An Overview of Massachusetts Law: Miranda and Juveniles

YOUTH ADVOCACY DIVISION
COMMITTEE FOR PUBLIC COUNSEL SERVICES [1]

Whenever your client makes a statement to the police, the following should be considered:

- Was your client in custody
- Was your client interrogated (or the functional equivalent)
- Under 14 – was there an actual opportunity to consult with an interested adult
- Over 14 – was there a meaningful/genuine opportunity to consult with an interested adult; if not, look at the characteristics of your client.
- Was the adult an "interested adult"
- Was the waiver knowing, intelligent and voluntary
- Was the statement voluntary

I. *MIRANDA* APPLIES TO JUVENILES

a) In *In Re Gault,* 387 U.S.1 (1967) the Supreme Court held that the due process clause of the U.S. Constitution applies to juveniles. Prior to *Gault*, many constitutional rights and protections were glossed over in juvenile court in the name of *parens patraie.* The Court acknowledged that as a result, it was frequent practice that rules governing the arrest and interrogation of adults by the police were not observed in the case of juveniles. *Id*. at 14. *Gault* established for juveniles, notice of charges, right to counsel, right of confrontation and cross examination, and the right against self- incrimination.

Recognizing a juvenile's right against self-incrimination, the court stated, "[w]e conclude that the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults. We appreciate that special problems may arise with respect to waiver of the privilege by or on behalf of children, and that there may well be some differences in technique-but not in principle-depending upon the age of the child and the presence and competence of parents. The participation of counsel will, of course, assist the police, Juvenile Courts and appellate tribunals in administering the privilege. If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or

[1] Updated 1/15 Holly T. Smith, Esq., Wendy Wolf, Esq.

suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair." *Id.* at 55

b) Even prior to *In Re Gault*, the U.S. Supreme Court recognized that juveniles need special protection. "[We] are told that this boy was advised of his constitutional rights before he signed the confession and that, knowing them, he nevertheless confessed. That assumes, however, that a boy of fifteen, without aid of counsel, would have a full appreciation of that advice and that on the facts of this record he had a freedom of choice. We cannot indulge those assumptions. Moreover, we cannot give any weight to recitals which merely formalize constitutional requirements. Formulas of respect for constitutional safeguards cannot prevail over the facts of life which contradict them. They may not become a cloak for inquisitorial practices and make an empty form of the due process of law for which free men fought and died to obtain." *Haley v. Ohio,* 332 U.S. 596, 601 (1948).

A juvenile cannot be compared to an adult "in full possession of his senses and knowledgeable of the consequences of his admissions." *Gallegos v. Colorado*, 370 U.S. 49 (1962).

c) The Supreme Court in *Gault* did not explicitly state that *Miranda* warnings must be provided in juvenile cases and did not set out a procedure for protecting juveniles when questioned by police. In Massachusetts, the SJC held that the Commonwealth has a heavy burden of demonstrating that a statement made by a juvenile was a knowing and intelligent waiver of *Miranda. Commonwealth v. A Juvenile*, 389 Mass. 128, 132 (1983). The court recognized that there are special problems when dealing with children and waiver, citing research which suggests that most juveniles do not understand "the significance and protective function of these rights even when they read the standard *Miranda* warnings. *Id.* at 131. *Commonwealth v. A Juvenile* also articulated the "interested adult" rule in Massachusetts. (see section III)

II. *MIRANDA* WARNINGS ARE REQUIRED WHEN A JUVENILE IS THE SUBJECT OF CUSTODIAL INTERROGATION OR ITS FUNCTIONAL EQUIVALENT

a) Custody

Miranda protections apply when a person is in custody and subjected to interrogation or its functional equivalent. *Rhode Island v. Innis*, 446 U.S. 291,300-301 (1980). "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently." *Miranda v. Arizona,* 384 U.S. 436, 444 (1966).

The defendant has the burden of proving that he/she was in custody. *Commonwealth v. Girouard*, 436 Mass. 657, 665 (2002).

The test for custody is how a reasonable person in the juvenile's position would have understood his/her position. *Commonwealth v. A Juvenile*, 402 Mass. 275, 277 (1975) (Emphasis added). Age is a consideration in Massachusetts juvenile jurisprudence. It is an object test "whether a reasonable person in the suspect's shoes would experience the environment in which the interrogation took place as coercive." *Commonwealth v. Larkin*, 429 Mass. 426, 432 (1999). The critical question is "whether considering all the circumstances, a reasonable person in the defendant's position would have believed that he was in custody. *Commonwealth v. Brum* 438 Mass, 103, 111 (2002)

US Supreme Court and juveniles – in *J. D. B. v. North Carolina,* 131 S.Ct. 2394 (2011) the U.S. Supreme Court held that a child's age properly informs the *Miranda* custody analysis. *J.D.B.* overrules *Yarborough v. Alvarado*, 541 U.S. 652 (2004).[2] The Court, in a 5-4 opinion authored by Justice Sotomayor, held that age must be considered in the determination of whether a juvenile is in custody since "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go." *Id.* at 19. The Court observed that this addition to the traditional custody analysis will not destroy the objective nature of the test since a child's age differs from other personal characteristics that have no objectively discernible relationship to a "reasonable person's" understanding of whether she is free to leave. "Including age as part of the custody analysis requires officers neither to consider circumstances 'unknowable' to them, nor to 'anticipat[e] the frailties or idiosyncrasies' of the particular suspect whom they question." *Id.* at 24. Justice Sotomayor notes that the Supreme Court's history is "replete with laws and judicial recognition that children cannot be viewed simply as miniature adults." *Id.* at 23.

> In *J.D.B.*, a police officer in uniform removed a 13 year old boy from his middle school classroom and brought him to a closed-door conference room where he was questioned by two police officers for 30 to 45 minutes. The juvenile was not given his *Miranda* rights or given the opportunity to speak to his grandmother. He was never informed that he was free to leave the room. The boy then confessed to break-ins in the area and was only then told that he could refuse to answer the investigator's questions and that he could leave at any time. In denying the child's motion to suppress, the state courts found that he was not in custody when he confessed, declining to extend the test for custody to include consideration

[2] The U.S. Supreme Court had held that the age of the defendant is not a consideration in determining custody. *See concurrence Connor, J.* (there may be cases were the suspects age is relevant to *Miranda* custody inquiry) *see also Breyer dissent* at 669-676. ("Common sense, and an understanding of the law's basic purpose in this area, are enough to make clear that Alvarado's age--an objective, widely shared characteristic about which the police plainly knew--is also relevant to the inquiry." at 676).

of the age of an individual subjected to police questioning. The U.S. Supreme Court reversed and remanded the case to the state court to consider the juvenile's age in the custody determination.

In *JDB,* the Court points out that age should be considered as a factor since children "generally are less mature and responsible than adults" and often lack the perspective, experience and judgment to "recognize and avoid choices that could be detrimental to them." *Id.* at 20. Justice Sotomayor emphasizes this by providing examples of the legal limitations placed on children, including "their ability to alienate property, enter a binding contract enforceable against them, and marry without parental consent." *Id.* at 22. This supports the "settled understanding that the differentiating characteristics of youth are universal." *Id. "*It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave. Seeing no reason for police officers or courts to blind themselves to that commonsense reality, we hold that a child's age properly informs the *Miranda* custody analysis." *Id.* at 8.

Custodial interrogation is any "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

i) <u>Factors Courts Consider</u>:

- Place of the interrogation;
- Whether the police have communicated their belief that the defendant is a suspect and whether this belief influenced the defendant's perception of the situation. *Commonwealth v. Morse,* 427 Mass. 117 (1998).
- The nature of the interrogation - Was it aggressive, informal, mentally or physically intimidating? Was it a coercive environment?
- Was the juvenile free to end the questioning by leaving the place of the interrogation or asking the police to leave? Did the questioning end with the juvenile's arrest?

