in Connection with a Plea Bargain[333]

Mass. R. Crim. P. 12(f), analogous to Fed. R. Crim. P. 11(e)(6),[334] provides that statements made in connection with and relevant to any offers to plead guilty are not admissible in any criminal proceedings against the person who made the plea or offer.[335] A statement made in connection with a plea bargain is inadmissible for purposes of impeachment as well as in the government's case in chief.[336] But a statement made in connection with and relevant to a guilty plea that is later withdrawn *is* admissible in a criminal proceeding for perjury if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

§ 19.4K. STATEMENTS MADE DURING PREPARATION OF PROBATION REPORTS

basis of defendant's statements, but not to their content); Commonwealth v. Buck, 64 Mass. App. Ct. 760, 766 (2005) (holding inadmissible confessions made during court-ordered psychiatric exam not admissible in hearing on defendant's motion for a new trial on the Rule 30(b) question of whether "justice may not have been done"). *See also* Commonwealth v. Baldwin, 426 Mass. 105, 111 n. 4 (1997) (defendant has no constitutional right to video record court-ordered psychiatric interview); Blaisdell v. Commonwealth, 372 Mass. 753, 758–760 (1977) (statements of defendant during court ordered psychiatric examination are "testimonial"; G.L. c. 233, § 23B, immunity grant, limiting admissibility at trial of certain statements, is constitutionally insufficient). *But see* Commonwealth v. Benoit, 410 Mass. 506, 517–20 (1991) (no violation of either state constitutional privilege against self-incrimination or statutory privilege where competency examiner testified to diagnosis and observations in rebuttal after defense expert "opened the door" by testifying to examiner's findings).

[332] G.L. c. 111E, §§ 10–1l.

[333] This section partly relies on PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA, CRIMINAL PRACTICE INSTITUTE, TRIAL MANUAL § 9.4(H) (1984).

[334] *But see* Commonwealth v. Wilson, 430 Mass. 440, 442-43 (1999) (unlike Federal rule, Rule 12(f) does not require that the statement be made to a government attorney).

[335] However, a court may later find that the statements were not made in the course of plea bargaining. *See* Commonwealth v. Wilson, 430 Mass. 440, 443 (1999) (defendant's statements to police detective, including offer to plead guilty, were not made during the course of plea negotiation, but were volunteered by defendant, without considering whether detective had authority to engage in negotiations); Commonwealth v. Luce, 34 Mass. App. Ct. 105, 111–12 (1993) (meetings between defendant, his counsel, and government officers did not constitute plea bargaining, so defendant's statement admissible). *See also* Commonwealth v. Boyarsky, 452 Mass. 700, 709 (2008) (defendant's statement to friend that he would be willing to accept a five-year sentence did not constitute an offer to plead where the friend had no authority to negotiate a plea and defendant had no reason to think that he did). As recommended by CPCS Training Bulletin, vol. 3, no. 2 (June 1993), therefore, before letting the defendant cooperate, counsel should get the prosecution's agreement *in writing* that the defendant's statements will be inadmissible under Rule 12(f).

[336] *Compare* United States v. Davis, 617 F.2d 677 (1979) (grand jury testimony given after the formalization of the plea agreement, hut before the defendant had entered his plea, not suppressible under Fed. R. Crim. P. 11(e)(6)).

Statements made at a prearraignment probation interview[337] or during a pretrial diversion assessment[338] are inadmissible against the defendant at trial. But other interviews with probation officers are not covered by these bars.[339]

§ 19.4L. EVIDENCE MORE PREJUDICIAL THAN PROBATIVE

A statement whose probative worth is outweighed by its potential prejudicial effect may be excluded as a matter of judicial discretion.[340]

§ 19.5 SCOPE OF EXCLUSIONARY REMEDIES

The usual consequence of suppressing a statement obtained in violation of the defendant's rights is exclusion of the statement itself,[341] and of any evidentiary "fruits" of the violation,[342] from the government's case in chief at trial. Also, an illegally obtained statement may not be used to establish probable cause to support a search or seizure, either with[343] or without a warrant.[344] Whether the government may make other use of such a statement depends on the substantive grounds on which it was suppressed.

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[337] S.J.C. Rule 3:10, § 7. The statement would be admissible in a prosecution for perjury or contempt committed while providing the information.

[338] G.L. c. 276A, § 5.

[339] *See, e.g.*, Minnesota v. Murphy, 465 U.S. 420, 429–34 (1984) (confession when called by probation officer and questioned about suspected crime was admissible). *But see* Warren v. United States, 436 A.2d 821, 841–42 (D.C. Ct. App. 1981) (defendant's posttrial statements to probation officer for use in presentence report inadmissible in later trial).

[340] *See* Commonwealth v. Lewin (*Lewin II*), 407 Mass. 629, 631 (1990) (upholding exclusion of statement indicating defendant's willingness to plead guilty to manslaughter; statement had "little unambiguous probative value" but jury was likely to give it improper, prejudicial weight).

[341] This may seem obvious, but counsel should ensure that an unlawfully obtained statement that is suppressed does not find its way into evidence indirectly. In Commonwealth v. Woodbine, 461 Mass. 720 (2012), a detective took two consecutive statements from the defendant, the first of which the detective did not record but the second of which he did. The trial court suppressed the recorded statement because it was taken in violation of defendant's Fifth Amendment right to counsel, but the court ruled that the unrecorded statement was admissible. Prior to trial the detective used the transcript of the suppressed statement to refresh his recollection concerning the unrecorded statement about which he then testified. Because the court did not conduct a voir dire adequate to determine whether the detective's purported memory of the unrecorded statements was actually that of the unrecorded statements as opposed to a memory of the suppressed statements that he had reviewed in preparing to testify, the S.J.C. held that it was prejudicial error to admit that testimony. *Id*. at 737.

