Interrogations & Confessions

§ I. Voluntariness under Fifth Amendment privilege against compelled self-incrimination, Fourteenth Amendment Due Process Clause, &/or Md. Decl. of Rights art. 22

In *Escobedo v. Illinois*, 378 U.S. 478, 488-89 (1964), the Supreme Court stated that when the system depends on a confession, the system is less reliable and more subject to abuse.

The Fifth Amendment provides that no person shall "be compelled in any criminal case to be a witness against himself." The Fifth Amendment applies only when the Defendant is compelled to be a witness against himself. In *Chavez v. Martinez*, 538 U.S. 760, 767-69 (2003), the Supreme Court held that the Fifth Amendment privilege against compelled self-incrimination was not violated when the Defendant was not prosecuted for an incident that triggered questioning.

In *Davis v. North Carolina*, 384 U.S. 737 (1966), the Supreme Court stated that, even when *Miranda* is applicable, it is still "the duty of courts to consider claims that a statement was taken under circumstances which violate the standards of voluntariness which had begun to evolve long prior to *Miranda* . . ." *Id.* at 740. In *Dennis v. Warden*, 6 Md. App. 295, 296 (1969), the Court of Special Appeals held that a confession is admissible only if freely and voluntarily given. *See McChan v. State*, 238 Md. 149, 158 (1965); *Taylor v. State*, 238 Md. 424, 429 (1965).

In *Walker v. State*, 12 Md. App. 684 (1971), the Court of Special Appeals recognized that "[t]he seminal case of *Miranda* . . . did not supersede pre-existing law on voluntariness. It simply added an additional dimension to the law. [T]he holdings of *Miranda* were 'impressed on that (pre-existing) standard.'" *Id.* at 696 (citations & quotations omitted). *See McCoy v. State*, 8 Md. App. 127 (1969); *McCarson v. State*, 8 Md. App. 20 (1969); *Dennis*, 6 Md. App. 295; *Hale v. State*, 5 Md. App. 326 (1968).

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The standard for voluntariness evolved from the Supreme Court's pre-incorporation decisions in state cases, which used the Due Process Clause in the same manner that the Court applied the Fifth Amendment privilege against compelled self-incrimination in federal cases. *Davis*, 384 U.S. at 740.

Since *Brown v. Mississippi*, 297 U.S. 278, 286-87 (1936), the Supreme Court has reviewed coerced confessions admitted in state courts. In state confession cases, the Court's rationale was that obtaining confessions violated the standards of decency and fair play implicit in the Due Process Clause of the Fourteenth Amendment. The Court emphasized voluntariness under the "totality of the circumstances" bearing on the Defendant's decision to confess. *See Haynes v. Washington*, 373 U.S. 503, 514 (1963).

An involuntary statement cannot be used against the Defendant, not only because it violates the Fifth Amendment privilege against compelled self-incrimination, but also because it violates the Due Process Clause of the Fifth Amendment (against the federal government) and the Due Process Clause of the Fourteenth Amendment (against state and local governments). In *State v. Dobbs*, 148 Md. 34 (1925), the Court of Appeals stated:

> [B]efore a confession can be offered in evidence it must be shown to be the free and voluntary act of the person making it, and that the burden of showing that is upon the State . . . The rule had its inception in the general dissatisfaction with the practice, legalized for many centuries, of officials for the State extorting confessions from prisoners by various methods of torture, and it is permanently expressed in the constitutional provision that no man shall be compelled to testify against himself. . . . But there still remains the natural desire on the part of arresting officers to secure from persons in their custody charged with some crime some admission or acknowledgment of guilt which will facilitate their conviction[. This] has led to grave abuses, and the power and authority which the police have over persons in their custody may without a conscious intent, unless it is wisely exercised and controlled, be used to compel such persons, not only to testify against themselves, but even to testify falsely. For that reason, it is the duty of the courts to scrutinize with the most exacting and discriminating care confessions obtained from persons under arrest, and not to admit or consider them at all until they have been satisfied that there is no reasonable probability that they are not free and voluntary.

Id. at 58-60.

In *Hof v. State*, 97 Md. App. 242, 289-90 (1993), *aff'd*, 337 Md. 581 (1995), the Court of Special Appeals stated: "The definitions of voluntariness enunciated by both the Supreme Court and the Maryland courts are indistinguishable from one another." 97 Md. App. at 283.

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In *Davis*, 384 U.S. at 752, the Defendant, who had a third or fourth grade education, escaped from a prison camp, was caught, was taken into custody, and was interrogated by police for 16 days during which they informed him that he would not be able to speak with anyone until he confessed. He was given sub-standard food. On several occasions, detectives attempted to trick him. The Supreme Court held that the Defendant's confession was involuntary.

In *Culombe v. Connecticut*, 367 U.S. 568 (1961), the Supreme Court held that the confession was involuntary because the Defendant, with the mental capacity of a nine-year-old, was interrogated for five days and four nights. *See Fikes v. Alabama*, 352 U.S. 191 (1957) (confession involuntary even though the Defendant not subjected to violence); *Turner v. Pennsylvania*, 338 U.S. 62 (1949) (confession involuntary following a five-day detention).

A. Totality of the circumstances test

To be admissible, a statement must be voluntary, which means freely and voluntarily given and not subject to actual or subtle coercion. *Gorge v. State*, 386 Md. 600, 620-21 (2005). Voluntariness is evaluated under a totality of the circumstances. *Burch v. State*, 346 Md. 253, 266 (1997); *see Williams v. State*, 375 Md. 404 (2003). In *Hof*, 337 Md. 581, the Court of Appeals stated:

> The "totality of the circumstances" includes a number of factors, e.g., where the interrogation was conducted; its length; who was present; how it was conducted; whether the Defendant was given *Miranda* warnings; the mental and physical condition of the Defendant; the age, background, experience, education, character, and intelligence of the Defendant; when the Defendant was taken before a court commissioner following arrest; and whether the Defendant was physically mistreated, physically intimidated, or psychologically pressured.

Id. at 596-97 (internal citations omitted); *see Spell v. State*, 7 Md. App. 121, 129-30 (1969).

Maryland Criminal Pattern Jury Instruction 3:18 and its Comment instruct the jury to consider, among other things, the following:

1. Conversations, if any, between police & the Defendant

Confessions based on promises of leniency or benefits violate due process, evaluated under the totality of the circumstances. In *Arizona v. Fulminante*, 499 U.S. 279 (1991), the Supreme Court held that the confession was involuntary when it was given based on a confidential informant's promise to protect the Defendant from a credible threat of physical violence if he "told the truth." *Id.* at 283. *But see Payne v. Arkansas*, 356 U.S. 560 (1958) (voluntary confession when police interrogator offered protection from a violent mob).

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In *Lee v. State*, 418 Md. 136, 157, 160-62 (2011), the Court of Appeals held that an implied promise that the Defendant's statements would remain confidential between the officer and the Defendant violated *Miranda* but did not render the statements involuntary.

Promises may be given under the "false friend" technique, in which the officer offers "friendly advice" to the Defendant to induce a confession. In *Spano v. New York*, 360 U.S. 315, 323-24 (1959), the Supreme Court held that the confession was involuntary when the officer, who was a friend of the Defendant, falsely stated to the Defendant that the officer's job was in jeopardy and his family would suffer if the Defendant did not confess. In addition, police refused to let the Defendant contact his retained attorney.

In *Leyra v. Denno*, 347 U.S. 556 (1954), the Supreme Court held that the confession was involuntary when a state-employed psychiatrist used the "false friend" technique, acting as a "doctor" sent to relieve physical pain, but instead elicited a confession from the Defendant, plus the Defendant was interrogated to the point of exhaustion. *Id.* at 561.

Police misrepresentation of facts does not usually violate due process. In *Frazier v. Cupp*, 394 U.S. 731, 739 (1969), the Supreme Court held that, even though officers falsely told the Defendant that his Co-Defendant confessed, that fact, by itself, was insufficient to render the confession involuntary. *See Ball v. State*, 347 Md. 156 (1997), *cert. denied*, 522 U.S. 1082 (1998) (police deception permissible); *accord Whittington v. State*, 147 Md. App. 496 (2002); *Finke v. State*, 56 Md. App. 450 (1983), *cert. denied*, 299 Md. 425, *cert. denied*, 469 U.S. 1043 (1984).

In *Lincoln v. State*, 164 Md. App. 170 (2005), the Court of Special Appeals held that the Defendant's confession was voluntary, even though police used fabricated handwritten documents that implicated the Defendant. The fabrications did not create the appearance of authority and contained mostly correct statements, which had been obtained through the officer's investigation. When told that his mother implicated him, the Defendant, who was a high school graduate and had been advised of his *Miranda* rights, gave a 90-minute recorded interview, in which he stated that he was speaking freely and voluntarily. The Court stated:

> The [Defendant] urges us to establish a bright-line rule . . . that police deception by use of fabricated documents is . . . so inherently psychologically coercive that it makes a resulting confession involuntary *per se*. [T]he use of a police-fabricated document as a ploy to deceive a Defendant into thinking the State has evidence of guilt, or greater knowledge than it actually has, is a relevant factor to be considered in deciding whether, in the totality of the circumstances, the Defendant's confession was freely and voluntarily made; but it is not, in and of itself, dispositive of the issue[. N]ot all fabricated docu-

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> ments carry the same weight of authority and have the same influential power to affect thinking . . . and, therefore, not all deceptions involving fabricated documents should be treated identically. Fabricated documents may run the gamut in appearance from seemingly official and authentic, on the one hand, to amateurish in their fakery, on the other. In addition, the circumstances of the interrogation and the facts peculiar to the suspect's background, including his level of education and past experiences with law enforcement, may affect how he perceives the document and whether it has any effect on his will.

Id. at 190-92.

When police incorrectly inform a juvenile that he is eligible for the death penalty, this may render a confession involuntary. In *Green v. State*, 91 Md. App. 790 (1992), the Court of Special Appeals stated: "It is obvious that the threat of a death penalty would be terrifying, particularly to a minor. It is difficult to conceive of any other purpose to [the detective's] action in mentioning a possible penalty to [the Defendant] other than to coerce him into cooperating." *Id.* at 797 (citations omitted); *see United States v. Duvall*, 537 F.2d 15, 25 (2d Cir.), *cert. denied*, 426 U.S. 950 (1976) (confession inadmissible when the Defendant was told that his crimes could result in a 100-year sentence, when a 100-year sentence was not possible in any real sense). *See State v. Blake*, 381 Md. 218 (2004), *cert. granted*, 544 U.S. 973, *cert. dismissed*, 545 U.S. 807 (2005).

Whether the Defendant was under arrest at the time of the interrogation is a voluntariness factor. *Burton v. State*, 32 Md. App. 529 (1976) (not in custody and not involuntary); *accord Shedrick v. State*, 10 Md. App. 579, 583-84 (1970); *Bernos v. State*, 10 Md. App. 184, 188 (1970). In *Smith v. State*, 186 Md. App. 498, 549 (2009), *aff'd*, 414 Md. 357 (2010), the Court of Special Appeals held that a police officer's statement, in the Defendant's apartment, that he would arrest everyone present, after finding an ounce of crack cocaine, was not interrogation and the Defendant was not under arrest, but merely stopped.

When police disregard interrogation guidelines or act in an egregious way to gain a confession, such conduct is a voluntariness factor. *Winder v. State*, 362 Md. 275, 317-21 (2001). When the Defendant voluntarily submits to a polygraph examination, and the other factors support voluntariness, the confession is voluntary. *State v. Tolbert*, 381 Md. 539, 559-60 (2004). A police suggestion that the Defendant, who initially declined to provide a written confession, reduce his statement to writing in order to tell the story "in his own words" did not render the statement involuntary. *Ball*, 347 Md. at 176. MPJI-Cr 3:18.

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2. Whether the Defendant was given *Miranda* warnings

Whether the Defendant was provided *Miranda* warnings, and whether the Defendant made a knowing and intelligent waiver of *Miranda* rights are voluntariness factors. *Frazier v. Cupp*, 394 U.S. 731, 739 (1969); *Procunier v. Atchley*, 400 U.S. 446 (1971).

When *Miranda* warnings are applicable, i.e., the Defendant is under arrest, but *Miranda* warnings are not given, the failure to inform the Defendant of the right to remain silent and/or the right to have counsel present are voluntariness factors. *Davis*, 384 U.S. at 740-41; *see Cunningham v. State*, 58 Md. App. 249, 261 (1984) (Defendant received *Miranda* warnings and signed a waiver). In *State v. Fowler*, 259 Md. 95 (1970), the Court of Appeals held that when a Defendant's rights are read to him, but those rights are denied to him, the confession is involuntary. MPJI-Cr 3:18.

3. Length of time that the Defendant was questioned

The length of the interrogation is a voluntariness factor, particularly if it appears that the Defendant's will was overcome by exhaustion from a long interrogation. In *Ashcraft v. Tennessee*, 322 U.S. 143, 154 (1944), the Supreme Court held that the confession was involuntary when the Defendant was questioned continuously for 36 hours without rest. In *Chambers v. Florida*, 309 U.S. 227, 240-41 (1940), the Supreme Court held that the confession was involuntary when the Defendant refused to speak during a five-day interrogation and broke down on the fifth night. In *Davis*, 384 U.S. at 752, the Supreme Court held that the confession was involuntary when the Defendant was isolated and detained for 16 days.

In *Winder*, 362 Md. at 317-21, the Court of Appeals held that the confession was involuntary when the Defendant was interrogated for 12 hours while police made promises inducing the confession. In *Young v. State*, 68 Md. App. 121 (1986), the Court of Special Appeals held that the confession was involuntary when the Defendant was interrogated for 22 hours without a break.

Length of the questioning alone does not render a confession involuntary. *Hamwright v. State*, 142 Md. App. 17 (2001) (confession voluntary even though the Defendant was held for ten hours in restraints); *Marr v. State*, 134 Md. App. 152 (2000) (confession voluntary despite being in custody for 35 hours when the Defendant was allowed several breaks and a nap); *Hines v. State*, 58 Md. App. 637, *cert. denied*, 300 Md. 794 (1984) (confession voluntary despite 15-hour interrogation when the Defendant was given food and cigarettes, was allowed to go to the bathroom, and seemed willing to talk). In *Robinson v. State*, 3 Md. App. 666 (1968), the Court of Special Appeals stated: "[L]engthy questioning does not, of itself, make a confession involuntary." *Id.* at 673. MPJI-Cr 3:18.

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4. Who was present during the interrogation

Isolation of the Defendant from family, friends, and counsel is a voluntariness factor. In *Fikes v. Alabama*, 352 U.S. 191, 196-97 (1957), the Supreme Court held that the confession was involuntary when the Defendant was questioned for more than a week, far from home, and seeing only police. In *Walker*, 12 Md. App. 684, the Court of Special Appeals held that a juvenile confession was involuntary following five days of isolation and being held incommunicado until after he confessed. *Id.* at 708.

In *Moran v. Burbine*, 475 U.S. 412, 421-24 (1986), the Supreme Court held that it did not violate due process when the Defendant was informed of the right to counsel, but did not ask for counsel, and the officers deliberately lied to the Defendant's retained attorney in order to keep the attorney away from the interrogation. *Cf. Lodowski v. State*, 307 Md. 233 (1986) (police would not allow the Defendant's counsel to speak to him until the Defendant requested counsel, and the court remanded to determine whether the Defendant waived the right to counsel).

The interrogation of a juvenile in the absence of parents, particularly when the juvenile or the parents request parental presence, is a voluntariness factor, but it is not dispositive. *McIntyre v. State*, 309 Md. 607, 623-26 (1987); *Walker*, 12 Md. App. at 708 (although age is not dispositive, it is a highly relevant factor); *State v. Hance*, 2 Md. App. 162, 168 (1967) (statement by a 15-year-old not involuntary solely because parent was not allowed into the interrogation); *accord King v. State*, 36 Md. App. 124 (1977). MPJI-Cr 3:18.

5. Mental & physical condition of the Defendant

Whether the Defendant was provided food and water during interrogation, particularly a long interrogation, is a voluntariness factor. In *Crooker v. California*, 357 U.S. 433, 437-38 (1958), the Supreme Court held that the statement was voluntary when police questioned the Defendant intermittently, while providing milk, sandwiches, and coffee, and allowed the Defendant to smoke.

The fact that the Defendant is physically fatigued by a lengthy interrogation is a voluntariness factor. In *Ashcraft*, 322 U.S. at 154, the Supreme Court held that physical exhaustion from a 36-hour continuous interrogation made the confession involuntary.

Giving a statement while in extreme pain is a voluntariness factor. In *Mincey v. Arizona*, 437 U.S. 385, 398-401 (1978), the Supreme Court held that the Defendant's confession was involuntary. The statement was taken while the Defendant was hospitalized with a gunshot wound, was on drugs, was experiencing unbearable pain, gave incoherent answers, and requested to postpone the interrogation until the next day or until counsel was present. In *Beecher v. Alabama*, 408 U.S. 234, 236 (1972), the Supreme Court held that the confession was involuntary when the Defendant confessed one hour after arrest to a doctor, while in extreme pain from a gunshot wound and under the influence of morphine.

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Physical signs of intimidation, e.g., shaking, quivering, is a voluntariness factor. *Winder*, 362 Md. at 307 & 319. It is relevant in determining voluntariness if the Defendant makes a statement while suffering from mental problems, while intoxicated, or while under the influence of drugs.

For a statement to be involuntary based on mental state, the Defendant must be so mentally impaired that, at the time the statement was made, the Defendant did not understand what he was saying. In *Buck v. State*, 181 Md. App. 585 (2008), the Court of Special Appeals held:

> The first step in determining whether a confession is voluntary under Maryland non-constitutional law is to determine whether the Defendant was mentally capable of making a confession. [M]ere mental deficiency is insufficient to automatically make his confession involuntary. Rather, a confession is only involuntary when the Defendant, at the time of his confession, is so mentally impaired that he does not know or understand what he is saying.

Id. at 637 (quoting *Hoey v. State*, 311 Md. 473 (1988)); *see Townsend v. Sain*, 372 U.S. 293 (1963); *Hof*, 337 Md. 581 (mental impairment from drugs or alcohol does not render a confession involuntary per se); *accord Campbell v. State*, 240 Md. 531 (1965) (confession voluntary even though the Defendant was sedated in a hospital); *Bryant v. State*, 229 Md. 531 (1962); *Mundell v. State*, 244 Md. 91 (1966) (confession voluntary even though the Defendant was hysterical and under the influence of alcohol); *Wiggins v. State*, 235 Md. 97 (1964) (confession voluntary notwithstanding alcohol withdrawal); *McCleary v. State*, 122 Md. 394 (1914).

In *Dobbs*, 148 Md. 34, the confession by a mentally retarded Defendant was involuntary, and the Court of Appeals held:

> [The Defendant has] the mentality of a child between 9 and 11 years of age, after he had been subjected day and night to constant questioning for five or six days, during which time he was prevented from communicating with any friend or relative, after he had been induced by an artifice to believe erroneously that another person had confessed to the crime with which he was charged, and after he had been told by the state's attorney that they were going to be "fair" with him, and that if he told the truth and was not "in it," he had nothing to fear . . .

Id. at 54; *see Ayala v. State*, 174 Md. App. 647, *cert. denied*, 401 Md. 173 (2007) (confession voluntary, even though no understanding of English because a translator was provided); *Bey v. State*, 140 Md. App. 607 (2001) (confession voluntary even though under the influence of PCP); *Dennis*, 6 Md. App. 295 (confession voluntary even though "scared"); *Carrington v. State*, 1 Md. App. 353 (1967) (confession voluntary even though drinking and slurred speech); *Cooper v. State*, 1 Md. App. 90 (1967) (con-

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fession voluntary even though sick); *Williams v. State*, 127 Md. App. 208 (1999) (confession voluntary during "hangover"); *Buck*, 181 Md. App. at 638-39 (confession voluntary even though the Defendant failed to take anti-depression medication); *Rodriguez v. State*, 191 Md. App. 196 (2010); *Harper v. State*, 162 Md. App. 55 (2005) (confession voluntary even though the Defendant consumed marijuana and alcohol and was sleep deprived); *James v. State*, 193 Md. 31, 44-45 (1949) (confession voluntary, despite a claim of insanity, which was refuted by the Defendant's own experts).

In *Blackburn v. Alabama*, 361 U.S. 199, 205-06 (1960), the Supreme Court held that the confession was involuntary when the Defendant had a long history of mental problems and may have been insane when interrogated. In *Townsend*, 372 U.S. at 307-08, the Supreme Court held that the confession was involuntary when the Defendant was given a drug with "truth serum." In *Combs v. State*, 237 Md. 428, 435 (1965), the Court of Appeals held that the confession was involuntary when the Defendant was (a) kept in a cell and told he would not be let out until he confessed; (b) had a mental deficiency and fear of being enclosed in a cell; and (c) was subjected to actual force by police.

In *Dempsey v. State*, 277 Md. 134, 153 (1976), the Court of Appeals held that the trial court should have considered, as a voluntariness factor, the Defendant's intoxication at the time of his statement. In *Robinson v. State*, 3 Md. App. 666 (1968), the Court of Special Appeals stated: "[T]he fact that [the Defendant] may have been a drug addict under going withdrawal symptoms at the time of his confession would not, standing alone, compel a finding that the confession was involuntarily made." *Id.* at 673. MPJI-Cr 3:18.

6. Whether police subjected the Defendant to force or threat of force

Confessions obtained by police brutality and/or by torture are involuntary. *Brown*, 297 U.S. at 285-86; *see Williams v. United States*, 341 U.S. 97, 99 (1951). In *Beecher*, 408 U.S. at 236, the Supreme Court held a confession was involuntary when taken after officers shot the Defendant in the leg and threatened to kill him if he did not confess, and the Defendant was in the hospital and under the influence of morphine. In *Jackson v. State*, 209 Md. 390 (1956), the Court of Appeals held that the confession was involuntary because of police threats of violence. The Court stated:

> [T]he prisoner was subjected to the physical indignity of being stripped of all his clothing at a time when it was quite unnecessary to do so for purposes of analysis. He was beaten . . . until his nose bled, and over the head with a blackjack. Later, at the police station, an officer hit his head against the wall and trod on his toes[. The officer, who] was specifically charged with beating the prisoner, was present when he confessed two days later.

Id. at 395.

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In *Burch v. State*, 346 Md. 253, 268 (1997), the Court of Appeals held that the confession was voluntary because the evidence did not support the Defendant's claim that (a) he was beaten by the emergency response team who arrested him; and (b) he confessed only to avoid further beatings or that there would be further beatings. *See Scott v. State*, 61 Md. App. 599 (1985) (confession voluntary because the trial court believed the officer's testimony over the Defendant's on whether he confessed because of police threats).

In *State v. Hill*, 2 Md. App. 594 (1967), when eight FBI agents stormed the Defendant's bedroom at 5:00 a.m., the Court of Special Appeals stated:

> [T]he constitutional inquiry is not whether the conduct of the officers in arresting [the Defendant] was shocking, but whether his confession was free and voluntary [or] extracted by any sort of threats or violence, or obtained by any direct or implied promises, however, slight, or by the extension of any improper influence.