In determining whether there was custodial interrogation, courts consider the four factors and apply them to the totality of the circumstances. See *Commonwealth v. Bryant*, 390 Mass. 729 (1984), *Commonwealth v.O'Brien*, 432 Mass. 578, 585-86 (2000) (youthful offender case).

Commonwealth v. Coleman, 49 Mass. App. Ct. 150 (2000) provides a good illustration of the above four factors in which the court found that the defendant was in custody, *Miranda* warnings should have been provided, and the statements should have been suppressed. Here the defendant was suspected of firing a gun at an MBTA station and the police went to the defendant's apartment to question him.

(1) Place of the questioning - the defendant was questioned in a bedroom measuring 11 x 12 feet, the defendant was sitting on the bed, one officer was sitting next to him and two other officers were standing, blocking the door. This situation was "isolating and coercive."

(2) Focus on the defendant - while the subjective beliefs of the police are irrelevant in determining the issue of custody, in this case, the belief that the defendant was guilty was communicated and influenced the confession.

(3) Nature of the interrogation - the questioning was "aggressive and persistent," the defendant's denials were "scorned and overridden," and the interview was largely one-sided. Police told the defendant that they were trying to find a member of a gang who might cooperate with the police, against the defendant. The police knew the defendant feared this individual.

(4) Possibility of ending the interview – given the facts in this case, the defendant was not free to leave. He was told if he didn't cooperate he would be looking at more serious charges and he would be arrested on the spot. The police fabrication was another psychological force.

Subjective Beliefs of Police

The subjective beliefs held by law enforcement officers are irrelevant in determining whether a person being questioned is in custody for purposes of the receipt of *Miranda* warnings except to the extent that those beliefs influence the objective conditions surrounding an interrogation. *Stansbury v. California*, 511 U.S. 318, 323-324, (1994) ("Our decisions make clear that the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." at 323). *Commonwealth v. Obershaw*, 435 Mass. 794 (2002).

b) Interrogation or its Functional Equivalent

Miranda protections apply when a person is in custody and subjected to interrogation or its functional equivalent. *Rhode Island v. Innis*, 446 U.S. 291, 300-301 (1980). "The term 'functional equivalent' encompasses 'any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" *Commonwealth v. Rubio*, 27 Mass. App. Ct. 506, 512 (1989), quoting from *Rhode Island v. Innis*, 446 U.S. at 301.

i) Case Examples

In Brewer v. Williams, 430 U.S. 387 (1977), the defendant asserted his right to counsel and his attorney was told by the police that they would not question him. The defendant was under arrest for the murder of a young girl. As he was being transported to the police station the police said it was important to find the body of the victim so she could have a Christian burial. The police knew the defendant had a history of mental illness and he was religious. The

defendant showed the police where the body was located. The Court held this was a violation of the Sixth Amendment.

Commonwealth v. Clark C., 59 Mass. App. Ct. 542 (2003) the court found that police statements to the juvenile were likely to provoke an incriminating response given the circumstances of the case and the juvenile's age. In *Clark C.*, the police spoke to the juvenile over the telephone about a home invasion. As a result of this conversation, the juvenile agreed to meet with the police. When this did not occur, the police went to the juvenile's home with an arrest warrant. The juvenile was asleep in his bedroom. An officer woke him up, told him to get dressed and come with him, whereupon the juvenile asked, "did my grandmother turn me in?" The court found that this statement was spontaneous and not in response to interrogation. However, then the officer responded, "no … you said you were going to turn yourself in …" and the juvenile replied that he was afraid because he had "a previous bad experience with police officers." The motion judge found that this constituted custodial interrogation or its functional equivalent. The SJC agreed with the motion judge because the police were dealing with a juvenile who was recently awoken and the police did more than answer the juvenile's question in the negative.

c) Unsolicited Statements

Unsolicited statements made to the police are admissible. Spontaneous and unprovoked statements are admissible even if made after a defendant has invoked his right to remain silent. *Commonwealth v. Brum,* 438 Mass.at 115 (after invoking his right to remain silent, the defendant blurted out, "I just fucked myself good, didn't I?"). *See also, Commonwealth v. Diaz*, 422 Mass. 269, 270-271 (1996).

- *Commonwealth v. Alan A.*, 47 Mass. App. Ct. 271 (1999), *fur. app. rev. den*. 430 Mass 1108 (after consulted with his parents, the juvenile would not speak to police, however he agreed to show the police where the gun was and made "unsolicited" statements to the police that were admissible).
- *Commonwealth v. King*, 17 Mass. App. Ct. 602 (1984) (incriminating statement that came at the completion of the booking procedure and after the juvenile asked to see the arrest warrant; was admissible because it was not made in response to police questioning).

d) Routine Booking Questions

Questions at booking are admissible as long as they are not designed to elicit an inculpatory response.

- *Pennsylvania v. Muniz,* 496 U.S. 582, 601 (1990) (questions such as "address, height, weight, eye color, date of birth, and current age do not qualify as custodial interrogation

… because the questions were not intended to elicit information for investigatory purposes").

- *Commonwealth v. Guerrero,* 32 Mass. App. Ct. 263, 268 (1992)(Questions about employment occupation can be incriminating especially in a drug case where the defendants\ states at booking he is not employed but the court did state that "[I]t will be preferable, unless Miranda warnings are repeated prior to booking, to scrub questions about employment status from the booking ritual")
- *Commonwealth v. Acosta*, 416 Mass. 279 (1993) ("Responses to booking questions [may be] testimonial in nature, their use would not be prohibited by Art. 12 unless incriminatory evidence was obtained by compulsion").
- *Commonwealth v. Rise* 50 Mass. App. Ct. 836, 842 (2001) (question concerning where the juvenile lived was admissible and court held "[I]n order for the booking question to be compelled, it must be designed or reasonably likely to elicit an incriminating response").
- *See US v. Pacheco-Lopez,* 531 F. 3d 420 (6th Cir., 2008) (questions such as "where he was from, how he had arrived at the house, and when he had arrived are questions "reasonably likely to elicit an incriminating response," thus mandating a *Miranda* warning").

e) Notification to Parents of Arrest

M.G.L. ch. 119 §67:

> "… whenever a child between seven and seventeen years of age is arrested with or without a warrant, as provided by law, the officer in charge of the police station or town lockup to which the child has been taken shall immediately notify the probation officer of the district court or of the juvenile court, if there is one, within whose judicial district such child was arrested and at least one of the child's parents, or, if there is no parent, the guardian or person with whom it is stated that such child resides, and shall inquire into the case. Pending such notice and inquiry, such child shall be detained…."

Police cannot book a juvenile without first summoning an interested adult under ch. 119, § 67. *Commonwealth* v. *Rise,* 50 Mass. App. Ct at 842. However, a violation of § 67 does not make an otherwise admissible statement inadmissible. "A violation of this statute, however, accompanied by lengthy questioning by the police would be an important factor to be considered in determining whether a detained juvenile had been overreached or coerced by the police…" *Commonwealth v. Wallace*, 346 Mass. 9, 16 (1963).

f) Invocation of Right to Counsel

During a custodial interrogation, if the "accused" states that he wants to remain silent the questioning must cease and, if counsel is requested, questioning must cease until an attorney is present. *Edwards v. Arizona*, 451 U.S. 477, 481 (1981).

The police did not "scrupulously honor" the defendant's invocation of his right to remain silent, under the 5th Amendment and Article 12, when the defendant chose not to speak to one officer and then thirty-five minutes later two other officers questioned him. *Commonwealth v. Callender*, 81 Mass. App. Ct. 153 (2012). In reaching its decision, the court looked to the totality of the circumstances and relied upon *Michigan v. Mosley,* 423 U.S. 96 (1975). In *Mosley* the court stated that where a suspect invokes his right to remain silent is subsequently re-approached for interrogation, the court must determine "whether the person's right to be free from interrogation, once exercised, was 'scrupulously honored' before questioning resumed." Some of the factors to be considered under *Mosley* are: 1) whether a significant amount of time elapsed between the suspect's invocation of the right to remain silent and further questioning; 2) whether the same officer conducted both the interrogation where the suspect invoked the right and the subsequent interrogation, and whether the venues differed; 3) whether the suspect was given a fresh set of Miranda warnings before the subsequent interrogation; 4) whether the subsequent interrogation concerned the same crime as the interrogation previously cut off by the suspect; and 5) the persistence of the police in wearing down the suspect's resistance in order to change his mind.

