

Miranda and Juveniles
An Outline of the Law in Massachusetts

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

- Was your client in custody
- Was your client interrogated (or the functional equivalent)
- Under 14 – was an interested adult present
- Over 14 – was there a meaningful/genuine opportunity to consult with and interested adult; if not, look at the characteristics of you client.
- Was the adult really an “interested adult”
- Was the waiver knowing and intelligent
- Was the waiver voluntary
- Public Safety Exception
- Look to the totality of the circumstances

I. MIRANDA APPLIES TO JUVENILES

a) *In Re Gault*, 387 U.S.1 (1967) the court found that *Miranda* protections are applicable in juvenile cases. “We appreciate that special problems may arise with respect to waiver of the privilege by or on behalf of children, and that there may well be some differences in technique -- but not in principle -- depending upon the age of the child and the presence and competence of parents. The participation of counsel will, of course, assist the police, Juvenile Courts and appellate tribunals in administering the privilege. If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.” *Id.* at 55.

b) While the Supreme Court in *Gault* does not explicitly state that *Miranda* warning must be provided in juvenile cases and did not set out a procedure for protecting juveniles when questioned by police, in *Commonwealth v. Juvenile*, 389 Mass. 128 (1983) the court held the Commonwealth has a heavy burden of demonstrating that a statement made by a juvenile was a knowing and intelligent waiver of *Miranda*. The court recognized that there are special problems when dealing with children and waiver and cited the research which suggests that most juveniles do not understand “the

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significance and protective function of these rights even when they read the standard *Miranda* warnings. *Id* at 131. *Commonwealth A Juvenile* articulated the “interested adult” rule in Massachusetts.

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

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

II. MIRANDA WARNINGS ARE REQUIRED WHEN A THE JUVENILE IS IN CUSTODY AND THE STATEMENT MUST BE THE RESULT OF CUSTODIAL INTERROGATION OR ITS FUNCTIONAL EQUIVALENT

a) Custody

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

The test for custody is how a reasonable person in the juvenile’s position would have understood his/her position *Commonwealth v. A Juvenile*, 402 Mass. 275, 277 (1975) (Emphasis added).

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

i) Age of the juvenile – In *Yarborough v. Alvarado*, 541 U.S. 652 (2004) the U.S. Supreme Court held that the age of the defendant, is not a consideration in determining custody. Alvarado was 17 years old, and brought to the police station by his parents. The police had requested that he come to the police station for questioning. He asked if his parents could be present during the interview, and this request was

rebuffed. The interview lasted two hours and *Miranda* warnings were not given, The appeal to the U.S. Supreme Court was on a writ of habeas corpus pursuant to 28 U.S.C. §2254(d)(1) where the court reviews the lower court decision on whether there has been an unreasonable application of clearly established federal law as determined by the U.S. Supreme Court. The Supreme Court has not held that a suspect's age or experience is relevant in determining custody for the purposes of *Miranda*. See *concurrency Connor, J.* (there may be cases where the suspect's age is relevant to *Miranda* custody inquiry) see also *Breyer dissent @ 669-676.*

b) Custodial Interrogation

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

i) Factors Courts Consider:

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

Commonwealth v. Bryant, 390 Mass. 729 (1984), *Commonwealth v. O'Brien*, 432 Mass. 578, 585-86 (2000) (youthful offender case).

While *Commonwealth v. Coleman*, 49 Mass. App. Ct. 150 (2000) is an adult case, it provides a good illustration of the above four factors in finding that the defendant's statements should have been suppressed. Here the police went to the defendant's apartment to question him. He was suspected of firing a gun at a T station.

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

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

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

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

"To find custodial interrogation, the court must first examine all the circumstances surrounding the exchange between the government agent and the suspect, then determine from the perspective of a reasonable person in the suspect's shoes whether there was (1) a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest and (2) express questioning or its functional equivalent," *United States v. Ventura*, 85 F.3d 708, 712 (1st Cir. 1996), which includes "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 711, quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L. Ed. 2d 297, 100 S. Ct. 1682 (1980). See *Commonwealth v. Sheriff*, 425 Mass. 186, 197, 680 N.E.2d 75 (1997); *Commonwealth v. Torres*, 424 Mass. 792, 796-797, 678 N.E.2d 847 (1997).

c) Functional Equivalent of Custodial Interrogation

"The term 'functional equivalent' encompasses 'any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" *Commonwealth v. Rubio*, 27 Mass. App. Ct. 506, 512 (1989), quoting from *Rhode Island v. Innis*, 446 U.S. at 301. An incriminating response is any response "whether inculpatory or exculpatory – that the prosecution may seek to introduce at trial." *Id.* at 301 n.5.