Id. at 601. *See Jones v. State*, 188 Md. 263 (1947) (although fear of "mob violence" may be sufficient to render a confession involuntary, it did not in this case).

7. Age, background, experience, education, character, & intelligence of the Defendant

Juveniles lack the maturity to fully understand the consequences of responding to police questioning. *In re Gault*, 387 U.S. 1, 55-56 (1967); *Gallegos v. Colorado*, 370 U.S. 49, 54-55 (1962); *Haley v. Ohio*, 332 U.S. 596, 599-601 (1948). However, youth alone will not render an otherwise voluntary statement involuntary. *See Bean v. State*, 234 Md. 432, 440 (1964); *Linkens v. State*, 202 Md. 212 (1953); *Jones v. State*, 188 Md. 263 (1947); *Birkenfeld v. State*, 104 Md. 253 (1906); *Harris v. State*, 1 Md. App. 318 (1967) (age 15 does not alone make the statement involuntary); *McIntyre*, 309 Md. at 623-24.

The Defendant's educational level and intelligence are voluntariness factors. *Crooker*, 357 U.S. at 437-38; *Koprivich v. State*, 1 Md. App. 147 (1967) (confession voluntary despite a third grade education); *Davis*, 384 U.S. at 752. MPJI-Cr 3:18.

8. Whether the Defendant was taken before a court commissioner without unnecessary delay following arrest &, if not, whether that affected the voluntariness of any statement

If the Defendant is arrested without a warrant, the Fourth Amendment requires the Defendant to be taken for an initial appearance before a judicial officer promptly to determine whether the arrest is supported by probable cause. *Gerstein v. Pugh*, 420 U.S. 103, 112-13 (1975). A period not exceeding 48 hours is considered prompt. *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991). If the Defendant is arrested

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pursuant to a warrant or grand jury indictment, there is no constitutional requirement for presentment before a judicial officer because there has already been a neutral determination of probable cause.

If the Defendant is arrested, with or without a warrant, in the federal system, the Defendant must be taken for an initial appearance before a federal magistrate judge without unnecessary delay. Fed. R. Crim. P. 5(a)(1)(A).

If the Defendant is arrested, with or without a warrant, in Maryland, the Defendant must be taken for an initial appearance before a Court Commissioner (a judicial officer who is not a judge) without unnecessary delay and, in no event, later than 24 hours after arrest. The Defendant is taken before a Circuit Court judge, instead of a District Court Commissioner, only if the Defendant is arrested pursuant to a warrant that so orders.

In Circuit Court, the Defendant is taken for an initial appearance before a judge without unnecessary delay and, in no event, later than the next court session. Md. Rule 4-212(e) & (f). *See Ayala*, 174 Md. 647; *Facon v. State*, 375 Md. 435 (2003) (delay exceeding 24 hours permissible when the Defendant was arrested out of State and there was no collusion between the states to avoid prompt presentment).

There are consequences for the State if it fails to comply with the prompt presentment requirement. If an arrest is supported by probable cause, even if the Defendant is not presented promptly for an initial appearance before a judicial officer, there are no Fourth Amendment consequences and no right to be released. *See Powell v. Nevada*, 511 U.S. 79, 83-85 (1994). The prompt presentment issue is whether the failure to comply with the prompt presentment requirement rendered the statement involuntary.

Prior to the Omnibus Crime Control & Safe Streets Act of 1968, 18 U.S.C. § 3501 (referred to as "the crime bill"), federal courts were controlled by the *McNabb-Mallory* rule, which was decided by the Supreme Court under its supervisory authority. Under that rule, confessions are inadmissible, even if otherwise constitutionally valid, if obtained during unnecessary delay in taking the Defendant before a judicial officer. *Mallory v. United States*, 354 U.S. 449, 455-56 (1957); *McNabb v. United States*, 318 U.S. 332, 344-45 (1943).

Fed. R. Crim. P. 5(a) requires police, upon arrest, with or without a warrant, to take the arrestee before a federal magistrate judge without unnecessary delay. In *Upshaw v. United States*, 335 U.S. 410, 414 (1948), the Supreme Court held that the confession was inadmissible, based on a 30-hour delay for the purpose of obtaining a confession. Through the *McNabb-Mallory* rule, the Supreme Court explained that an arrested Defendant must be taken to a judicial officer as quickly as possible, but certain circumstances may justify a brief delay. Delay must not be for the purpose of obtaining a confession.

The Omnibus Crime Control & Safe Streets Act addressed *Miranda v. Arizona*

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and the *McNabb-Mallory* rule. Through 18 U.S.C. § 3501(a) & (b), Congress attempted to "overturn" *Miranda* by making statements admissible if voluntary, even if police failed to comply with *Miranda*, making *Miranda* compliance merely a voluntariness factor. In *Dickerson v. United States*, 530 U.S. 428, 434-44 (2000), the Supreme Court held that *Miranda* is of constitutional dimension, as part of the Fifth Amendment privilege against compelled self-incrimination, and that portion of the crime bill that attempted to "overturn" *Miranda* was unconstitutional.

The *McNabb-Mallory* rule, and the federal rules implementing it, are not of constitutional dimension and may be amended by Congress. *See Powell*, 511 U.S. 79. Under 18 U.S.C. § 3501(c), if a confession is obtained, following a lawful arrest, but prior to presentment before a judicial officer, the confession is admissible if it (a) complies with *Miranda*; (b) complies with voluntariness, and (c) was obtained within six hours after arrest (or a longer period if required by transportation and distance needs). If that otherwise constitutional confession is obtained more than six hours after arrest, it is inadmissible if it was obtained during an unnecessary or unreasonable delay, which cannot be established solely by time.

In *Corley v. United States*, 556 U.S. 303, 322-23 (2009), the Defendant was validly arrested and taken for interrogation and not taken before a federal magistrate judge. At 9.5 hours after arrest, the Defendant waived *Miranda* rights and gave an oral confession. At 29.5 hours after arrest, the Defendant gave a written confession. The Supreme Court reversed the Defendant's conviction, holding that 18 U.S.C. § 3501(a) & (b) applies to *Miranda* only, and 18 U.S.C. § 3501(c) applies to *McNabb-Mallory*. The Court held that Congress did not intend to eliminate the *McNabb-Mallory* rule, but only meant to modify it by establishing a six-hour "safe harbor" of per se admissibility.

In *Perez v. State*, 155 Md. App. 1 (2004) (*Perez* I), the Court of Special Appeals explained the evolution of Maryland law with regards to the "prompt presentment" requirement:

> The prompt presentment rule, first adopted in 1971, currently appears in Md. Rule 4-212, which provides that a Defendant be served with a copy of the warrant and charging documents promptly after arrest and be taken before a commissioner within 24 hours after arrest. Prior to *Johnson v. State*, 282 Md. 314 (1978), the general criterion for admissibility of a confession was voluntariness. In *Johnson*, the Court of Appeals applied the 24-hour requirement as a *per se* rule of exclusion and held that statements obtained more than 24 hours after arrest would be suppressed. This decision was followed in *McClain v. State*, 288 Md. 456 (1980). In 1981, the legislature repudiated the *Johnson-McClain* exclusionary rule, returning to the voluntariness standard . . . As explained in *Williams*, 375 Md. 404, "[the *McClain* decision] did

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> produce a swift legislative response. . . . There is no doubt that the statute was a delayed reaction to *Johnson* and an immediate reaction to *McClain* . . . The Maryland legislature made it clear that voluntariness is the test, determined by consideration of all relevant factors. The legislature did not address the weight to be given to any particular factor, presumably because, under a totality of the circumstances test, the hearing judge generally determines the weight of each factor, considered in the context of the whole . . ." After the instant case was argued before a three-judge panel of this Court, the Court of Appeals ruled in [*Facon v. State*, 375 Md. 435 (2003); *Williams*, 375 Md. 404; *Hiligh v. State*, 375 Md. 456 (2003)], that, under certain circumstances, a delay in presentment should be given "very heavy weight" when considering the totality of the circumstances. *See Young v. State*, 68 Md. App. 121 (1986) (deliberate delay rendered the Defendant's confession inadmissible).

Id. at 17-19. MPJI-Cr 3:18.

In 1977, the Court of Appeals promulgated a rule that required the Defendant, whether arrested by warrant or without a warrant, to be taken before a judicial officer without unnecessary delay and, in no event, later than 24 hours after arrest. In *Johnson*, 282 Md. 314, the Court of Appeals held that the Maryland rule tracked the then-current version of Fed. R. Crim. P. 5(a), requiring presentment before a judicial officer "without unnecessary delay" and suppressing any statement obtained in violation of the rule.

In *Johnson*, the Defendant was arrested at 3:15 p.m., and was taken to the police station and not taken before a court commissioner. At the station, the Defendant was given *Miranda* warnings but, because of stomach pains, interrogation was postponed, and he spent the night in a cell. At 9:45 a.m., following a written waiver of *Miranda* rights, the Defendant was interrogated for six hours, culminating in a ten-page written statement, which he signed at 3:45 p.m. At 4:00 p.m., the Defendant was taken before a court commissioner.

Not only was the presentment outside the 24-hour limit, there was unnecessary delay. Police deliberately postponed presentment in order to subject the Defendant to interrogation. The Court held that the rule was mandatory, and not directory, and vacated the conviction.

In *McClain*, 288 Md. at 470, the Court of Appeals applied *Johnson* retroactively, reversing a murder conviction of a Defendant who dropped a ten-month-old child into the trash chute of a high-rise apartment building. In that case, the confession was obtained 24 hours and 12 minutes after arrest, without presentment to a court commissioner.

In 1981, the Maryland General Assembly enacted 1981 Md. Laws ch. 577, which was codified in Md. Ann. Code, Cts. & Jud. Proc. § 10-912. The statute "overturned"

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the court rule, providing that a "confession may not be excluded solely because the Defendant was not taken before a judicial officer after arrest within the time specified by the Md. Rules, and failure to strictly comply with the Md. Rules is only one factor when deciding the voluntariness of a confession."

In *Williams*, 375 Md. at 416, the Court of Appeals held that, if the Defendant is not taken before a Court Commissioner timely, and the delay is deliberate and unnecessary, particularly when the delay is for the purpose of interrogation, that delay must be given "very heavy weight" when determining the voluntariness of the confession, unless the Defendant made a knowing and intelligent waiver of the right to prompt presentment.

In *Hiligh*, 375 Md. at 471, the Court of Appeals held that when the police had all the evidence needed in less than five hours after arrest, any further delay in presentment was unnecessary. *See Faulkner v. State*, 156 Md. App. 615 (2004) (7.5-hour delay did not render the confession involuntary when there were valid administrative and investigative reasons for delay). In *Facon*, 375 Md. at 446-49, the Court of Appeals held that the prompt presentment requirement is inapplicable to a Defendant arrested out-of-state. *See Perez v. State*, 168 Md. App. 248 (2006) (*Perez* II); *Freeman v. State*, 158 Md. App. 402 (2004); *Odum v. State*, 156 Md. App. 184 (2004).

For a statement obtained prior to presentment, there is a two-step suppression process. The first step is a motion to suppress, under Md. Rule 4-252, with the trial court determining voluntariness of the statement. The Defendant argues that the statement was obtained during an unnecessary delay in presentment, rendering the confession involuntary. The court determines admissibility of the confession, with the State bearing the burden of persuasion by a preponderance of the evidence. The second step is a jury determination of voluntariness. If the court denies the motion to suppress, and rejects the voluntariness argument, and the Defendant argues involuntariness at trial, the Defendant is entitled to a jury instruction that permits the jury to consider the confession only if the jury finds that the confession was voluntary, beyond a reasonable doubt. MPJI-Cr 3:18.

B. Burden is on the State to show that a confession is voluntary

The burden is on the State to show that the Defendant's confession was voluntary. *Parker v. State*, 225 Md. 288, 291 (1961). In *Jackson v. State*, 141 Md. App. 175 (2001), *cert. denied*, 368 Md. 240 (2002), the Court of Special Appeals stated:

> Voluntariness of a Defendant's confession must be established in a two-tier approach. First, the trial court must rule on the admissibility of the Defendant's confession, that is, whether it passes constitutional . . . At that juncture, the State must prove the voluntariness of the confession by a preponderance

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> of the evidence. Once the trial court has ruled the confession admissible, the issue of its voluntariness, if generated at trial, becomes a question for the jury to decide in light of all the facts and circumstances of the case, and must be proven by the State beyond a reasonable doubt.

Id. at 186-87.

C. The Defendant is entitled to a jury instruction on voluntariness if the Defendant raised the issue of voluntariness both in a pre-trial suppression motion & at trial

For the Defendant to be entitled to a jury instruction on voluntariness, with the burden of persuasion on the State to prove voluntariness, beyond a reasonable doubt, the Defendant must litigate the issue in a pre-trial motion to suppress and must generate the issue at trial. In *Hof v. State*, 337 Md. 581 (1995), the Court of Appeals stated:

> The two-tier approach to the voluntariness decision anticipates . . . jury reconsideration of the trial court's determination[. U]nless the issue is pursued at trial, there is absolutely no reason for it to even be submitted to the jury. [J]ury reconsideration can only occur when the same or substantially the same evidence is presented both at the pre-trial hearing and at trial. . . . Thus, even though the Defendant may request a jury instruction on voluntariness, unless it has been generated by evidence, from whatever source, presented before the jury, the requested instruction need not be given.

Id. at 617-18.

In *White v. State*, 13 Md. App. 1, *cert. denied*, 263 Md. 723 (1971), the Court of Special Appeals stated: "When the confession is presented to the jury, they have the final determination whether or not it was voluntary and whether or not it should be believed. To consider it, they must find it voluntary beyond a reasonable doubt." *Id.* at 5-6. *See Murphy v. State*, 8 Md. App. 430 (1970) (trial court's failure to make a preliminary finding of voluntariness was error).

1. Maryland Pattern Jury Instruction Cr 3:18 (Statement of Defendant)

Maryland Criminal Pattern Jury Instructions 3:18 provides:

> You have heard evidence that the Defendant made a statement to the police about the crime charged. [You must first determine whether the Defendant made a statement. If you find that the Defendant made a statement, then] you must decide whether the State has proven, beyond a reasonable doubt, that the statement was voluntarily made. A voluntary statement is one that, under

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all circumstances, was given freely. [To be voluntary, a statement must not have been compelled or obtained as a result of any force, promises, threats, inducements or offers of reward.]

If you decide that the police used [force] [a threat] [promise or inducement] [offer of reward] in obtaining the Defendant's statement, then you must find that the statement was involuntary, and you must disregard it, unless the State has proven, beyond a reasonable doubt, that the [force] [threat] [promise or inducement] [offer of reward] did not, in any way, cause the Defendant to make the statement. If you do not exclude the statement for one of these reasons, you then must decide whether it was voluntary under the circumstances.

In deciding whether the statement was voluntary, consider all of the circumstances surrounding the statement, including (a) the conversations, if any, between the police and the Defendant; (b) [whether the Defendant was advised of [his] [her] rights]; (c) the length of time that the Defendant was questioned; (d) who was present; (e) the mental and physical condition of the Defendant; (f) whether the Defendant was subjected to force or threat of force by the police; (g) the age, background, experience, education, character, and intelligence of the Defendant; [(h) whether the Defendant was taken before a District Court Commissioner without unnecessary delay following arrest and, if not, whether that affected the voluntariness of the statement]; and (i) any other circumstances surrounding the taking of the statement.

If you find, beyond a reasonable doubt, that the statement was voluntary, give it such weight as you believe it deserves. If you do not find, beyond a reasonable doubt, that the statement was voluntary, you must disregard it.

The "Notes on Use" to Maryland Criminal Pattern Jury Instructions 3:18 provides:

The initial bracketed language in the first paragraph should be given only if there is an issue as to whether the Defendant actually made a statement. The instructions in the second paragraph should be given if there is an issue, generated by the evidence, about whether force, promises, threats, or offers of reward compelled or produced the statement. In the third paragraph, factor (b) should be given in those cases in which a person in custodial interrogation and was entitled to be informed of his rights. In pre-custodial settings, the failure of police officers to advise a person of his or her rights may be considered under other factors, particularly, factors (g) and (i). Factor (i) should be given only if there is an issue concerning the promptness of presentment before a judicial officer after arrest.

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2. Comment to Maryland Pattern Jury Instruction Cr 3:18 (Statement of Defendant)

The Comment to Maryland Criminal Pattern Jury Instructions 3:18 provides in part:

Initially, if the issues are generated by the evidence, the jury must decide whether the Defendant made a statement and whether that statement was compelled or obtained as a result of force, promises, threats, inducements, or offers of reward. *See Lee v. State*, 418 Md. 136 (2011); *Hill v. State*, 418 Md. 62 (2011); *Hillard v. State*, 286 Md. 145 (1979). In *Hill*, the Court of Appeals explained why the "improper inducement" issue should be considered first:

> Although a totality of the circumstances analysis is standard practice for determining whether an accused's statement to the police was voluntarily made, not all of the factors that bear on voluntariness are of equal weight; certain factors are "transcendent and decisive." *Williams*, 375 Md. at 429. Thus, "a confession that is preceded or accompanied by threats or a promise of advantage will be held involuntary, notwithstanding any other factors that may suggest voluntariness, unless the State can establish that such threats or promises in no way induced the confession." *Knight v. State*, 381 Md. 517, 533 (2004); *Williams*, 375 Md. at 429; *see Hill*, 418 Md. at 76.

An involuntary statement may not be used as evidence against the Defendant, both because of the common law concern for fairness and the constitutional requirements of the Fifth Amendment, applied against the states through the Due Process Clause of the Fourteenth Amendment. *See Hillard*, 286 Md. at 150-51. The standard for admissibility is whether the statement was voluntary under the totality of the circumstances. *Id.*; *Hof v. State*, 97 Md. App. 242, 289-90 (1993), *aff'd*, 337 Md. 581 (1995) ("The concern is whether an improper influence . . . has been the pivotal criterion in producing a confession from one who would not have confessed but for that improper influence . . . Unless the improper influence is the precipitating or catalytic agent for the confession, it is not fatal."); *Burch v. State*, 346 Md. 253, 261-68, *cert. denied*, 522 U.S. 1001 (1997) (police abuse does not necessarily make subsequent inculpatory statement involuntary); *Matthews v. State*, 106 Md. App. 725, 739 (1995), *cert. denied*, 341 Md. 648 (1996); *Blake*, 381 Md. 218 (inmate's statement to police, after he invoked *Miranda* rights and was given a statement of charges that incorrectly indicated he was death-penalty eligible was coercive); *see Arizona v. Fulminante*, 499 U.S. 279, *reh'g denied*, 500 U.S. 938 (1991) (confession coerced when given to fellow inmate, who was paid FBI informant and who offered protection in return for truth).

Admissibility of a statement must first be determined by the court out of the presence of the jury, with the State bearing the burden of proving the voluntariness of the statement by a preponderance of the evidence. *See Hillard*, 286 Md. at 151; *Jackson v. Denno*, 378 U.S. 368, 395 (1964); *Channer v. State*, 94 Md. App. 356 (1993); 1 Kenneth

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S. Broun, *McCormick on Evidence* § 161, at 651-54 (6th ed. 2006); *Brittingham v. State*, 306 Md. 654 (1986) (Defendant may not be impeached by a statement that fails the common law voluntariness test of *Hillard*). If the statement is determined by the court to have been voluntarily given, the issue is then submitted to the jury. However, before the jury may use the statement in determining guilt, the State must persuade the jury of the voluntariness of the statement beyond a reasonable doubt. *Hillard*, 286 Md. at 151; *Hof*, 97 Md. App. 242. The court must give a requested voluntariness instruction even if the court is convinced of the statement's voluntariness. *Bellamy v. State*, 50 Md. App. 65, 73 (1981), *cert. denied*, 292 Md. 376 (1982); *cf. Hof*, 337 Md. at 617 (if the Defendant generates the issue of voluntariness at trial, and not just during a pre-trial hearing, the Defendant is entitled to a voluntariness instruction).

If the jury determines that the statement was voluntarily made, it considers the statement along with all other evidence in the case. *Hof*, 337 Md. at 605; *Smith v. State*, 237 Md. 573 (1965); *Ralph v. State*, 226 Md. 480 (1961), *cert. denied*, 369 U.S. 813 (1962); *Smith v. State*, 189 Md. 596 (1948). If the jury determines that the statement was involuntarily made, it must disregard it. *Hof*, 337 Md. at 605; *Dempsey v. State*, 277 Md. 134, 145 (1976); *Gill v. State*, 265 Md. 350 (1972); *see* Joseph F. Murphy, Jr., *Maryland Evidence Handbook* § 1303(A)(2), at 621-23 (4th ed. 2010). *See generally* Lynn McLain, *Maryland Evidence* § 514.3, at 280-81 (2d ed. 2001 & Supp. 2010).

Corroboration is required if the corpus delecti of the crime is established by the Defendant's statement. *Traverso v. State*, 83 Md. App. 389, *cert. denied*, 320 Md. 801 (1990); *Crouch v. State*, 77 Md. App. 767, 769, *cert. denied*, 315 Md. 307 (1989); *see Birchead v. State*, 317 Md. 691 (1989) (convictions supported by the Defendant's oral admission to police, as corroborated by other evidence); *Woods v. State*, 315 Md. 591, 615-20 (1989). *See* Murphy, *supra* § 805(B)(1), at 400 (citing with approval MPJI-Cr 3:18). Although the jury is required to consider all acts and circumstances surrounding the statement, those factors emphasized by the courts have been included in the committee's instruction.

MPJI-Cr 3:18.

Paraphrased, the Comment to MPJI-Cr 3:18 goes on to explain:

The jury should consider the conversations between police and the Defendant. As to place, see *Burton v. State*, 32 Md. App. 529 (1976); *Shedrick v. State*, 10 Md. App. 579 (1970); *Bernos v. State*, 10 Md. App. 184 (1970). As to type of questioning, see *Hughes v. State*, 346 Md. 80, 94-97 (1997); *Grimes v. State*, 44 Md. App. 580 (1980), *rev'd on other grounds*, 290 Md. 236 (1981); *Clarke v. State*, 3 Md. App. 447 (1968).

As to the nature of the conversations, see *Winder*, 362 Md. 275 (egregiousness of the officer's conduct by disregarding interrogation guidelines); *Johnson v. State*, 303 Md. 487, 513 (1985), *cert. denied*, 474 U.S. 1093 (1986) (referring to the Defendant's willingness to take a polygraph test not error when the Defendant acknowledged that his statement was freely given and not the product of threats or coercion); *Mitchell*

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v. State, 51 Md. App. 347, 353-54, *cert. denied*, 293 Md. 617, *cert. denied*, 459 U.S. 915, *reh'g denied*, 459 U.S. 1024 (1982) (evidence of a polygraph test may be admitted in limited situations in which voluntariness of a statement is at issue and it is contended that administering a polygraph test is relevant to whether the statement was voluntarily given); *Bowers v. State*, 298 Md. 115 (1983); *Radovsky v. State*, 296 Md. 386 (1983); *Ciriago v. State*, 57 Md. App. 563, *cert. denied*, 300 Md. 152 (1984).