Article 12 provides greater protection in this context than the Fifth Amendment and in the **pre-waiver** context, *art. 12* does not require a suspect to invoke his right to remain silent with the utmost clarity, as required under Federal law. *Commonwealth v. Mavredakis*, 430 Mass. 848, 858-860 (2000), see also, *Commonwealth v. Clarke*, 461 Mass. 336 (2012), *and cases cited therein*. In *Clarke,* the SJC found that the defendant's pre-waiver conduct of shaking his head from side to side when asked "so you don't want to speak?" was an invocation of the his right to remain silent . *Id.* at 337 (emphasis added).

III. THE WAIVER MUST BE KNOWING, INTELLIGENT AND VOLUNTARY

The Commonwealth has the burden of proving a knowing and intelligent waiver, **beyond a reasonable doubt**. *Commonwealth v. Day*, 387 Mass. 915, 920-921 (1983).

"The inquiry [into the validity of a waiver] has two distinct dimensions. First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine,* 475 U.S. 412, 422 (1986).

Courts are to "indulge every reasonable presumption against waiver of fundamental Constitutional rights." *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938).

All of the warnings must be given. *Commonwealth v. Adams,* 389 Mass. 265, 268 (1983). If all warnings are not given, any evidence obtained cannot be used against the defendant.

A written notation of the waiver is not essential to show a valid waiver. *Commonwealth v, Cain*, 361 Mass. 224, 229 n. 2 (1972).

The Commonwealth has a heavy burden of demonstrating that the defendant was "advised of his rights in a meaningful way that he could comprehend." *Commonwealth v. Seng*, 436 Mass. 537, 544 (2002)., *app .aft. remand* 445 Mass. 536, 445 Mass. 536 (on issue of competency). In *Seng*, the SJC ordered a new trial because the *Miranda* warnings, which were administered in Khmer, were deficient. The defendant was not advised of his right to remain silent. He was told he must be truthful, he was never advised that anything he said could be used against him in court, and he was not advised that a lawyer would be appointed if he could not afford one. After the defendant was given the defective warnings in Khmer, he was read the warnings in English. The court held that "where 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." *Id.* at 547.

In *Commonwealth v. Hoyt*, 461 Mass. 143 (2011) after *Miranda* warnings were provided, the defendant stated to the police "I'd like an attorney present. I mean but I can't afford one. So I guess I'll speak to you now. I don't have an attorney." The Commonwealth argued that the latter two phrases made the first statement regarding an attorney ambiguous and thus the defendant didn't adequately invoke his right to counsel. The Court said not only was this an unambiguous invocation of his right to counsel but the latter two phrases indicated that the defendant didn't understand his rights and therefore, the Commonwealth did not satisfy its heavy burden of a knowing and intelligent waiver.

In *Commonwealth v*. *MacNeill*, 399 Mass. 71 (1987), the juvenile, aged 16 years and 8 months old, was charged with murder. He had completed the eighth grade and left school because the teachers weren't giving him enough work. He did not consult with his grandfather who was at the police station when he was questioned. The motion judge observed the juvenile on the stand and the juvenile appeared to be bright and answered the questions appropriately. Also, while he was being detained pre-trial, the juvenile pretended to attempt suicide so he could go to Bridgewater to study the law books. The statement was admissible as it was knowingly, intelligent and voluntary.

IV. COURTS LOOK TO THE TOTALITY OF CIRCUMSTANCES TO ASSESS WHETHER THE WAIVER WAS VALID

In determining whether there has been a valid waiver courts look at the characteristics of the juvenile and the circumstances/details of the interrogation. See *Commonwealth v. Williams,* 388 Mass. 846 (1983); *Commonwealth v. O'Brien, supra* 432 Mass. at 586-587.

"The Commonwealth bears the burden of proving beyond a reasonable doubt that the defendant voluntarily, knowingly, and intelligently waved his *Miranda* rights in the totality of the circumstances. " *Commonwealth v. Jackson*, 432 Mass. 82, 85 (2000).

V. SPECIAL PROTECTIONS FOR JUVENILES - The Interested Adult Rule

Massachusetts follows the interested adult rule and recognizes that most children do not understand the significance and protective function of *Miranda.* "[F]or the Commonwealth successfully to demonstrate a knowing and intelligent waiver by the juvenile, in most cases, it should show that a parent or an interested adult was present, understood the warnings, and had the opportunity to explain his rights to the juvenile so that the juvenile understands the significance of waiver of these rights." *Commonwealth v. A Juvenile*, 389 Mass. 128,134 (1983) "These added protections are consistent with our legal system's traditional policy which affords minors a unique and protected status. The law presumes different levels of responsibility for juveniles and adults and, realizing that juveniles frequently lack the capacity to appreciate the consequences of their actions, seeks to protect them from the possible consequences of their immaturity. Moreover, by providing the juvenile with the opportunity for meaningful consultation with an informed adult, these procedures prevent the warnings from becoming merely a ritualistic recitation wherein the effect of actual comprehension by the juvenile is ignored." *Id.* at 132.

a) Juveniles Under Age Fourteen

For juveniles under age 14, an interested adult must be present and the interested adult must understand the warnings and have an opportunity to explain the rights to the juvenile so the juvenile understands the significance of a waiver. If these protections are not followed, the waiver is invalid. *Commonwealth v. A Juvenile*, 389 Mass. 128,134 (1983).

"Actual opportunity" for consultation, rather than actual consultation, fulfills the requirements set forth in *Commonwealth v. A Juvenile*. *Commonwealth v. Mark. M.*, 59 Mass. App. Ct. 86 n.5 (2003), citing *Commonwealth v. Phillip S.*, 414 Mass. 804, 811 (1993). The interested adult must understand that they have the opportunity to consult, what their role is, and be given an opportunity to consult prior to the waiver. *Id.* at 92. The consultation must take place after the juvenile and the adult have been given *Miranda* warnings and before any waiver is given and questioning begins. *Commonwealth v. Mark M.,* 65 Mass. App. Ct. 703, 706 (2006). The Commonwealth does not have to prove that the juvenile and the "interested adult" made full use of the opportunity to consult and actually discussed the rights and consequences of a waiver. *Commonwealth v. Philip S.*, 414 Mass at 811. The police do not have to inform the adult and juveniles that they should discuss the rights; however that would be the better practice. *Philip S.,* 414 Mass. at 811, n. 5.

Mark M. provides a good illustration of the role of the interested adult and the opportunity to consult. In *Mark M.* the 13 year old juvenile and his grandmother (legal guardian) went to the police station at the request of the police. The police officer read the juvenile and grandmother the *Miranda* warnings and both said they understood. The officer informed them there was an allegation that the juvenile indecently touched a young girl. There was an agreement to talk to the police but there was no consultation. The juvenile denied the

allegation and said the girl and he had been watching TV when a "Playboy" commercial came on and he changed the channel so the girl wouldn't see the commercial. The grandmother then asked the juvenile if he would feel more comfortable speaking to the officer alone; the juvenile said "yes." The officer then left to ask his superior whether it was appropriate to talk to the juvenile alone. During this time the juvenile was alone with his grandmother. There was no evidence as to what happened between the juvenile and his grandmother during this time. Upon getting permission to speak with the juvenile alone, the officer had the grandmother leave the room and the juvenile made incriminating statements.