An example of functional equivalent to an interrogation is *Brewer v. Williams* 430 Mass. 387 (1977). Here the defendant asserted his right to counsel and his attorney was told by the police that they would not question him. The defendant was under arrest for the murder of a young girl. As he was being transported to the police station the police said it was important to find the body of the victim so she could have a Christian burial. The police knew the defendant had a history of mental illness and he was religious. The defendant showed the police where the body was located. The Court held this was a violation of the Sixth Amendment.

Commonwealth v. Clark C., 59 Mass. App. Ct. 542 (2003) is a juvenile case where the court found that statements by police were likely to provoke an incriminating response given the circumstances of the case and the juvenile's age. In *Clark C.*, the police spoke to the juvenile over the telephone about a home invasion. As a result of this conversation, the juvenile agreed to either call the police to be picked up or he'd come to an assessment center the following morning to talk to the police. When the juvenile did not call or show up the police went to his home with an arrest warrant. The juvenile was in his bedroom asleep, an officer woke him up, and told him to get dressed and come with him. The juvenile asked "Did my grandmother turn me in?" The court found

that this statement was spontaneous and not in response to interrogation. However, then the officer responded “no ... you said you were going to turn yourself in ...” and the juvenile replied that he was afraid because he had “a previous bad experience with police officers.” The motion judge found that this constituted custodial interrogation or its functional equivalent. The SJC agreed with the motion judge considering the police were dealing with a juvenile, who was recently awoken, and the police did more than answer the juvenile’s question in the negative.

d) Subjective Beliefs of Police

The subjective beliefs held by law enforcement officers are irrelevant in the determining whether a person being questioned is in custody for purposes of the receipt of *Miranda* warnings, except to the extent that those beliefs influence the objective conditions surrounding an interrogation. *Stansbury v. California*, 511 U.S. 318, 323-324, (1994) See also *Commonwealth v. Damiano*, 422 Mass. 10, 13, (1996); *Commonwealth v. Gallati*, 40 Mass. App. Ct. 111, 114, (1996); *Commonwealth v. Sim*, 39 Mass. App. Ct. 212, 220 n.8, 654 N.E.2d 340 (1995).

e) Unsolicited Statements

Unsolicited statements made to the police are admissible.

- *Commonwealth v. Alan A.*, 47 Mass. App. Ct. 271 (1999), *fur. app. rev. den.* 430 Mass 1108 (juvenile consulted with parents and would not speak to police yet agreed to show them where gun was, statements made by juvenile while looking for the gun were admissible).
- *Commonwealth v. King*, 17 Mass. App. Ct. 602 (1984) (defendant’s statement was after he asked to see the arrest warrant and not in response to any police questioning. However, this juvenile was mature, age 17, and had prior experience with the law).

Spontaneous and unprovoked statements are admissible even if made after a defendant has invoked his right to remain silent. *Commonwealth v. Brum*, 438 Mass. 103, 115 (2002) (after invoking his right to remain silent, the defendant blurted out “I just fucked myself good, didn’t I?”) See also, *Commonwealth v. Diaz*, 422 Mass. 269, 270-271 (1996).

f) Booking Questions

Questions at booking are admissible.

- *Commonwealth v. Acosta*, 416 Mass. 279 (1993) (“responses to booking questions [may be] testimonial in nature, their use would not be prohibited by art. 12 unless incriminatory evidence was obtained by compulsion”).
- *Commonwealth v. Rise*, 50 Mass. App. Ct. 836, 842 (2001) (juvenile case, question was where the juvenile lived, held admissible. “In order for the booking

question to be compelled, it must be designed or reasonably likely to elicit an incriminating response.”).

g) Notification to Parents of Arrest

M.G.L. ch. 119 §67:

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

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

III. SPECIAL PROTECTIONS FOR JUVENILES

a) Juveniles Under Age Fourteen

“[F]or the Commonwealth successfully to demonstrate a knowing and intelligent waiver by the juvenile, in most cases, it should show that a parent or an interested adult was present, understood the warnings, and had the opportunity to explain his rights to the juvenile so that the juvenile understands the significance of waiver of these rights. For the purpose of obtaining the waiver, in the case of juveniles who are under the age of fourteen, we conclude that no waiver can be effective without this added protection.” *Commonwealth v. A Juvenile*, 389 Mass. 128,134 (1983). A juvenile under the age of fourteen must have an actual consultation with an interested adult; an opportunity to consult is not enough. *Id*, see also *Commonwealth v. Berry*, 410 Mass 31, 35 n. 2 (1991).