The jury should consider whether the Defendant was warned of his or her rights. *See Cunningham v. State*, 58 Md. App. 249, 261-62, *cert. denied*, 300 Md. 316 (1984); *Leuschner v. State*, 49 Md. App. 490, *cert. denied*, 291 Md. 778 (1981); *Thomas v. State*, 3 Md. App. 101 (1968). *But see Hill v. State*, 89 Md. App. 428 (1991) ("public safety exception" to *Miranda* requirements).

The jury should consider the length of time that the Defendant was questioned. *See Winder*, 362 Md. 275 (Defendant confessed after 12 hours of interrogation and changed his story after the officers promised to help and protect him); *Hines v. State*, 58 Md. App. 637, *cert. denied*, 300 Md. 794 (1984); *Finke*, 56 Md. App. 450.

The jury should consider who was present. *See Leuschner*, 49 Md. App. 490; *Cummings*, 27 Md. App. at 373-74.

The jury should consider the mental and physical condition of the Defendant. *See Winder*, 362 Md. 275 (Defendant was intimidated, quivering, and shaking); *Dempsey*, 277 Md. at 150-54; *Mundell v. State*, 244 Md. 91 (1966); *Greenwell v. State*, 32 Md. App. 579 (1976).

The jury should consider whether the Defendant was subjected to force or threat of force by police. *See Beecher*, 389 U.S. 35; *Brown*, 297 U.S. 278; *Finke*, 56 Md. App. 450; *Blake*, 381 Md. 218 (self-incriminating statement inadmissible because officers should have known that their actions were reasonably likely to elicit an incriminating statement; their contact with the Defendant was the functional equivalent of interrogation; and after administering *Miranda* warnings, the Defendant had not initiated contact with police).

The jury should consider the age, background, experience, education, character, and intelligence of the Defendant. *See Payne v. Arkansas*, 356 U.S. 560 (1958); *Ward v. Texas*, 316 U.S. 547 (1942); *White*, 13 Md. App. 1.

The jury should consider whether there was unnecessary delay following arrest, prior to taking the Defendant before a District Court Commissioner, and if so, whether the delay affected the voluntariness of the statement. Md. Rule 4-212(f) requires that "[w]hen a Defendant is arrested without a warrant, the Defendant must be taken before a judicial officer of the District Court without unnecessary delay and, in no event, later than 24 hours after arrest." Md. Code Ann., Cts & Jud. Proc. § 10-912, provides that a statement may not be excluded solely because of non-compliance with this rule, but that non-compliance is a factor "in deciding the voluntariness and admissibility of a confession." *Id.* § 10-912(b).

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With some alterations, the Comment to MPJI-Cr 3:18 continues:

Since 2003, Maryland's appellate courts have had occasion to address this rule and statute. In *Williams*, 375 Md. 404, the Court of Appeals held that when a Defendant is not taken before a District Court Commissioner timely, and the delay is designed for the purpose of soliciting a confession, such delay should be given heavy weight when determining the voluntariness of the confession. The Court recognized that the right to prompt presentment is subject to a knowing and intelligent waiver, provided the arrestee may reassert the right to prompt presentment at any time.

In *Facon v. State*, 375 Md. 435 (2003), the Court of Appeals held that the requirement of prompt presentment is inapplicable if the Defendant is held out-of-state. Out-of-state time does count against the State if Maryland officials are working with out-of-state officials for reasons other than extradition. In *Facon*, although the Defendant was presented to a District Court Commissioner within 24 hours, his confession was inadmissible because, after entering Maryland, there was an unnecessary delay, designed solely for conducting an all-night interrogation, and the Defendant was not taken before a judicial officer without unnecessary delay. *See Hiligh*, 375 Md. 456; *Odum v. State*, 156 Md. App. 184 (2004) (remanded to address whether a 30-hour delay, between arrival at the police station and presentment before a District Court Commissioner, was unnecessary and was for the sole purpose of obtaining a confession); *Perez* I, 155 Md. App. 1 (delay in presentment given added weight when the Defendant is held nearly 48 hours before presentment); *Perez* II, 168 Md. App. at 279 (Defendant did not waive the right of prompt presentment and delay in presentment was a factor that rendered a statement involuntary); *Freeman v. State*, 158 Md. App. 402 (2004) (no suppression based on three-hour delay in presentment that was not for the sole purpose of obtaining a statement).

As to promises, inducements, or offers of reward, *see Hillard*, 286 Md. 145; *Hill*, 418 Md. 62 (Defendant relied on the officer's statement that the victim's family wanted only an apology, which was an improper inducement); *Stokes v. State*, 289 Md. 155 (1980); *Knight*, 381 Md. 517; *Winder*, 362 Md. 275; *Taylor v. State*, 388 Md. 385 (2005) (detective's suggestion that the Defendant's cooperation would benefit in the Commissioner's release decision was an improper inducement); *Griner v. State*, 168 Md. App. 714, 735 (2006) (detective's statement that "he would speak to Child Protective Services concerning the information [that the Defendant] had given him" was not an improper inducement); *Fuget v. State*, 70 Md. App. 643, 651-52 (1987); *Bellamy v. State*, 50 Md. App. 65 (1981), *cert. denied*, 292 Md. 376 (1982); *Whack v. State*, 94 Md. App. 107 (1992), *cert. denied*, 330 Md. 155 (1993); *Boyer v. State*, 102 Md. App. 648 (1995). *But see Reynolds v. State*, 327 Md. 494, 504-08 (1992), *cert. denied*, 506 U.S. 1054 (1993) (trend against per se exclusion of statements made in reliance on inducements); *see Harrison v. State*, 151 Md. App. 648 (2003), *rev'd on other grounds*, 382 Md. 477 (2004) (statement not made in response to inducement of leniency).

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In *Knight*, 381 Md. 517, the Court of Appeals held that there was no nexus between the improper inducement and the confession, and the Defendant gave the first statement before the inducement and did not rely on the inducement in making the second, virtually identical, statement. Determine also whether there was an intervening factor that caused the Defendant to confess. *Winder*, 362 Md. at 320 (no "attenuation in time, no change of environment, and no interruptive change of the interrogation team").

As to whether police used deception to obtain the statement, see *Ball*, 347 Md. 156 (police permitted some subterfuge); *Lewis v. State*, 285 Md. 705 (1979); *Rowe v. State*, 41 Md. App. 641, *cert. denied*, 285 Md. 733 (1979); *Hopkins v. State*, 19 Md. App. 414 (1973), *cert. denied*, 271 Md. 738 (1974).

In *Lee*, 418 Md. 136, the Court of Appeals distinguished a promise of confidentiality from one of leniency, holding that the interrogating officer's statement to the Defendant, that this is "between you and me, Bud," rendered the Defendant's prior *Miranda* waiver ineffective. However, it did not render the Defendant's subsequent statements involuntary. The Court noted that the Defendant did not testify at the suppression hearing, so there was no evidence that his will was overborne by the officer's comment, and the confidentiality issue remains open. *Id.* at 162.

In *Wright v. State*, 307 Md. 552, 583-87 (1986), the Court of Appeals held that, if police or a prosecutor tell the Defendant that, if he confesses or pleads guilty plea to second degree murder, his first degree murder charge will be dismissed, and if the Defendant confesses based on that inducement, his confession would be involuntary and inadmissible after withdrawal of the guilty plea. Relevant to determining the nexus between the inducement and the statement is whether there was an intervening factor that caused the Defendant to confess. *Winder*, 362 Md. at 320 (no "attenuation in time, no change of environment, and no interruptive change in the interrogation team").

In *Brittingham*, 306 Md. at 667-69, there was evidence that the Defendant requested an attorney prior to making a statement to the polygraph examiner, but was told that such a request would delay both the examination and the trial and would result in increased costs to him. This was relevant to the jury's determination of whether the Defendant's statement, offered for impeachment, was voluntary. *See Brown v. State*, 79 Md. App. 163, 168-70 (1989) (admission of the Defendant's post-arrest statement was not harmless error when there was a reasonable possibility that the statement may have contributed to the guilty verdict); *Boyd v. State*, 79 Md. App. 53, 66 (1989), *aff'd on other grounds*, 321 Md. 69 (1990) (Defendant's statement to police was not rendered involuntary by interrogating officer's refusal to permit the Defendant to see his children until after the statement was given); *State v. Conover*, 312 Md. 33, 41-43 (1988) (not all police conduct that may cause the Defendant to speak constitutes interrogation under *Miranda*; reading and handing charging document to the

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Defendant after he declined to waive *Miranda* rights and requested an attorney was not "interrogation"); *Fowler v. State*, 79 Md. App. 517, 522, *cert. denied*, 317 Md. 392 (1989) (officer's comment to the Defendant that he should disclose the other suspect's name so "the weight could be shared" was not an inducement); *Hoey v. State*, 311 Md. 473, 480-82 (1988) (Defendant's mental deficiency did not automatically render his confession involuntary); *Snowden v. State*, 76 Md. App. 738, 741 (1988), *rev'd in part on other grounds*, 321 Md. 612 (1991) (Defendant's statement was voluntary based on his intelligence and understanding, plus, after his arrest, he had two meals and an opportunity to sleep and make phone calls); *Bloodsworth v. State*, 76 Md. App. 23, 33-34, *cert. denied*, 313 Md. 688 (1988) (Defendant's former testimony is admissible in a later proceeding when the record does not indicate that the testimony at the first trial was involuntary); *Kirkland v. State*, 75 Md. App. 49, 57, *cert. denied*, 313 Md. 506 (1988) (under exception to the rule against hearsay for admissions of party opponent, a party may introduce anything, in the nature of an admission, that an opposing party has said or done, if relevant); *see Lodowski*, 307 Md. at 249-55; *State v. Kidd*, 281 Md. 32, 37-38, *cert. denied*, 434 U.S. 1002 (1977); *Green v. State*, 93 Md. App. 571 (1992), *cert. denied*, 329 Md. 480 (1993) (confession admissible when confession based on fear or threats from unidentified person not a police officer).

Comment to MPJI-Cr 3:18.

D. When is corroboration of the Defendant's confession required?

In Maryland, if the Defendant's statement establishes the corpus delecti of the crime, the State is required to produce corroboration of the statement. *Birchead v. State*, 317 Md. 691, 706-07 (1989); *Wood v. State*, 192 Md. 643, 649 (1949); *Traverso v. State*, 83 Md. App. 389, 396-97 (1990). In *Lemons v. State*, 49 Md. App. 467 (1981), the Court of Special Appeals stated: "[A] Defendant's extrajudicial confession standing alone is, as a matter of law, insufficient to support a criminal conviction. To warrant a conviction, such a confession must be accompanied—or as the rule is typically phrased 'corroborated'—by some independent evidence . . ." *Id.* at 468-69.

In *Borza v. State*, 25 Md. App. 391, 403, *cert. denied*, 275 Md. 746 (1975), the Court of Special Appeals stated: "The thrust of the principle is to prevent mentally unstable persons from confessing to, and being convicted of, crimes that never occurred." *But see Traverso*, 83 Md. App. at 397 (territorial jurisdiction may be based on the Defendant's uncorroborated confession).

E. Statements made during plea negotiations

Statements made during plea negotiations are generally inadmissible. A plea agreement may provide that the Defendant's statements are admissible at trial if the Defendant repudiates the agreement. Md. Rule 5-410; *see State v. Pitt*, 390 Md. 697, 719

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(2006); *Elmer v State*, 353 Md. 1, 10 (1999). *Compare Wright v. State*, 307 Md. 552 (1986) (permissible to admit the Defendant's statements when he breached the plea agreement), *with Allgood v. State*, 309 Md. 58 (1987) (impermissible to admit the Defendant's statements before the grand jury pursuant to a plea agreement).

F. Involuntary statements, unlike statements made in violation of *Miranda*, may not be used for any purpose

Involuntary statements may not be used for any purpose, unlike statements made in violation of *Miranda*, which may be used for impeachment. In *Reynolds v. State*, 88 Md. App. 197, 217 (1991), the Court of Special Appeals stated: "[T]raditional involuntariness invariably contemplates a degree of malevolence and coercive influence that goes beyond the presumptive coercion of custodial interrogation[. A] 'mere *Miranda*' violation—although calling for the suppression of the confession on the merits of guilt or innocence, does not trigger second-level suppression under the 'fruit of the poisonous tree' doctrine." *See Michigan v. Tucker*, 417 U.S. 433 (1974); *Oregon v. Elstad*, 470 U.S. 298 (1985).

Thus, it is permissible to use *Miranda*-violative statements for impeachment purposes. *Harris v. New York*, 401 U.S. 222 (1971); *Oregon v. Hass*, 420 U.S. 714 (1975). *See Kidd*, 281 Md. 32. In *Fried v. State*, 42 Md. App. 643 (1979), the Court of Special Appeals held that "the doctrine of taint, i.e., the fruit of the poisonous tree, does not follow from a 'mere *Miranda*' violation, but applies only to confessions involuntarily obtained as by improper inducements or coercion." *Id.* at 646.

§ II. Maryland common law promises or inducements

Under Maryland common law, independent of the federal constitutional requirement, if police promise an advantage or special benefit to the Defendant, who confesses in reliance on that promise, the statement is involuntary, even if the statement would be voluntary under the Fifth Amendment privilege against compelled self-incrimination and the Fourteenth Amendment Due Process Clause. *Hill*, 418 Md. at 74-79; *Winder*, 362 Md. at 317-20; *Ball*, 347 Md. 156; *Hillard*, 286 Md. 145.

In *Dobbs*, 148 Md. 34, the Court of Appeals held that the statement "[t]ell the truth about it. You've got nothing to fear if you tell the truth, and you weren't in it," was an improper inducement. *Id.* at 57-58. In *Biscoe v. State*, 67 Md. 6 (1887), the Court of Appeals held that the statement "it would be better for him to tell the truth, and have no more trouble about it," was an improper inducement; *State v. Rush*, 174 Md. App. 259, 309-11 (2007); *Harper v. State*, 162 Md. App. 55, 81 (2005).

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For a confession to be involuntary, based on improper promises or inducements, (a) police must promise or imply that the Defendant will be given special consideration from a prosecuting authority or be given some form of assistance in exchange for the confession; and (b) the Defendant must confess in apparent reliance on the promise or inducement. *Winder*, 362 Md. at 309. In *Lee v. State*, 418 Md. 136, 157, 160-62 (2011), the Court of Appeals held that an implied promise of confidentiality, without more, may violate *Miranda*, but it does not render a statement inadmissible under Maryland's common law of "promises or inducements." *See Tolbert*, 381 Md. at 554-56.

A. Promises

In *Reynolds v. State*, 327 Md. 494 (1992), the Court of Appeals stated: "Without a promise of benefit or advantage, there [is] no inducement." *Id.* at 509.

1. Objective test

Whether a police statement constitutes a promise to the Defendant of special consideration in exchange for a confession is an objective test, regardless of the subjective belief of the Defendant. In *Hill*, 418 Md. at 78, the Court of Appeals reinforced that it depends on whether a reasonable layperson in the Defendant's position would have inferred from the officer's statement that the Defendant would gain an advantage of non-prosecution or some form of assistance. *See Lyter v. State*, 2 Md. App. 654 (1968) (confession involuntary because the State failed to rebut the Defendant's claims that his confession was the product of police promises and inducements).

2. Exhortations to tell the truth

A mere exhortation that the Defendant tell the truth is insufficient to render a statement involuntary. *Reynolds*, 327 Md. at 507. Telling the Defendant that a prosecutor would be made aware of how the interrogation went is not an improper inducement, so long as the officer does not promise anything in return. In *Knight*, 381 Md. 517, the Court of Appeals stated:

> Those statements that have been held improper inducements have involved promises by the interrogating officers either to exercise their discretion or to convince the prosecutor to provide some special advantage to the subject. [In this case, the officer] offered no special advantage, did not promise to exercise any discretion, and did not promise that the prosecutor would exercise any discretion in favor of [the Defendant].

Id. at 536.

In *Clark v. State*, 48 Md. App. 637 (1981), the Court of Special Appeals held that there was "no sense in lying" was not a promise or inducement but rather "a mere exhortation to tell the truth. [The Defendant] may have thought it would be to his

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advantage to make the statement, but he was not led to believe this" by interrogating officers. *Id.* at 646. In *Bean v. State*, 234 Md. 432 (1964), the Court of Appeals held that "get it off your chest" was not an improper inducement. In *Deems v. State*, 127 Md. 624 (1916), the Court of Appeals held that an officer's statement that "the truth would hurt no one" was not a promise or inducement; *accord Merchant v. State*, 217 Md. 61 (1958) ("the truth hurts no one" was not an improper inducement).

3. Advantage or special consideration

When the Defendant is told, or it is implied, that making an inculpatory statement will be to the Defendant's advantage, because the Defendant will be given help or some special consideration, that is a promise of a benefit. In *Kier v. State*, 213 Md. 556 (1957), the Defendant had been stripped nude and was being examined for evidence of rape and murder. The Court of Appeals held that it was an improper inducement for the doctor to tell the Defendant to "say something" so that he could leave. In *Finke*, 56 Md. App. 450, the Court of Special Appeals stated:

> When a Defendant is told that if he "tells the truth," then the police will "go to bat for him" or help him with the State's Attorney, he is being coerced into giving a confession. He is faced with a disturbing dilemma: give a confession and receive a lesser punishment (by virtue of the police going to bat for him) or maintain his innocence by exercising his right to remain silent and, if found guilty, receive a greater punishment (by virtue of his being "uncooperative").

Id. at 484.

In *Hillard*, 286 Md. 145, the Court of Appeals held that an officer's statement that, "if you are telling me the truth, I will go to bat for you," was an improper promise. *Id.* at 153. In *Streams v. State*, 238 Md. 278 (1965), the Court of Appeals held that it was an improper inducement to tell the Defendant that the officer would try to obtain probation if he talked. In *Biscoe*, 194 Md. 387, the Court of Appeals held that it was an improper inducement to tell the Defendant "that it would be better to tell the truth, and have no more trouble about it." *Id.* at 397.

In *Lubinski v. State*, 180 Md. 1 (1941), the Court of Appeals held that it was an improper inducement to tell the Defendant that giving a statement would "help him a lot." *Id.* at 5. In *Taylor v. State*, 388 Md. 385, 399-403 (2005), the Court of Appeals held that it was an improper inducement for the officer to state that he would make a favorable recommendation to the Court Commissioner for the Defendant's release. In *Watts v. State*, 99 Md. 30 (1904), the Court of Appeals held that it was an improper inducement to tell the Defendant that "it would possibly be better for him if he would make a clean statement, so it would not appear erroneously in the papers." *Id.* at 35.

In *Hill*, 418 Md. 62, the Court of Appeals held that it was an improper inducement for the officer to state that the victim and his mother did not want to see the

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Defendant get into trouble, but wanted only an apology. The Court stated that a layperson would not know that the State could prosecute a person against the wishes or over the objection of the victim. The Defendant "had an objectively reasonable belief, based on the detective's statement, that by making an inculpatory statement that included an apology to the victim's family, he might avoid criminal charges or, at the least, lessen the likelihood of a successful criminal prosecution." *Id.* at 79.

The Court rejected the State's argument that only statements offering assistance can be deemed improper, stating, "[i]t matters only that [the detective] promised or suggested such assistance by one or more persons who, from the perspective of a layperson in [the Defendant's] position, could reasonably provide it." *Id.* at 80. The Defendant made inculpatory statements directly to the detective immediately following the inducement.

In *Knight*, 381 Md. at 537, the Court of Appeals held that it was an improper inducement for the officer to promise to exercise discretion on behalf of the Defendant or to advocate to the prosecutor for the Defendant, in exchange for a confession. However, a different detective's statement that the prosecutor would be made aware of his cooperation was not an improper inducement because the officer offered nothing in exchange for the Defendant's statements and reviewing the interview with a prosecutor is routine police practice.

In *Finke*, 56 Md. App. at 483-84, the Court of Special Appeals held that a detective's statement that if the Defendant could not remember any details of the crime, the Detective would "help him" was not an improper inducement. In *Griner*, 168 Md. App. 714, the Court of Special Appeals held that it was not an improper inducement when the detective indicated that he would speak to Child Protective Services after his interview with the Defendant. The Court stated: "The detective did not say that he could or would do anything for [the Defendant], that he could help her, or that he would assist her in any fashion." *Id.* at 735. *Accord Abbott v. State*, 231 Md. 462 (1963); *Boyer v. State*, 102 Md. App. 648 (1995) (no improper inducement when not offering anything in exchange for a statement).

4. Prosecutors merely acting in a routine capacity

If a prosecutor promises to drop certain charges or grant immunity in exchange for testimony or a guilty plea, this is routine and authorized practice, and it is not an improper promise or inducement. *Jones v. State*, 173 Md. App. 430, 444-45 (2007). Courts permit and even encourage promises of leniency through reduced charges or lower sentences that induce Defendants to admit culpability and plead guilty. *Reynolds*, 327 Md. 494.

5. Promises made or implied with relation to a third party

Improper inducements include promises on behalf of a third party. In *Stokes v. State*, 289 Md. 155 (1980), the Court of Appeals held that it was an improper inducement to

tell the Defendant to "produce the narcotics [and your] wife [will] not be arrested." *Id.* at 162-66.

B. Inducements

An inducement renders a confession involuntary only if there is a nexus between the inducement and the statement. In *Tolbert*, 381 Md. 539, the Court of Appeals stated: "We look first to see if the police made a threat, promise, or inducement. If that prong is satisfied, we look next to see whether there was a nexus between the promise and inducement and the Defendant's confession." *Id.* at 558. In *Raras v. State*, 140 Md. App. 132 (2001), the Court of Special Appeals stated:

> One common thread that runs through our cases is that the promises must have caused the suspect to confess. If a suspect did not rely on the interrogator's comments, obviously the statement is admissible, regardless of whether the interrogator has articulated an improper inducement. Thus, it is the trial judge's responsibility to determine not only if an inducement was made, but to ascertain further whether or not the Defendant was influenced by the inducement.

Id. at 159. In *Johnson v. State*, 348 Md. 337, 349-50 (1998), the Court of Appeals held that the nexus requirement was not met when the confession occurred three days after police told the Defendant that he might get medical treatment, rather than incarceration, in exchange for a confession, and the Defendant requested to speak with an officer who was not present when the promise was made. In *Ralph v. State*, 226 Md. 480, 485-87 (1961), the Court of Appeals held that a one-time statement made eight hours before the Defendant confessed was sufficiently attenuated that the Defendant did not rely on it in confessing.

In *Knight*, 381 Md. 517, the Defendant gave two statements to police. The first statement was not the product of an improper inducement, but the second statement was. The Court of Appeals held that, because the first statement, which was not the product of an improper inducement, preceded the statement that was the product of an improper inducement, and the statements were identical, there was insufficient "nexus" to suppress the second statement.

The Court stated: "If [the Defendant] needed no improper inducement in order to give the first statement, then it is reasonable to conclude that there was no nexus between, or reliance on, the improper inducement in his repetition of the substantive content of the former statement." *Id.* at 537-38.