The juvenile filed a motion to suppress the statements that he was alleged to have made when the grandmother was in the room as well as the statements he was alleged to have made when he was alone with the police. The motion was allowed on the grounds that the juvenile did not have an opportunity to consult. The questioning began right after the warnings were given and the juvenile and grandmother were not advised that they had a right to consult. The appeals court vacated the order and remanded for further findings as to whether (1) the first statement was incriminating, and if so, was there a break in the stream of events to insulate the second statement; (2) the grandmother and juvenile understood the *Miranda* warnings; (3) the grandmother understood her role as an advisor; and (4) the waiver was knowing, voluntary, and intelligent. On remand, the motion judge found that the initial statement was incriminating since it placed the juvenile at the scene of the crime. The motion judge also found that there was not a sufficient break in time to insulate the later statement and furthermore, there was no evidence that the grandmother understood the *Miranda* warnings or her role as the juvenile's advisor. Additionally, there was no opportunity for the juvenile and grandmother to consult, hence, the waiver was not knowing, voluntary, or intelligent. The juvenile's statements were again suppressed.

Again, the Commonwealth appealed and the Appeals Court affirmed the allowance of the motion. *Commonwealth* v. *Mark M.,* 65 Mass. App. Ct. 703 (2006). When the juvenile and his grandmother were informed of *Miranda* they were not provided with an opportunity to consult before the juvenile first spoke to the police officer. An opportunity to consult must occur after *Miranda* is given and before there is a waiver and questioning. The court also found that the grandmother did not understand that there was an opportunity to consult; this was supported by her suggestion that the police officer and juvenile speak privately while she left the room. Said action, on the part of the grandmother demonstrated her lack of appreciation of her role in the interrogation process. Furthermore, the appeals court upheld the lower court's finding that the several minutes the juvenile and grandmother were alone, while the police officer spoke to his supervisor, did not constitute a sufficient opportunity to consult because it came after the Miranda waiver. The appeals court also found that there was not a sufficient break between the two statements to insulate them from each other to overcome the taint.

b) Juveniles Over Age Fourteen

For a child who has reached the age of 14, "there should ordinarily be a meaningful consultation with the parent, interested adult or attorney to ensure that the waiver is knowing and intelligent." *A Juvenile*, 389 Mass. at 134, (Emphasis added). If there is no consultation the statement can be admissible if the record shows a high degree of intelligence, experience, knowledge, or sophistication on the part of the juvenile. *Id.*

For juvenile's over 14, there only need be a "genuine opportunity" to consult with an interested adult. *Commonwealth v. MacNeill*, 399 Mass. 71, 77-78 (1987). In *MacNeill,* the defendant, age 16 and 8 months, did not seek his grandfather's advice and no advice was given. "It is the juvenile's opportunity to consult that is critical, not whether he avails himself." The issue is whether the defendant understood the rights. The fact that he chose not to speak with his grandfather suggested, to the court, that the juvenile did not need the consultation. *MacNeill*, 399 Mass. at 78. "No more than a 'genuine opportunity' is required." *Id.*

The police are not required to inform the juvenile and the interested adult that they may confer in private. *Commonwealth v. Ward,* 412 Mass. 395, 397 (1992). As with children under age 14, the adult must be informed of and understand the rights. *Commonwealth v. Berry*, 410 Mass. 31 (1991).

In *Commonwealth v. Quint Q.,* 54 Mass. App. Ct. 507 (2013), the police went over the Miranda waiver with the 15 year old juvenile and his mother at the same time. The police immediately proceeded to interrogate the juvenile without giving the juvenile and his mother any time to discuss the Miranda rights and whether the juvenile should waive them. The appeals court held, without much discussion, that the mother acknowledged on tape that she understood these rights, that she was present and appeared to be attentive throughout the situation with which her son was being presented and that "nothing more was required."

Repeated offers to get the juvenile's mother, do not amount to a "genuine opportunity to consult". *Commonwealth v. Alfonso A,* 438 Mass. 372, 381 (2003). In *Alfonso A.* the juvenile, age 15, was at the co-defendant's (an adult) apartment with and the police. The police were waiting for a search warrant. While waiting for the search warrant the co-defendant's mother, step-father and older brother entered the apartment. Before questioning but after giving *Miranda* the police asked the juvenile if he wanted them to contact his mother so she could be present at the interview. The detectives advised the juvenile of his *Miranda* rights; the juvenile stated he understood them before they ever mentioned contacting his mother. No attempt was made to contact the mother while the juvenile was being held prior to questioning. The juvenile had been arrested two times, once for robbery. The juvenile was also asked twice if he wanted to consult with one of the adults in the apartment. The juvenile declined both offers. The police first questioned the adult co-defendant, age 18; his mother wanted to be present but the co-defendant didn't want her there. This exchange took place in the juvenile's presence.

In *Alfonso A.* the court recognized that juveniles may be embarrassed to ask for an adults' help and that the child may engage in a show of "bravado," rather than admitting they need to consult with an adult. The offer to get the mother, no matter how many times it was made, did not provide the juvenile with a "genuine opportunity" to consult.

While courts have never held that an interested adult must be physically present in order to give a juvenile over the age of fourteen a "genuine opportunity" to consult with an interested adult, the SJC in *Alfonso A*. notes that "[i]n all the cases decided so far the adult has been present; the requirement suggests there should be such presence, or at least some contact. The SJC also noted: "The 'genuine opportunity' for consultation that our cases envision is not merely a theoretical opportunity, that the juvenile may utilize at some future time, but an opportunity that is immediately and evidently available to the juvenile before the juvenile waives his or her rights." *Id.* at 382. "If the juvenile needs to assert his rights in order to obtain the benefit of any consultation with an adult, the purpose behind the requirement is nullified." *Id.*

c) Who is an Interested Adult

An interested adult is someone with a relationship with the juvenile who is "sufficiently interested in the juvenile's welfare to afford the juvenile appropriate protection." *Commonwealth v. MacNeill*, 399 Mass. 71, 77-78 (1987). The adult must be informed of the juvenile's rights and understand them. *Commonwealth v. Guyton*, 405 Mass. 497, 502 n. 1 (1989); *Commonwealth v. Mark M.,* 59 Mass. App. Ct. 86, 92 (2003).

Whether a person is in fact an "interested adult," is determined from the perspective of the person doing the questioning. *Commonwealth v. Berry*, 410 Mass. 31 (1991), *Commonwealth v. Philip S.,* 414 Mass. 804 (1993). If it is objectively apparent at the time of questioning that the adult "….lacked capacity to appreciate the juvenile's situation and to give advice, or was actually antagonistic toward the juvenile," then the interested adult rule would be violated. *Berry*, 410 Mass. at 36-37.

A parent who "fails to tell a child not to speak to interviewing officials, who advises the child to tell the truth, or who fails to seek legal assistance immediately" istill qualifies as an interested adult. *Philip S.,* 414 Mass. at 810. In *Philip S.* the juvenile (age 12 and 11 months) was interrogated on two occasions. His mother was present for both. The mother kept telling the juvenile to tell the truth but the juvenile was angry and ran out of the room. The mother brought him back. At the second interview, the juvenile's story kept changing and the mother got frustrated and told him to tell the truth. At the end of the interview the mother did not want to take the juvenile home. "[O]ur interested adult rule …is not violated because a parent fails to provide what, in hindsight and from a legal perspective, might have been optimum advice." *Id.* An interested adult does not have to act as a defense attorney.

