Chapter 24

Motions To Suppress Confessions, Admissions, and Other Statements of the Respondent

Part A. Introduction

§ 24.01 STRATEGIC REASONS FOR SEEKING SUPPRESSION OF THE RESPONDENT'S STATEMENTS, WHETHER INCULPATORY OR EXCULPATORY

The doctrines described in this chapter supply grounds for suppressing not only confessions but any statement by the respondent – "whether inculpatory or exculpatory – that the *prosecution* may seek to introduce at trial." *Rhode Island v. Innis,* 446 U.S. 291, 301 n.5 (1980) (emphasis in original); *see also Miranda v. Arizona,* 384 U.S. 436, 476-77 (1966).

Ordinarily, counsel will want to suppress all statements made by the respondent. In the case of a confession or a damaging admission, this is self-evident; the confession or admission is frequently the most damning thing the prosecutor has. In cases involving ostensibly exculpatory statements, a suppression motion is also the prudent course, since the facts that emerge at trial may render the statement more damaging than counsel can predict. For example, a statement asserting self-defense may prove to be detrimental in a case in which the state has no other persuasive proof that the respondent was the person who committed the assault. Also, counsel's pursuit of a suppression motion may serve the ancillary goals of discovery and creation of transcript material for use in impeaching prosecution witnesses at trial. See §§ 22.02, 22.04(b), 22.04(c) *supra.*

§ 24.02 APPLICABILITY OF ADULT COURT SUPPRESSION DOCTRINES TO JUVENILE COURT PROCEEDINGS

The discussion in this chapter of the constitutional and statutory grounds for suppressing statements interweaves adult and juvenile court caselaw. Although the Supreme Court has not expressly held the *Miranda* doctrine applicable to juvenile delinquency prosecutions, *Fare v. Michael C.,* 442 U.S. 707, 717 n.4 (1979), and has not explicitly addressed the "procedures or constitutional rights" governing suppression of statements extracted during the "pre-judicial stages of the juvenile process" (*In re Gault,* 387 U.S. 1, 13 (1967); *compare Haley v. Ohio,* 332 U.S. 596 (1948) (applying traditional due process requirements to determine the validity of a statement by a juvenile prosecuted in adult court)), the Court has recognized the logic of extending the safeguards provided in adult court to juvenile confessional evidence (*see In re Gault,* 387 U.S. at 49-52; *see also id.* at 56 & n.97) and has approvingly cited lower court caselaw applying adult court doctrines of statement suppression in juvenile court proceedings (*see id.* at 52-55). The lower courts uniformly hold these doctrines applicable to juvenile proceedings. *See, e.g., United States v. Fowler,* 476 F.2d 1091, 1092 (7th Cir. 1973); *In re Creek,* 243 A.2d 49 (D.C. 1968); *In the Interest of Edwards,* 227 Kan. 723, 725, 608 P.2d 1006, 1008-

09 (1980); *State ex rel. Coco,* 363 So.2d 207, 208 (La. 1978); *In re Meyers,* 25 N.C. App. 555, 558, 214 S.E.2d 268, 270 (1975).

Part B. Involuntary Statements

§ 24.03 GENERAL STANDARD FOR ASSESSING VOLUNTARINESS

As noted in § 22.03(d) subdivision (ii) *supra,* whenever the defense claims that a respondent's statement was "involuntary" and is therefore inadmissible in evidence as a matter of Due Process, the prosecution bears the burden of proving by a preponderance of the evidence (and, in some jurisdictions, by proof beyond a reasonable doubt) that the statement was voluntarily made.