If police made an improper inducement, the State bears the burden of proving, by a preponderance of the evidence, that the Defendant's incriminating statement was not made in reliance on that inducement. *Hillard*, 286 Md. at 150-52.

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§ III. *Miranda v. Arizona* & its progeny

A. Background

In 1897, the Supreme Court announced the test for compliance with the Fifth Amendment privilege against compelled self-incrimination. That test was, and still is, voluntariness under "totality of the circumstances." Prosecutorial conduct—or misconduct—always "pushed the envelope." The Warren Court was much more protective of constitutional rights than its predecessors.

In 1964, the Supreme Court held that the voluntariness test alone was insufficient to protect the Defendant's right against compelled self-incrimination. In *Escobedo v. Illinois*, 378 U.S. 478 (1964), the Court held that "voluntariness" would no longer be the sole criterion for admissibility. The Court held that, once the Defendant became the "focus" of the investigation, a confession was invalid and inadmissible if obtained without the benefit of counsel, provided the Defendant requested counsel. However, there was no requirement to advise the Defendant of the constitutional right to remain silent. In essence, *Escobedo* was the forerunner to—and a rough draft of—*Miranda v. Arizona*, 384 U.S. 436 (1966).

Questions left open in *Escobedo* were resolved in *Miranda*, which announced (1) mandatory procedures for all statements obtained during custodial interrogations; and (2) an exclusionary rule for the failure to comply. *Miranda* did not abandon the voluntariness test, but rather it added an additional requirement for all statements obtained during custodial interrogation. *See Bagley v. Warden*, 1 Md. App. 154, 159 (1967); *Fisher v. State*, 233 Md. 48 (1963).

In *Miranda*, 384 U.S. 436, the Supreme Court announced a mandatory procedure designed to ensure that police comply with the Fifth Amendment privilege against compelled self-incrimination. The Court held:

> [T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the Defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination . . . The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the Defendant can truly be the product of his free choice . . .
>
> We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law enforcement officers during in-custody questioning. . . . As a practical matter, the compulsion to speak in the isolated

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> setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery[. T]here can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.
>
> We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of a crime contains inherently compelling pressures which work to undermine the individual's will to resist and compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.

Id. at 458-67 (internal citations & quotation omitted). *See Escobedo v. Illinois*, 378 U.S. at 490-91; *Haynes v. Washington*, 373 U.S. 503, 512-13 (1963); *Townsend v. Sain*, 372 U.S. 293, 307-08 (1963); *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963). The purpose of *Miranda* is not to modify police conduct, but rather to protect the Defendant's privilege against compelled self-incrimination. *New York v. Quarles*, 467 U.S. 649, 664 (1984).

Miranda was controversial from the day it was decided, and questions arose. Would *Miranda* make it impossible for police officers to do their job? Was *Miranda* found in the Constitution or was it just an invention of the Supreme Court? In *Bryant v. State*, 49 Md. App. 272, *cert. denied*, 291 Md. 782 (1981), *cert. denied*, 456 U.S. 949 (1982), the Court of Special Appeals stated:

> Dire consequences were predicted by some law enforcement officers as a result of what they saw as the unwarranted shackles placed upon them by *Miranda*. Confessions, it was said, would be virtually eliminated. Nevertheless, we have found no statistics indicating that *Miranda* has reduced the number of confessions, nor do we perceive that it has unduly hampered police. The end of what has been styled "the Warren Court" and the beginning of what is now known as "the Burger Court" gave rise to widespread speculation that *Miranda* would be short-lived. Indeed, in holdings such as *Harris v. New York*, 401 U.S. 222 (1971), the Court seemed to chip away at *Miranda* and fashioning a coffin for *Miranda*'s ultimate demise as a viable constitutional force. *Miranda* critics, and they were numerous, said that the outlook was extremely rocky for the (*Miranda*) nine. It was just a matter of time, they said, until the "right" case would be heard by the Supreme Court and *Miranda* would be unlamented past history. Those prognosticators of

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> *Miranda*'s expiration must have sustained an intellectual jolt when the Court filed *Edwards v. Arizona*, 451 U.S. 477 (1981).

Id. at 275-76 (internal citations, alterations, & quotations omitted).

On the constitutional front, the debate was whether the requirements of *Miranda* are constitutionally mandated, as part of the Fifth Amendment privilege against compelled self-incrimination, or whether *Miranda* warnings are merely a prophylactic device, of non-constitutional dimension, invented by the Supreme Court. In *Schmidt v. State*, 60 Md. App. 86 (1984), the Court of Special Appeals stated: "*Miranda* warnings are not constitutional dictates but merely prophylactic rules designed to protect an accused from self-incrimination coerced by police conduct outside of judicial scrutiny." *Id.* at 101.

Law enforcement agencies rapidly adjusted to the requirement to provide Defendants with *Miranda* warnings. In 1968, just two years after *Miranda*, Congress enacted the Omnibus Crime Control & Safe Streets Act of 1968 (known as "the crime bill"). One of the designs of the crime bill was to "overturn" *Miranda*. Under section 3501, *Miranda* warnings were not mandated. Instead, whether *Miranda* warnings were provided to a Defendant was merely a factor on the issue of the voluntariness of the Defendant's statement.

Thus, if *Miranda* warnings were not of constitutional dimension, Congress had, in essence, repealed *Miranda* because *Miranda* was no longer a mandate. Instead, *Miranda* was merely a factor in the voluntariness analysis. Nonetheless, because law enforcement agencies had adjusted so rapidly to the requirements of *Miranda*, virtually no prosecutors were arguing that there was no requirement to comply with Miranda.

Indicative of the uncertainty of the status of *Miranda*, 28 years after it was announced, Justice Scalia stated, in a concurring opinion in *Davis v. United States*, 512 U.S. 452 (1994), the following:

> Section 3501 of Title 18 of the United States Code is the statute governing the admissibility of confessions in federal prosecutions. That provision declares that "a confession . . . *shall be admissible in evidence if voluntarily given*," and that the issue of voluntariness shall be determined on the basis of "*all* the circumstances surrounding the giving of the confession, *including* whether or not [the] Defendant was advised or knew that he was not required to make any statement; . . . whether or not [the] Defendant has been advised prior to questioning of his right to the assistance of counsel; . . . and whether or not [the] Defendant was without the assistance of counsel when questioned . . ."
>
> The presence or absence of any of the above mentioned factors . . . need not be conclusive on the issue of voluntariness of the confession. Legal analysis of the admissibility of a confession without reference to these provisions

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is equivalent to legal analysis of the admissibility of hearsay without consulting the Rules of Evidence; it is an unreal exercise. Yet as the Court observes, that is precisely what the United States has undertaken in this case. It did not raise section 3501(a) below and asserted that it is "not at issue" here. This is not the first case in which the United States has declined to invoke section 3501 before us—nor even the first case in which that failure has been called to its attention.

In fact, with limited exceptions, the provision has been studiously avoided by every Administration, not only in this Court but in the lower courts, since its enactment more than 25 years ago . . . For most of this century, voluntariness *vel non* was the touchstone of admissibility of confessions. Section 3501 of Title 18 *seems* to provide for that standard in federal criminal prosecutions today. I say "seems" because I do not wish to prejudice any issue of law. I am entirely open to the argument that section 3501 does not mean what it appears to say; that it is inapplicable for some other reason; or even that it is unconstitutional.

But I will no longer be open to the argument that this Court should continue to ignore the commands of section 3501 simply because the Executive declines to insist that we observe them . . . Section 3501 of Title 18 is a provision of law directed *to the courts*, reflecting the people's assessment of the proper balance to be struck between concern for persons interrogated in custody and the needs of effective law enforcement. We shirk our duty if we systematically disregard that statutory command simply because the Justice Department systematically declines to remind us of it.

The United States' repeated refusal to invoke section 3501, combined with the courts' traditional (albeit merely prudential) refusal to consider arguments not raised, has caused the federal judiciary to confront a host of "*Miranda*" issues that might be entirely irrelevant under federal law . . . Worse still, it may have produced—in an era of intense national concern about the problem of run-away crime—the acquittal and the non-prosecution of may dangerous felons, enabling them to continue their depredations upon our citizens.

There is no excuse for this. Perhaps (though I do not immediately see why) the Justice Department has good basis for believing that allowing prosecutions to be defeated on grounds that could be avoided by invocation of section 3501 is consistent with the Executive's obligation to "take care that the Laws be faithfully executed [under Article II, § 3]." That is not the point. The point is whether *our* continued refusal to *consider* section 3501 is consistent with the Third Branch's obligation to decide according to the law. I think it is not.

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Id. at 462-65 (emphasis in original) (internal citations, quotations, & alterations omitted).

At that time, the constitutionality debate did not get to the courts and was relegated to academia. Finally, in *Dickerson v. United States*, 530 U.S. 428, 438-40 (2000), the Supreme Court addressed whether *Miranda* is a constitutional mandate and held that it is. Thus, the Court held that the 1968 crime bill was unconstitutional to the extent that it attempted to eliminate *Miranda* warnings as a requirement for admissibility of a statement and attempted to make *Miranda* warnings merely a factor in the voluntariness analysis. Because the only remedy for a *Miranda* violation is suppression of a non-*Mirandized* statement, *Miranda* applies only if the Defendant is charged with a crime. *Martinez*, 538 U.S. at 772-73.

B. Applicability of *Miranda* warnings

Miranda warnings apply to all custodial interrogations. In *Miranda*, the Supreme Court stated: "By custodial interrogation, we mean 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." 384 U.S. at 444. In *Oregon v. Mathiason*, 429 U.S. 492 (1977), the Supreme Court recognized that "police officers are not required to administer *Miranda* warnings to everyone whom they question." *Id.* at 445.

In *Cummings v. State*, 27 Md. App. 361 (1975), the Court of Special Appeals stated: "*Miranda*, in precise terms, was aimed not at self-incrimination generally (even in response to police interrogation) but at compelled self-incrimination—the inherent coercion of the custodial, incommunicado, third-degree questioning process." *Id.* at 364.

There are four relevant questions to resolve a *Miranda* scenario. First, was the Defendant in custody? Second, was the Defendant's statement made in response to interrogation? In *Cummings*, the Court stated: "The answer to both of the foregoing questions must be in the affirmative before *Miranda* is even applicable. Only in the event that Custody and Interrogation are found to have been present does a court move on to consider [the third and fourth questions]." *Id.* at 367. Thus, if the Defendant was not in custody or if the Defendant was not subject to interrogation, *Miranda* does not apply. *See, e.g.*, *Minehan v. State*, 147 Md. App. 432, 440 (2002) (confession not the product of custodial interrogation and *Miranda* inapplicable).

If both the first question and the second question are answered in the affirmative, i.e., *Miranda* is applicable because the Defendant was in custody and subject to interrogation, the third question is whether there were adequate *Miranda* warnings, and the fourth question is whether *Miranda* rights asserted or knowingly and intelligently waived?

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C. Custody

1. Custody occurs when the Defendant is arrested or it is the functional equivalent arrest, decided under an objective standard

Miranda applies when a person is taken into custody or otherwise deprived of freedom of action in any significant way by a government actor, regardless of whether the custody is for a misdemeanor or felony. *Berkemer v. McCarty*, 468 U.S. 420 (1984). If a person is in custody, any interrogation (even if for a different crime) triggers *Miranda* requirements. *Mathis v. United States*, 391 U.S. 1, 4-5 (1986). Thus, a person is in custody when arrested or when freedom is limited in a manner that is equivalent to a full custodial arrest at common law.

In *Rosenberg v. State*, 129 Md. App. 221, 240 (1999), *cert. denied*, 358 Md. 382 (2000), the Court of Special Appeals stated: "Custody ordinarily contemplates that a suspect will be under arrest, frequently in a jailhouse of station house setting. The concept of 'custody,' however, is not necessarily synonymous with an actual arrest; it includes a reasonable perception that one is significantly deprived of freedom of action." *Id.* at 240 (internal citations & quotations omitted).

The test is whether a reasonable person would have believed that he or she was under arrest or its functional equivalent. Whether the individual being questioned is a suspect is irrelevant. *California v. Beheler*, 463 U.S. 1121, 1125 (1983); *Berkemer*, 468 U.S. 420; *Thompson v. Keohane*, 516 U.S. 99 (1995). In *Bond v. State*, 142 Md. App. 219 (2002), the Court of Special Appeals stated:

> In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but the ultimate inquiry is simply whether there [was] a formal arrest or restraint of freedom of movement of the degree associated with a formal arrest. Accordingly, the issue of custody is to be decided under an objective standard, i.e., how a reasonable man in the suspect's position would have understood the situation. Furthermore, the decision whether the accused was in 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.

Id. at 228 (internal citations & quotations omitted).

In *Buck v. State*, 181 Md. App. 585 (2008), the Defendant argued that the his mental state and his depression medication should be taken into account in determining whether he was in custody. The Court of Special Appeals rejected this argument, reaffirming that the test for custody is measured by an objective standard, stating:

> Under Supreme Court case law . . . notwithstanding that [the Defendant] had been diagnosed with and was being treated for depression, the *Miranda* cus-

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> tody issue before the circuit court remained whether a reasonable person in [the Defendant's] position—not a reasonable person experiencing depression or other mental illnesses—would have felt free to break off questioning and leave.

Id. at 613. The subjective intent of police and the subjective belief of the individual being interrogated are irrelevant to whether the Defendant was in custody. In *Stansbury v. California*, 511 U.S. 318 (1994), the Supreme Court stated:

> [A] police officer's subjective view that the individual under questioning is a suspect, if undisclosed, does not bear upon the question of whether the individual is in custody for purposes of *Miranda*. [An] officer's evolving but unarticulated suspicions do not affect the objective circumstances of an interrogation or an interview, and thus cannot affect the *Miranda* custody inquiry . . . An officer's knowledge or beliefs may bear upon the custody issue if they are conveyed, by word or deed, to the individual being questioned. Those beliefs are relevant only to the extent they would affect how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action . . .
>
> In sum, an officer's views concerning the nature of an interrogation, or beliefs concerning the potential culpability of the individual being questioned, may be one of many factors that bear upon the assessment whether that individual was in custody, but only if the officer's views or beliefs were somehow manifested to the individual under interrogation and would have affected how a reasonable person in that position would perceive his or her freedom to leave . . . Our cases make clear, in no uncertain terms, that any inquiry into whether the interrogating officers have focused their suspicions upon the individual being questioned (assuming those suspicions remain undisclosed) is not relevant for the purposes of *Miranda*.

Id. at 324-26 (internal citations & quotations omitted). *See In re Joshua David C.*, 116 Md. App. 580, 593 (1997); *Whitfield v. State*, 287 Md. 124, 143 (1980). In *Mulligan v. State*, 10 Md. App. 429, 437-38 (1970), the Court of Special Appeals held that the Defendant was "in custody" when police told that if he did not come with them to the station, he would be arrested.

In *Minnesota v. Murphy*, 465 U.S. 420, 430 (1984), the Supreme Court held that *Miranda* was not applicable when the Defendant was ordered to meet with a probation officer and confessed during a probation interview, because that was not the functional equivalent of arrest. *But see Marrs v. State*, 53 Md. App. 230 (1982) (custody when questioned by probation officer following arrest for trespassing). The Court of Special Appeals stated:

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> While statements made to a probation officer without the *Miranda* warnings being given are uniformly held properly admitted in a probation or parole revocation hearing, there seems to be a difference of opinion as to whether those same statements may be admitted in a subsequent criminal prosecution. The overwhelming weight of authority, however, stands in favor of exclusion. [C]ustodial interrogation is not limited to police stationhouse interrogation[. When] a Defendant is subject to the inherently compelling pressures, . . . he must receive certain warnings before any official interrogation, whether the official interrogator be a prison guard, an agent of the Internal Revenue Service, a court designated psychiatrist, or a prosecuting attorney.

Id. at 232-33.

In *Estelle v. Smith*, 451 U.S. 454, 467 (1981), the Supreme Court held that *Miranda* was applicable during a post-arrest, court-ordered psychiatric evaluation requested by the State. In *Buchanan v. Kentucky*, 483 U.S. 402, 424-25 (1987), the Supreme Court held that if the Defendant requests a psychiatric evaluation or presents evidence from such evaluation, the State may use the report as rebuttal evidence because *Miranda* is not applicable. In *Mathis*, 391 U.S. at 4, the Supreme Court held that *Miranda* was applicable when IRS agents questioned the Defendant while in jail on an unrelated state conviction. Thus, *Miranda* is not limited to police officers.

In *Brown v. State*, 171 Md. App. 489, 525-26 (2006), the Court of Special Appeals held that field sobriety tests are not custodial, and *Miranda* does not apply. A trial court's determination of whether an individual is "in custody" is reviewed, on appeal, de novo as a question of law, applying the facts established at the suppression hearing. *Accord Griner v. State*, 168 Md. App. 714, 731 (2006); *Ashe v. State*, 125 Md. App. 537, 549 (1999).

2. Custody factors

Custody is analyzed under a totality of the circumstances. *United States v. Mendenhall*, 446 U.S. 544, 557 (1980). In *Howes v. Fields*, 132 S. Ct. 1181 (2012), the Supreme Court held:

> As used in our *Miranda* case law, "custody" is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion. In determining whether a suspect is in custody in this sense, the initial step is to ascertain whether, in light of the objective circumstances of the interrogation, a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave. And in order to determine how a suspect would have gauged his freedom of movement, courts must examine all the circumstances surrounding the interrogation. Relevant factors include the location of the questioning, *see* [*Maryland v. Shatzer*, 559 U.S. 98 (2010)];

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> its duration, *see Berkemer*, 468 U.S. at 437-38; statements made during the interview, *see* [*Mathiason*, 429 U.S. at 495]; *Yarborough v. Alvarado*, 541 U.S. 652, 665 (2004); [*Stansbury*, 511 U.S. at 325]; the presence or absence of physical restraints during the questioning, *see Quarles*, 467 U.S. at 655; and the release of the interviewee at the end of questioning, *see Beheler*, 463 U.S. at 1122-23.

Id. at 1189 (some internal citations omitted).

In *Whitfield*, 287 Md. 124, the Court of Appeals, addressing the factors for determining custody, stated:

> [W]hen and where [the encounter occurred]; how long it lasted; how many police were present; what the officers and the Defendant said and did; the presence of actual physical restraint on the Defendant or things equivalent to actual restraint, such as drawn weapons or a guard stationed at the door; and whether the Defendant was being questioned as a suspect or as a witness . . . Facts pertaining to events before the interrogation are also relevant, especially how the Defendant got to the place of questioning; and whether he came completely on his own, in response to a police request, or escorted by police officers. Finally, what happened after the interrogation, whether the Defendant left freely, was detained, or arrested may assist the court in determining whether the Defendant, as a reasonable person, would have felt free to break off questioning.

Id. at 141 (internal quotations omitted).

In *McIntyre*, 168 Md. App. 504 (2006), the Court of Special Appeals stated:

> [I]n order to determine whether a subject is "in custody" for *Miranda* purposes, seven factors must be considered, viz., (1) the location and duration of the interview; (2) the number of police officers present; (3) what was said and done; (4) whether the Defendant was physically restrained; (5) whether there was an indication of implied physical restraint, such as guns drawn or a guard at the door; (6) the manner in which the Defendant arrived at the interview; and (7) whether the Defendant was arrested or permitted to leave after the interview.

Id. at 516-17 (citing *Bond*, 142 Md. App. 219; *Clark v. State*, 140 Md. App. 540 (2001)); *see Cummings*, 27 Md. App. at 369-81.

In *Smith v. State*, 62 Md. App. 627, 631, *cert. denied*, 304 Md. 96 (1985), the Court of Special Appeals held that the Defendant's statements were not made during a "custodial interrogation," even though police initially drew their weapons when they encountered the Defendant, because police eventually holstered their weapons and

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informed the Defendant he was not under arrest and was free to leave. *See Allen v. State*, 158 Md. App. 194, 232-33 (2004), *aff'd on other grounds*, 387 Md. 389 (2005). In *Minehan*, 147 Md. App. at 442, the Court of Special Appeals stated: "[T]here is rarely custody when the person questioned leaves the interrogation unencumbered."

3. Stops & investigative detentions are not custody

If there is a Fourth Amendment intrusion less than arrest or its functional equivalent, e.g., stop or detention, *Miranda* is inapplicable. *See Berkemer*, 468 U.S. at 434-40 (*Terry* stops not subject to *Miranda*); *Duffy v. State*, 243 Md. 425, 431-32 (1966) ("Is this the knife you used in the fight?" was mere accosting and *Miranda* did not apply). In *Jones v. State*, 2 Md. App. 429, 431-32 (1967), the Court of Special Appeals held that the Defendant was merely accosted, and not in custody, when an officer asked if he had been at a dance hall that evening.

In *Jones v. State*, 132 Md. App. 657 (2000), the Court of Special Appeals stated: "A mere 'stop,' unless it escalates into a more significant detention, will presumably be brief, whereas a custodial interrogation may frequently be prolonged indefinitely, with the suspect fearing that questioning will continue until he provides his interrogators with the answers they seek." *Id.* at 669.

In *State v. Rucker*, 374 Md. 199 (2003), the Court of Appeals held that *Miranda* was not applicable when police stopped the Defendant in a parking lot on an informant's tip and asked the Defendant whether he had anything that he should not have. In *Allen*, 158 Md. App. at 232-33, the Court of Special Appeals held that *Miranda* was not applicable when police questioned the Defendant in a store parking lot. *See Martin*, 113 Md. App. 190, 207 (1996). In *Conboy v. State*, 155 Md. App. 353, 372-73 (2004), the Court of Special Appeals held that *Miranda* was not applicable when the Defendant returned to the scene of an accident, and the officer asked him to sit on the curb while the officer attempted to start the Defendant's wrecked vehicle with the Defendant's key.

In *McIntyre*, 168 Md. App. at 518-19, the Court of Special Appeals held that *Miranda* was not applicable when the Defendant was questioned during the day in a police car parked near the Defendant's home. Only one officer was present, the questioning lasted only 12 minutes, the Defendant was not told that he was under arrest, the Defendant was advised that he did not have to speak to police, and there was no indication of actual or constructive physical restraint.

In *Robinson v. State*, 419 Md. 602 (2011), the Court of Appeals held that the Defendant was not in custody when she was detained by police at the scene of a shooting, as a witness, and questioned in the back of a patrol car. The Court stated:

> When [the Defendant] was originally questioned at the scene, she was a potential witness. The officers attempting to obtain information about what

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> had occurred were entitled to (1) require that the potential witness remain at the scene, and (2) question those witnesses without advising them of their *Miranda* rights. The record shows that [the Defendant's] freedom of movement was not restricted beyond what was required in order to take her statement . . .

Id. at 613.

In *Owens v. State*, 399 Md. 388, 430 (2007), the Court of Appeals held that the Defendant was not in custody when he was questioned by police in a closed room at the hospital where the Defendant worked. The Court emphasized that the Defendant was questioned in a familiar place and must have felt free to break off the police interview because the Defendant eventually did just that. *See Bryant v. State*, 142 Md. App. 604, 621, *cert. denied*, 369 Md. 179 (2002) (no custodial interrogation when the Defendant was interviewed on his friend's lawn by one officer, and the Defendant was not restrained).