[342] *See infra* § 19.5B.

[343] Commonwealth v. White, 374 Mass. 132, 138–39 (1977), *aff'd by an equally divided court*, 439 U.S. 280 (1978) (invalidating search warrant issued on basis of statement obtained in violation of *Miranda).*

[344] Commonwealth v. Haas, 373 Mass. 545, 555–56 (1977) (suppressing fruits of arrest, which, because founded on information obtained from defendant in violation of *Miranda*, was illegal).

"Coerced" or "involuntary" statements obtained in violation of due process[345] and statements that are "compelled" in violation of the Fifth Amendment[346] may not be used at all. Statements obtained in violation of *Miranda* rights,[347] the Sixth Amendment right to counsel,[348] the Fourth Amendment, or statutory rights may still be used at trial to impeach the defendant's credibility should he testify. Statements obtained in violation of *Miranda* rights or of the Fourth Amendment may also be used as substantive evidence in pre- and post-trial proceedings such as the grand jury[349] and probation revocation hearings.[350] In allowing such collateral uses, the S.J.C. has adopted the Supreme Court's "cost-benefit" analysis of the Fourth Amendment exclusionary rule, articulated in *United States v. Calandra.*[351] Under this reasoning, because exclusion is not a "personal constitutional right of the party aggrieved" but serves general deterrent goals,[352] the courts must balance the potential deterrent effect of excluding illegally seized evidence against the costs of excluding reliable evidence from the finder of facts. The courts usually consider barring collateral use unjustified, because it is "likely to have only a marginal additional deterrent effect on illegal police misconduct."[353]

§ 19.5A. USE OF DEFENDANT'S STATEMENTS FOR IMPEACHMENT

[345] Mincey v. Arizona, 437 U.S. 385, 396–402 (1978).

[346] New Jersey v. Portash, 440 U.S. 450 (1979).

[347] *See* Harris v. New York, 401 U.S. 222, 226 (1971); §19.5A, *infra*.

[348] Kansas v. Ventris, 556 U.S. 586, 593-94 (2009) (holding that defendant's statement deliberately elicited in violation of his Sixth Amendment right to counsel could be used to impeach his contrary testimony at trial).

[349] *See supra* § 5.6E.

[350] *See infra* ch. 41, note; Commonwealth v. Vincente, 405 Mass. 278 (1989) (police violated *Miranda* by questioning defendant after he asserted right to counsel; statements suppressed at trial but used as basis for probation revocation, upheld by S.J.C. under federal law), *distinguishing* Brown, Petitioner, 395 Mass. 1006 (1985) (remand to determine whether judge revoking probation had relied on unreliable hearsay evidence). *Vincente* left open whether exclusion would be appropriate if the agents who unlawfully obtained the statement knew of the suspect's status as a probationer. *Vincente, supra*, 405 Mass. at 281 n.3. *See also* Commonwealth v. Olsen, 405 Mass. 4971 (1989) (where police who unlawfully seized evidence from the defendant neither knew nor had reason to know of his probationary status, neither Fourth Amendment nor art. 14 of the Mass. Const. Declaration of Rights bars use of evidence in probation revocation proceedings).

[351] 414 U.S. 338 (1974), discussed in Commonwealth v. Vincente, 405 Mass. 278, 279-80 (1989). The Court has not distinguished between the Fourth and Fifth Amendment exclusionary rules for this purpose. *See Vincente, supra*, 405 Mass. at 281 & n.4.

[352] Commonwealth v. Vincente, 405 Mass. 278, 280 (1989) (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)). The S.J.C. has subscribed to the prevailing Supreme Court view that the *Miranda* rules have only sub-constitutional status as "prophylactic rules which *themselves* safeguard rights of constitutional magnitude." Commonwealth v. Mahnke, 368 Mass. 662, 678–79 n.23 (1975), *cert. denied*, 425 U.S. 959 (1976) (emphasis in original). *But see* Dickerson v. United States, 530 U.S. 428, 120 S. Ct. 2326 (2000) (*Miranda* was a constitutional holding, and could not be overruled by an Act of Congress).

[353] Commonwealth v. Vincente, 405 Mass. 278 (1989).

1. Use of Suppressed Statement for Impeachment

The U.S. Supreme Court has consistently held that due process forbids any use of involuntary confessions, even to impeach the defendant's credibility should he testify at trial.[354] But in *Harris v. New York* [355] the Supreme Court held that statements taken in violation of *Miranda's* "prophylactic" rules are admissible to impeach the defendant's testimony, as long as they satisfy the legal standards for trustworthiness. The Court reasoned that "sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief,"[356] and that "[t]he shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances."[357] *Harris,* which concerned defective *Miranda* warnings, has been extended by the Supreme Court to permit impeachment by statements resulting from refusal to honor a request for counsel,[358] from a violation of the Sixth Amendment right to counsel,[359] and from Fourth Amendment violations.[360]