"The [Due Process] question in each case is whether a [respondent's] . . . will was overborne at the time he confessed," *Reck v. Pate,* 367 U.S. 433, 440 (1961); *cf. United States v. Washington,* 431 U.S. 181, 188 (1977) – "whether the behavior of the State's law enforcement officials was such as to overbear [the respondent's] . . . will to resist and bring about confessions not freely self-determined," *Rogers v. Richmond,* 365 U.S. 534, 544 (1961), or whether the confession was "the product of an essentially free and unconstrained choice by its maker," *Culombe v. Connecticut,* 367 U.S. 568, 602 (1961) (plurality opinion), approved in *Schneckloth v. Bustamonte,* 412 U.S. 218, 225-26 (1973). This question is said to be determined "on the 'totality of the circumstances' in any particular case." *Boulden v. Holman,* 394 U.S. 478, 480 (1969). *See*, *e.g.*, *Koh v. Ustich*, 933 F.3d 836, 844 (7th Cir. 2019) ("'The voluntariness of a confession depends on the totality of the circumstances, including both the characteristics of the accused and the nature of the interrogation. If those circumstances reveal that the interrogated person's will was overborne, admitting the resulting confession violates the Fifth Amendment.'").

Despite the psychological flavor of the "voluntariness" label, the Supreme Court's involuntary-statement caselaw has gradually evolved to focus as much upon police mistreatment of suspects for its own sake as upon the effects of the mistreatment in wearing the suspect down. *See, e.g., Spano v. New York,* 360 U.S. 315, 320-21 (1959); *Blackburn v. Alabama,* 361 U.S. 199, 206-07 (1960); *Jackson v. Denno,* 378 U.S. 368, 385-86 (1964); *Beecher v. Alabama,* 389 U.S. 35 (1967) (per curiam); *Sims v. Georgia,* 389 U.S. 404 (1967) (per curiam); *Brooks v. Florida,* 389 U.S. 413 (1967) (per curiam); *Crane v. Kentucky,* 476 U.S. 683, 687-88 (1986); *but see Moran v. Burbine,* 475 U.S. 412, 432-34 (1986).

> "This Court has long held that certain interrogation techniques either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment. . . . Although these decisions framed the legal inquiry in a variety of different ways, usually through the 'convenient shorthand' of asking whether the confession was 'involuntary,' . . . the Court's analysis has consistently been animated

> by the view that 'ours is an accusatorial and not an inquisitorial system,' . . . and that, accordingly, tactics for eliciting inculpatory statements must fall within the broad constitutional boundaries imposed by the Fourteenth Amendment's guarantee of fundamental fairness." (*Miller v. Fenton,* 474 U.S. 104, 109-10 (1985).)

Indeed, *some* coercive behavior on the part of government agents is an indispensable ingredient of an involuntary-statement claim: In *Colorado v. Connelly,* 479 U.S. 157 (1986), the Court rejected a defendant's contention that his confession was involuntary solely because his mental illness drove him to confess. But this does not mean that a defendant's or respondent's mental, emotional, or physical vulnerability is immaterial. To the contrary, *Connelly* reaffirms the clear holding of *Blackburn v. Alabama,* 361 U.S. 199 (1960), that mental illness is "relevant to an individual's susceptibility to police coercion" (479 U.S. at 165); and in *Yarborough v. Alvarado*, 541 U.S. 652 (2004), the Court definitively declared that "whether 'the defendant's will was overborne,' . . . [is] a question that logically can depend on 'the characteristics of the accused'" (*id*. at 667-68), so "we do consider a suspect's age and experience" – together with other "characteristics of the accused . . . [including] the suspect's . . . education, and intelligence, . . . as well as a suspect's prior experience with law enforcement" as bearing on "the voluntariness of a statement" (*id.*). *See also Haley v. Ohio*, 332 U.S. 596, 599 (1948), discussed in § 24.05(a) *infra*. Personal qualities and conditions relevant to the assessment of a suspect's susceptibility to coercion include intellectual disability (*Reck v. Pate*, 367 U.S. at 441-44; *Culombe v. Connecticut*, 367 U.S. at 620-21, 624-25, 635), educational privation (*Payne v. Arkansas,* 356 U.S. 560 (1958); *Fikes v. Alabama,* 352 U.S. 191 (1957)), physical pain and drug ingestion (*Townsend v. Sain,* 372 U.S. 293 (1963); *Beecher v. Alabama,* 408 U.S. 234 (1972)), and any "unique characteristics of a particular suspect" (*Miller v. Fenton,* 474 U.S. at 109) that impair the suspect's "powers of resistance to overbearing police tactics" (*Reck v. Pate,* 367 U.S. at 442). In addition, the propriety or impropriety of police conduct is itself measured, to a large extent, by its tendency to weaken the suspect's will. *See, e.g., Spano v. New York,* 360 U.S. 315 (1959); *Lynumn v. Illinois,* 372 U.S. 528 (1963); *cf. Moran v. Burbine,* 475 U.S. at 423 ("[a]lthough highly inappropriate, even deliberate deception of an attorney [that keeps the attorney from coming to the police station to advise a suspect who is undergoing interrogation] could not possibly affect a suspect's decision to waive his *Miranda* rights unless he were at least aware of the incident"). State constitutional protections may exclude statements found to be involuntary for reasons wholly apart from any inappropriate police behavior. *See State v. Rees*, 2000 ME 55, 748 A.2d 976, 977, 978-79 (Me. 2000) (construing the state constitution to reject *Colorado v. Connelly*'s holding that "'coercive police activity is a necessary predicate to the finding that a confession is not "voluntary" within the meaning of the Due Process Clause'"; the state supreme court affirms a trial court's finding of involuntariness which was based entirely on the defendant's "'dementia,'" and which "'stressed that this ruling makes no finding of improper or incorrect conduct upon the part of the investigating officers'"). And see § 17.11 *supra*.