- i) The Commonwealth does not have to prove that the juvenile and the “interested adult” made full use of the opportunity to consult and actually discussed the rights and consequences of a waiver. *Commonwealth v. Phillip S.*, 414 Mass 804, 811 (1993).

b) Juveniles Over Age Fourteen

For a child who has reached the age of 14, “there should **ordinarily** be a meaningful consultation with the parent, interested adult or attorney to ensure that the waiver is

knowing and intelligent. For a waiver to be valid without such a consultation the circumstances should demonstrate a high degree of intelligence, experience, knowledge, or sophistication on the part of the juvenile.” *Commonwealth v. A Juvenile*, 389 Mass. at 134, (Emphasis added).

c) The Interested Adult Rule

The purpose of the interested adult rule is that most children do not understand the significance and protective function of *Miranda*; they frequently lack the capacity to appreciate the consequences of their actions. See *A Juvenile* 389 at 131,132.

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

In reviewing whether the person is in fact an “interested adult,” this question is viewed from the perspective of the persons doing the questioning. *Commonwealth v. Berry*, 410 Mass.31 (1991), *Commonwealth v. Phillip S.*, 414 Mass. 804 (1993). If it is objectively apparent, at the time of questioning that the adult “...lacked capacity to appreciate the juvenile’s situation and to give advice, or was actually antagonistic toward the juvenile,” then the interested adult rule would be violated. *Berry*, at 36-37.

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

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

- i) Who is not an interested adult?
 - o DYS worker, *A Juvenile*, 402 Mass. 275, 279-280 (1988) (DYS worker was acting as an instrument of the police).

- Minor, in this case 17 yr. old sister, *Commonwealth v. Guyton*, 405 Mass. 497 (1989)²
 - Co-defendant's mother, step-father or brother who was at the scene. *Alphonso A.* 438 Mass 372 (2003) (no evidence of any relationship with the juvenile and the adults at the scene that they would act as an advisor)
- ii) Who is an interested adult?
- Grandfather, even though juvenile did not seek his advice and no advice was offered. *Commonwealth v. MacNeill*, 399 Mass. 71 (1987)³
 - Father, even though juvenile and father had a fight with each other the night before the police interrogation. *Commonwealth v. Berry*, 410 Mass. 31, 35-37, (1991).
 - Aunt, who was sister of one of the murder victims. *Commonwealth v. McCra*, 427 Mass. 564 (1998) (the court found that the aunt did not pressure the juvenile to answer questions, she appeared intelligent and friendly toward the juvenile)
 - Spanish speaking mothers of co-defendants, even though they lacked familiarity with the system. The police officer, who was the interpreter was not involved in the investigation. *Commonwealth v. Leon L.* 52 Mass. App. Ct. 823 (2001).⁴
 - Foster Parent. *Commonwealth v. Escalera*, 70 Mass. App. Ct. 729 (2007).

d) What Is A "Meaningful Consultation"?

The juvenile and interested adult do not have to make full use of the opportunity to consult and the Commonwealth does not have to prove that the juvenile and the adult actually discussed the rights and the possible consequences of waiver in order for this requirement to be satisfied. *Phillip S.*, 414 at 811. In *Phillip S.*, the mother and son were alone, in a room for five to fifteen minutes. There was no evidence that they discussed the rights. In *Commonwealth v. McNeill*, the defendant, age 16 and 8 months, did not seek his grandfather's advice and no advice was given. "It is the juvenile's opportunity to consult that is critical, not whether he avails himself." The issue is whether the defendant understood the rights. The fact that he chose not to speak with his grandfather suggested, to the court, that the juvenile did not need the consultation. *MacNeill*, 399 Mass. at 78. "No more than a "genuine opportunity is required." *Id.*

² In *Guyton* the sister was 13 days shy of her 18th birthday. There was testimony by the sister that she understood *Miranda*, but the court stated that this was not enough to qualify her as an advisor to the juvenile on such a crucial question.