Because of strong policy arguments opposing admission of unconstitutionally obtained evidence for the purpose of impeachment,[361] several states have refused to follow the Supreme Court's lead and have relied on their own constitutions to bar the evidence for all purposes.[362] The Massachusetts cases have partially tracked the Supreme Court precedents, while leaving room in some instances for counsel to claim greater protection for the defendant under the Declaration of Rights. An involuntary confession may not be used for any purpose, even to impeach the defendant's credibility.[363] As to "voluntary" statements obtained in violation of *Miranda*, a closely divided S.J.C. has permitted impeachment use.[364] But the Court barred impeachment

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[354] Mincey v. Arizona, 437 U.S. 385, 398 (1978). The same rule applies to statements compelled in violation of the Fifth Amendment. *See* New Jersey v. Portash, 440 U.S. 450 (1979); Blaisdell v. Commonwealth, 372 Mass. 753, 763 (1977) (discussed *infra* at § 33.7A).

[355] 401 U.S. 222, 224–26 (1971).

[356] Harris v. New York, 401 U.S. 222, 225 (1971).

[357] Harris v. New York, 401 U.S. 222, 226 (1971).

[358] Oregon v. Hass, 420 U.S. 714 (1975).

[359] Kansas v. Ventris, 556 U.S. 586, 593-94 (2009).

[360] United States v. Havens, 446 U.S. 620, 626–27 (1980). *But see* James v. Illinois, 493 U.S. 307 (1990) (refusing to allow impeachment of defense *witness* by use of defendant's statement obtained in violation of Fourth Amendment).

[361] The principal harms from permitting impeachment use include keeping a possibly innocent defendant from the witness stand, and giving police an incentive to disregard the *Miranda* protections, on the theory that once a defendant refuses to talk they have nothing to lose from further interrogation. *See* Commonwealth v. Harris, 364 Mass. 236, 240–41 (1973); Commonwealth v. Mahnke, 368 Mass. 662, 720–21 (1975); *cert. denied,* 425 U.S. 959 (1976) (Kaplan, J., dissenting).

[362] *See, e.g.,* People v. Disbrow, 545 P.2d 272 (Cal. 1976); State v. Santiago, 492 P.2d 657 (Hawaii 1971) *reh'g after remand,* 526 P.2d 1256 (Hawaii 1973); Commonwealth v. Triplett, 341 A.2d 62 (Pa. 1975).

[363] Commonwealth v. Harris, 364 Mass. 236, 241–42 (1973) (dictum), *reaff'g* Commonwealth v. Kleciak, 350 Mass. 679, 689–90 (1966).

[364] In Commonwealth v. Mahnke, 368 Mass. 662, 691–97 (1975), *cert. denied,* 425 U.S. 959 (1976), a divided (four–three) Court followed *Harris v. New York* and *Hass* and

use of uncoerced statements obtained by an unreasonable and particularly intrusive search and seizure in violation of article 14 of the Declaration of Rights.[365] The Court's test seeks to balance "the State's interest in impeachment and its interest in deterrence of police misconduct."[366] The S.J.C.'s rejection of the Supreme Court precedents should encourage defense counsel to argue for expanded protections based on the state constitution.

2. Defendant's Silence as Impeachment

The law restricts the Commonwealth's ability to use the defendant's pretrial silence[367] or request for counsel[368] against him at trial. Although a defense witness may be impeached by his prior failure to report exculpatory evidence to the police,[369] the

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permitted impeachment use of a "voluntary and trustworthy" statement obtained in violation of *Miranda.* Justices Kaplan, Wilkins, and Hennessey argued in dissent that neither *Harris v. New York* nor *Hass* would allow impeachment where the police violation of *Miranda* had been deliberate. *Mahnke, supra,* 386 Mass. at 714–22, 728. Such flagrant police misconduct, Justice Kaplan argued, should result in exclusion of statements for any purpose under the Mass. Const. Declaration of Rights, if not under the U.S. Constitution. *Mahnke, supra,* 368 Mass. at 721.

[365] Commonwealth v. Fini, 403 Mass. 567, 571–73 (1988) (given magnitude of art. 14 violation in warrantless, nonconsensual electronic eavesdropping of conversations in private home, "half measures of deterrence are not enough"; recorded evidence inadmissible even to impeach).

[366] Commonwealth v. Fini, 403 Mass. 567, 571 (1988).

[367] The defendant's postarrest silence cannot be used against him substantively. Commonwealth v. Nickerson, 386 Mass. 54, 59 n.5 (1982) (citing authorities); Commonwealth v. Somers, 44 Mass. App. Ct. 920 (1998) (rescript) (error to admit *Miranda* rights form, signed by defendant, which indicated that he wished to assert his right to remain silent); Commonwealth v. Callagy, 33 Mass. App. Ct. 85, 88 (1992) (grand jury should not be informed that the suspect exercised his constitutional right to remain silent). *See also* cases cited *infra* at § 35.3B(3) (improper for prosecutor to mention defendant's post-arrest silence in closing argument).

A defendant's post-warnings inquiries about his rights, or "thinking out loud" about whether to exercise them, are also protected from impeachment use. Commonwealth v. Peixoto, 430 Mass. 654, 659 (2000) (error, under state constitutional due process and self-incrimination provisions, for prosecutor to bring out, on cross examination, that defendant said to detective after receiving *Miranda* warnings, "I don't know if I should talk to you or not").