Thus the caselaw provides a basis for presenting involuntary-statement claims from any one or more of three perspectives:

(a) with an emphasis upon the *behavior* of the police as constituting "coercive government misconduct," *Colorado v. Connelly,* 479 U.S. at 163, that is "'revolting to the sense of justice,'" *id.,* quoting *Brown v. Mississippi,* 297 U.S. 278, 286 (1936); *see, e.g., Brooks v. Florida*, 389 U.S. at 414-15; *cf. Crowe v. County of San Diego,* 608 F.3d 406, 432 (9th Cir. 2010) ("One need only read the transcripts of the boys' interrogations, or watch the videotapes, to understand how thoroughly the defendants' conduct in this case "shocks the conscience." Michael and Aaron – 14 and 15 years old, respectively – were isolated and subjected to hours and hours of interrogation during which they were cajoled, threatened, lied to, and relentlessly pressured by teams of police officers. 'Psychological torture' is not an inapt description. In *Cooper* [*v. Dupnik*, 963 F.2d 1220, 1223 (9th Cir. 1992)], we held that police violated an adult suspect's substantive due process rights when they 'ignored Cooper's repeated requests to speak with an attorney, deliberately infringed on his Constitutional right to remain silent, and relentlessly interrogated him in an attempt to extract a confession.' . . . The interrogations of Michael and Aaron are no less shocking. Indeed, they are more so given that the boys' interrogations were significantly longer than Coopers's, the boys were minors, and Michael was in shock over his sister's brutal murder. The interrogations violated Michael's and Aaron's Fourteenth Amendment rights to substantive due process.");

(b) with an emphasis upon the *effects* of the police behavior on the accused's psychological state, considering the accused's individual weaknesses and vulnerabilities, *see, e.g., Culombe v. Connecticut*, 367 U.S. at 620-21, 624-25, 635; *Davis v. North Carolina*, 384 U.S. 737 (1966); *Colorado v. Spring,* 479 U.S. 564, 573-74 (1987) (dictum), as bearing on the question whether the confession was """the product of a rational intellect and a free will,""" *Mincey v. Arizona,* 437 U.S. 385, 398 (1978); *see also Townsend v. Sain,* 372 U.S. at 308 ("[a]ny questioning by police officers which *in fact* produces a confession which is not the product of a free intellect renders that confession inadmissible"; emphasis in original); *and see* Dean A. Strang, *Inaccuracy and the Involuntary Confession: Understanding Rogers v. Richmond Rightly*, 110 J. CRIM. L. & CRIMINOLOGY 69 (2020) (arguing that accuracy of factual details in a confession cannot properly be considered as evidence of voluntariness but that inaccuracy should be considered as evidence of involuntariness); or

(c) with an emphasis upon the *tendency* of the police behavior to overbear the will of someone in the accused's position and condition, *see, e.g., Sims v. Georgia,* 389 U.S. 404 (1967); *Miller v. Fenton,* 474 U.S. at 116 ("the admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne"; emphasis in original).