"The 'interested adult' rule strikes a balance between protecting a juvenile's rights and the legitimate need of law enforcement officials to question juvenile suspects." *See Phillip S., supra.*

The interested adult rule includes consideration of "whether the juvenile had the assistance of an interested adult throughout the interview." *Commonwealth v. Quint Q.*, 84 Mass. App. Ct. 507 (2013), citing *Phillip S.*, *Supra*.

i) Some examples of who is <u>not</u> an interested adult

- DYS worker. *A Juvenile,* 402 Mass. 275, 279-280 (1988) (DYS worker was acting as an instrument of the police).
- Minor, in this case a 17 yr. old sister. *Commonwealth v. Guyton*, 405 Mass. 497 (1989)[3].
- Co-defendant's mother, step-father or brother who was at the scene where police were executing a search warrant. *Commonwealth* v. *Alfonso A.*, 438 Mass 372 (2003) (no evidence of any relationship with the juvenile and the adults at the scene that would suggest that they would act as an advisor to juvenile).

ii) Some examples of who is an interested adult

- Grandfather, even though the juvenile did not seek his advice and no advice was offered. *Commonwealth v. MacNeill*, 399 Mass. 71 (1987).[4]
- Father, even though juvenile and father had a fight with each other the night before the police interrogation. *Commonwealth v. Berry*, 410 Mass. 31, 35-37, (1991).
- Aunt, who was sister of one of the murder victims. *Commonwealth v. McCra*, 427 Mass. 564 (1998) (the court found that the aunt did not pressure the juvenile to answer questions, she appeared intelligent and friendly toward the juvenile).
- Spanish speaking mothers of co-defendants, even though they lacked familiarity with the system. The police officer, who was the interpreter, was not involved in the investigation. *Commonwealth v. Leon L.* 52 Mass. App. Ct. 823 (2001).[5]
- Foster Parent. *Commonwealth v. Escalera*, 70 Mass. App. Ct. 729 (2007).
- Mother who was found to be domineering by the motion judge and who also participated in questioning the juvenile was found by appeals court to be an interested adult. *Commonwealth v. Quint Q.*, 84 Mass. App. Ct. 507 (2013).

[3] In *Guyton* the sister was 13 days shy of her 18th birthday. There was testimony by the sister that she understood *Miranda*, but the court stated that this was not enough to qualify her as an advisor to the juvenile on such a crucial question.

[4] "In the absence of contrary indications it is fairly inferable that a grandfather in whose home a juvenile is found, and who accompanies the juvenile to the police station, is sufficiently interested in the juvenile's welfare to afford the juvenile appropriate protection." *Id.* at 77-78.

[5] In *Leon L*, *the* motion judge found the mothers were not "interested adults." The Appeals Court found there were objective facts indicating that the mothers understood the events and could assist the juveniles.

d) No "Genuine Opportunity" to consult – Statement Can Still Be Admissible

In order for a juvenile's (age 14 and older) statement to be admissible without a genuine opportunity to consult with an interested adult, the Commonwealth must prove that the juvenile has a high degree of intelligence, experience, knowledge or sophistication. *Commonwealth v. Guyton*, 405 Mass. 497 (1989), citing *A Juvenile,* 389 Mass. at 134.

Examples where there was no consultation with an adult:

In *Commonwealth v. King*, *supra,* the juvenile, age 16, was charged with rape. He did not consult with his mother, yet his statement was admissible. While at the police station he was given *Miranda* three times before he made a statement. His mother was present when he made some of the statements to the police. Additionally, at trial he testified that he was aware of his right to have an attorney. There was evidence that the juvenile was not mentally impaired or under the influence. He went to the 10th grade in school and was able to hold down a job. The defendant had a criminal record and there was evidence that he told the victim that nothing could happen to him because he was a juvenile. Two weeks before his arrest on this case, the juvenile consulted with an attorney on another matter and chose not to speak with the police. On the stand the juvenile appeared to be mature, understood the questions posed to him and was able to read from portions of a transcript. The statement was admissible.

In *Commonwealth v. Alfonso A., supra,* the SJC remanded the case for further findings as to whether the juvenile had sufficient intelligence, experience, knowledge or sophistication to make a knowing and intelligent waiver without the presence of an interested adult. The court hinted that this requirement may be satisfied in this particular case. The juvenile had been arrested twice and acknowledged that he was familiar with his rights. Additionally, at one point during the police questioning the juvenile stopped the questioning and refused to tell the police who else was involved in the crime. However, there was also evidence that the juvenile had performed poorly in school.

In *Guyton, supra,* the juvenile's minor sister could not be an "interested adult. When examining the juveniles' waiver the court held that **extensive contact with the police**, by itself, does not demonstrate sophistication or knowledge if the implications of *Miranda*. The motion judge found that the juvenile had extensive contact with the police and the confession was admitted into evidence. The SJC reversed and remanded for a new trial. The SJC held that the motion judge was not justified in finding that the juvenile had extensive contact with the police. When asked whether he understood his rights by the police he responded, "Yes I've heard it before," yet there was no evidence that he had heard the warnings in connection with a case. The juvenile did say that he heard the warnings on TV, but no one had read them to him before. Additionally, there was evidence that the juvenile stopped attending school after the eighth grade and worked on a cleaning crew.

In *Commonwealth v. Ray,* 467 Mass. 115 (2014) the SJC concluded that the statement of a juvenile murder defendant who did not have a genuine opportunity to consult with an interested adult was admissible because the Commonwealth met its burden by demonstrating a high degree of intelligence, experience, knowledge, or sophistication on the part of the juvenile. The defendant made two custodial statements. The first statement was made at his school where his mother was present. The police read both the mother and son the Miranda waiver then left room for them to discuss. Both mother and son signed waiver and, after a little while, the defendant stated that he thought he should consult with a lawyer and interrogation stopped. The defendant was one month shy of his 17th birthday when he made the first statement. The juvenile was arrested about a month later; four days shy of his 17th birthday, and made an additional statement at the police station when his mother was not present. The SJC found that the second statement was admissible despite the lack of the presence of an interested adult because the Commonwealth had met its burden. The significant factor in this equation was the defendant's participation and assertion of his rights in the previous interrogation where his mother was present, the proximity of his seventeenth birthday, and his prior experience with the criminal justice system.

VI. THE STATEMENT MUST BE VOLUNTARY

A judicial determination of voluntariness is constitutionally required. Even if the requirements of *Miranda* are met, a statement is inadmissible if it is not freely and voluntarily given. *Commonwealth v. Tavares,* 385 Mass. 140, 145 (1982). The defendant has the burden of producing evidence to show that a statement is not voluntary. *Commonwealth v. Tremblay,* 460 Mass. 199, 206 (2011).

A statement is initially presumed to be voluntary. "At a suppression hearing, the defendant bears the initial burden to produce evidence tending to show her statement was not voluntary." *Commonwealth v. Hilton*, 450 Mass. 173 (2007). Once this happens, the Commonwealth "bears the heavy burden of establishing that [the confession] was voluntary." *Commonwealth v. Baye* 462 Mass. 246 (2012), quoting *Commonwelath v. Meehan*, 377 Mass. 552, 563 (1979).

Courts look to the totality of the circumstances and due process requires a separate inquiry, apart from the validity of the *Miranda* waiver, as to whether a statement is voluntary. *Commonwealth v.* Magee, 423 Mass. 381 (1996). Statements must be the product of a "rational intellect" and not the product of physical or psychological coercion. *Commonwealth v. Allen*, 395 Mass. 448 (1985). Voluntariness must be proved **beyond a reasonable doubt.** *Id* at 456-57. (emphasis added)

A judicial determination on voluntariness must be made not only when the police are involved, but also when statements are made to private citizens. *Commonwealth v. Allen,* at 455-457. "Statements extracted by a howling lynch mob or a lawless private pack of vigilantes from a

terrorized, pliable suspect are repugnant to due process mandates of fundamental fairness and protection against compulsory self-incrimination." *Commonwealth v. Mahnke*, 368 Mass. 662, 681 (1975).

In *Miranda v. Arizona*, 384 U.S at 448-449, the court stressed that "the modern practice of in-custody interrogation is psychologically rather than physically oriented. As we have stated before,. . .this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition." "Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms. A valuable source of information about present police practices, however, may be found in various police manuals and texts which document procedures employed with success in the past, and which recommend various other effective tactics."

In assessing voluntariness, courts look at:

- Insanity
- Intoxication
- Assurance that statement will aid the defense or lesser sentence *Commonwealth v. Meehan,* 377 Mass. 552 (1979).
- Age
- Promises or inducements
- False statements of the evidence or law
- Education
- Intelligence and emotional stability
- Experience with the criminal justice system
- Physical or mental condition - *Commonwealth v. Daniels,* 366 Mass. 601 (1975).
- Details of the interrogation, including recitation of the warnings
- Psychological pressure – *Commonwealth v. Hunt,* 12 Mass. App. Ct. 841 (1981).