In limited circumstances the defendant's silence may be admissible for a purpose other than impeachment. *See, e.g.,* Commonwealth v. Babbitt, 430 Mass. 700 (2000) (defendant's silence in face of codefendant's out of court statements admissible as adoptive admissions). *See also* Commonwealth v. Thompson, 431 Mass. 108, 117-18 (2000) (where defendant did not invoke right to silence, but gave "far-ranging statement," proper for prosecutor to comment on fact that defendant did not ask police questions that an innocent party would ordinarily ask).

[368] Commonwealth v. DePace, 433 Mass. 379, 382-84(2001) (principle of *Doyle v. Ohio* bars admission at trial of fact that, after receiving *Miranda* warnings, defendant wrote on rights form "I want to talk to my attorney;" murder conviction reversed).

[369] Commonwealth v. Nickerson, 386 Mass. 54, 57–58 (1982); Commonwealth v. Brown, 11 Mass. App. Ct. 288, 296–97 (1981) (guidelines for laying a foundation before challenging a defense witness on the basis of pretrial silence).

same is not necessarily true of the defendant who testifies.[370] The propriety of using a defendant's prior silence to impeach his trial testimony depends on whether his silence was (1) after arrest and warnings, (2) after arrest but before receiving *Miranda* warnings, or (3) before his arrest. The Supreme Court in 1976 held in *Doyle v. Ohio* [371] that it violates due process to impeach a defendant by his silence after he has been arrested and received *Miranda* warnings. But in later retreats from *Doyle*, the Court allowed impeachment by a defendant's prearrest failure to volunteer exculpatory evidence to the police,[372] and by silence after arrest but before receiving *Miranda* warnings.[373] In the latter situation article 12 of the Massachusetts Constitution Declaration of Rights may well bar any negative use of the defendant's postarrest silence[374] vis-à-vis the authorities.[375] In the former, the S.J.C. has warned that impeachment with the fact of prearrest silence "should be approached with caution, and, wherever it is undertaken, it should be prefaced by a proper demonstration that it was 'natural' to expect the defendant to speak in the circumstances."[376] Such a showing is most improbable where by coming forward the defendant would have produced some

[370] Commonwealth v. Nickerson, 386 Mass. 54 (1982) (reversible error to allow impeachment of defendant's trial testimony by reference to his prearrest failure to come forward and tell police his story, which was partially incriminating).

[371] 426 U.S. 610 (1976). *See also* Commonwealth v. Martinez, 34 Mass. App. Ct. 131 (1993) (prosecutor's cross-examination of defendant regarding failure to come forward voluntarily and provide police with statements, hair and blood samples, or clothing); Commonwealth v. Bennett, 2 Mass. App. Ct. 575, 580 (1974) (prosecutor's cross-examination of defendant regarding his post-arrest, post-*Miranda* silence was reversible error); Commonwealth v. Sazama, 339 Mass. 154, 157–58 (1958) (evidence of silence violates art. 12 of the Mass. Const. Declaration of Rights). While such error can be found harmless (*see* Commonwealth v. Grieco, 5 Mass. App. Ct. 350, 358–59 (1977) (improper impeachment by prosecutor held harmless error)), it is normally "so egregious that reversal is the norm." Commonwealth v. King, 34 Mass. App. Ct. 466, 469 (1993) (quoting Commonwealth v. Mahdi, 388 Mass. 679, 698 (1983)); Commonwealth v. Martinez, 34 Mass. App. Ct. 131, 133 (1993) (substantial risk of miscarriage of justice).

[372] Jenkins v. Anderson, 447 U.S. 231, 239 (1980).

[373] Fletcher v. Weir, 455 U.S. 603 (1982) (per curiam).

[374] "No admission by silence may be inferred ... if the statement is made after the accused has been placed under arrest, after the police have read him his Miranda rights, or after he has been so significantly deprived of his freedom that he is, in effect, in police custody." Commonwealth v. Stevenson, 46 Mass. App. Ct. 506, 510 (1999), *rev. denied*, 429 Mass. 1109 (1999), quoting Commonwealth v. Ferrara, 31 Mass. App. Ct. 648, 652 (1991). *See also* Commonwealth v MacKenzie, 413 Mass. 498, 505–08 & n.8 (1992) (rejecting adoptive admission of accomplice's statement by defendant's post-*Miranda* silence, and elaboration of Court's "general wariness" of adoptive admissions).

[375] "[A] defendant's failure to report certain facts to someone other than the police would be an appropriate subject for cross-examination where it would have been natural for the defendant to report those facts." Commonwealth v. Nickerson, 386 Mass. 54, 62 n.6 (1982).

[376] Commonwealth v. Nickerson, 386 Mass. 54, 62 (1982). The Court suggested that the trial court should hold a voir dire on the question and, if impeachment evidence is admitted, instruct the jury to consider the silence for impeachment purposes "only if they find that the witness naturally should have spoken up in the circumstances." *See also* Commonwealth v. Rivera, 425 Mass. 633, 638–41 (1997) (same requirements of voir dire and jury instructions regarding prosecutor's questions about omissions from defendant's affidavit filed in support of pretrial suppression motion).

incriminating evidence against himself.[377] As for other cases, a defendant has no duty to report a crime nor to offer exculpatory information to the authorities.[378] The Court also stressed the many unimpeachable reasons why a defendant might refrain from telling his story to the police, and the possible "substantial prejudice" to the defendant should the jury take his silence as substantive evidence of guilt.[379]