In *Bartram v. State*, 33 Md. App. 115, 145-46 (1976), the Court of Special Appeals held that the Defendant was not in custody when questioned by police in an emergency room after her husband was admitted with a gunshot wound. In *Tillery v. State*, 3 Md. App. 142, 146-47 (1968), the Court of Special Appeals held that the Defendant was not in custody when questioned at the hospital by police about his gunshot wounds, and police were unaware of a connection between the wounds and the robbery for which eventually convicted. However, in *Shedrick v. State*, 10 Md. App. 579, 583 (1970), the Court of Special Appeals held that the Defendant was in custody when questioned by police in the hospital after a fight.

4. Traffic stops are not custody

In *Berkemer*, 468 U.S. 420, the Supreme Court held that *Miranda* does not apply to police questioning during a routine traffic stop because such stop does not implicate the concerns of coercion underlying *Miranda*. Although a traffic stop curtails freedom of movement, *Miranda* is inapplicable for two reasons, as follows:

> First, detention of a motorist pursuant to a traffic stop is presumptively temporary and brief. The vast majority of roadside detentions last only a few minutes. A motorist's expectations, when he sees a policeman's light flashing behind him, are that he will be obliged to spend a short period of time answering questions and waiting while the officer checks his license and registration, that he may then be given a citation, but that in the end he most likely will be allowed to continue on his way. In this respect, questioning incident to an ordinary traffic stop is quite different than station house interrogation, which frequently is prolonged, and in which the detainee often is aware that questioning will continue until he provides the interrogators the answers they seek.

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> Second, circumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of the police. To be sure, the aura of authority surrounding an armed, uniformed officer and the knowledge that the officer has some discretion in deciding whether to issue a citation, in combination, exert some pressure on the detainee to respond to questions. But other aspects of the situation substantially offset there forces. Perhaps most importantly, the typical traffic stop is public, at least to some degree.
>
> Passersby, on foot or in other cars, witness the interaction of officer and motorist. This exposure to public view both reduces the ability of an unscrupulous police officer to use illegitimate means to elicit self-incriminating statements and diminishes the motorist's fear that, if he does not cooperate, he will be subjected to abuse. The fact that the detained motorist typically is confronted by only one or at most two policemen further mutes his sense of vulnerability. In short, the atmosphere surrounding an ordinary traffic stop is substantially less police dominated than that surrounding the kinds of interrogation at issue in *Miranda*, and in the subsequent cases in which we have applied *Miranda*.

Id. at 437-39 (internal citations omitted).

5. Field sobriety tests are not custody

In *McAvoy v. State*, 314 Md. 509, 516 (1989), the Court of Appeals held that the Defendant was not in custody when a field sobriety test was conducted because "the time of detention from the stop to the arrest was brief; . . . the detention took place in a public place; and, [the Defendant] was never told his detention would not be temporary." In *Brown*, 171 Md. App. at 526-27, the Court of Special Appeals held that a field sobriety test is not custodial.

6. If police develop probable cause to arrest the Defendant during an investigative detention, police questioning may be custody

In *Argueta*, 136 Md. App. at 294-95, the Court of Special Appeals held that, although a *Terry* stop does not normally constitute custody, it did in this case because police had probable cause to arrest prior to initiating questioning. The Court distinguished *Jones v. State*, 132 Md. App. at 667, in which the Defendant was not in custody because, during a *Terry* stop, he gave incriminating statements to routine questions.

7. In one's home is rarely custody

In *Orozco v. Texas*, 394 U.S. 324, 325-26 (1969), the Supreme Court held that the Defendant was in custody, because he was arrested and not free to leave, when he

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was awakened at 4:00 a.m. in his bedroom and questioned by four officers about a murder. In *Bond*, 142 Md. App. at 234, the Court of Special Appeals held that the Defendant was in custody when several officers were admitted into his home by his minor child, after 10:30 p.m., and the Defendant was questioned about a hit and run accident while in bed and several officers blocked the bedroom door

In *Beckwith v. United States*, 425 U.S. 341, 347 (1976), the Supreme Court held that the Defendant was not in custody when questioned by IRS agents, at 8:00 a.m., in his home, at the dining room table, after the Defendant invited them to enter. Even though the Defendant was the "focus" of a criminal investigation, the agents did not arrest him. In *Gantt v. State*, 109 Md. App. 590 (1996), the Court of Special Appeals held that the Defendant was not in custody when he gave a statement to an officer, in response to a question in his home, even though he was identified as "the man who did it." *Id.* at 596.

In *Pryor v. State*, 195 Md. App. 311, 324-25 (2010), the Court of Special Appeals held the Defendant was not in custody when questioned in his home by police at 8:30 p.m., after police knocked on the door, identified themselves, were let in by the Defendant, did not display weapons, and did not touch the Defendant.

In *Buck*, 181 Md. App. at 621-22, the Court of Special Appeals held that the Defendant was not in custody in his home when police merely accompanied him to his bedroom while he was changing. In *McIntyre*, 168 Md. App. at 518-19, the Court of Special Appeals held that the Defendant was not in custody when questioned outside his trailer home, in an unlocked patrol car, because he was questioned for a short time, by only one officer, who was courteous, offered him a donut, had no weapon drawn, did not physically restrain him, told him that he was not under arrest, and advised him that he did not have to speak with the officer.

In *Reynolds v. State*, 88 Md. App. 197, 209-10 (1991), *aff'd*, 327 Md. 494 (1992), the Defendant was not in custody when questioned in his home by only one police officer. In *Bernos v. State*, 10 Md. App. 184, 188 (1970), the Court of Special Appeals held that the Defendant was not in custody when he was questioned by police in his home, while lying on his bed. *See Coward v. State*, 10 Md. App. 127, 135 (1970) (not in custody when questioned in his home); *Jackson v. State*, 8 Md. App. 260, 264-66 (1969) (not in custody when police came to the Defendant's home and asked if a hat found at a crime scene was his).

8. In a police station, but not formally arrested, is rarely custody

In *Abeokuto v. State*, 391 Md. 289, 332 (2006), the Court of Appeals stated that "questioning occur[ing] in a police station is not determinative of whether a custodial interrogation occurred." In *Minehan*, 147 Md. App. at 441-42, the Court of Special Appeals stated that "interrogation in a police station does not amount to custody per se."

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In *Robinson*, 419 Md. at 607-08, the Court of Appeals held that the Defendant was in custody. Immediately after she made a statement to a detective at the scene, she was placed in a marked police car, her hands were "bagged" to preserve any gunshot residue, and she was taken to the police station, where she was placed in a holding cell for five hours before being questioned, she was photographed, her hands were tested for gunshot residue, and she was questioned for two hours.

In *Buck*, 181 Md. App. at 622, the Court of Special Appeals held that the Defendant was in custody, even though police told him three times, during a five-hour interrogation, that he was free to leave, because a reasonable person in the Defendant's position would not have felt free to leave based on police conduct. In *Myers v. State*, 3 Md. App. 534, 538 (1968), the Court of Special Appeals held that the Defendant was in custody when he was interrogated by police on the way to the station.

In *Mathiason*, 429 U.S. at 495-96, the Supreme Court held that the Defendant was not in custody when he voluntarily came to the station and was allowed to leave unhindered after a brief interview. The officer's false statement that he had the Defendant's fingerprints is irrelevant to the custody issue. In *Beheler*, 463 U.S. at 1123, the Supreme Court held that the Defendant was not in custody when he voluntarily confessed over the phone, agreed to come to the station, confessed again at the station, and was allowed to leave.

In *Wiener v. State*, 290 Md. 425, 448 (1981), the Court of Appeals held that, although the Defendant was at the police station, he was not in custody because he was not under arrest, willingly came to the station at police request, indicated a desire to assist in the investigation, there were no guards at the interview room, and he was not brought to the station to give a statement, but rather to volunteer his fingerprints. When it became a custodial interrogation, police gave *Miranda* warnings. In *Ross v. State*, 78 Md. App. 275, 281-82 (1989), the Court of Special Appeals held that the Defendant was not in custody when he came to the station voluntarily, was free to go after giving a statement, and was not arrested until 11 days later.

In *Burton v. State*, 32 Md. App. 529, 534 (1976), the Court of Special Appeals held that the Defendant was not in custody when he called police and voluntarily went to the station to answer questions. The Defendant was not a suspect and not made to believe that he was. He was not charged, arrested, photographed, fingerprinted, or deprived of freedom of movement. When asked if he could assist in retracing the victim's last steps, the Defendant gave a statement. When asked to repeat the statement, he gave the exact same statement. Both statements were in narrative form and not the product of accusatory questions. Police took no notes, and the Defendant was not confronted with any evidence.

In *Griner*, 168 Md. App. at 734, the Court of Special Appeals held that the Defendant was not in custody at the police station. She travelled to and from the station in her own vehicle, was informed she was not under arrest and was free to leave, was

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not restrained, was not touched, and did not indicate that she wanted the questioning to end. In *Ashe*, 125 Md. App. at 551-52, the Court of Special Appeals held that the Defendant was not in custody at the police station. Although police requested that he accompany them to the station, they informed him that he was not under arrest and was free to go.

In *Schmidt*, 60 Md. App. at 102, the Court of Special Appeals held that the Defendant was not in custody. Questioning took place in a police vehicle, at the Defendant's request, because he did want his family involved. In *Glazier v. State*, 30 Md. App. 647, 654-55 (1976), the Court of Special Appeals held that the Defendant was not in custody at the police station when she was interviewed as a witness, and she contacted police. In *Minehan*, 147 Md. App. at 441, the Court of Special Appeals held that the Defendant was not in custody at the police station when he was there of his own free will, and police informed him he was free to leave.

In *Moody v. State*, 209 Md. App. 366 (2013), the Court of Special Appeals held that, although the Defendant was not arrested after questioning, which weighed against custody, she was in custody when interrogated at the police station. The Court stated:

> Although [the Defendant] was released after questioning, a review of the totality of the circumstances leads us to conclude that [the Defendant]'s statements were made while she was in custody. [The Defendant] was removed from her vehicle at gunpoint, handcuffed, transported to the police station, and locked in a holding cell prior to questioning. Although the record does not indicate that the manner in which [the Defendant] was interrogated over the next hour was coercive, the detectives never informed [the Defendant] that she was not a suspect, that she was not under arrest, or that she was free to leave or refuse to answer her questions. A reasonable person in such circumstances would believe that she was in custody.

Id. at 386.

9. Juveniles in custody

Because the definition of custody is objective, juvenile status and prior inexperience with the law is not dispositive of whether the Defendant is in custody. In *Yarborough v. Alvarado*, 541 U.S. 652, 665 (2004), the Supreme Court held that a 17-year-old was not in custody when he was brought to the police station by his parents, at the request of police, and was interrogated for two hours, while his parents waited in a different room. The Defendant was twice asked whether he wanted a break. The fact that police told the Defendant that he was a suspect and could not leave until he confessed may be relevant on the voluntariness of his confession, but was irrelevant on whether he was in custody.

In *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011), police removed a 13-year-old

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seventh grader from class and questioned him in the school conference room. The Supreme Court held that the Defendant was not in custody, but acknowledged that a child's age may be a factor when determining custody. *Id.* at 2406.

10. Incarcerated for a different crime is usually not custody

The fact that the Defendant is incarcerated for another crime does not necessarily mean that the inmate is in custody for the crime currently being investigated. In *Shatzer*, 559 U.S. at 114, the Supreme Court held that when an inmate is allowed to return to his normal prison routine, he is no longer in custody for purposes of *Miranda*, even though he is incarcerated.

In *Howes v. Fields*, 132 S. Ct. 1181 (2012), the Supreme Court held that *Miranda* warnings are not necessarily required when an inmate is removed from the general population and subjected to interrogation regarding a crime separate from the crime for which incarcerated. The Defendant was removed from his cell and placed in a locked conference room. The officers informed the Defendant that he was free to leave, which would take 20 minutes to summon a correctional officer to take him back to his cell. Although the Defendant did not ask to return to his cell and did not ask for an attorney, he did state several times that he no longer wanted to speak with police.

The Supreme Court held that an inmate is not always "in custody" for purposes of *Miranda* when he isolated from the general prison population and questioned about conduct occurring outside the prison. *Id.* at 1193-94.

In *Clark*, 140 Md. App. at 569-70, the Court of Special Appeals held that the incarcerated Defendant was not in custody for the purposes of *Miranda* when he made statements during a voluntary meeting to review his prison housing situation. In *Hamilton v. State*, 62 Md. App. 603 (1985), the Court of Special Appeals held that the Defendant's statements to an informant, while incarcerated, were not the product of custodial interrogation, even though the Defendant was incarcerated. The Court held that, although there is an "inherently coercive" environment in prison, it is not coercive, and thus no custody, in the casual questioning by an informant and not by a police interrogator . . ." *Id.* at 616.

11. Witnesses before a jury or grand jury are not in custody

In *Davidson v. State*, 54 Md. App. 323, 327 (1983), the Court of Special Appeals held that the Defendant was not required to be informed of *Miranda* rights before testifying in the criminal trial of another person when the witness was informed of his general Fifth Amendment privilege against compelled self-incrimination. In *United States v. Mandujano*, 425 U.S. 564, 579 (1976), the Supreme Court held that *Miranda* warnings do not have to be given to a grand jury witness because grand jury testimony is not the inherently coercive situation contemplated by *Miranda*.

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12. Defendants at bail review hearings are not in custody

A Defendant does not need to be informed of his *Miranda* rights prior to a bail review hearing. *Schmidt*, 60 Md. App. at 100.

D. Interrogation

Custody alone does not trigger *Miranda* because *Miranda* applies only when there is both custody and interrogation. In *Miranda*, 384 U.S. 436, the Supreme Court stated: "Volunteered statements of any kind are not barred by the Fifth Amendment." *Id.* at 478. In *Clark*, 140 Md. App. at 568, the Court of Special Appeals stated that statements made by the Defendant when not being questioned by police are not the product of interrogation.

In *Shedrick*, 10 Md. App. 579, the Court of Special Appeals stated: "A voluntary utterance is one made without any prodding or inducement of any kind by the officer to whom it is made[, and] it is not within the protective scope of *Miranda*." *Id.* at 583-84. *See Brown v. State*, 4 Md. App. 261, 267 (1968) ("spontaneous utterance" is not the product of an interrogation, and *Miranda* warnings are not required).

1. Express questioning or its functional equivalent

Interrogation includes both express questioning and the functional equivalent of express questioning. The latter means words or actions of police that they should know are reasonably likely to elicit an incriminating response. *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980). In *Owens*, 399 Md. 388, the Court of Appeals stated:

> "Interrogation" is no longer considered solely as direct questioning by the police, a concept that prevailed when *Miranda* was newly-minted. That concept now "refers not only to express questioning, but also to 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.'"

Id. at 428 (quoting *Innis*, 446 U.S. at 301); *see Drury v. State*, 368 Md. 331, 336 (2002).

Express questioning includes "journalist's" questions that begin with "who," "why," "where," "when," "what," or "how." Express questioning may include an order to speak, even though not formed as a question.

2. Functional equivalent of express questioning

The functional equivalent of express questioning is words and/or conduct that police know or should know are reasonably likely to elicit an incriminating response. In *Blake*, 381 Md. 218, a 17-year-old Defendant was arrested for murder and was provided *Miranda* warnings. The Defendant requested counsel and the interrogation stopped.

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About 30 minutes later, two officers gave the Defendant a statement of charges, which incorrectly stated that the Defendant was eligible for the death penalty. As the two officers were walking away from the Defendant's cell, one officer said, "I bet you want to talk now." The Defendant then gave an incriminating statement. *Id.* at 224.

The Court of Appeals held that police conduct was the functional equivalent of interrogation. Police knew or should have known that showing a 17-year-old Defendant a charging document that indicates the Defendant is eligible for the death penalty, and stating "bet you want to talk now," was conduct that police knew or should have known was reasonably likely to elicit an incriminating response. *Id.* at 236.

In *Drury*, 368 Md. at 339-40, the Court of Appeals held that the Defendant was subject to the functional equivalent of interrogation when an officer placed a tire iron and stolen goods in front of the Defendant. In *Adams v. State*, 192 Md. App. 469, 494 (2010), the Court of Special Appeals held that the Defendant was subject to the functional equivalent of interrogation when police served documents of intent to seek life without parole and then remained to talk with him without an attorney present.

In *Shedrick*, 10 Md. App. 579, the Court of Special Appeals held that the Defendant's statements were the subject of interrogation when made to police in a room adjacent to the alleged victim, who was in critical condition. "The detectives and [the Defendant] were equally aware of the apparently grave condition of [the victim], the causal linkage of that condition to [the Defendant], and the legal consequences stemming from this implication." *Id.* at 584.

3. Not the functional equivalent of express questioning

In *Arizona v. Mauro*, 481 U.S. 520, 528 (1987), the Supreme Court held that *Miranda* was not applicable because there was no interrogation, but officers recorded a conversation between the Defendant and his spouse. After the Defendant expressed a desire to remain silent, the Defendant's wife requested to speak with him, and police agreed on the condition that an officer was present during the conversation.

In *Blake*, 381 Md. at 236, the Court of Appeals held that presenting the Defendant with a charging document was not the functional equivalent of questioning. In *Fenner v. State*, 381 Md. 1, 10 (2004), the Court of Appeals held that a judge's question, during a bail review hearing, of "is there anything you would like to tell me about yourself" was not interrogation as intended by *Miranda* because it was not reasonably likely to elicit an incriminating response. *Accord Schmidt*, 60 Md. App. 86.

In *Prioleau v. State*, 411 Md. 629, 639 (2009), the Court of Appeals held that police asking "what's up Maurice?" was not interrogation or its functional equivalent. In *Hoerauf v. State*, 178 Md. App. 292, 307 (2008), the Defendant, while in custody, asked to speak with his mother, who is an attorney. Later, the Defendant was approached by an officer, who asked whether the Defendant would like to talk with him. When the Defendant indicated "yes," the officer provided *Miranda* warnings and obtained a

waiver. The Court of Special Appeals held that asking the Defendant if he would like to speak was not interrogation.

In *Smith*, 186 Md. App. 498, the Court of Special Appeals held that police discovery of cocaine, followed by announcing that everyone in the apartment would be arrested, was not reasonably likely to elicit an incriminating response, and the Defendant's admission of ownership was a "blurt out."

In *Costley v. State*, 175 Md. App. 90 (2007), the Court of Special Appeals held that the Defendant was not subjected to interrogation. While being transported in a police vehicle, the Defendant refused to give his social security number and said to an officer, "Why don't you hit me?" The officer asked "what?" The Defendant responded: "You heard me, why don't you hit me. That's all you people want to do anyway, hit the poor little black man," and then, after a short pause, stated, "I'm glad that bitch is dead." The Court held that the officer was not aware that his question would likely elicit an incriminating response. It was not a question, and it did not relate to the crime. *Id.* at 97-98.

In *Conboy*, 155 Md. App. at 373, the Defendant wrecked his truck, with several alcoholic beverages inside, and fled. When he later returned in a taxicab, he was confronted by police. Upon seeing a rifle in the cab, the officer conducted a *Terry* "pat-down" and felt keys, which the officer used to start the truck, stating "it's funny, the key fits," after which the Defendant admitted to driving the truck and being intoxicated while doing so. The Court of Special Appeals held that the police statement was not the equivalent of interrogation, but rather a mere observation that did not invite a response.

In *Rodriguez v. State*, 191 Md. App. 196, 221-22, *cert. denied*, 415 Md. 42 (2010), the Court of Special Appeals held that a police attempt to calm an agitated Defendant was not the functional equivalent of interrogation because it was not likely to elicit an incriminating response. In *Vines v. State*, 285 Md. 369, 378 (1979), the Court of Appeals held that giving the Defendant the inventory of evidence seized from a raid on his home, stating that the items were found in his home, was not interrogation for purposes of *Miranda*.

In *Grymes v. State*, 202 Md. App. 70, 99-100 (2011), the Defendant was suspected of an armed robbery in which a cell phone and cash were taken. Police executed a warrant for the apartment where the Defendant was staying and found him sleeping on the floor. Police arrested the Defendant and took him into the hallway. The Defendant asked police to retrieve his two jackets. Police asked him if the coats were his. Upon confirming that they were, police searched the coats and found the victim's cell phone. The Defendant argued that the question about ownership of the coats was interrogation because the officer knew that the jackets matched the description given by the victim.

The Court of Special Appeals disagreed. The Defendant was wearing shorts and

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a T-shirt. Because it was December, and the Defendant was being taken to the police station, it was logical to ask police to retrieve the jackets. When the clothing was brought to him, the Defendant volunteered that it was his.

4. Undercover state agents are not interrogators within the meaning of *Miranda*

When an incarcerated Defendant does not know that the questioner is a state actor, e.g., an undercover agent placed in the Defendant's cell, it is not "custodial interrogation" because *Miranda* is designed to protect Defendants during the coercive atmosphere of police-dominated interrogation, and such atmosphere is absent if the Defendant believes that he is speaking with another inmate. *Illinois v. Perkins*, 496 U.S. 292, 296 (1990); *Pulley v. State*, 43 Md. App. 89 (1979).

The *Perkins* analysis assumes that the Defendant has not been formally charged when questioned. If the Defendant has been formally charged, the result will change because, even if the Fifth Amendment *Miranda* analysis is inapplicable, formal charges make the Sixth Amendment right to counsel applicable, which applies regardless of whether the Defendant knows the questioner is the government. *See United States v. Henry*, 447 U.S. 264, 272 (1980).

5. "Routine booking" questions are not interrogation

If police ask a routine booking question, as part of a legitimate police procedure, and in response, the Defendant makes an incriminating statement, the statement is not in response to interrogation within the meaning of *Miranda*. In *Pennsylvania v. Muniz*, 496 U.S. 582 (1990), the Supreme Court held that *Miranda* did not apply when the Defendant, who was arrested for drunk driving, answered routine booking questions at the station, e.g., name, address, height, weight, eye color, date of birth, and age. The Defendant's incoherent and confused answers were not in response to questioning for *Miranda* purposes. *Id.* at 601-02. *Accord Ferrell v. State*, 73 Md. App. 627, 640-41 (1988), *rev'd on other grounds*, 318 Md. 235 (1990).

To come within the "routine booking" exception, the questions must not be designed to elicit an incriminating response. Thus, in *Muniz*, 496 U.S. at 599-600, when police asked the Defendant the date of his sixth birthday, it was a question within *Miranda*. In *Hughes v. State*, 346 Md. 80 (1997), the Court of Appeals held that the routine booking questions exception did not apply, and *Miranda* did apply, to a question on the arrest form, regarding whether the Defendant was a "narcotics or drug user," particularly when arrested for drug distribution. *Id.* at 97-98.