³ "In the absence of contrary indications it is fairly inferrable that a grandfather in whose home a juvenile is found, and who accompanies the juvenile to the police station, is sufficiently interested in the juvenile's welfare to afford the juvenile appropriate protection." *Id* at 77-78

⁴ In *Leon L.*, the motion judge found the mothers were not "interested adults" yet the Appeals Court found there were objective facts indicating that the mothers understood the events and could assist the juveniles.

The police do not have to inform the adult and juveniles that they should discuss the rights; however that would be the better practice. *Phillip S* at 811, n. 5

The Commonwealth does not have to prove that the “consultation conveyed the vital information that [the juvenile] needed to know.” *Phillip S* at 811, n. 6 However the adult must be informed of and understand the rights. *Commonwealth v. Berry*, 410 Mass. 31.

In *Commonwealth v. Ward*, the Court would not adopt a rule that the police are required to advise the juvenile and adult that they may talk in private. *Commonwealth v. Ward*, 412 Mass. 395, 397 (1992). However, if such a request is made it must be granted. Here the juvenile was sixteen years old.

While the court has not adopted a rule requiring the pole to inform the juvenile and the adult of their right to consult, the interested adult must understand that there is an opportunity to consult and what his/her role is in that consultation. *Commonwealth v. Mark M.*, 59 Mass. App. Ct. 86 (2003) *Commonwealth v. Mark M.* provides a good illustration of the role of the interested adult and the opportunity to consult.

In *Mark M.* the 13 year old juvenile and his grandmother (legal guardian) went to the police station at the request of the police. The police officer read the juvenile and grandmother the *Miranda* warnings and both said they understood. The officer informed them there was an allegation that the juvenile indecently touched a young girl. There was an agreement to talk to the police but there was no consultation. The juvenile denied the allegation and said the girl and he had been watching TV when a “Playboy” commercial came on and he changed the channel so the girl wouldn’t see the commercial. The grandmother then asked the juvenile if he would feel more comfortable speaking to the officer alone; the juvenile said “yes.” The officer then left to ask his superior whether it was appropriate to talk to the juvenile alone. During this time the juvenile was alone with his grandmother. There was no evidence as to what happened between the juvenile and his grandmother during this time. Upon getting permission to speak with the juvenile alone, the officer had the grandmother leave the room and the juvenile incriminated himself. A motion to suppress statements was allowed on the grounds that the juvenile did not have an opportunity to consult, the questioning began right after the warnings were given, and the juvenile and grandmother were not advised that they had a right to consult. The appeals court vacated the order and remanded for further findings as to whether (1) the first statement was incriminating, and if so was there a break in the stream of events to insulate the second statement, (2) the grandmother and juvenile understood the *Miranda* warnings, (3) the grandmother understood her role as an advisor, and (4) the waiver was knowing, voluntary, and intelligent. On remand, the motion judge found that the initial statement was incriminating since it placed the juvenile at the scene of the crime. The motion judge also found that there was not a sufficient break in time to insulate the later statement and furthermore, there was no evidence that the grandmother understood the *Miranda* warnings or her role as the juvenile's advisor. Additionally, there was no

opportunity for the juvenile and grandmother to consult, hence, the waiver was not knowing, voluntary, or intelligent. The juvenile's statements were again suppressed.

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

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

"The 'genuine opportunity' for consultation that our cases envision is not merely a theoretical opportunity, that the juvenile may utilize at some future time, but an opportunity that is immediately and evidently available to the juvenile before the juvenile waives his or her rights." *Id.* at 382. "If the juvenile needs to assert his rights in order to obtain the benefit of any consultation with an adult, the purpose behind the requirement is nullified." *Id.*

In *Alfonso A.* the court recognized that juveniles may be embarrassed to ask for an adults' help and that the child may engage in a show of "bravado," rather than admitting they need to consult with an adult. The offer to get the mother, no matter how

many times it was made, did not provide the juvenile with a “genuine opportunity” to consult.