If a defendant waives *Miranda* rights and gives a statement to the police, the prosecution may comment at trial upon his refusal to answer particular questions.[380] Also, the prosecutor may ask the defendant about any differences between her trial testimony and the statements she gave to the police. But "a prosecutor may not introduce evidence of a defendant's postarrest silence except in the context of the entire conversation and for the limited purpose of clarifying why the interview ended abruptly."[381]

§ 19.5B. EXCLUSION OF THE "FRUITS" OF UNLAWFULLY OBTAINED STATEMENTS

[377] Commonwealth v. Nickerson, 386 Mass. 54, 60–61 (1982) (defendant's story, that an absent third party cut the victim, placed defendant at the scene, admitted seeing the attack and the weapon, and admitted knowing the perpetrator and leaving the scene with him). *Compare* Commonwealth v. Barnoski, 418 Mass. 523 (1994) (permissible on cross-examination to question defendant's failure to contact the police in order to get help for his alleged friend, the victim, but not his failure to tell the police his exculpatory story).

[378] Commonwealth v. Nickerson, 356 Mass. 54, 60 (1982). Nor has a suspect any duty, except under court order, to appear in a lineup. *See* Commonwealth v. Holland, 410 Mass. 248, 259 at n.10 (1991) (implying, without deciding, inadmissibility of defendant's refusal, after receiving *Miranda* warnings, to appear in lineup).

[379] Commonwealth v. Nickerson, 386 Mass. 54, 61–62 n.6 (1982).

[380] Commonwealth v. Senior, 433 Mass. 453 (2001) (defendant's post-waiver silence when asked where he had been drinking did not amount to assertion of right to cut off questioning; therefore, prosecutorial comment permissible).

[381] Commonwealth v. Farley, 431 Mass. 306 (2000) (new trial ordered where prosecutor cross-examined defendant about her post-warnings silence in police questioning; precedents reviewed). *See also* Commonwealth v. Martinez, 431 Mass. 168, 183 (2000) (no error for prosecutor to elicit police testimony that defendant terminated the interview), *citing* Commonwealth v. Waite, 422 Mass. 792, 798–99 & n.5 (1996) (silence admissible in "rare situation" to dispel jury confusion, created by defense counsel, about why interrogation abruptly ended) and Commonwealth v. Habarak, 402 Mass. 105, 110 (1988) (admissible to show why interview ended abruptly), *distinguished in* Commonwealth v. DePace, 433 Mass. 379, 383-84(2001); Commonwealth v. Fowler, 431 Mass. 30, 38-39 (2000) (no evidence of juror confusion, nor of any conduct by defendant to cause confusion) *and in* Commonwealth v. Clarke, 48 Mass. App. Ct. 482, 485-88 (2000) (reversible error for prosecutor in final argument to use defendant's termination of interview as evidence of consciousness of guilt); Commonwealth v. King, 34 Mass. App. Ct. 466, 468–69 (1993) (reversible error to admit defendant's statement refusing to continue talking). *See also* Haberek v. Maloney, 81 F.Supp.2d 202, 209-11 (D. Mass. 2000) (collecting cases) (for testimony to constitute an impermissible comment on silence it must "(1) exhibit a manifest intent to comment on silence or (2) be of such a nature that a jury would naturally and necessarily construe the remarks as a comment on defendant's silence."). When testimony regarding defendant's silence is admitted under the *Habarak-Waite* exception, counsel should request protective jury instructions. *See Fowler, supra*, 431 Mass. at 38-39, fn 12.

1. In General

Subject to developing restrictions on suppressing evidentiary fruits of *Miranda* violations,[382] the Fourth, Fifth, Sixth, and Fourteenth Amendment exclusionary rules apply "not only to the direct results of police misconduct but also to the 'fruits' of official illegality."[383] Evidence is admissible if it derives from a source independent of the illegality, if "the connection between the police misconduct and the discovery of the challenged evidence is 'so attenuated as to dissipate the taint'" or "if the evidence would inevitably have been discovered in the normal course of a legal police investigation."[384]

Addressing the attenuation issue in *Wong Sun v. United States*,[385] the Supreme Court framed the question as "whether . . . the evidence . . . has been come at by exploitation of . . [the primary] illegality or instead by means sufficiently distinguishable to be purged of the primary taint."[386] If, for example, an illegally arrested defendant subsequently confesses, the question is whether the confession was "sufficiently an act of free will to purge the ... taint" of the prior illegality.[387] In *Brown v. Illinois*,[388] the Court followed up on the role of defendant's "free will" in this fruits analysis. The Court held that in asking whether a statement is a suppressible fruit of an unconstitutional arrest or is instead sufficiently attenuated from that violation to be free of its "taint," defendant's post-arrest waiver of his *Miranda* rights is not dispositive but rather is only one factor in the analysis. The other factors include: (1) the temporal proximity of the arrest and the confession, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct.[389] *See generally supra* § 17.2A.

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[382] *See infra* § 19.5B(3).

[383] *See* Commonwealth v. Lahti, 398 Mass 829, 833 (1986). Exclusion "is limited to evidence obtained in violation of the constitutional rights of the person who is challenging the admissibility of such evidence." Commonwealth v. Gallant, 381 Mass. 465, 470 n.4 (1980). *But see* Commonwealth v. Parham, 390 Mass. 833, 833–44 (1984) (applying attenuation test to defendant's claim that his statement was suppressible fruit of a statement illegally obtained from his codefendant).