"Voluntariness turns on the 'totality of the circumstances,' including 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." *Commonwealth v. Mandile*, 397 Mass. 410, 413, (1986), *see also Mark M.,supra,* 59 Mass, App. Ct. at 89 n. 3. The "use of improper interrogation techniques by the police does not always mandate suppression; '[h]owever, the more problematic the details of the interrogation, the more difficult it will be for the Commonwealth to prove beyond a reasonable doubt that the defendant's will was nevertheless not overborne.'" *Commonwealth v. Ortiz*, 84 Mass. App. Ct. 254, 267 (2013), quoting *Commonwealth v. Baye*, 462 Masss. 246 (2012).

Expert testimony on psychological manipulation and its relation to false confessions is admissible if the proposed evidence satisfies the *Lanigan* standard. See *Commonwealth v. Robinson*, 449 Mass. 1 (2007).

i) Massachusetts case examples

In *Leon L., supra,* the statements of both juvenile were found to be involuntary:

While Leon, age 14, and his mother were at the police station waiting for an interpreter, the police officer was talking to the juvenile in a raised voice and banging his open hand on a table, pressuring Leon to make a statement. The officer's conduct made the mother break down and cry. "Leon "was frightened and upset. The tension broke when another officer came to interpret. "Leon "and his mother were left alone to talk. "Leon" denied involvement in the crime, yet the police stated that a named person said the juvenile and the co-defendant were responsible for the crime. After speaking with his mother and the police interpreter, the juvenile confessed. The juvenile had been in the United States for four years. The motion judge found that the juvenile was intimidated into making a statement.

The co-defendant Carl, age 13, got to the police station after Leon. He was with his mother. *Miranda* was given in English and Spanish and they both signed the waiver form. The same police officer was the interpreter. At first Carl denied involvement in the crime. He was crying and nervous. He was not allowed to take a break during the questioning. His mother was nervous. His mother left the room and when she returned Carl was confessing. The mother was having difficulty understanding the nature of the interrogation. She was distraught and did not know what to do. Carl was nervous and crying while he made the statement. Carl had not completed the sixth grade. He told his mother that the police had told him that if he did not plead guilty, he would be locked up alone.

The Appeals Court found that the judge was within her discretion in finding that both juveniles were unable to withstand the pressure to confess. The emotional states of the juveniles and their mothers indicated a loss of mental freedom of action.

In *Commonwealth v. DiGiambattista* 442 Mass. 423 (2004), the statement was suppressed because it was not voluntarily given by the defendant. The defendant was questioned at length regarding an arson. The interrogators engaged in repeated and prepared trickery and falsehoods during the interrogation. They also engaged in an interview tactic known as "minimization", continually empathizing that they could understand why he would have burned down the dwelling, the fact that no one was hurt, and that he had a problem with alcohol and stress and this was a cry for help. The court acknowledged that trickery is extremely disfavored, although it does not result in an automatic finding that a statement is not voluntary. However, combined with promises of leniency, under the totality of the circumstances, the Commonwealth failed to establish that the statement was voluntarily made. Additionally, promises of leniency need not be explicit, but can be implied from the statements made. In this case, the minimization techniques lead the defendant to the reasonable conclusion that if he

confessed, he would be treated leniently. The court found that the "use of false information as a tactical device is strongly disapproved and casts instant doubt on whether a defendant's statement is voluntary." *Id*. at 432 and "ongoing research has identified such use of false statements as a significant factor that pressures suspects into waiving their rights and making a confession. *Id*. at 434. "The combination of trickery and implied promises is recognized as potentially coercive to the point of making innocent persons confess to crimes." *Id.* at 439.

In *Commonwealth v. Tremblay*, supra, the court held that statements made "off the record" to a State Troopers were not "so manipulative or coercive that it deprived the defendant of his ability to make a free and rational choice about whether to make such statements in the first instance." This does not mean all statements made "off the record" will be deemed voluntary and courts look at the facts on a case-by-case basis. *See Dissent,* Gants, J., (where police agree statement will be "off the records" a suspect relies on that promise, it is a false promise and cast doubt on the voluntariness of the statement.) The dissent cites numerous cases where trickery and misrepresentations render a statement involuntary.

In *Commonwealth v. Baye*, 462 Mass. 246 (2012), the defendant moved to suppress statements that he was alleged to have made in the course of a ten hour interrogation on the grounds, *inter alia*, that they was not voluntarily made. The SJC agreed and held that the state troopers' minimization of the crimes, misrepresentation of evidence, promises of leniency, and promises not to use any statements against the defendant in combination with their attempts to persuade the defendant from obtaining the advice of counsel constituted an affirmative interference with the defendant's understanding of his fundamental constitutional rights and that the Commonwealth did not show beyond a reasonable doubt that the defendant's statements were nevertheless freely and voluntarily made. *Id*. at 265.

In *Baye*, the defendant was a suspect in a string of residential arson fires around Northampton. In one of the fires, two men were killed when their home burned to the ground. The police interviewed the defendant at the Northampton police department on three separate occasions in the days following the fires and the last interview, wherein the defendant made the statements he sought to suppress, lasted for almost ten hours and was conducted by two experienced state troopers. During this last interview, the troopers repeatedly mislead the defendant regarding the nature of the evidence, minimized the crime and made promises of leniency. The troopers also mischaracterized the felony/murder rule by indicating that it wasn't murder if the defendant didn't intend to hurt anyone. During this interview, the defendant stated that if "I'm being accuses of anything, I want to talk to a lawyer." The troopers did not get the defendant a lawyer at this stage but stated "'[W]e can clear this up" and, according to the court, "almost begged" the defendant to continue the interview without counsel. The

troopers indicated that as long as he only wanted a lawyer if they were going to accuse him of something they could continue to talk without counsel because it would allow them to "work something on this case" that would put a rest to the case and not "jam" the defendant's "life up." The defendant went on to make incriminating statements and eventually, acknowledged that his alibi was false, and indicated that he never wanted to hurt anyone.[6] *Id*., at 246-251.

The Court noted that "assurances that a suspect's statements will not be used to prosecute him will often be 'sufficiently coercive to render the suspect's subsequent admissions involuntary' even when the suspect shows no outward signs of fear, distress or mental incapacity." *Id*. at 262 (citations omitted).

In *Commonwealth v. Ortiz*, 84 Mass. App. Ct. 258 (2013), a first degree murder case, the appeals court affirmed the trial court's suppression of the defendant's statements on the grounds that they were involuntary. The gist of the decision was that "the nineteen year old defendant's will was overborne by improper police interrogation tactics." The court focused on three such tactics. First, the detectives made false statements to the defendant; specifically, they "misrepresented the results of their investigation" by suggesting that various witnesses had provided inculpatory information about the defendant. Second, the detectives improperly told the defendant that the interview would be his "'last chance' to tell his story"; this was a plain misstatement of the defendant's right to present a defense. The third inappropriate tactic (and the one deemed most serious) was the detectives' use of the "forbidden" technique of assuring the defendant that an admission by him would "'aid the defense or result in a lesser sentence.' [Commonwealth v. Meehan, 377 Mass. 552,] 564 [1979]."[7] Contrast, *Commonwealth v. Harris*, 468 Mass. 429 (2014) where the SJC rejected the twenty-one year old defendant's argument that his statements to the police should have been suppressed because the combination of the defendant's mental and physical health (he was anorexic, hadn't eaten in 2 days, had gender identity issues, and suffered from depression) and the police minimization tactics rendered his statements involuntary. The SJC held that the record supported the judge's ultimate conclusion that the statements were voluntarily made and not the product of an overborne will. The SJC noted that although the defendant cried at times during the interview, he was able to regain his composure and spoke calmly with police. The SJC noted further that the officers were kind to and professional with the defendant, they did

[6] The defendant raised the invocation of his right to counsel in his Motion to Suppress. The Court addressed the issue but did not resolve it as "the statements must be suppressed as involuntary." The Court opined that the issue of whether the defendant was in custody for Miranda purposes was a close one and that it would be unwise to decide the issue without the judge's findings.