Defense counsel should select the perspective or perspectives that will make the most of the facts of the particular case.

It should be noted that although the lower courts occasionally confuse or interweave analyses of involuntariness and *Miranda* claims, the two claims are separate and distinct. *See, e.g.*, *Dickerson v. United States*, 530 U.S. 428, 432-35 (2000); *Miller v. Fenton,* 474 U.S. at 109-10; *Oregon v. Elstad,* 470 U.S. 298, 303-04 (1985); *Colorado v. Connelly*, 479 U.S. at 163-71; *cf. United States v. Patane*, 542 U.S. 630, 636-41 (2004) (plurality opinion). The doctrines may overlap in their application to the facts of a particular case: for example, the facts showing the involuntariness of the statement will usually also show the involuntariness of the respondent's waiver of *Miranda* rights. *Cf. Colorado v. Connelly,* 479 U.S. at 169-70. But counsel should be precise in identifying the constitutional basis of the claim, both because it may significantly affect the appropriate analysis (see, *e.g.*, *Yarborough v. Alvarado*, 541 U.S. at 667 ("the objective *Miranda* custody inquiry could reasonably be viewed as different from doctrinal tests that depend on the actual mindset of a particular suspect")) and because it may affect the scope of relief for any constitutional violation that is found. For example, a statement suppressed on *Miranda* grounds cannot be used in the prosecution's case in chief but can be used to impeach the respondent if s/he testifies at trial, whereas a statement suppressed because of a finding of involuntariness under the Due Process Clause cannot be used by the prosecution for any purpose. See § 24.23 *infra.* And the scope of exclusion of derivative evidence is broader in the case of involuntary statements than in the case of statements obtained in violation of *Miranda.* See § 24.20 *infra.*

§ 24.04 POLICE COERCION RENDERING A STATEMENT INVOLUNTARY

As explained in § 24.03 *supra,* "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connelly,* 479 U.S. 157, 167 (1986). "While each confession case has turned on its own set of factors justifying the conclusion that police conduct was oppressive, all have contained a substantial element of coercive police conduct." *Id.* at 163-64. The concept of "coercive police activity" includes physical force or the threat of force (see § 24.04(a) *infra*), excessively long detention or intimidating circumstances of detention (see § 24.04(b) *infra*), promises of leniency or threats of adverse governmental action (see § 24.04(c) *infra*), and tricks or artifices (see § 24.04(d) *infra*).

§ 24.04(a) Physical Force or Threat of Force

As the Supreme Court observed in *Sims v. Georgia,* 389 U.S. 404, 407 (1967) (per curiam): "It needs no extended citation of cases to show that a confession produced by violence or threats of violence is involuntary and cannot constitutionally be used against the person giving it." *See, e.g.*, *Arizona v. Fulminante*, 499 U.S. 279, 287-88 (1991) ("Fulminante's will was overborne in such a way as to render his confession the product of coercion" as a result of a fellow inmate, who was a government agent, offering to protect him from other inmates if he

confessed: "Our cases have made clear that a finding of coercion need not depend upon actual violence by a government agent; a credible threat is sufficient."); *Payne v. Arkansas,* 356 U.S. 560 (1958) (a confession was rendered involuntary by the totality of police conduct "and particularly the culminating threat" (*id.* at 567) that the Chief of Police was preparing to admit a lynch mob into the jail); *State v. Hilliard,* 318 S.E.2d 35, 36 (W. Va. 1983) (a confession was rendered involuntary when a police officer told the accused he would "knock [his] . . . head off" if he didn't confess).