[384] Commonwealth v. Lahti, 398 Mass. 829, 833–34 (1986); Commonwealth v. McAfee, 63 Mass. App. Ct. 467, 478 (2005) (holding that where a statement taken in violation of *Payton* led to a gun that inevitably would have been discovered in the course of executing a lawful search warrant, the gun should not be suppressed as a fruit of the unlawfully obtained statement).

[385] 371 U.S. 471, 488 (1963).

[386] Wong Sun v. United States, 371 U.S. 471 (1963), *quoted in* Commonwealth v. Bradshaw, 385 Mass. 244, 258 (1982).

[387] Brown v. Illinois, 422 U.S. 590, 602 (1975); Commonwealth v. Fielding 371 Mass. 97, 113–14 (1976); Commonwealth v. Sylvia, 380 Mass., 180, 183-85 (1980).

[388] 422 U.S. 590 (1975).

[389] Brown v. Illinois, 422 U.S. 590, 603–04 (1975), *applied in* Commonwealth v. Chongarlides, 52 Mass. App. Ct. 366 (2001) and Commonwealth v. Bradshaw, 385 Mass. 244, 258 (1982). In New York v. Harris, 495 U.S. 14 (1990), the Supreme Court distinguished *Brown* and its attenuation analysis. In *Harris*, the police entered defendant's home and arrested him even though they had no arrest warrant. Once at the police station, defendant made a statement. Because, unlike in *Brown*, the officers had probable cause to arrest defendant, he had no Fourth Amendment right to be free of custody, and the Fourth Amendment violation was

2. Multiple Confessions: "Cat-out-of-the-Bag" Analysis

The police often subject a suspect to a series of interrogations and extract several incriminating statements. If the first statement is the fruit of some illegality, such as an illegal arrest, coercive questioning techniques or violation of the *Miranda* rules, the question arises what impact this will have on the admissibility of subsequent statements. If the prior illegality results in an unlawfully obtained confession, the question is, having confessed once, albeit due to a constitutional violation, could any subsequent statement be truly voluntary? In *United States v. Bayer*[390] Justice Jackson described the defendant's likely reaction:

> Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may he looked upon as fruit of the first.[391]

The cat-of-out-the-bag doctrine, which is a species of standard "fruits-attenuation" analysis, requires the exclusion of a statement "if, in giving [it], the defendant was motivated by the belief that, after a prior coerced statement, his effort to withhold further information would be futile and he had nothing to lose by repetition or amplification of the earlier statements. Such a statement would be inadmissible as the direct product of the earlier coerced statement."[392] Although the ultimate question is whether, under the totality of circumstances, the later statement is voluntary,[393] an

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thus limited to the warrantless entry of his home to effect the arrest. *See* Payton v. New York, 445 U.S. 573 (1980). So, the Court held that his subsequent statement to police at the station was not a fruit of that Fourth Amendment violation, confined as it was to the entry of his home; when he made the statement he was in lawful custody, and the Fourth Amendment violation had run its course.

[390] 331 U.S. 532 (1947).

[391] *Id*. at 540-41. *See also* Darwin v. Connecticut, 391 U.S. 346, 350–51 (1968) (concurring and dissenting opinion of Harlan, J.): "If a first confession is not shown to he voluntary, I do not think a later confession that is merely a direct product of the earlier one should be held to be voluntary." *See also* Commonwealth v. Knapp, 26 Mass. 495, 506 (1830), for the common law presumption of continued coercion.

[392] Commonwealth v. Mahnke, 368 Mass. 662, 686 (1975), *cert. denied,* 425 U.S. 959 (1976) (citing United States v. Bayer, 331 U.S. 532, 540–41 (1947)).

[393] Commonwealth v. Mahnke, 368 Mass. 662, 682–83 (1975). *Mahnke* identifies two lines of analysis from the Supreme Court cases. "Break in stream of events" analysis looks for a "break" in the prior coercive circumstances "sufficient to insulate the [subsequent] statements from the effect of all that went before," Mahnke, supra, 368 Mass. at 682 (quoting Clewis v. Texas, 386 U.S. 707, 710 (1967)). "Cat out of the bag" analysis, articulated in United States v. Bayer, 331 U.S. 532, 540–41 (1947), focuses on the effect of the previous confession on the defendant's will). *Mahnke, supra,* 368 Mass. at 681–88. For reaffirmation of the *Mahnke* lines of analysis, *see* Commonwealth v. Smith, 412 Mass. 823, 830f. & n.9 (1992) (avoiding decision whether, under state common law, Commonwealth must prove satisfaction of both tests: "because interrogation without benefit of the *Miranda* warnings is itself improper police conduct, the absence of a break in the stream of events, in some circumstances, may mandate the suppression of a post-Miranda statement, even where the suspect made no incriminating statement during the course of the illegal interrogation"); Commonwealth v. Prater, 420 Mass.

inference exists "that the second confession was the product of the first," which the Commonwealth can overcome "only by [showing] such insulation as the advice of counsel or the lapse of a long period of time."[394]

3. *Miranda* Violations and "Fruits-Attenuation" Analysis

The Supreme Court has suggested that in some circumstances the "fruit of the poisonous tree" doctrine should not require suppression of a voluntary statement which followed one obtained in violation of the *Miranda* rules.[395] In *Oregon v. Elstad* the Supreme Court refused to apply the cat-out-of-the-bag doctrine to *Miranda* violations,[396] a refusal that the Court has since reaffirmed.[397] Thus, if the police obtain a confession by violating a suspect's *Miranda* rights, then give him proper warnings and obtain a waiver, his subsequent statements will not be regarded as "tainted" by the prior illegality unless the police deliberately use this question-first, warn-later approach to circumvent *Miranda*'s protections.[398] However, in the case of a deliberate evasion of

569, 582 at n.11 (1995) (depending on facts of the case, one or both lines of analysis might apply); Commonwealth v. Nom, 426 Mass. 152, 155–56 (1997) (same); Commonwealth v. Torres, 424 Mass. 792, 799 & n.8 (1997).