Left open is the question - does the interested adult have to be physically present? In all the cases decided so far the adult has been present; the requirement suggests there should be such presence, or at least some contact. In *Alfonso A*, the court did not rule out that something less than actual presence might satisfy this requirement.

e) No Consultation – Statement Can Still Be Admissible

In order for a juvenile’s statement to be admissible without a consultation, the Commonwealth must prove that the juvenile had a high degree of intelligence, experience, knowledge or sophistication where there was no consultation. *A Juvenile*, 389 Mass. at 134. Below are some case law examples where there was no consultation with an adult.

In *Commonwealth v. King*, 17 Mass. App. Ct. 602 (1984) the juvenile, age 16, was charged with rape. He did not consult with his mother yet his statement was admissible. There was evidence that the juvenile was not mentally impaired or under the influence. He went to the 10th grade in school and was able to hold down a job. At the police station he was given *Miranda* three times before he made a statement and on the stand he testified that he was aware of his right to have an attorney. The defendant had a criminal record and there was evidence that he told the victim nothing could happen to him because he was a juvenile. Two weeks before his arrest on the rape case, the juvenile consulted with an attorney and chose not to speak with the police. On the stand the juvenile appeared to be mature, understood the questions posed to him and was able to read from portions of a transcript. The statement was admissible.

In *MacNeill, supra*, the juvenile, age 16 and 8 months was charged with murder. He had completed the eighth grade and left school because the teachers weren’t giving him enough work. He did not consult with his grandfather who was at the police station. The motion judge observed the juvenile on the stand and the juvenile appeared to be bright and answered the questions appropriately. Also, while he was being detained pre-trial the juvenile pretended to attempt suicide so he could go to Bridgewater to study the law books. The statement was admissible.

In *Alfonso A., supra*, the Appeals Court found that the record was insufficient as to the juvenile’s background and knowledge and allowed the juvenile’s motion to suppress the statement. The SJC remanded the case for further findings as to whether the juvenile had sufficient intelligence, experience, knowledge or sophistication to make a knowing and intelligent waiver. The court hinted that this requirement could be satisfied. The juvenile had been arrested twice and he acknowledged that he was familiar with his rights. Additionally, at one point during the questioning he stopped the questioning, and he refused to tell the police who else was involved in the crime. However, there was evidence that the juvenile had performed poorly in school.

It should be noted that extensive contact with the police, by itself, does not demonstrate sophistication or knowledge about *Miranda*. See *Guyton, supra*. In *Guyton*, the motion judge found that the juvenile had extensive contact with the police and the confession was admitted into evidence. However the SJC reversed and remanded for a new trial. The SJC did not think the motion judge was justified in finding the juvenile had extensive contact with the police. Also, there was evidence that the juvenile stopped attending school after the eighth grade and worked on a cleaning crew. When asked whether he understood his rights by the police he responded “Yes I’ve heard it before” yet there was no evidence he heard the warnings in connection with a case. The juvenile did say that he heard the warnings on TV but no one had read them to him before.

f) Tape-Recorded Statements

In *Commonwealth v. DiGiambattista*, 442 Mass. 423 (2004) the court did establish a rule that statements to the police should be recorded, however, if requested the defendant is entitled to a cautionary instruction on the lack of a recording. “[W]hen the prosecution introduces evidence of a defendant’s confession or statement that is the product of a custodial interrogation or an interrogation conducted at a place of detention (e.g., a police station), and there is not at least an audiotape recording of the complete interrogation, the defendant is entitled (on request) to a jury instruction advising that the State’s highest court has expressed a preference that such interrogations be recorded whenever practicable, and cautioning the jury that, because of the absence of any recording of the interrogation in the case before them, they should weigh evidence of the defendant’s alleged statement with great caution and care. Where voluntariness is a live issue and the humane practice instruction is given, the jury should also be advised that the absence of a recording permits (but does not compel) them to conclude that the Commonwealth has failed to prove voluntariness beyond a reasonable doubt.” *Id* at 447. This rule applies prospectively.

Very few states require the recording of confessions. Wisconsin requires the recording of juvenile statements. *State v. Jerrell C.J.*, 2005 WI 105. Here the Wisconsin Supreme Court exercised its supervisory power to require all custodial interrogations of juveniles be electronically recorded where feasible. If a juvenile is in a place of detention, the confession must be recorded.

IV. THE WAIVER MUST BE KNOWING AND INTELLIGENT

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

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

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

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

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

Prior arrest does not necessarily mean the juvenile understands the rights. *Commonwealth v. Guyton*, 405 Mass. 497 (1989).