Serious physical abuse or the threat of it will ordinarily be held to render subsequent statements involuntary even when it is not closely related in time or circumstances to police interrogation or the making of the statements. *See, e.g.*, *Sims v. Georgia,* 389 U.S. at 405-07 (on the facts of the case, set forth at greater length in *Sims v. Georgia,* 385 U.S. 538 (1967), a confession was rendered involuntary because the defendant was physically abused, even though the abuse took place several hours prior to, and in a different location from, the confession); *Beecher v. Alabama,* 389 U.S. 35 (1967) (per curiam), as construed in *Colorado v. Connelly,* 479 U.S. at 163 n.1 (the "crucial element of police overreaching" was holding a gun to the head of the wounded defendant at the time of his arrest, five days prior to the interrogation and confession).

§ 24.04(b) Intimidating or Overbearing Circumstances of Interrogation or Detention

The coerciveness of interrogation increases with the length of the interrogation (*see, e.g., Haley v. Ohio,* 332 U.S. 596 (1948) (15-year-old questioned from midnight to 5 a.m.); *Spano v. New York,* 360 U.S. 315 (1959) (adult interrogated for eight hours); *Doody v. Ryan*, 649 F.3d 986, 990, 1023 (9th Cir. 2011) (en banc) ("sleep-deprived" 17-year-old interrogated by a "tag team of detectives" in "relentless, nearly thirteen-hour interrogation"); *In the Interest of Jerrell C.J.*, 2005 WI 105, 283 Wis. 2d 145, 162-63, 699 N.W.2d 110, 118-19 (Wis. 2005) (14-year-old questioned for five-and-a-half hours)), and with the length of time that the suspect is held incommunicado by the police (*see, e.g., Haley v. Ohio,* 332 U.S. at 600 (15-year-old held incommunicado and denied access to his mother for five days); *Gallegos v. Colorado,* 370 U.S. 49 (1962) (14-year-old held incommunicado for five days); *In the Interest of Jerrell C.J.*, 2005 WI 105, 283 Wis. 2d at 162-63, 699 N.W.2d at 118-19 ("In this case, [14-year-old] Jerrell was handcuffed to a wall and left alone for approximately two hours. He was then interrogated for five-and-a-half more hours before finally signing a written confession . . . . The duration of Jerrell's custody and interrogation was longer than the five hours at issue in *Haley*. Indeed, it was significantly longer than most interrogations. Under these circumstances, it is easy to see how Jerrell would be left wondering 'if and when the inquisition would ever cease.'" (footnote omitted).). *See also Crowe v. County of San Diego*, 608 F.3d 406, 432 (9th Cir. 2010) (holding, in a civil rights action, that the police interrogations of two juvenile suspects violated their "Fourteenth Amendment rights to substantive due process" because the 14-year-old and 15-year-old youths "were isolated and subjected to hours and hours of interrogation during which they were cajoled, threatened, lied to, and relentlessly pressured by teams of police officers").

Prolonged detention under oppressive or debilitating conditions can render a confession

involuntary even in the absence of extensive interrogation. *See Brooks v. Florida*, 389 U.S. 413, 414-15 (1967) (per curiam) ("Putting to one side quibbles over the dimensions of the windowless sweatbox into which Brooks was thrown naked with two other men, we cannot accept his statement as the voluntary expression of an uncoerced will. For two weeks this man's home was a barren cage fitted only with a hole in one corner into which he and his cell mates could defecate. For two weeks he subsisted on a daily fare of 12 ounces of thin soup and eight ounces of water. For two full weeks he saw not one friendly face from outside the prison, but was completely under the control and domination of his jailers. These stark facts belie any contention that the confession extracted from him within minutes after he was brought from the cell was not tainted by the 14 days he spent in such an oppressive hole.").