[394] United States v. Gorman, 355 F.2d 151, 157 (2d Cir. 1965), *cert. denied*, 384 U.S. 1024 (1966) (Friendly, J.), *quoted in* Commonwealth v. Meehan, 377 Mass. 552, 570–71 (1979), *cert. dismissed*, 445 U.S. 39 (1980) (Commonwealth failed to overcome inference that defendant's spontaneous statement to family members was not product of previous involuntary confession where the statement was made a relatively short time after the confession, was corroborative, and there was no opportunity for consultation with family or break in time or the stream of events). *See also* Commonwealth v. Osachuk, 418 Mass. 229, 236 (1994) (questioner's brief absence from interrogation room was not sort of "intervening circumstance" that breaks stream of events). *Compare* Commonwealth v. Prater, 420 Mass. 569, 582 (1995) (relevant factors include external constraints which may have overborne defendant's will, temporal proximity of second confession to the first, and presence of intervening circumstances: 90-minute break during which defendant's intoxication wore off sufficed to break stream); Commonwealth v. Mahnke, 368 Mass. 662, 681–88 (1975) (upholding admissibility of statements made after defendant left cabin where captors had obtained coerced statements from him; although defendant was still in captors' company, the absence of new threats and his rejection of several opportunities for escape showed that later statements were products of free will). *Cf. Mahnke, supra*, 368 Mass. at 705–14 (dissenting opinion of Kaplan, J.).

[395] *Compare* Commonwealth v. Meehan, 377 Mass. 552, 568–69 & n.12 (1979) (distinguishing involuntary confessions, to which the fruits doctrine applies, from simple violations of *Miranda);* New York v. Quarles, 467 U.S. 649, 660 (1984) (O'Connor, J. concurring in part and dissenting in part) *(Miranda* bars only testimonial fruits of a violation, not tangible evidence discovered as a result of the statement).

[396] 470 U.S. 298, 314 (1985).

[397] *See* Missouri v. Seibert, 542 U.S. 600, 612 n.4 (2004).

[398] Oregon v. Elstad, 470 U.S. 298, 314 (1985) ("A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should (support a conclusion) that the suspect made a rational and intelligent choice whether to waive or invoke his rights"). *But see* Missouri v. Seibert, 542 U.S. 600, 621 (2004) (Kennedy, J. , concurring) (*Elstad* is the proper approach to addressing such sequential confessions unless the police deliberately seek to evade *Miranda*'s requirements by taking an unwarned confession, then giving the *Miranda* warnings and eliciting a waiver, then repeating the interrogation with the result that the suspect again confesses).

Miranda through a question-first, warn-later strategy, the ensuing Mirandized statement must be suppressed unless the police take curative measures that would cause a reasonable person to understand the import and effect of the *Miranda* warnings and waiver.[399]

The S.J.C. takes a more protective approach, rejecting *Elstad* and citing common-law principles to reaffirm earlier Massachusetts cases applying fruits theory to *Miranda* violations.[400] An admission or confession obtained in violation of *Miranda* requirements presumptively taints any subsequent confession made by the accused, and the taint is not dissipated solely by giving *Miranda* warnings. The prosecution may overcome this presumption by showing either: "(1) after the illegally obtained statement, there was a break in the stream of events that sufficiently insulated the post-*Miranda* statement from the tainted one;[401] or (2) the illegally obtained statement did

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In writing for the four judge plurality, Justice Souter set out a more protective approach to this question-first, then-warn interrogation technique. Rather than departing from the *Elstad* approach only in cases in which the police deliberately seek to evade *Miranda*'s requirements, Justice Souter would ask, as a threshold matter, if looking at the totality of the circumstances, was it reasonably likely that the warnings, when and as given, were effective in conveying to the suspect that "he had a real choice about giving an admissible statement at that juncture?" *Id.* at 612-13 & n.4. If not, the ensuing waiver would be treated as ineffective, and the ensuing interrogation would be treated as a continuation of its unwarned predecessor. Only if the warnings were regarded as effective would the court then proceed to the question of waiver. *Id.* However, because this approach garnered only four votes, Justice Kennedy's more narrow, deliberate-evasion approach constitutes *Seibert*'s operative rule. For state court practitioners, this distinction matters little, because the S.J.C. has long mandated an even more protective solution under common-law principles. *See* note 417 & text *infra*.

[399] *See* Missouri v. Seibert, 542 U.S. 600, 621 (Kennedy, J., concurring).