[7] The trial court suppressed only the statements relative to the gun. The Appeals Court, however, augmented the judge's order: "[W]e conclude that the selective suppression of statements made [after the detectives' improper assurances to the defendant] is not a proper remedy. Other statements made after the defendant's will was overborne are no less tainted by the improper police tactics and cannot reasonably be said to be voluntarily made. Accordingly, all subsequent statements made by the defendant must be suppressed."

not raise their voices, and they provided him with water and offered him food. Regarding the minimization tactics the SJC concluded that while the officers used minimization tactics (they repeatedly assured the defendant that they understood he had a lot going on and that they understood the pressures he was under), they did not minimize the seriousness of the potential charge nor did they make false statements to the defendant in order to pressure him into making a confession.

See also, *Commonwealth v. Quint Q.*, *supra.* (where the appeals court reversed the motion judge's finding that mother's coercive "domineering" conduct rendered the juvenile's statements involuntary and deprived him of the presence of an interested adult because the juvenile did not appear upset, the mother did not raise her voice, and many times, the juvenile ignored her)

ii) US Supreme Court Cases to Consider on the Issue of Voluntariness

a) Historical Cases – the following cases have language that is useful on the issue of voluntariness and the differences between children and adults.

Haley v. Ohio, 332 U.S. 596 (1948), juvenile was questioned for five hours by relays of one to two officers. No friend or parent was present. After being shown alleged confessions of the others involved, he confessed. Thereafter, a confession was typed in question and answer form, with a heading that advised him of his rights. He was detained incommunicado for three more days, during which time a lawyer hired by his mother was twice denied access to him. The court stated, "when, as here, a mere child an easy victim of the law -- is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. A 15-year-old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition. Mature men possibly might stand the ordeal from midnight to 5 a. m. But we cannot believe that a lad of tender years is a match for the police in such a contest." *Id* at 599.

Gallegos v. Colorado, 370 U.S. 49 (1962), a 14 year old boy was arrested for assault and robbery of an elderly man. After his arrest on January 1st, he was detained in a secure juvenile facility until January 7th. His mother attempted to see him on January 2nd, but permission was denied. Police interviewed him on January 2nd and he immediately made a confession. The court held that the use of the juvenile's statement violated his due process rights. The court stated, a fourteen year old "cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions." *Id.* at 54.

In Re Gault, 387 U.S. 1. (1967) (see Section I of outline), the court stated "admissions and confessions of juveniles require special caution." *Id* at 45. "Careful attention must be given to ensure that a juvenile's confession is not the fruit of fright, immaturity and despair." *Id* at 55.

b) Recent Cases

In addressing the voluntariness of confessions by a juvenile, the case of *Roper* v. *Simmons,* 543 U.S. 551, 125 S.Ct. 1183 (2005) should be considered.[8] In *Roper*, the Court discussed (among other things) the difference between youth (under age 18) and adults. [9] In noting three substantial differences between children and adults, one is particularly relevant to the issue of voluntariness: "juveniles are more vulnerable or susceptible to negative influences and outside pressure…"Youth…is a time and condition of life when a person may be more susceptible to influence and psychological damage…juveniles lack the freedom that adults have to extricate themselves from a criminogenic setting." *Id*. at 569-571. Children and young adults do not possess the same cognitive, emotional, decision-making or behavioral capacity as do adults.

In *Graham v. Florida,* 560 U. S. __ (2010)[10] the Supreme Court's Eighth Amendment jurisprudence strengthens *Roper's* assertion that juveniles are intrinsically less developmentally formed than adult offenders and therefore less culpable and more vulnerable. Justice Kennedy, writing for the majority, illustrates the developmental differences between juveniles and adults and it is this innate vulnerability that is directly related to involuntary statements:

> No recent data provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles. As petitioner's *amici* point out, developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence. See Brief for American Medical Association et al. as *Amici Curiae* 16–24; Brief for American Psychological Association et al. as *Amici Curiae* 22–27. Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of "irretrievably depraved character" than are

[8] *Roper* invalidated the imposition of the death penalty on youth who were under eighteen when their crimes were committed.

[9] Police interrogation is inherently biased against the juvenile's young age. Research reveals that children are more likely than adults to give unreliable information and false confessions when suggestively questioned. The interested adult rule no impact on the rate at which youth waive their rights (due in part to parents playing a passive role or urging their children to cooperate with the police). Adolescents are suggestible, impulsive and easily influenced by authority figures, giving interviewers bias against them and often prompting a presumption of guilt before questioning even begins. Police too often mistake the natural behaviors of adolescents for signs of deception and lying. This vulnerability deserves heightened protection and safeguards. Safeguards already exist for child witnesses and child victims. Tamar R. Birckhead, *The Age of the Child: Interrogating Juveniles After* Roper v. Simmons, 65 WASH. & LEE L. REV. 385 (2008).

[10] In *Graham v.* the Supreme Court held that life imprisonment without the possibility of parole for a non-homicide offense committed before the Juvenile reached the age of 18 violates the Eighth Amendment.

> the actions of adults. *Roper,* 543 U.S., at 570, 125 S.Ct. 1183. It remains true that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Ibid.*

In addition, the majority in *Graham* emphasizes that "juveniles [are] 'less deserving of the most severe punishments' because of their 'lessened culpability.' This lessened culpability stems from a juvenile's immaturity, undeveloped sense of responsibility, unformed character, and vulnerability to negative influences."[11] "The features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings." "Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it."

In *JDB v. North Carolina, supra,* the US Supreme Court found it is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave. *J.D.B.* was decided under a *Miranda* analysis. However, there is important language that is relevant in a voluntariness analysis:

> "The inherently coercive nature of custodial interrogation blurs the line between voluntary and involuntary statements." "The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them." "Events that would leave a man cold and unimpressed can overawe and overwhelm a teen." "A child's age is far more than a chronological fact…It is a fact that generates commonsense conclusions about behavior and perception…Such conclusions are self-evident to anyone who was a child once himself, including any police officer or judge."

VII. HUMANE PRACTICE

At trial, the judge must find, beyond a reasonable doubt, that the statement is voluntary. A voir dire is conducted, out of the presence of the jury. The issue of voluntariness is then submitted to the jury, and they must be instructed that the Commonwealth has the burden of proving the statement was voluntary beyond a reasonable doubt. *Commonwealth v. Tavares*, 385 Mass.140 (1982), *See also*, *Commonwealth v. LaFleur,* 58 Mass. App. Ct. 546, n.5, (2003)

[11] Harvard Law Review Association, *Eighth Amendment- Juvenile Life without Parole Sentences,* 124 HARV. L. REV. 209 (2010).

If voluntariness is properly raised, it is error if the judge does not conduct a voir dire to determine voluntariness. *Commonwealth v. Hunter*, 416 Mass. 831 (1994). Here the defendant made statements to private citizens. At trial he filed a motion requesting a voir dire on the voluntariness of his statement along with an affidavit. The court held that the defendant properly raised the issue and failure to conduct a voir dire constituted error.

In *Commonwealth v. Adams*, 416 Mass. 55 (1993), an adult case, the presence of the defendant's mother at questioning was relevant to the issue of voluntariness. At trial, the judge excluded the mother's testimony that the defendant assisted his mother in overcoming a drug addiction and her presence at the interrogation compelled him not to upset her. Court held this evidence was admissible and should be admitted at the retrial.

"If a humane practice instruction was warranted, admission of evidence relevant to the jury's determination of voluntariness was also warranted." *Commonwealth v. Crawford*, 429 Mass. 60 (1999).

VIII. Tape-Recorded Statements

In *Commonwealth v. DiGiambattista*, *infra,* the Court created a new protocol regarding the preference for recording interrogations and the favorable jury instruction available regarding caution to be exercised when a recording is not done. "[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 jury 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 jury 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." *Id* at 447. This rule applies prospectively. It is important to note, in this case the statement in was suppressed because it was not voluntary. *See* Section VIII of this outline.