In *White v. State*, 374 Md. 232, 250 (2003), the Court of Appeals held that reading the statement of charges to the Defendant, announcing for the first time that the Defendant was charged with murder, was not the functional equivalent of interrogation because Maryland law calls for providing a copy of the charging document to the Defendant. *Accord State v. Conover*, 312 Md. 33, 42 (1988) (reading the statement of

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charges to the Defendant and providing him with a copy after he had invoked *Miranda* was not the functional equivalent of interrogation). In *Argueta*, 136 Md. App. at 283-84, the Court of Special Appeals held that asking "what are you doing with this knife" went beyond routine booking questionings.

In *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177, 182, 185 (2004), the Supreme Court upheld a conviction for obstructing an officer in the performance of his duties by refusing to produce identification. The Defendant refused only because he believed that his name was none of the officer's business, and not because he thought that providing his name would be used against him in a criminal proceeding. *Id.* at 190.

E. *Miranda* warnings

If the Defendant is in custody, police may not interrogate the Defendant unless and until (1) police properly administer *Miranda* warnings; and (2) the Defendant has knowingly and intelligently waived his or her four *Miranda* rights. *See Fowler*, 259 Md. at 104.

1. *Miranda* warning #1— "You have the right to remain silent"

Prior to questioning a custodial Defendant, police must inform the Defendant in unequivocal terms that he or she has the absolute right to remain silent. Knowing that there is an absolute right to remain silent is a threshold requirement if police are to obtain a knowing and intelligent waiver. Moreover, such a warning is a prerequisite for police to overcome the inherent pressures of an interrogation atmosphere. *Miranda*, 384 U.S. at 468.

2. *Miranda* warning #2—"Anything you say may and will be used against you"

The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make the Defendant aware not only of the privilege, but also the consequences of foregoing the privilege. It is only through an awareness of these consequences that there can be an assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning can serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of people acting solely in his interest. *Id.* at 469.

3. *Miranda* warning #3—"You have the right to have an attorney present during questioning"

Defendants who are held for questioning must be made aware that they do not have to speak, but if they do speak, that will probably help police and hurt the defense

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case. In addition, the Defendant must know that there is an absolute right to consult with an attorney and to have an attorney present during interrogation. The presence of an attorney is necessary to counter the inherent pressure associated with custodial interrogation.

In addition to the right to remain silent and the fact that anything said may be used as evidence against the Defendant, knowledge of the right to have counsel present during interrogation is an absolute prerequisite to interrogation. Once the Defendant knows of the right to counsel, the Defendant must take steps to exercise the right to counsel. *Id.* at 471-72.

4. *Miranda* warning #4—"If you cannot afford an attorney to be present with you during interrogation, you have the right to an attorney present during interrogation at government expense"

The financial ability of the Defendant has no relationship to the scope of the rights under *Miranda*. The need for counsel to protect the privilege against compelled self-incrimination, in the inherently coercive situation, exists for the indigent as well as the affluent. Thus, for an indigent Defendant to fully obtain the rights guaranteed by *Miranda*, the Defendant must fully understand the right to counsel, and must also understand that, if he is indigent, *Miranda* counsel will be appointed at government expense prior to any questioning. *Id.* at 473.

5. Constitutional perspective on the four *Miranda* warnings

Of the four required *Miranda* warnings, the first two warnings "sound" Fifth Amendment in nature, i.e., the privilege against compelled self-incrimination. Of the four required Miranda warnings, the second two warnings "sound" Sixth Amendment in nature, i.e., the right to counsel.

Nonetheless, constitutionally, *Miranda* is based exclusively on the Fifth Amendment privilege against compelled self-incrimination, and it is not based on the Sixth Amendment right to counsel. *Miranda* is rooted in the idea that police procedures, absent safeguards, are inherently coercive and violate the Fifth Amendment's privilege against compelled self-incrimination, particularly during custodial interrogation. *See Cummings*, 27 Md. App. at 363-64.

6. Interrogation protected by the Fifth Amendment privilege against compelled self-incrimination

Miranda is based solely on the Fifth Amendment privilege against compelled self-incrimination. Even though *Miranda* includes the Sixth Amendment concept of the right to counsel, *Miranda* is purely a Fifth Amendment protection, and it is not a Sixth Amendment protection. *Miranda* provides, under the Fifth Amendment, a limited right to counsel. To help ensure no violation of the Fifth Amendment privilege

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against compelled self-incrimination during custodial interrogation, *Miranda* borrows an attorney from the Sixth Amendment for the limited purpose of protecting the Fifth Amendment.

Also, because *Miranda* is Fifth Amendment based, *Miranda* rights are question based and not offense based, i.e., *Miranda* applies to all questions, whether or not they relate to a crime for which the Defendant is arrested. By contrast, the right to counsel under the Sixth Amendment is not question based, but rather offense based, i.e., it applies only to questions related to offenses for which the Defendant has been formally charged. *See McNeil v. Wisconsin*, 501 U.S. 171, 176-77 (1991)

7. Interrogation protected by what appears to be the Sixth Amendment right to counsel, but is actually the Fifth Amendment right to counsel

The scope of the limited Fifth Amendment right to counsel, as afforded through the Fifth Amendment privilege against compelled self-incrimination, is different than the scope of the Sixth Amendment right to counsel. The Sixth Amendment right to counsel is "offense based," and the right to counsel applies only to offenses for which the Defendant has been formally charged, and not merely arrested or suspected.

In *Minehan*, 147 Md. App. 432, the Court of Special Appeals stated: "There is indeed a right to counsel rooted in both the Fifth and Sixth Amendments of the U.S. Constitution. The Sixth Amendment right, however, attaches only when formal charges have been filed." *Id.* at 444 (citing *Massiah v. United States*, 377 U.S. 201 (1964)). Thus, the Sixth Amendment right to counsel applies only upon commencement of formal judicial adversarial proceedings, i.e., formally charged by a prosecutor by indictment or criminal information and not merely arrested by police.

8. When warnings are given in a manner that does not fully comply with *Miranda*

Miranda does not require any "talismanic incantation" of magic words. *California v. Prysock*, 453 U.S. 355, 359 (1981). As long as a fully effective equivalent of the *Miranda* litany is provided, *Miranda* is satisfied. In *Smith v. State*, 31 Md. App. 106, 118 (1976), warnings that "anything you say can be used against you in court," were sufficient warnings, even without including the fact that what is said "can *and will* be used against you in court." In *Robinson v. State*, 1 Md. App. 522, 527 (1967), the failure to include the fact that the right to an attorney is *at state expense*, *if indigent* were insufficient warnings. Whether *Miranda* warnings are sufficient is measured objectively under a totality of the circumstances.

9. *Miranda* warnings deemed adequate

In *Prysock*, 453 U.S. at 356, the Supreme Court held that a juvenile was sufficiently warned of *Miranda* rights when he was told: "You have the right to talk to a lawyer

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before you are questioned, have him present with you while you are being questioned, and all during questioning." The Defendant was also told that he had the right to a court-appointed attorney if he could not afford one, even though he was not told when he would be given that attorney. When the language used to warn the Defendant is accurate and the totality of the warnings properly advises the Defendant of his rights, *Miranda* is satisfied. *Id.* at 361.

In *Duckworth v. Eagan*, 492 U.S. 195, 198 (1989), the Supreme Court held that the Defendant was sufficiently warned of *Miranda* rights, even though the warnings seemed to indicate that the Defendant would not get an attorney at the present time. The warnings included:

> Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. 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. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you've talked to a lawyer.

In *Florida v. Powell*, 559 U.S. 50 (2010), the Supreme Court held that the *Miranda* warnings, although not the clearest, were adequate. The warning included the following: "If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning." The Court held that the warning did not mean that the Defendant could talk to an attorney only prior to questioning. The Court held that the warning also meant that the Defendant could talk to an attorney during questioning, as indicated by the fact that the Defendant was also told that he had the right to talk to a lawyer before answering any questions and could use any of his rights at any time during the interview. *Id.* at 64.

In *Rush v. State*, 403 Md. 68, 92 (2008), the Court of Appeals held that the police statement that, if the Defendant wanted a lawyer, she would be provided with an attorney "at some time," was sufficient to comply with *Miranda*.

10. *Miranda* warnings deemed inadequate

In *Luckett v. State*, 413 Md. 360, 371 (2010), the Court of Appeals held that when police erroneously clarified the *Miranda* rights, to include, "if we discuss matters outside this case, you don't need a lawyer present at all . . . ," that was misleading, incorrect, and nullified the Defendant's waiver. The State cannot overcome improper *Miranda* warnings by showing that the Defendant had knowledge of his rights, unless

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those rights were included in the *Miranda* warnings. In *Duckett v. State*, 3 Md. App. 563 (1968), the Court of Special Appeals held that the advisement that the Defendant had the right to "contact" an attorney, and not that the Defendant had the right to the "presence" of an attorney, rendered his subsequent statements inadmissible because police did not comply with *Miranda*. The Court stated:

> We hold that merely advising a person who has been arrested and who is about to be questioned with reference to the crime that he has a right "to contact" a lawyer does not comport with *Miranda* requirements concerning the warning of his right to the presence of counsel. Nor does the advice that the prisoner has a right "to contact" a lawyer, coupled with an inquiry as to whether he wants an attorney, constitute, in our judgment, the substance or equivalent of advice to the person that he "has the right to consult with a lawyer and have the lawyer with him during interrogation."

Id. at 574. In *Hale v. State*, 5 Md. App. 326, 330 (1968), the Court of Special Appeals held that the *Miranda* warnings given to the Defendant were inadequate when they failed to advise the Defendant of his right to a lawyer or his right to a lawyer at State expense if he could not afford one.

11. *Miranda* warnings do not require providing information on collateral matters

The Fifth Amendment does not require advice of collateral information beyond the requirements of *Miranda*. In *Colorado v. Spring*, 479 U.S. 564, 577 (1987), the Supreme Court held that the Defendant need not be aware of all possible subjects of the questioning. In *Donaldson v. State*, 200 Md. App. 581, 594 (2011), the Court of Special Appeals held that there was no requirement that a Defendant be informed that his statements may be recorded.

12. Public safety exception to the need to give *Miranda* warnings

In *Quarles*, 467 U.S. 649, the Supreme Court recognized a "public safety" exception to the requirement to give *Miranda* warnings whenever police have reasonable suspicion that the Defendant is armed and presently dangerous, such that providing *Miranda* warnings may endanger police or the public. In *Quarles*, a woman told police that she had just been raped at gunpoint by a man who entered a store. Police entered the store, saw the Defendant, and frisked him. The Defendant was wearing an empty shoulder harness, and police asked the location of the weapon without giving *Miranda* warnings. The Defendant responded "the gun is over there." *Id.* at 651.

The Court held that, even though the Defendant was in custody, his statement that "the gun is over there" and the discovery of the gun were permissible because

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the "public safety" exception permits police to ask questions reasonably prompted by public safety concerns. In this case, it appeared that a gun was hidden in the store, based on the information that the Defendant entered the store with a gun, and the Defendant was wearing an empty shoulder holster. *Id.* at 657.

In *Thomas v. State*, 128 Md. App. 274, *cert. denied*, 357 Md. 192 (1999), the Court of Special Appeals held that, after the Defendant bit the officer, who then asked the Defendant to submit to a blood test, based on concern that the Defendant may be infected, the Defendant's incriminating response was admissible under the "public safety" exception because, if the Defendant had AIDS or hepatitis, it was important for the officer to know quickly so that he could receive treatment and avoid infecting others, particularly his family. *Id.* at 294.

In *Hill v. State*, 89 Md. App. 428 (1991), three officers received a radio broadcast that an armed robbery had taken place in their area. Almost immediately, the officers saw three armed suspects scale a ten-foot fence. Although the officers ordered the men to halt, they fled. Upon catching two suspects, an officer asked about the location of the third man. The officer, having retrieved only one of the three suspected guns, asked the Defendant the location of the other guns, to which the Defendant responded that the other suspects had them. The Court of Special Appeals held that these statements, made without *Miranda* warnings, were admissible under the "public safety" exception, stating:

> [T]he police officers' reactions and questions were in response to an emergency situation, rather than an investigation as the [Defendant] postulates, because the officers reasonably believed that the third suspect who fled under cover of darkness was armed and dangerous and could have retaliated by opening fire[. A]fter the suspects had been apprehended, the evidence unit recovered an Uzi machine gun along the path that the three men used to flee. Therefore, it was not unrealistic for the police to have assumed that the weapons could have been located . . . Furthermore, the officers testified that their questions were not only out of a concern for the safety of the police team, but also for the employees or guests . . .

Id. at 434.

In *Orozco*, 394 U.S. 324, the Supreme Court held that, when police entered the Defendant's bedroom and questioned him about a gun used in a murder several hours earlier, there was no need to protect police or the public from immediate danger. In *Argueta v. State*, 136 Md. App. 273, *cert. denied*, 364 Md. 142 (2001), the Court of Special Appeals held that the "public safety" exception did not apply because there was no indication of an emergency or imminent flight when the officer asked the Defendant "what are you doing with this [knife]?" *Id.* at 288.

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13. Rescue doctrine

California adopted the "rescue doctrine," permitting the use of statements made without *Miranda* warnings when obtained in response to questions posed to locate a kidnapping victim. *See People v. Modesto*, 62 Cal. 2d 436, 446 (1965); *People v. Dean*, 39 Cal. App. 3d 875 (1975); *People v. Willis*, 104 Cal. App. 3d 433, *cert. denied*, 449 U.S. 877 (1980). In *People v. Riddle*, 83 Cal. App. 3d 563, 576, *cert. denied*, 440 U.S. 937 (1979), the Court held that the "rescue doctrine" requires an urgent need to save human life, with the rescue as the primary purpose and motive of the interrogation. Maryland has not addressed the rescue doctrine.

F. Waiver of *Miranda* rights

1. Waiver of *Miranda* rights must be knowing, intelligent, & voluntary with the burden of persuasion on the State by a preponderance of the evidence

To establish a waiver of *Miranda* rights, the State must demonstrate, by a preponderance of the evidence, in a pre-trial suppression hearing, that the Defendant's post-arrest statement, during custodial interrogation, followed a knowing, voluntary, and intelligent waiver of *Miranda* rights. *Miranda*, 384 U.S. 436; *see Colorado v. Connelly*, 479 U.S. 157 (1986). In *Fowler*, 259 Md. 95, the Court of Appeals stated:

> The *Miranda* opinion makes clear that a mere perfunctory reading of the four safeguards is not enough to ensure the voluntariness of the confession. The State has the burden of showing that the suspect intelligently and knowingly waived his constitutional rights. Thus, the obtaining of the confession is not to be equated to a game between the police and the suspect.

I*d.* at 104.

A waiver of *Miranda* rights requires a knowing, intelligent, & voluntary waiver. In *Luckett*, 413 Md. 360, the Court of Appeals stated:

> [T]he rights accorded by *Miranda* can be waived. The State has a heavy burden, however, to establish that a suspect has waived those rights. The State must show that the waiver was knowing, intelligent, and voluntary under the high standard of proof . . . set forth in *Johnson v. Zerbst*, 304 U.S. 458 (1938). By this it is meant that: 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 both of the nature of the right being abandoned and the consequences of the decision to abandon it.

Id. at 379 (internal citations, quotations, & alterations omitted). However, in *Elstad*, 470 U.S. 298, the Supreme Court stated: "This court has never embraced the theory

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that a Defendant's ignorance of the full consequences of his decision vitiates their voluntariness." *Id.* at 316 (citing *Beheler*, 463 U.S. 1121; *McMann v. Richardson*, 397 U.S. 759 (1970)).

2. A full understanding of the consequences of waiver is not required

The requirement of a knowing and intelligent waiver does not require that the Defendant have a full understanding of the consequences of the decision to waive *Miranda*. In *Barrett*, 479 U.S. at 524, the Defendant agreed to give oral statements, without counsel present, but refused to give written statements without counsel present. Even though this might have meant that the Defendant believed that only written statements could be used as evidence, the Supreme Court held that the oral statements were admissible.

However, in *State v. Luckett*, 188 Md. App. 399 (2009), the Court of Special Appeals held that, although the confession was voluntary, it was not made knowingly, under a totality of the circumstances, when police told the Defendant that it was "only an oral interview" and did not involve a written statement, and that the officer would help the Defendant obtain evidence that his wife was having an affair. *Id.* at 430.

3. Police deception may or may not preclude a knowing, intelligent, & voluntary waiver

There is no requirement for police to correct the Defendant's misunderstanding of his rights. *Barrett*, 479 U.S. at 530. In *Moran v. Burbine*, 475 U.S. 412, 425 (1986), the Supreme Court held that there is no requirement for police to inform the Defendant that an attorney wishes to meet with him. In *Marr v. State*, 134 Md. App. 152, 167 (2000), the Court of Special Appeals held that when police lied to the Defendant's attorney, stating that there was no arrest warrant for the Defendant, hoping that the Defendant would appear at the police station without an attorney, that was permissible because it did not affect his voluntary waiver of *Miranda* rights.

Failure to tell the Defendant what crime is being investigated is permissible. *Spring*, 479 U.S. at 577. Events occurring outside the presence of the Defendant and unknown to the Defendant have no bearing on the Defendant's ability to comprehend and knowingly waive a constitutional right. *See Zerbst*, 304 U.S. 458.

However, in *Logan v. State*, 164 Md. App. 1, 48 (2005), *aff'd*, 394 Md. 378 (2006), the Court of Special Appeals held that Defendant's waiver of *Miranda* was not knowing, intelligent, and voluntary when police told the Defendant that "the only way this jeopardizes you is if you don't tell the truth," immediately after warning that anything he said could be used against him in court, which may have deceived the Defendant into believing that honest statements could not be used against him.

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4. Express waiver versus implied waiver

There is no particular manner in which the Defendant must make a knowing, voluntary, and intelligent waiver of *Miranda* rights. Waiver may be express in writing, orally, or recorded. Waiver may be implied by conduct and/or a reasonable interpretation of what the Defendant said. In *North Carolina v. Butler*, 441 U.S. 369 (1979), the Supreme Court held that a nod of the head may be sufficient to constitute a waiver of *Miranda* rights, but that mere silence is insufficient to constitute a *Miranda* waiver. *Id.* at 373.

Whether the Defendant made a knowing and intelligent waiver of *Miranda* rights is determined under a totality of circumstances. *Wyrick v. Fields*, 459 U.S. 42, 46 (1982). In *Freeman v. State*, 158 Md. App. 402 (2004), the Court of Special Appeals held: "The issues of invocation and waiver are entirely distinct inquiries, and the two must not be blurred. When a suspect indicates in any manner that he or she wished to remain silent, *Miranda* requires that the interrogation must cease. Moreover, there is no proscribed form or set way in which to waive *Miranda* rights." *Id.* at 425.

5. Partial waiver of *Miranda* rights

The Defendant may set the terms of the scope of any waiver. In *Connecticut v. Barrett*, 479 U.S. 523, 529 (1987), after being advised of *Miranda* warnings and signing a form acknowledging that he understood his rights, the Defendant refused to give a written statement without counsel, but agreed to speak with police without counsel. The Supreme Court held that the Defendant, by his own terms, limited the right to have counsel present to written statements, and the Defendant waived the right to counsel during oral statements.

In *Wyrick*, 459 U.S. at 47, on advice of counsel, the Defendant requested a polygraph examination. Prior to the polygraph, the Defendant was informed of his *Miranda* rights and stated that he did not want an attorney present. After the polygraph examination, the Defendant was informed that there were indications of deception on the polygraph, and the Defendant then made incriminating statements. The Supreme Court held that the Defendant waived his Fifth Amendment right to have counsel present during interrogation by requesting a polygraph examination and stating that he did not want counsel present for the polygraph examination. In *United States v. Frazier*, 476 F.2d 891 (D.C. Cir. 1973), the Court upheld a waiver despite the Defendant's condition that no notes be taken.

6. Waiver of *Miranda* rights requires a voluntary waiver

The totality of the circumstances test is used to determine whether a waiver of *Miranda* rights was voluntary. *Moran*, 475 U.S. 412; *Marr*, 134 Md. App. 152. In *Fare v. Michael C.*, 442 U.S. 707 (1979), a 16-year-old juvenile, who had been on probation

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since age 12, was arrested for murder. At the station, the Defendant was advised of his *Miranda* rights. After the officer denied the Defendant's request to see his probation officer, the Defendant said that he would give a statement without an attorney present and confessed. The Supreme Court held that the Defendant's request to see his probation officer was neither an assertion of the right to remain silent, nor a request for an attorney to be present during questioning. *Id.* at 722-23.

In *Holmes v. State*, 116 Md. App. 546 (1997), the Court of Special Appeals held that a 17-year-old's waiver of *Miranda* was voluntary, even though the Defendant's mother was not permitted to be present during the interrogation. The Defendant had an 11th grade education and read part of the waiver form aloud. There was no indication that the Defendant did not understand his rights, and the length of the interrogation was not excessive. There were no threats or inducements. The Defendant declined an offer of food and drink and used the bathroom on request.

There was no evidence that the Defendant's mother would have assisted in his understanding of his rights. The Court held that the Defendant's request to see his mother, during questioning about a rape, was not an invocation of his right to remain silent and was not a request for counsel. *Id.* at 553-54.

In *Rush*, 403 Md. 68, the Court of Appeals stated that, when determining the voluntariness of a confession, court looks to (a) the manner in which the waiver was obtained; (b) the number of officers present; and (c) the age, education, and experience of the Defendant. However, when determining the sufficiency of the *Miranda* warnings, it does not matter whether the Defendant has a Ph.D. or a GED. *Id.* at 93 (internal citations & quotations omitted); *see McIntyre*, 309 Md. 607.

In *Gilliam v. State*, 320 Md. 637 (1990), the Court of Appeals held that the Defendant's "voluntary inattentiveness" in waiving his *Miranda* rights did not influence his decision to waive those rights. The Defendant explained that the only thing that he did not understand was that he could terminate the interview at any time. The Court noted:

> [W]hen discussing the *Miranda* form, [the Defendant stated]: "I wasn't really paying attention to it when I was reading it. I was just reading it because they told me that I had to read. I just wanted to get it over with." He stated that he signed the *Miranda* waiver . . . because he "became impatient with the officers' and was feeling 'uncomfortable.'" [The Defendant's] voluntary inattentiveness does not undermine his decision to waive his *Miranda* rights.

Id. at 650.

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7. If *Miranda* rights are waived, is there a requirement to re-Mirandize after a break in questioning?

Usually, there is no requirement to re-*Mirandize* after a break in questioning

When the Defendant is given *Miranda* warnings, and waives *Miranda* rights, there is often a question of how long that waiver remains in effect. Stated alternatively, when, if at all, must the Defendant be re-advised of his *Miranda* rights and re-waive *Miranda*? This issue usually arises when there has been (a) a break in interrogation; (b) a change in interrogators; and/or (c) a change in the location of the interrogation. This issue is evaluated under a totality of the circumstances. Typically, courts have not required a re-*Mirandizing* and re-waiving in order for the interrogation to proceed.

In *Harper v. State*, 162 Md. App. 55 (2005), the Court of Special Appeals set forth a non-exhaustive list of factors to consider when determining whether police were required to re-*Mirandize*, as follows: (a) the length of time between the warnings and the second interrogation; (b) whether warnings were given and a waiver was obtained in one place, but police obtained the statement in a different place; (c) whether warnings were given and a waiver was obtained by one officer, but a second officer obtained the statement; (d) the extent to which the statement differed from any previous statement given; and (e) the apparent intellectual and emotional state of the Defendant. *Id.* at 86.