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

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

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

VI. SCHOOL CASES

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

be equated with “custodial interrogation.” School officials are supposed to address school behavior.

VII. PUBLIC SAFETY EXCEPTION

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

The public safety exception applied where the juvenile was in a private residence. *Commonwealth v. Alan A.*, 47 Mass. App. Ct. 271 (1999), *fur. app. rev. den.* 430 Mass. 1108. In *Alan A.* the court found that a gun even though it was in a private residence, can create a substantial threat to people, including the police. When the police questioned the juvenile they did not know if the gun was in the house or had been disposed of in a public area.

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

Commonwealth v. Guthrie G. 66 Mass. App. Ct. 414 (2006), *aff.* 449 Mass.1028 (2007). The father of the juvenile co-defendant told the police his son and the juvenile, age 14, might be in possession of a gun. The father saw the two teenagers working on what appeared to be a gun in the father’s tool shed. When the boys saw the father they took off. The co-defendant later told the police and his father that he believed the gun was a bb gun and it was at the juvenile’s house. Three uniformed police officers went to the juvenile’s house and the juvenile let them into the living room or kitchen area. An officer asked about the gun, at first the juvenile denied any knowledge and then said he had a BB gun. The police asked to see the gun, the juvenile went to his bedroom, and one officer followed the juvenile while another officer stood at the threshold of the bedroom. The juvenile got the gun and one of the officers saw gun parts in the trash can in the bedroom; other gun parts were found under the bed. The juvenile was home alone the whole time. The appeals court held that the public safety exception to *Miranda* applied to this case. A fourteen year old who flees with a gun triggers the heightened public safety concerns and the limited public safety exceptions set out in *New York v. Quarles*, 467 U.S. 649 (1984) and *Commonwealth v. Alan A.* 47 Mass. App. Ct. 271 (1999). The court reasoned that the police did not know where the gun could be since the boys ran for several miles from one house to another, and the police did not know if the gun was still in the juvenile’s house, even though the co-defendant told them it was in the juvenile’s house.

VIII. THE STATEMENT MUST BE VOLUNTARY

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

Courts look at:

- Insanity
- Intoxication – *Commonwealth v. Hosey*, 368 Mass. 571 (1975)
- Assurance that statement will aid the defense or lesser sentence
Commonwealth v. Meehan, 377 Mass. 552 (1979)
- Age
- Promises or inducements
- Education
- Intelligence and emotional stability –
- Experience with the criminal justice system
- Physical or mental condition - *Commonwealth v. Daniels*, 366 Mass. 601 (1975)
- Details of the interrogation, including recitation of the warnings
- Psychological pressure – *Commonwealth v. Hunt*, 12 Mass. App. Ct. 841 (1981).

"Voluntariness turns on the 'totality of the circumstances,' including promises or other inducements, conduct of the defendant, the defendant's age, education, intelligence and emotional stability, experience with and in the criminal justice system, physical and mental condition, the initiator of the discussion of a deal or leniency (whether the defendant or the police), and the details of the interrogation, including the recitation of *Miranda* warnings." *Commonwealth v. Mandile*, 397 Mass. 410, 413, (1986), *see also Mark M., supra*, 59 Mass, App. Ct. at 89 n. 3.

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

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

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

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

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

In addressing the issue of a voluntary confession, the case of *Roper v. Simmons*, 125 S.Ct. 1183 (2005) should be considered. In *Simmons*, the court, among other things discusses the difference between youth (under age 18) and adults. The court noted that youth do not think about the long term consequences of their actions and are more vulnerable to outside pressures.

IX. HUMANE PRACTICE

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

X. MOTIONS AND AFFIDAVIT

Always cite Article 12, along with US Constitution.

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

- person with knowledge;
- custodial interrogation;
- not voluntary, knowingly;
- no interested adult, present but not interested, present but didn't understand;

- o no meaningful consultation;
- o age; and
- o education

XI. STATEMENT CAN BE USED FOR IMPEACHMENT PURPOSES

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

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

XII. POLICE MUST INFORM SUSPECT IN CUSTODY OF HIS ATTORNEY

Police must inform a suspect of an attorney's effort to contact him/her for the purpose of providing legal advice. The suspect's knowledge of this is necessary to affect a knowing and intelligent *Miranda* waiver. *Commonwealth v. Mavredakis*, 430 Mass. 848 (2000).

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