The coerciveness of these tactics also increases with the youth of the respondent. Thus the court in *State in the Interest of S.H.,* 61 N.J. 108, 293 A.2d 181 (1972), found a 10-year-old's confession involuntary because he was "isolated in a room with a detective for a period of 90 minutes" of interrogation (*id.* at 114, 293 A.2d at 184) and denied contact with his father. *See also, e.g.*, *A.M. v. Butler*, 360 F.3d 787, 797, 800-01 (7th Cir. 2004) (statement must be deemed involuntary because accused was 11 years old, "had no prior experience with the criminal justice system," and "was questioned for almost 2 hours in a closed interrogation room with no parent, guardian, lawyer, or anyone at his side"). There is an extensive jurisprudence on the subject of police denying juveniles access to their parents or guardians, which is described in § 24.14 *infra.* An excessive period of detention at the police station may also run afoul of state statutory requirements for post-arrest treatment of juveniles, which are described in § 24.15 *infra.*

Even if the period of detention is not excessively long, unusually harsh conditions of confinement preceding the confession, such as deprivations of food, sleep, or medication, can render the confession involuntary. *See, e.g., Greenwald v. Wisconsin,* 390 U.S. 519 (1968) (denial of food, sleep, and medication for high blood pressure); *Reck v. Pate,* 367 U.S. 433 (1961) (inadequate food and medical attention); *Payne v. Arkansas,* 356 U.S. 560 (1958) (three days with little food); *State v. Garcia*, 301 P.3d 658, 666-67, 668 (Kan. 2013) (confession was rendered involuntary by "coercive tactics" of "withholding requested relief for an obviously painful untreated gunshot wound over the course of a several-hours-long interrogation" ("[e]ven if Garcia did not confess solely to obtain medical treatment") and by the officer's assurance to the suspect that "a murder charge and accompanying life sentence could be avoided by admitting to the robbery and testifying against" another (even though "[i]t appears that Garcia refused to take the bait because he thought it was a trick").).

§ 24.04(c) Promises of Leniency or Threats of Adverse Governmental Action

A confession is involuntary if "'obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence.'" *Hutto v. Ross,* 429 U.S. 28, 30 (1976) (per curiam), quoting *Bram v. United States*, 168 U.S. 532, 542-43 (1897). *See, e.g., Lynumn v. Illinois,* 372 U.S. 528, 534 (1963) (confession held involuntary largely because police told the defendant "that state financial aid for her infant children would be cut off, and her children taken

from her, if she did not 'cooperate'"); *Haynes v. Washington,* 373 U.S. 503, 514 (1963) (a confession was rendered involuntary in part because of "the express threat of continued incommunicado detention and . . . the promise of communication with and access to family"); *Koh v. Ustich*, 933 F.3d 836, 847 (7th Cir. 2019) (an interrogating officer's statement "that they could be there for 'days and days and days,'" if found to be a threat, would be probative of coercion, rendering a confession involuntary); *Sharp v. Rohling*, 793 F.3d 1216, 1219 (10th Cir. 2015) (a confession was rendered involuntary by the interrogating officer's promise of "leniency – no jail"); *United States v. Young*, 964 F.3d 938 (10th Cir. 2020) (holding a confession involuntary: "The district court found that Agent Brown made false representations to Young when he stated that he was 'on your side' and that he had discussions with the judge about Young's charges and sentence. It also found Agent Brown's statement that Young could 'buy down' his time by answering questions truthfully was a promise of leniency." (*Id*. at 942-43.) "Although we do not require a law enforcement officer to inform a suspect of the penalties for all the charges he may face, if he misrepresents these penalties, then that deception affects our evaluation of the voluntariness of any resulting statements. In this interrogation, Agent Brown misrepresented the law to Young, a factor that weighs in favor of concluding his actions were coercive. (*Id*. at 944.)); *United States v. Lopez*, 437 F.3d 1059, 1066 (10th Cir. 2006) ("the federal agents' promising Lopez that he would spend 6 rather than 60 years in prison if he admitted to killing Box by mistake and the Agents' misrepresenting the strength of the evidence they had against Lopez, resulted in Lopez's first confession being coerced and, thus, involuntary"; "although Lopez's second confession came after a night's sleep and a meal, and almost twelve hours elapsed between confessions, the coercion producing the first confession had not been dissipated."); *United States ex rel. Everett v. Murphy,* 329 F.2d 68 (2d Cir. 1964) (a confession was rendered involuntary when police falsely promised assistance in arranging less serious charges than they knew would be brought); *Rincher v. State*, 632 So.2d 37, 40 (Ala. Crim. App. 1993) (17-year-old's stationhouse statement was "coerced" because a police captain "promised . . . [him] that he could go home if he made a statement"); *People v. Perez*, 243 Cal. App. 4th 863, 866-67, 196 Cal. Rptr. 3d 871, 875 (2016) ("Perez's statements were clearly motivated by a promise of leniency, rendering the statements involuntary": "a police sergeant told Perez that if he '[told] the truth' and was 'honest,' then, 'we are not gonna charge you with anything'"); *People v. Ramadon*, 2013 CO 68, 314 P.3d 836, 838, 844-45 (Colo. 2013) (the defendant's statements were rendered involuntary by the interrogating officer's telling him "that, if he did not tell the truth, he would likely be deported to Iraq," and "insinuat[ing] that Ramadon would not be deported if he admitted to committing the sexual assault"); *State v. Howard*, 825 N.W.2d 32, 34, 41 (Iowa 2012) (an interrogating detective "crossed the line into an improper promise of leniency" and thereby rendered the confession inadmissible by repeatedly referring to "getting help" for the suspect (who had been arrested for sexually abusing a minor) and overtly suggesting that "if Howard admitted to sexually abusing A.E. he merely would be sent to a treatment facility similar to that used to treat drug and alcohol addiction in lieu of further punishment"); *State v. Polk*, 812 N.W.2d 670, 676 (Iowa 2012) (an interrogating officer "crossed the line" and rendered the resulting confession involuntary by "combining statements that county attorneys 'are much more likely to work with an individual that is cooperating' with suggestions . . . [that the defendant] would not see his kids 'for a long time' unless he confessed"); *In the*