A ten-minute break in questioning does not require re-*Mirandizing*. *Pryor*, 195 Md. App. at 327; *see Freeman*, 158 Md. App. 402. In *Smith v. State*, 20 Md. App. 577 (1974), the Court of Special Appeals held that there was no requirement to re-*Mirandize* the Defendant, stating:

> The trial court could properly accept the detectives' version of the facts relating to the elapsed time between the administration of the warnings at 10:30 p.m. and the commencement of the preparation of the statement at 3:00 a.m.—a total of approximately 4 ½ hours. During this time, [the Defendant] was not removed from the original place of interrogation nor were the identities of the interrogators changed.

Id. at 586. In *State v. Tolbert*, 381 Md. 539 (2004), the Court of Appeals held that the *Miranda* warnings given to the Defendant prior to taking a polygraph examination were sufficient to inform the Defendant of his rights with relation to questions asked after the polygraph, and thus he did not have to be re-*Mirandized*, even though the initial warnings were given while the Defendant was not in custody. The Court stated:

> We join those jurisdictions that hold that statements made by a suspect are not inadmissible in evidence merely because the police did not repeat prop-

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> erly administered *Miranda* warnings previously given to the suspect when he or she was not in custody . . . The *Miranda* warnings given prior to the polygraph were sufficiently proximate in time and place to custodial status to inform [the Defendant] of his constitutional privilege against self-incrimination.

Id. at 554. In *Crosby v. State*, 366 Md. 518 2001), the Court of Appeals held that re-*Mirandizing* the Defendant was not required when police asked the Defendant to reduce his statement to writing. The Court stated: "It is the choice between speech and silence that must remain unfettered, not the choice between *different forms* of speech." *Id.* at 531 (emphasis in original); *see Collins v. State*, 52 Md. App. 186, 191 (1982) (re-*Mirandizing* not required during the course of a 5½ hour interrogation).

In *Brooks v. State*, 32 Md. App. 116 (1976), the Court of Special Appeals held that re-*Mirandizing* was not required when the Defendant was placed in a separate room and questioned by a different officer. The second officer questioned the Defendant immediately after the questioning by the first officer in an adjoining room. The statement to the second officer was substantially the same as the statement the Defendant gave to the first officer. *Id.* at 121. *See Hebb v. State*, 31 Md. App. 493, 498-99 (1976) (no requirement to re-*Mirandize* after the Defendant was moved to a different room with better lighting immediately after receiving and waiving *Miranda* warnings).

Occasionally, there is a requirement to re-*Mirandize* after a break in questioning

On occasion, courts have held that (a) giving *Miranda* warnings and obtaining a valid waiver of those rights may not be sufficient; and (b) a new set of *Miranda* warnings and a new waiver are required. In *Brown v. State*, 6 Md. App. 564 (1969), the Court of Special Appeals held that the Defendant's statement made on a Monday, after being given and waiving *Miranda* warnings on Sunday, was inadmissible when (a) the interrogating officers were different; (b) the statements obtained were different; and (c) the second interrogation occurred at a different location than the first. The Court stated:

> We think the circumstances in the case at bar did not justify the trial judge's implicit finding that [the Defendant] knowingly and intelligently relinquished his constitutional rights. We point to (1) the time lapse, (2) the distance to the location of the second interrogation, (3) the difference in interrogators, and (4) the difference in the statement obtained.

Id. at 570. In *Franklin v. State*, 6 Md. App. 572 (1969), the Court of Special Appeals held that, even though the Defendant was fully advised on September 4 of his *Miranda* rights and waived his rights, when he was subjected to further custodial interro-

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gation on September 5 and September 6, without new warning and a new waiver, and the State obtained a statement on September 6, the September 4 waiver was insufficient. *Id.* at 577-78.

8. Police conduct may invalidate the Defendant's waiver of *Miranda* rights

In *Lee v. State*, 418 Md. 136 (2011), the Court of Appeals held that, after the Defendant waived his *Miranda* rights, police affirmatively misrepresented, and violated *Miranda*, by undermining the warning that "anything you say can and will be used against you in court." The officer stated, mid-way through the interrogation, that their conversation was "just between you and me, bud. Only you and me are in here." *Id.* at 157.

The Court held that the affirmative misrepresentation rendered the prior *Miranda* waiver ineffective, stating that "the detective's words were nothing less than a promise of confidentiality, even though not couched in precisely those terms." *Id.* The Court stated that a reasonable person would have thought that the conversation would remain confidential.

In *Hopkins v. Cockrell*, 325 F.3d 579, 585 (5th Cir. 2003), the Fifth Circuit held that police cannot read *Miranda* warnings to the Defendant and then tell him that, despite those warnings, what he tells the officer will be confidential. In *State v. Pillar*, 359 N.J. Super. 249, 256 (N.J. App. Div. 2003), the Court held that an officer cannot directly contradict the very *Miranda* warnings that the officer has just given.

In *Angulo-Gil v. State*, 198 Md. App. 124 (2011), the Court of Special Appeals held that an officer's promise of confidentiality, i.e., "everything that we talk about is going to stay here in this room," was impermissible and nullified the Defendant's prior waiver of *Miranda*. The Court stated: "The officer's statements constituted express promises of confidentiality and are inconsistent with the *Miranda* warning that 'anything [a suspect] says can be used against [the suspect] in a court of law.'" 188 Md. App. at 147.

9. The two-step approach of (a) attempting to obtain a voluntary statement without *Miranda* warnings, and (b) if a confession is obtained, then give *Miranda* warnings in the hope of having the Defendant repeat what was said prior to *Miranda* warnings

Assume that police obtain a voluntary statement, but provide no *Miranda* warnings, and thus obtain no *Miranda* waiver. In *Elstad*, 470 U.S. at 301, police went to the Defendant's home because he was the suspect in a burglary. Prior to receiving *Miranda* warnings, the Defendant, in response to police explaining that they believed he was involved in the burglary, stated "Yes, I was there [at the scene of the burglary]."

In *Elstad*, the Defendant was transported to the police station, where he was read his *Miranda* rights, which he waived, and then gave a written confession. The

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Supreme Court held that the second statement was admissible even though it related back to the Defendant's initial, unwarned, and un-waived statement. The Court stated:

> It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.

Id. at 309.

In *Missouri v. Seibert*, 542 U.S. 600 (2004), police used the *Elstad* "two-step" interrogation process, initially intentionally withholding *Miranda* warning, in an effort to obtain a first confession, then giving *Miranda* warnings, hoping to obtain a waiver, and then asking the Defendant to repeat his confession after *Miranda* rights were given and waived. The Court rejected this approach, stating:

> In *Elstad*, it was not unreasonable to see the occasion for questioning at the station house as presenting a markedly different experience from the short conversation at home; since a reasonable person in the suspect's shoes could have seen the station house questioning as a new and distinct experience, the *Miranda* warnings would have made sense as presenting a genuine choice whether to follow up the earlier admission. At the opposite extreme are the facts here, which by any objective measure reveal a police strategy adapted to undermine the *Miranda* warnings.

Id. at 615-16.

G. Assertion of *Miranda* rights

1. Defendant must clearly & unambiguously invoke *Miranda* rights & silence is insufficient to invoke *Miranda* rights

The Defendant must clearly and unambiguously invoke the right to remain silent. If the Defendant remains silent for an extended period after being provided *Miranda* warnings, the Defendant waives *Miranda* rights by voluntarily responding to police questioning, assuming that, during the extended period, the Defendant did not expressly and unambiguously assert the right to remain silent or the right to counsel.

In *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010), the Defendant never stated that he wanted to remain silent and never stated that he did not want to talk to police.

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Had the Defendant made either of these statements, he would have invoked his right to silence and his right to terminate questioning. Because he did neither, the Defendant never invoked the right to remain silent. The Supreme Court held that when the Defendant remains silent for nearly three hours during police questioning, he implicitly has waived the right to remain silent if he responds to police questioning. *Id.* at 2264.

In *Salinas v. Texas*, 133 S. Ct. 2174 (2013), police did not arrest the Defendant and did not give him *Miranda* rights, but did talk with him. At one point, in response to a question that could have incriminated him, the Defendant remained silent. The officer stated that he "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, cl[e]nched his hands in his lap, [and] began to tighten up." *Id.* at 2178. The State introduced the Defendant's non-response in its case-in-chief. *Id.*

The Supreme Court held that the Defendant could not invoke the Fifth Amendment privilege because his pre-arrest, pre-*Miranda* silence was insufficient to assert the privilege against compelled self-incrimination. The Court held that the Defendant waived the Fifth Amendment privilege and, thus, it was permissible for the State to use his silence in its case-in-chief. *Id.* at 2183-84.

Maryland has addressed this issue under its common law rules of evidence. In Maryland, the Defendant's (a) pre-arrest silence in police presence; and (b) post-arrest silence (regardless of whether *Miranda* warnings had been given), are inadmissible as substantive evidence of the Defendant's guilt. *Weitzel v. State*, 384 Md. 451, 460-61 (2004); *Ware v. State*, 170 Md. App. 1, 28-29, *cert. denied*, 396 Md. 13 (2006), *cert. denied*, 549 U.S. 1342 (2007) (error to admit evidence of the Defendant's post-*Miranda* silence when asked about the location of the murder weapon).

In *Souffie v. State*, 50 Md. App. 547 (1982), the Court of Special Appeals held that the Defendant waived her right to remain silent, despite equivocation, when she made a statement to police after appearing reluctant. The Court stated: "The words and actions of the [Defendant] clearly implied a knowing and intelligent waiver of the rights of which she was admittedly advised." *Id.* at 555.

A custodial Defendant who wishes to remain silent and not be interrogated by police must unequivocally communicate that desire to police. In *Berghuis*, 130 S. Ct. at 2260, the Defendant failed to unambiguously invoke his right to remain silent, as required when desiring to assert the right to remain silent under *Miranda*. The Defendant ignored police questions for nearly three hours, after which he provided an incriminating statement, which was admissible.

In *State v. Purvey*, 129 Md. App. 1, 18-19 (2000), the Court of Special Appeals held that the Defendant's statement that he did not wish to make a written statement was not an invocation of the right to remain silent, but was only a statement that he was unwilling to give a written statement. *See McIntyre*, 309 Md. at 625 (juvenile's requests to speak with his mother was not an invocation of the right to remain silent).

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2. If the Defendant asserts the right to remain silent, police must cease interrogation & scrupulously honor the request to remain silent

If a custodial Defendant asserts the right to remain silent, the Supreme Court, in *Michigan v. Mosley*, 423 U.S. 96 (1975), established the steps that police must follow in order to be eligible to obtain an admissible statement. The steps are as follows: (a) police must immediately cease questioning; (b) police must "scrupulously honor" the Defendant's assertion of the right to remain silent, which probably requires a two-hour cessation of questioning; (c) police must administer a second set of *Miranda* warnings; and (d) police must obtain a knowing and intelligent waiver of *Miranda* rights. *Id.* at 104-06. *See Arizona v. Roberson*, 486 U.S. 675, 683 (1988).

In *Latimer v. State*, 49 Md. App. 586 (1981), the Court of Special Appeals stated:

> *Miranda* does not create a per se proscription of all further interrogation once the person being interrogated has invoked his desire to remain silent. The reasoning in these cases seems to be that once the right to silence has been expressed, the police must at that time cease their interrogation. This serves to notify the Defendant that all he needs to do to foreclose or halt questioning is to give a negative response when asked if he will submit thereto. In order to communicate this message, it is imperative that the interrogation stop for some period of time. By this stoppage, the Defendant is made aware that he need answer no further questions either then or later unless he so desires. It seems then that the action that is condemned in *Miranda* is police refusal to take a Defendant's "no" for an answer, that is, sanctions wherein the police continue to question and thereby harass and coerce the Defendant so as to overcome his assertion of his constitutional right to remain silent.

Id. at 590-91.

In *Conway v. State*, 7 Md. App. 400, 410 (1969), the Court of Special Appeals rejected an argument that, once a Defendant in custodial interrogation invokes the right to remain silent, he cannot thereafter be questioned in the absence of counsel. Instead, the Court held that the right to remain silent, once invoked, may subsequently be waived, if there is a knowing and intelligent waiver under *Zerbst*, 304 U.S. 458. *Zerbst* requires an intentional relinquishment or abandonment of a known right or privilege. *Id.* at 464.

In *Fellows v. State*, 13 Md. App. 206, 219, *cert. denied*, 264 Md. 747 (1971), the Court of Special Appeals held that, when the Defendant invoked the right to remain silent, and was then left alone for 30 hours and, thereafter, waived his *Miranda* rights, and confessed, his statement was admissible. *See Marr*, 134 Md. App. at 165; *Costley*, 175 Md. App. at 107; *Freeman*, 158 Md. App. at 434; *Manno v. State*, 96 Md. App. 22, 42 (1993).

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3. Assertion of *Miranda* rights by asserting the right to counsel

A custodial Defendant who wishes to speak with counsel and not be interrogated without counsel present must unequivocally and unambiguously communicate that desire to police. The Defendant must articulate a desire to have counsel present, with sufficient clarity, that a reasonable officer, under the circumstances, would understand the Defendant's statement as a request for an attorney present during questioning. In *Davis*, 512 U.S. at 456, the Supreme Court held that a statement of "maybe I should talk to a lawyer" is not an unambiguous request for counsel. In *Matthews v. State*, 106 Md. App. 725, 737 (1995), the Court of Special Appeals held that "where's my lawyer?" was insufficient to assert the right to counsel.

In *Wimbish v. State*, 201 Md. App. 239 (2011), the Court of Special Appeals held that when the Defendant said, "what about my lawyer?", that was not an unequivocal assertion of the Defendant's right to counsel. The Court stated: "When appellant asked, at the outset of the interview, 'What about my lawyer?', a reasonable police officer could infer that the Defendant was "wondering about his lawyer's whereabouts or, perhaps, whether a lawyer has been provided for him.'" *Id.* at 256 (quoting *Ballard*, 420 Md. at 491).

In *Braboy v. State*, 130 Md. App. 220, 234-35, *cert. denied*, 358 Md. 609 (2000), the Court of Special Appeals held that the Defendant's statement "I want a lawyer, but I can't afford a lawyer" was not an unambiguous invocation of the right to counsel. *See Angulo-Gil*, 198 Md. App. at 138 (Defendant's request for an attorney was not unequivocal).

Because attorneys play a unique role in the adversarial criminal justice system, a request for someone other than an attorney, e.g., a probation officer, does not constitute an assertion of the right to counsel. *Michael C.*, 442 U.S. at 722. Moreover, the Defendant's request must be reasonably construed to be a request for counsel to assist in dealing with custodial interrogation.

In *McNeil*, 501 U.S. at 178-79, the Supreme Court held that a request for counsel at a bail hearing does not constitute a request for counsel to assist during interrogation. In addition, the Defendant cannot invoke the right to counsel anticipatorily. Thus, an assertion of the right to counsel prior to being placed in custody is ineffective. *See Costley*, 175 Md. App. at 100; *Marr*; 134 Md. App. at 178.

For the request for counsel to be effective, that request must occur after the Defendant is in custody and must occur in the context of custodial interrogation. In *Hoerauf*, 178 Md. App. 292, the Court of Special Appeals held:

> Assuming that [the Defendant] clearly expressed his desire for the assistance of counsel by repeatedly asking to talk to his mother, an attorney, all such requests were made by [the Defendant] prior to being placed in the interroga-

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> tion room and interrogated[. A]t no time from his entry into the interrogation room until the completion of his statement did [the Defendant] ask to speak with his mother, or otherwise request the assistance of counsel. Accordingly, we hold that [the Defendant] did not validly invoke his Fifth Amendment right to counsel . . .

Id. at 318.

In *Davis*, 512 U.S. 452, the Supreme Court stated that, if the Defendant makes an equivocal or ambiguous request for counsel

> it will often be good police practice for the interviewing officers to clarify whether or not he wants an attorney . . . Clarifying questions help protect the rights of the suspect by ensuring that he gets an attorney if he wants one, and will minimize the chance of a confession being suppressed due to subsequent judicial second-guessing as to the meaning of the suspect's statement regarding counsel.

Id. at 461.

However, in *Davis*, the Court noted that it had "decline[d] to adopt a rule requiring officers to ask clarifying questions. If the Defendant's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him. *Id.* at 461-62.

In *Ballard v. State*, 420 Md. 480, 482 (2011), the Court of Appeals held that the Defendant's statement, "You mind if I not say no more and just talk to an attorney about this" was an unequivocal assertion of the right to counsel and that interrogation should have ceased. In *Billups v. State*, 135 Md. App. 345, 355-56 (2000), the Court of Special Appeals held that the Defendant invoked the right to counsel when he placed his initials on the waiver of counsel form, but added the word "no" after his initials.

In *Fowler*, 259 Md. at 106, the Court of Appeals held that the Defendant was denied the right to counsel when police remained in the interview room while the Defendant was consulting with his attorney because it "prevented effective communication between the accused and his counsel, as contemplated by *Escobedo* and *Miranda*."

4. If the Defendant asserts the right to counsel, police must cease interrogation until counsel is provided or until the Defendant initiates conversation with police directly or indirectly related to the investigation

If a custodial Defendant unequivocally requests counsel, police must cease questioning until counsel arrives or until the Defendant initiates further communication with police directly or indirectly related to the investigation. *Edwards v. Arizona*, 451 U.S. 477, 485 (1981); *Bradshaw v. Oregon*, 462 U.S.1039, 1044 (1983); *see Wallace v. State*, 100 Md. App. 235, 237-38 (1994). In *Conover*, 312 Md. at 35, the Court of Appeals

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stated: "When an individual in custody requests an attorney, interrogation must cease until an attorney is present, unless the accused himself initiated further communication, exchanges, or conversations with the police." *See Radovsky v. State*, 296 Md. 386, 397 (1983).

In *Bryant*, 49 Md. App. at 280, the Court of Special Appeals held: "[O]nce the right to the presence of counsel has been made by the accused, arrestee, or suspect, any attempt by authorities to 'spark' the accused's 'own initiative' will contaminate the waiver and render it a nullity." In *Smith v. Illinois*, 469 U.S. 91, 98 (1984), the Supreme Court characterized the *Edwards* holding as a bright-line rule prohibiting all police overreaching whether deliberate or unintentional.

The right to counsel in custodial interrogation does not mean that officers must provide counsel. The officers may choose not to provide counsel, provided they do not question the Defendant. *Roberson*, 486 U.S. at 687.

The Defendant's assertion of the right to counsel, under *Miranda*, is based on the Fifth Amendment and is not based on the Sixth Amendment. As such, the right to counsel is question-based and not offense-based. Thus, the request for counsel applies to all questions and not just to questions related to the offense(s) for which the Defendant is in custody. *Roberson*, 486 U.S. at 685.

Once the Defendant requests counsel, that request stays in place, unless and until it is withdrawn through the Defendant's initiating further communication with police directly or indirectly related to the investigation. Assuming the request is not withdrawn, counsel must be present during any interrogation. If police obtain counsel, who consults with the Defendant, and then departs, that does not permit police to interrogate the Defendant, and counsel must be brought back prior to any subsequent attempt to interrogate the Defendant. *Minnick v. Mississippi*, 498 U.S. 146, 150 (1990).

In *State v. Quinn*, 64 Md. App. 668 (1985), the Court of Special Appeals held that the burden is on the State to show that the Defendant initiated further communication after invoking *Miranda* rights, stating:

> If the Defendant asserts the right to counsel, the Defendant may withdraw that right. The Defendant is deemed to have withdrawn the right to counsel if the Defendant initiates communication with the police that is directly or indirectly related to the investigation. Such conduct indicates the Defendant's desire to speak with the police about the investigation. Even if the Defendant initiates such communication, that is not a waiver of *Miranda*. Instead, initiation of communication by the Defendant permits the police to re-*Mirandize* the Defendant. If the Defendant then makes a knowing and intelligent waiver of *Miranda* rights, the police may question the Defendant.

Id. at 671.

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In *Raras v. State*, 140 Md. App. 132, 153-54, *cert. denied*, 367 Md. 90 (2001), the Court of Special Appeals held that the Defendant's statements given during a second interview, after she had invoked her right to counsel in the first, were admissible because the Defendant reinitiated contact by "ask[ing] after the first interview if she could speak with him in order to clarify certain matters[. M]oreover, that at the start of the second interview, [the Defendant] signed an advice of rights form waiving her *Miranda* rights . . . ." (citing *Davis*, 512 U.S. at 458-59; *Edwards*, 451 U.S. at 484).

In *Johnson v. State*, 348 Md. 337, 350 (1998), the Court of Appeals held that statements made three days after the Defendant invoked his right to counsel were admissible because the Defendant initiated contact with police.

Police may not initiate conversation with the Defendant in the hope that the Defendant will then initiate conversation with police. In *Blake*, 381 Md. at 235, police arrested a 17-year-old Defendant, who invoked the right to counsel when he was provided *Miranda* warnings. Without counsel present, one officer gave the Defendant a charging document, which incorrectly stated that the Defendant was eligible for the death penalty. A Defendant must be age 18 at the time of the crime to be eligible for the death penalty.

Showing the Defendant the words "death penalty" was followed by the police statement of "I bet you want to talk now." The second officer told the first officer that they could not talk with the Defendant. About 30 minutes later, the Defendant asked whether he could still talk with the officers. They said "yes," which led to a waiver of *Miranda* and a confession.

The Court of Appeals held that *Miranda* was violated. A combination of (a) handing the Defendant a charging document with the words "death penalty" written on the front; and (b) the follow-up statement of "I bet you want to talk now," was the functional equivalent of interrogation, because it was reasonably likely to elicit an incriminating response.

Because this functional equivalent of interrogation occurred after the Defendant asserted the right to counsel, and because counsel was not present, the ensuing incriminating statements were obtained in violation of *Miranda*. In essence, the Defendant initiated conversation with police, but only after police initiated the Defendant's initiation by the words "death penalty" and the statement "I bet you want to talk now."

However, assuming that a charging document is proper, police conduct of reading the charging document to the Defendant, under Md. Rule 4-212(f), and/or having the Defendant read it, after the Defendant invoked his *Miranda* rights, is not a re-initiation of interrogation by police. *White*, 374 Md. at 248.

In *Bryant*, 49 Md. App. 272, the Defendant invoked his right to an attorney. Thereafter, police put the Defendant in a room with his Co-Defendant who was writing

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a statement at the time and police told the Defendant that his Co-Defendant was confessing and implicating the Defendant. The Court of Special Appeals held that the Defendant's statements made in response to this "ploy" were inadmissible and condemned the police actions, stating:

> [E]fforts by law enforcement officers to induce an ensuing waiver of the right to the presence of counsel cannot and will not be tolerated. Violation of *Miranda-Edwards* will lead to the suppression of any evidence in contravention thereof . . . We point out that the bounds of the Fifth Amendment and Article 22 of the Maryland Declaration of Rights are exactly the same as those of the conduct they seek to prevent. Attempts to manipulate the mental process of the accused, arrestee, or suspect in order to "psych" him or her into changing his or her mind about the presence of counsel are just as devastating to individual rights as is the case of the "rubber hose." The only difference between the two types of coercion is the matter of the degree of duress.