[400] *See, e.g.*, Commonwealth v. Smith, 412 Mass. 823, 836 (1992) (quoting State v. Lavaris, 664 P.2d 1234, 1237 (Wash. 1983) (post-*Miranda* statement presumptively tainted by inculpatory statement given during illegal interrogation, where police allowed interrogation to continue without affording defendant break in stream of events; "[t]he failure to administer the Miranda warnings . . . is itself an improper police tactic, and 'any confession obtained in the presence of proper . . . warnings is by definition "coerced " ' "). Prior Massachusetts cases include, Commonwealth v. Haas, 373 Mass. 545, 554–55 (1977) (applying "cat out of the bag" doctrine to suppress properly warned statements which closely followed statements obtained in violation of *Miranda;* Court also suppressed tangible fruits of arrest that, because based on same statements, lacked probable cause); Commonwealth v. White, 374 Mass. 132, 138–39 (1977), *aff'd by an equally divided court*, 439 U.S. 280 (1978) (suppressing drugs seized under search warrant issued on basis of statements obtained in violation of *Miranda);* Commonwealth v. Watkins, 375 Mass. 472, 480–82 (1978) (noncoerced first statement, suppressed for *Miranda* violations, only admitted being in Boston with codefendant during relevant time period, but otherwise did not really let the "cat" out of the bag); Commonwealth v. White, 353 Mass. 409, 416–19 (1967), *cert. denied*, 391 U.S. 968 (1968) (upholding ruling that the defendant's third statement was "sufficiently separated from [two earlier suppressed confessions] as not to be tainted by them"); Commonwealth v. Gallant, 381 Mass. 465, 471 (1980) (refusing to suppress defendant's confession as the "fruit" of the violation of another s *Miranda* rights. However, the Court conceded the possibility of a "broader application of the prophylactic rule" if the police fabricated the other statement, or had obtained it by coercion, or possibly if the police had been led to defendant only because of the other's statements).

[401] *See supra* notes 347, 348, discussing "break in stream" analysis. *Compare* Commonwealth v. Mark M., 65 Mass. App. Ct. 703, 708, rev. denied, 447 Mass. 1105 (2006) (juvenile's statements following those taken in violation of *Miranda* tainted where officer left

not incriminate the defendant, or, as it is more colloquially put, the cat was not out of the bag."[402] By basing this rule on state common law rules of evidence, the S.J.C. avoided reliance on the Massachusetts Constitution Declaration of Rights.[403]

On a related issue – whether physical evidence obtained as a result of a *Miranda* violation should be suppressed as a fruit of that violation – the Supreme Court and the S.J.C. have also split. In *United States v. Patane*,[404] the Supreme Court refused to apply the exclusionary rule to a gun found as a direct result of a *Miranda* violation, holding that the exclusion of the suspect's statement fully vindicated the Fifth Amendment protection against compelled self-incrimination.[405] Suppressing the gun, which the Court regarded as a particularly reliable piece of evidence only marginally related to the underlying Fifth Amendment violation, was in the Court's eyes too high a price to pay.[406] The S.J.C. disagreed. In a case with facts virtually identical to those in *Patane*, the Court characterized the failure to administer *Miranda* warnings as an improper, illegal police tactic that must be discouraged and therefore held, as a matter of state common law, that suppressing the gun thus recovered by the police was a necessary remedy.[407]

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room for a few minutes and then resumed interrogation) *with* Commonwealth v. Garner, 59 Mass. App. Ct. 350, 366-67, *rev. denied*, 440 Mass. 1107 (2003) (statement given to police seven hours after statement taken in violation of *Miranda* sufficiently attenuated where suspect volunteered to go to the police station to cooperate, was unrestrained and was given *Miranda* warnings).

[402] Commonwealth v. Larkin, 429 Mass. 426, 436-38 (1999); Commonwealth v. Prater, 420 Mass. 569 (1995) (quoting Commonwealth v. Osachuk, 418 Mass. 229, 235–36 (1994)). *See also* Commonwealth v. Smith, 412 Mass. 823, 836–37 (1992) (presumption of taint supports value of "bright-line" *Miranda* rule); Commonwealth v. Nom, 426 Mass. 152, 155–56 (1997). In some circumstances, the absence of a break in the stream of events might require suppression of a post-*Miranda* statement even if the illegally obtained statement did not incriminate the defendant. Commonwealth v. Torres, 424 Mass. 792, 799 & n.8 (1997).

"Cat-out-of-the-bag" analysis focuses on whether defendant's second confession was primarily motivated by feeling that he had nothing further to lose. *Prater, supra*, 420 Mass. at 583–84. *See also Osachuk, supra* (distinguishing Commonwealth v. Watkins, 375 Mass. 472 (1978), suppression ordered; "wiser course . . . is to presume that a statement made following the violation of . . . *Miranda* rights is tainted").

[403] The S.J.C. has previously left open the question whether art. 12 of the state constitution supported the pre-*Elstad* state cases. *See* Commonwealth v. Shine, 398 Mass. 641, 650 n.3 (1986) (avoiding argument under Mass. Const. Declaration of Rights art. 12 that cat-out-of-the-bag doctrine applies to *Miranda* violations); Commonwealth v. Smallwood, 379 Mass. 878, 886 n.2 (1980) (impliedly reserving question whether cat-out-of-the-bag analysis applies when the earlier statement is not coerced). For persuasive argument why the cat-out-of-the- bag doctrine should apply to *Miranda* violations, *see* Oregon v. Elstad, 470 U.S. 298, 318 et seq. (1985) (dissenting opinion of Brennan, J.).

[404] 542 U.S. 630 (2004).

[405] *Id*. at 636-37.

[406] *Id*.

[407] *See* Commonwealth v. Martin, 444 Mass. 213, 215 (2005).