Interest of J.D.F., 553 N.W.2d 585, 589 (Iowa 1996) ("J.D.F.'s inculpatory admission was induced by the police promising that they would take him home rather than to the juvenile intake center"); *State v. Brown*, 286 Kan. 170, 182 P.3d 1205 (2008) (a child welfare agency worker unconstitutionally coerced a statement by pressuring the defendant to admit culpability for his child's injury or else risk losing custody of his children); *Dye v. Commonwealth*, 411 S.W.3d 227, 232-34 (Ky. 2013) (police coerced a confession by falsely telling the 17-year-old defendant that the only way to avoid the death penalty was to confess, even though the police "knew, or should have known, that . . . [he] was not death-eligible," and by telling the defendant that "a confession is the only way he will avoid daily prison assault"); *State v. Wiley*, 2013 ME 30, 61 A.3d 750, 760 (Me. 2013) (an interrogating officer's "concrete representation of a short jail sentence followed by probation in exchange for Wiley's cooperation" was a "primary motivating force for the ensuing confession" and rendered it involuntary); *State v. Smith,* 203 Neb. 64, 66, 277 N.W.2d 441, 443 (1979) (a confession was rendered involuntary when police promised to "attempt to have the matter transferred to juvenile court" if defendant cooperated).

Statements made to government agents such as parole and probation officers in settings in which a defendant has reason to believe that s/he is obliged to answer incriminating questions or suffer revocation of conditional release represent the "'classic penalty situation' [that] arises when a person must choose between incriminating himself, on the one hand, or suffering government-threatened punishment for invoking his Fifth Amendment privilege to remain silent, on the other" (*McKathan v. United States*, 969 F.3d 1213, 1217 (11th Cir. 2020)). "[T]he Supreme Court has . . . identified a solution to this problem: when a 'classic penalty situation' occurs, the Fifth Amendment privilege is self-executing, and the government is deemed to have compelled the speaker's statements in violation of the Fifth Amendment . . . [citing *Minnesota v. Murphy*, 465 U.S. 420, 435 (1984)]. As a result, the statements are rendered inadmissible in a criminal prosecution." *McKathan*, 969 at F.3d at 1217. Outside the context of police interrogation as well, incriminating disclosures which an individual is legally required to make in order to avoid forfeitures or similar adverse consequences are regarded as involuntary (*see Lacy v. Butts*, 922 F.3d 371 (7th Cir. 2019), summarized in § 12.15(a) *supra*) and cannot be used as evidence of guilt in the prosecution's case in chief. *See State v. Melendez*, 240 N.J. 268, 222 A.3d 639 (2020), summarized in § 12.15(a) *supra.*