In *Commonwealth v. Drummond*, 76 Mass. App. Ct. 625 (2010), the court held that the *DiGiambattista* instruction, if requested, must be given in full and is not conditioned on whether the defendant was advised of his right to have his statement records and did not decline the recording. In *Drummond*, the judge erroneously modified the *DiGiambattista* instruction and the defense attorney did not object. Since there was no objection and the court reviewed this issue as to whether this "created a substantial risk of a miscarriage of justice." Based on the evidence in this case, such a risk was not created. See also *Commonwealth v. Barbosa,* 457 Mass. 773, 801 (2010) (Judge only gave one-half of the *DiGiambattista* instruction, in this case it was not prejudicial).

In *Commonwealth v. Tavares*, 81 Mass. App. Ct. 71 (2011), the appeals court found that it was error for the trial judge to refuse to give the *DiGiambattisa* instruction where the evidence suggested that the defendant refused to have his statement recorded. The Commonwealth can address any reasons why no recording was made; however, the *DiGiambattisa* instruction must still be given to the jury.

The State of Wisconsin requires the recording of juvenile statements. *State v. Jerrell C.J.,* 2005 WI 105 (2005). Here, the Wisconsin Supreme Court exercised its supervisory power to require that all custodial interrogations of juveniles be electronically recorded where feasible. If a juvenile is in a place of detention, the confession must be recorded. The court reasoned that: 1) a recording requirement will provide courts with a more accurate and reliable record of a juvenile's interrogation; 2) an accurate record will reduce the number of disputes over *Miranda* and voluntariness issues for juveniles; 3) the recording will protect the individual interest of police officers wrongfully accused of improper tactics; 4) recordings will enhance law enforcement interrogations, since they will no longer be distracted by note taking, etc.; and 5) such a rule protects the rights of the accused, who are otherwise facing a credibility contest with officers, which officers invariably win.

IX. Interrogations by School Officials

School officials, when questioning a student about a crime, do not have to provide *Miranda* warnings. In *Commonwealth v. Ira I.* 439 Mass. 805 (2003) the court found that an assistant principal was not acting as an agent of the police when he separately questioned four juveniles, all 13 or 14 years old, without giving *Miranda* and with no interested adult present. There was no evidence that the police directed, controlled or influenced the assistant principal's investigation and questioning of the juveniles. The assistant principal was acting as a school administrator when he questioned the juveniles regarding an assault on another student. A trip to the principal's office cannot be equated with "custodial interrogation." School officials are supposed to address school behavior.

X. PUBLIC SAFETY EXCEPTION

A suspect who is in custody does not have to be advised of *Miranda* before an interrogation if the threat to public safety outweighs the need for protecting an individual's privilege against self-incrimination. *New York v. Quarles*, 467 U.S. 649 (1984). In *Quarles,* a rape victim told the police the defendant had just entered a supermarket with a drawn gun.

The public safety exception applied where the juvenile was in a private residence. Here the juvenile was provided *Miranda* however he did not have an opportunity to consult with an interested adult. *Commonwealth v. Alan A.*, 47 Mass. App. Ct. 271 (1999), *fur. app. rev. den.* 430 Mass. 1108. Even though the juvenile was in a private residence when he was questioned by the police, the court held that a gun can create a substantial threat to people including the

police and therefore the public safety exception applied. The police did not know, at the time of questioning, whether the gun was in the house or had been disposed of in a public area. See also *Commonwealth v. Guthrie G.* 66 Mass. App. Ct. 414 (2006), *aff.* 449 Mass.1028 (2007)

In *Commonwealth v. Dillon D.,* 448 Mass. 793 (2007) the court found that it was unnecessary to give *Miranda* warnings when the juvenile was seen at his middle school with a clear plastic bag containing over 50 bullets. Because possession of the bullets was enough to lead to an inference that there was a gun nearby, the public safety exception applied and the statements were not excluded.

XI. MOTIONS AND AFFIDAVIT

In motions, always cite Article 12, along with US Constitution.

Affidavit should be complete, Mass. R. Crim. P. 13(a)(2):

- person with knowledge;
- custodial interrogation;
- not voluntary, knowingly; state with particularity (See *Ira, I, supra*.)
- no interested adult, present but not interested, present but didn't understand;
- no actual opportunity to consult
- no genuine opportunity to consult;
- age; and
- education

XII. STATEMENTS MADE IN VIOLATION OF MIRANDA CAN BE USED FOR IMPEACHMENT PURPOSES

Statements that are suppressed due to *Miranda* violations are admissible for impeachment purposes. *Commonwealth v. Ferrer*, 47 Mass. App. Ct. 645 (1999).

However, if the statements are suppressed because they were **involuntary**, they **may not** be used for impeachment purposes. *Commonwealth v. Kleciak*, 350 Mass. 679, 690 (1966).

XIII. POLICE MUST INFORM SUSPECT IN CUSTODY OF HIS ATTORNEY

Police must inform a suspect of an attorney's effort to contact him/her for the purpose of providing legal advice. The suspect's knowledge of this is necessary to affect a knowing and intelligent *Miranda* waiver. *Commonwealth v. Mavredakis,* 430 Mass. at 859. "[A]rt. 12 requires a higher standard of protection than that provided by *Moran [v.Burdine]*. The *Moran* analysis proceeds from the assumption that information regarding the immediate availability of an attorney has no bearing on a suspect's ability knowingly and intelligently to waive Miranda rights."

In *Commonwealth v. Collins,* 440 Mass. 475 (2003) the rule in *Mavredakis* did not apply. In *Collins*, the defendant had retained counsel before he was charged. The attorney had contacted the police and told them he wanted to be present at any interview of his client. The attorney was unable to attend two scheduled "meetings" with the police; however, the police did not interview the defendant at this point. Thereafter, the police obtained an arrest warrant for the defendant and he was arrested in Rhode Island and brought to Massachusetts. After receiving *Miranda,* the defendant told the police he was embarrassed by attorney's actions and that he had nothing to hide. The defendant made an incriminating statement. The SJC held that these statements were admissible. The court reasoned that this case was unlike *Mavredakis,* where the attorney was present at the station on the suspect's behalf. Here, the defendant told the police he had retained counsel and his attorney was not denied access. The police did not impede on the defendant's right to consult.

In *Commonwealth v. Martin*, 467 Mass. 291 (2014) the SJC upheld the denial of the defendant's motion to suppress statements he made to the police in a Virginia jail. The defendant was arrested in Virginia and his Massachusetts attorney sent a letter to the district attorney's office stating that he represented the defendant, that the defendant should not be interviewed without counsel present, and that counsel wanted to speak with the defendant prior to any questioning. The defendant was never shown the letter nor was he informed of its contents. The defendant argued that the police had a duty to inform him of the contents of his attorney's letter citing *Commonwealth v. Mavredakis*, *supra* at 849. Relying on *Commonwealth v. McNulty*, 458 Mass. 305 (2010), and *Commonwealth v. Rivera*, 464 Mass.56, 67, cert. denied, 133 S.Ct. 2828 (2013) the SJC disagreed and determined that the failure to give the Defendant the letter was not a violation. The Court stated, "[w]hile holding in *McNulty* that police officers had a duty to convey an attorney's legal advice that a defendant avoid speaking to police, in … *Rivera* … we distinguished between those situations in which an attorney instructs police to tell a defendant not to talk to them, and those situations in which an attorney instructs police not to talk to a defendant. The former, we said, constitutes 'legal advice aimed at the defendant,' whereas the latter constitutes 'an attempt by the attorney to invoke his client's right to silence.' *Id.* We declined 'to extend *McNulty* to a situation where the attorney merely instructs the police not to talk to his client.' *Rivera*, *supra* at 67." *Martin* at 306. In *Martin*, the Court concluded that counsel's letter did not constitute advice to the defendant that would have triggered the protections of *Mavredakis.*