Id. at 278-79.

In *Quinn*, 64 Md. App. 668, the Court of Special Appeals held that presentment of a Co-Defendant's statements incriminating the Defendant violates *Miranda-Edwards* rule. The Court stated:

> As we see it, the only difference between *Bryant* and the matter *sub judice* is that no one handed Bryant a summary of his Co-Defendant's statements. Bryant was told that his Co-Defendants had incriminated him. Here, [the Defendant] was shown in clear print that his Co-Defendants not only indicated that he was involved, but that he "was the one who pushed the robbery." When the trooper handed the application to [the Defendant] to read, it was the same as if he had said to [the Defendant], "Look and see for yourself what I have against you. Now what do you have to say?" We believe . . . that the trooper's actions were deliberately designed to circumvent *Miranda* and *Edwards*. What the trooper did was innovative; it was also impermissible.

Id. at 674.

In *Wallace*, 100 Md. App. 235, the Defendant requested an attorney during an interrogation. Using a "ploy," police stated that they could not take any pictures of the Defendant's supposedly defensive wounds unless he withdrew his request. Thereafter, the Defendant withdrew his request for an attorney and gave a statement. The Court of Special Appeals held that the statement was inadmissible, stating: "The subtle message to the [Defendant] was that if he insisted on his right to counsel, he would pay the price for it by not receiving the benefit of having his injuries photographically memorialized." *Id.* at 239.

In *Phillips v. State*, 425 Md. 210 (2012), the Court of Appeals held that the Defen-

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dant's statements made after invoking his right to counsel, and in response to a detective's statement that he "just wanted to get the Defendant's side of the story," were the functional equivalent of interrogation, and thus inadmissible. In that case, the Defendant was brought to the police station for questioning in a murder case. The Defendant told one detective that he wanted to speak with an attorney.

After this request, a second detective remained in the interview room with the Defendant to speak with him. The second detective informed the Defendant that his invocation of the right to counsel only meant that the detective "couldn't speak to him regarding the case [but] if he decided he wanted to talk and he wanted to tell the story to me that he could do that." Id. at 215.

The Defendant continued to speak, and the detectives recorded the conversation, in which the Defendant made inculpatory statements that were used against him at trial. The Court of Appeals held that, under *Edwards*, the Defendant's right to counsel was not honored and the detective's statements were the functional equivalent of interrogation, stating:

> We do not condemn the police for using legitimate tactics, including telling a suspect that they would like to hear his/her side of the story, in order to induce the suspect to respond to questions or make a statement, so long as the *Miranda* advisements have been given and the suspect has validly waived the right to remain silent and the right to consult with an attorney. When those rights have not been waived, however, and the suspect has elected to remain silent generally or consult with an attorney before undergoing further interrogation, that kind of inducement, in the absence of convincing evidence to the contrary, generally will suffice to constitute the functional equivalent of interrogation, dooming to suppression, in the State's case-in-chief, any ensuing inculpatory statement.

Id. at 224.

5. If the Defendant asserts the right to counsel, the assertion lasts only for 14 days after the Defendant is released from custody

If the Defendant asserts the right to counsel, but police do not provide counsel, and the Defendant does not withdraw the request for counsel, by initiating conversation with police directly or indirectly related to the investigation, does the request for counsel last forever? In *Shatzer*, 559 U.S. 98, the Supreme Court held that police may initiate a second attempt to obtain a waiver of the right to counsel, provided police wait 14 days after a break in custody before re-approaching the Defendant.

In *Shatzer*, police attempted to interview an incarcerated Defendant. When police read the Defendant his *Miranda* rights, the Defendant requested an attorney, and

the interview ended. Two and a half years later, police re-interviewed the Defendant, without counsel, while he remained incarcerated. *Id.* at 101-02, 116-17.

The Defendant argued that his statement violated *Miranda*, under *Edwards v. Arizona*, because he (a) requested counsel; (b) was not afforded counsel; and (c) and did not withdraw his request for counsel. The Court disagreed and created a bright line pro-prosecution rule.

Prior to *Shatzer*, under the line of cases from *Edwards* to *Minnick*, if a custodial Defendant requested counsel, the only police options were to (a) obtain counsel for the Defendant, which permitted interrogation; (b) not obtain counsel for the Defendant and not interrogate; or (c) hope that the Defendant would withdraw the request for counsel, by initiating communication with police directly or indirectly related to the investigation, which would permit police to start over, re-*Mirandizing* the Defendant with the hope of obtaining a statement. Thus, the period of non-interrogation could last forever. *Id.* at 107-08.

In *Shatzer*, the Court held that the period of per se non-interrogation ends 14 days following a break in custody. Even though, in *Shatzer*, the Defendant was incarcerated, the Court held that his incarceration was not "custody" for the purposes of *Miranda* because, for inmates, the place and conditions of incarceration become their accustomed surroundings, which is not the inherently coercive setting addressed by *Miranda*. 559 U.S. at 113.

In *Coleman-Fuller v. State*, 192 Md. App. 577, 604 (2010), the Court of Special Appeals held that a seven-day break in custody, following an unfulfilled and not withdrawn request for counsel, was insufficient to permit police (a) to re-*Mirandize*; (b) to obtain a waiver; and (c) to obtain a statement.

H. Statements obtained in violation of *Miranda* may be used for impeachment purposes

In *Harris*, 401 U.S. at 224-25, the Supreme Court held that a statement obtained in violation of *Miranda*, but otherwise voluntary, is admissible for impeachment if the Defendant testifies. First, as with the Fourth Amendment, "one bite" of suppression is adequate to obtain the deterrent value against police misconduct. Second, (1) the Defendant's Fifth Amendment privilege against compelled self-incrimination, (2) the Fourteenth Amendment Due Process Clause, and (3) Maryland's promises or inducement analysis all preclude the Defendant from committing perjury. *See Hass*, 420 U.S. at 719-20; *Kidd v. State*, 33 Md. App. 445, 475 (1976).

In *State v. Franklin*, 281 Md. 51 (1977), the Court of Appeals discussed how the *Harris-Hass* exception to the use of statements obtained in violation of *Miranda* applies only to impeach a Defendant on specific contradictions arising during the direct examination of the Defendant and not for general impeachment purposes. The Court stated:

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> [A] statement may be received in evidence at a criminal trial of the declarer for purpose of impeaching his credibility, not generally, but specifically with regard to a contradiction, reasonably inferred, between issues initiated by him on direct examination and the impeaching statement, provided the trustworthiness of the evidence satisfies legal standards.

Id. at 58.

§ IV. Overlap of the Fifth Amendment & Sixth Amendment in confession law

In *In re Darryl P.*, 211 Md. App. 112 (2013), the Court of Special Appeal stated:

> There is a vast difference between the influence on confession law of the Sixth Amendment right to counsel, and the Fifth Amendment privilege against self-incrimination. There is a difference between the constitutional right to counsel under *Massiah* and the prophylactic right to counsel under *Miranda*. There is a difference between the triggers of formal accusation and custodial interrogation, just as there is a difference between the respective covers that are triggered. There is a difference in how the separate rights to counsel are invoked. There is a difference in how separate rights to counsel are waived.
>
> . . .
>
> Litigants too often confronted with this constitutional kaleidoscope, and constitutional overlap quickly degenerate into constitutional chaos. It does not help to have a Sixth Amendment factor intruding into a Fifth Amendment analysis. It does not help to have a Fifth Amendment factor intruding into a Sixth Amendment analysis.

A. Pre-incorporation of the Fifth & Sixth Amendments through the Due Process Clause of the Fourteenth Amendment

In state courts, prior to the 1963 incorporation of the Sixth Amendment right to counsel, and prior to the 1964 incorporation of the Fifth Amendment privilege against compelled self-incrimination, the only constitutional basis to suppress an illegally obtained statement was the Due Process Clause of the Fourteenth Amendment. Successful suppression under the due process approach was very rare. *See Harris v. South Carolina*, 338 U.S. 68, 73 (1949); *Crooker v. California*, 357 U.S. 433, 438-39 (1958).

In *White v. Maryland*, 373 U.S. 59, 60 (1963), a pre-incorporation case, the Supreme Court held that a capital Defendant has an absolute due process right to counsel during an adversarial preliminary hearing. The Court recognized a close rela-

tionship between due process voluntariness and the right to counsel during interrogation. *Haynes v. Washington*, 373 U.S. 503, 516-17 (1963).

The move away from the due process approach to full incorporation of the Bill of Rights began, in a sense, with *Spano v. New York*, 360 U.S. 315, 320-21 (1959). In *Spano*, decided four years before incorporation, the Supreme Court reversed a conviction because the confession was involuntary, under a totality of the circumstances, under the Due Process Clause. However, in *Spano*, three concurring justices stated that, because the Defendant had been indicted, he should have had a right to counsel. *Id.* at 326-27.

B. Incorporation of the Sixth Amendment right to counsel & the Fifth Amendment privilege against compelled self-incrimination

In *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963), the Supreme Court incorporated the Sixth Amendment right to counsel against the states through the Due Process Clause of the Fourteen Amendment. The Sixth Amendment right to counsel provides a right to counsel during all critical stages after the Defendant has been formally charged with a felony, by either indictment or criminal information, or who has been subjected to a trial-like confrontation in the form of an adversarial preliminary hearing, whether or not the Defendant is under arrest at the time.

Interrogation is a critical stage. *Iowa v. Tovar*, 541 U.S. 77, 80-81 (2004); *Summerlin v. Schriro*, 427 F.3d 623, 629 (9th Cir. 2005). An indigent Defendant has an absolute right to counsel, at government expense.

In *Malloy v. Hogan*, 378 U.S. 1, 6 (1964), the Supreme Court incorporated the Fifth Amendment privilege against compelled self-incrimination against the states through the Due Process Clause of the Fourteenth Amendment. The Fifth Amendment privilege against compelled self-incrimination provides a limited right to counsel, under *Miranda*, when the Defendant is subjected to post-arrest custodial interrogation, whether or not the Defendant is formally charged.

C. The interplay between the Fifth Amendment & Sixth Amendment regarding suppression of statements

After the Sixth Amendment right to counsel was incorporated, and prior to incorporation of the Fifth Amendment privilege against compelled self-incrimination, the Supreme Court decided *Massiah*, 377 U.S. at 204.

In *Massiah*, police placed a radio transmitter in the vehicle of a Co-Defendant and made arrangements for the Co-Defendant to discuss a pending criminal trial with the Defendant. The Supreme Court held that police violated the Sixth Amendment right to counsel when they deliberately elicited statements, from a formally charged

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Defendant, without either the assistance of counsel or a knowing and intelligent waiver of the right to counsel. Thus, without the Fifth Amendment incorporated, it appeared that the Sixth Amendment would be the basis to suppress illegally obtained post-indictment statements.

However, after *Massiah* was decided, the Supreme Court (1) incorporated the Fifth Amendment privilege against compelled self-incrimination, and (2) decided *Miranda v. Arizona*. Based on these two events, it was believed that the era of the Sixth Amendment, as the basis to suppress illegally obtained statements, was short lived. Particularly because of the Court's decision in *Miranda*, it was believed that the Fifth Amendment and *Miranda* would be the basis to suppress illegally obtained statements.

However, the Supreme Court was not favorable to *Miranda*, and many experts believed that it was only a matter of time until *Miranda* would be overruled. The Court confronted the demise or survival of *Miranda* in *Brewer v. Williams*, 430 U.S. 387, 398 (1977). Approximately half the states filed amicus briefs in *Brewer*, urging the court to overrule *Miranda*. To avoid the "up" or "down" decision on *Miranda*, and because *Brewer* involved a formally charged Defendant, the Court skirted the Fifth Amendment analysis and resolved *Brewer* on Sixth Amendment grounds.

Brewer v. Williams was the first post-*Massiah* case to suppress statements based on the Sixth Amendment right to counsel. In *Brewer*, the Court expanded *Massiah*, holding that the Sixth Amendment right to counsel is triggered when (1) the Defendant is subjected to (a) formal judicial adversarial proceedings, i.e., indictment or criminal information, or (b) a trial-like confrontation, i.e., an adversarial preliminary hearing; and (2) police take steps designed to elicit, and do elicit, an incriminating statement from the Defendant. Whether police deliberately elicited a response from the Defendant is a factual question.

Brewer, 430 U.S. at 400, involved a murder investigation. The Defendant had been formally charged and was being transported 90 miles. The Defendant's attorney and police agreed that police would not ask the Defendant any questions during the trip. Although the officer did not ask an express question, the following happened. The officer gave what has become known as the "Christian burial speech," which resulted in the Defendant showing police the location of the victim's body. The Court held that the "Christian burial speech" was the equivalent of interrogation because the officer deliberately attempted to elicit information from the Defendant. *See Fellers v. United States*, 540 U.S. 519, 524-25 (2004) (deliberately eliciting information is sufficient, even if police conduct did not constitute "interrogation").

In *Brewer*, the officer knew that the Defendant was mentally ill and deeply religious and began addressing him as "Reverend." The officer stated that he hoped that the victim's parents would be able to have a Christian burial at Christmas time before the Iowa winter snows came and it might take months to locate the body. The officer

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told the Defendant to think about it. The Defendant responded by taking police to the body. The Court rejected the State's argument that the Defendant waived the right to counsel (1) by not asserting the right to counsel; and (2) by not asserting that he wished to remain silent without counsel present.

D. The Sixth Amendment right to counsel is offense-based, & the Fifth Amendment right to counsel, under *Miranda*, is question based

If the Defendant is in custody, and asserts his *Miranda* rights, police are prohibited from asking any questions, i.e., questions about the offense(s) for which arrested and questions related to any other offense(s). That is because the Fifth Amendment rights under *Miranda* are question based, i.e., applies to all questions. However, if the Defendant has been formally charged, his rights under the Sixth Amendment right to counsel apply only to offenses for which the Defendant has been formally charged. Of course, if the Defendant is both formally charged, and under arrest, the Fifth Amendment applies to all questions, even though the Sixth Amendment does not apply to all questions.

Thus, the Fifth Amendment right to counsel is triggered when the Defendant is "charged" by police, i.e., arrested (custody), and the right is question based, i.e., applying to all questions, regardless of the crime involved. By contrast, the Sixth Amendment right to counsel is triggered when the Defendant is "charged" by the prosecutor, i.e., the Defendant has been indicted or the prosecutor has filed a criminal information.

E. Application of the Sixth Amendment right to counsel to statements made by the Defendant

In *United States v. Henry*, 447 U.S 264, 284-86 (1980), the Supreme Court held that placing a paid police informant in the cell with a formally charged Defendant is deliberate elicitation because the Government created the situation and the paid informant had incentive to elicit information.

In *Maine v. Moulton*, 474 U.S. 150, 176-77 (1985), the Supreme Court held that the use of a Co-Defendant to elicit an incriminating statement, after the right to counsel attached, is government exploitation of, and interference with, the attorney-client relationship. The Court did not, however, exclude evidence pertaining to charges for which the Sixth Amendment right to counsel had not yet attached. In *Texas v. Cobb*, 532 U.S. 162, 167-68 (2001), the Supreme court held that police may speak with a Defendant about offenses for which the right to counsel has not yet attached.

By contrast, in *Kuhlmann v. Wilson*, 477 U.S. 436, 456 (1986), the Supreme Court held that merely placing an informant in a cell with a formally charged Defendant, and allowing the informant to listen, but not elicit information, is permissible. *See Fellers v. United States*, 540 U.S. 519, 524-25 (2004).

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In *Rollins v. State*, 172 Md. App. 56, 70-71 (2006), *cert. denied*, 398 Md. 315 (2007), the Court of Special Appeals held that a Defendant awaiting trial who elects to testify in an unrelated case, and is represented by counsel, may be cross-examined by the State regarding his testimony in the unrelated case, so long as the judge in the unrelated case advised the Defendant that his testimony in that case may be used against him in his trial and regardless of whether the Defendant gave the unrelated testimony on direct examination or cross-examination.

F. Interplay of the Fifth Amendment & Sixth Amendment regarding waiver

1. Relationship of a knowing & intelligent waiver of *Miranda* & knowing & intelligent waiver of the Sixth Amendment right to counsel

In *Patterson v. Illinois*, 487 U.S. 285, 290-91 (1988), the Supreme Court held that if the Defendant makes a knowing and intelligent waiver of the rights under *Miranda*, a knowing and intelligent waiver of the Fifth Amendment right to counsel is also a knowing and intelligent waiver of the Sixth Amendment right to counsel. In *Patterson*, the Defendant did not request counsel, despite being informed of the importance of counsel. The Court rejected the argument that the Sixth Amendment right to counsel is superior to the Fifth Amendment right to counsel and/or more difficult to waive than the Fifth Amendment right to counsel. 487 U.S. at 296-97.

Thus, the Defendant's knowing and intelligent waiver of the Fifth Amendment right to counsel, under *Miranda*, is also a knowing and intelligent waiver of the Sixth Amendment right to counsel, provided the Defendant is informed of the right to counsel and its importance during post-indictment questioning.

In *In re Darryl P.*, 211 Md. App. 112, the Defendant was arrested and retained counsel who obtained the Defendant's release on bail. One month later, the Defendant was indicted and erroneously re-arrested after an arrest warrant was issued. The Defendant's attorney was not informed of the indictment or the arrest warrant. The Defendant was interrogated without counsel's knowledge and made inculpatory statements regarding his role in a shooting. The Defendant moved to suppress these statements.

The Court of Special Appeals confronted the issue of how and when a Defendant can waive his or her Sixth Amendment right to counsel. The Court noted that "[w]hen *Patterson* equated a waiver of the *Miranda*-based prophylactic right with a waiver of the Sixth Amendment right, it clearly did so in the limited context of custodial interrogation where the two rights were conterminous[.]" *Id.* at 188. The Court stated:

> The *Patterson* holding was thus silent on the effect of *Miranda* waiver on the right to counsel beyond the narrow context of custodial interrogation,

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> and *Patterson*, therefore, should not be read overbroadly with respect to an issue that was not before the Court. The Supreme Court itself was, indeed, conscious of the fact that to satisfy or to waive *Miranda* is not *ipso facto* to satisfy or to waive the Sixth Amendment more broadly.

Id. at 190-91.

The Court held that, although *Miranda* was inapplicable or waived, the Defendant's statements should have been suppressed pursuant to a Sixth Amendment violation, stating:

> We hold that the [Defendant] has a Sixth Amendment right to counsel during [his re-arrest] that went beyond the mere Fifth Amendment-based right to the presence of a lawyer during custodial interrogation. That lesser right to a lawyer during custodial interrogation may well have been waived pursuant to the relaxed waiver standard of *Berghuis v. Thompkins*, but the extended or incremental right to have "counsel as a medium between himself and the State" was, we hold, not voluntary and knowledgeably waived.
>
> This [Defendant had] the right to have the fact of his . . . indictment communicated to his lawyer, if not to himself, a full month before he was subject to uncounseled interrogation.
>
> . . .
>
> Had counsel been present before any interrogation . . . began, as he should have been, counsel would have protested that the [Defendant] was on bail and was not subject to arrest in the first place. Counsel would not merely have sat in on a custodial interrogation. Counsel would have insisted no interrogation take place. Counsel's role would have been more than contemplated by *Miranda*. The [Defendant] was not informed of any of these aspects of his right to counsel and any ostensible waiver of them was correspondingly not knowledgeable.
>
> . . .
>
> The prophylactic right to counsel only comes into existence when it is unambiguously invoked, perhaps deep into interrogation, if ever. The constitutional right to counsel, by contrast, comes into existence automatically, whether invoked or not, at the moment the suspect is formally charged. The critical time period is when an uncounseled interrogation begins. . . . The fuller constitutional right to counsel, by contrast, does not need to be invoked. It automatically applies and does not, therefore, share with its prophylactic counterpart the vulnerable status of being "invoked." The effective inferential waiver of the prophylactic right, moreover, depends upon the fact that the suspect is fully aware of his entitlement to counsel. The *Massiah*-based constitutional right to counsel, by contrast, does not involve any necessary

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> *Berghuis v. Thompkins* knowledge of it existence by the suspect. The constitutional right to counsel simply would not qualify for a *Berghuis v. Thompkins* variety of waiver.
>
> . . .
>
> We hold that the broader Sixth Amendment protection of counsel, as a necessary medium between the [Defendant] and the State, is not vulnerable to a waiver by inference from merely informed silence or from merely the act of confessing itself after having been given *Miranda* rights. Even to speak of the right not to be interrogated at all being waived by inference two hours deep into the interrogation is an oxymoron. In a variety of ways, this [Defendant] was denied his Sixth Amendment right to have "counsel as a medium between himself and the State." His confession was a direct and unattenuated fruit of that violation and should have been suppressed.

I*d.* at 197 (citation omitted).

2. Knowing & intelligent waiver of *Miranda* is permissible even after the Defendant has asserted the right to counsel or has been assigned Sixth Amendment counsel

In *Michigan v. Jackson*, 475 U.S. 625 (1986), the Supreme Court held that police may not obtain a *Miranda* waiver, and interrogate the Defendant, after the Defendant invokes the Sixth Amendment right to counsel at an arraignment or other court proceeding. The Court held that if, after the Sixth Amendment right to counsel attaches, the Defendant asserts that right, or was assigned counsel, police may not obtain a waiver of *Miranda* and interrogate the Defendant. The Court stated that (a) the reasons for prohibiting interrogation of uncounseled Defendants, who have requested counsel, is even stronger once formally charged; and (b) if the Defendant requests counsel at arraignment, it is presumed that the Defendant requests counsel at every critical stage thereafter. *Id.* at 685.

In *Montejo v. Louisiana*, 556 U.S. 778, 797 (2009), the Supreme Court overruled *Jackson*, 475 U.S. 625. In *Montejo*, during a preliminary hearing, the Defendant remained silent, instead of affirmatively accepting the appointment of counsel. Police subsequently gave the Defendant *Miranda* warnings, which the Defendant waived and gave a statement. The Court held that it would not presume that the Defendant's consent to police-initiated interrogation was invalid simply because the Defendant was entitled to counsel at a prior court appearance. The Court found no reason to assume that the Defendant, who took no steps to request Sixth Amendment counsel, would not be amenable to speak with police without counsel present.

Thus, police may (a) approach the Defendant; (b) give *Miranda* warnings; (c) obtain a knowing and intelligent waiver; and (d) obtain a statement. If the Defendant

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does not wish to speak to police without counsel present, the Defendant need only say so when given *Miranda* warnings. If the Defendant, at that time, requests counsel, police must cease questioning the Defendant, unless the Defendant subsequently withdraws the request for counsel under *Bradshaw*, 462 U.S. 1039. The right to counsel is a right held by the client and not by the attorney.

Thus, the Defendant may waive the right to counsel without notice to counsel. *See Brewer*, 430 U.S. at 405 (Defendant could have waived the right to counsel, despite having already acquired counsel, but he did not waive his right to counsel).

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