§ 24.04(d) Tricks or Artifices

Although the Supreme Court has never ruled a confession involuntary solely because it was induced by tricks or artifices, the Court has cited trickery as one of the factors considered when holding a confession involuntary in the light of "the totality of the situation" (*Spano v. New York,* 360 U.S. 315, 323 (1959) (a police officer who was a close childhood friend of the defendant's misleadingly told the defendant that he, the officer, would get in trouble with the police force if the defendant failed to confess). *See also Colorado v. Spring,* 479 U.S. 564, 576 n.8 (1987) (dictum) (citing *Spano*, *supra*, and *Lynumn v. Illinois*, *supra*).

Lower courts have similarly treated police artifice as a factor in the "totality of the

circumstances" leading to a finding of involuntariness. *See, e.g.*, *Dye v. Commonwealth*, 411 S.W.3d 227, 232-34 (Ky. 2013), summarized in § 24.04(c) *supra*; *United States v. Lall*, 607 F.3d 1277, 1287 (11th Cir. 2010) ("Gaudio explicitly assured Lall that anything he said would not be used to prosecute him. . . . Gaudio's promise was deceptive. . . . Gaudio told him he would not be charged for any statements or evidence collected on the night of the robbery. . . . It is inconceivable that Lall, an uncounseled twenty-year-old, understood at the time that a promise by Gaudio that he was not going to pursue any charges did not preclude the use of the confession in a federal prosecution. Indeed, it is utterly unreasonable to expect any uncounseled layperson, especially someone in Lall's position, to so parse Gaudio's words. On the contrary, the only plausible interpretation of Gaudio's representations, semantic technicalities aside, was that the information Lall provided would not be used against him by Gaudio or anyone else. Under these circumstances, Gaudio's statements were sufficient to render Lall's confession involuntary and to undermine completely the prophylactic effect of the *Miranda* warnings Gaudio previously administered."); *United States v. Lopez*, 437 F.3d 1059, 1065 (10th Cir. 2006) ("in this case, the agents' misrepresentation of the evidence against Lopez, together with Agent Hopper's promise of leniency to Lopez if he confessed to killing Box by mistake, are sufficient circumstances that would overbear Lopez's will and make his confession involuntary"); *United States v. Morales,* 233 F. Supp. 160 (D. Mont. 1964) (a juvenile's statement was rendered involuntary partly because he was falsely told that his accomplices had signed statements implicating him); *Gray v. Commonwealth*, 480 S.W.3d 253, 260-61 (Ky. 2016) (the police "overbore Gray's free will" by showing him "falsified documents purporting to represent the official results of a state-police lab's DNA examination" and making false statements about other evidence inculpating him); *In re Elias V.*, 237 Cal. App. 4th 568, 571, 579, 583, 588, 188 Cal. Rptr. 3d 202, 204, 211, 214, 218 (2015) (a 13-year-old's confession was rendered involuntary because his will was "'overborne'" by the police officers' use of "the type of coercive interrogation techniques condemned in *Miranda*," including the so-called "'Reid Technique,'" which uses "a 'cluster of tactics' [termed "'maximization/ minimization'"] designed to convey . . . 'the interrogator's rock-solid belief that the suspect is guilty and that all denials will fail' [and] 'to provide the suspect with moral justification and face saving excuses for having committed the crime in question,'" and also including police claims of fictitious evidence implicating the suspect, notwithstanding that even "the most recent edition of the Reid manual on interrogations notes that . . . 'this technique should be avoided when interrogating a youthful suspect with low social maturity' because such suspects 'may not have the fortitude or confidence to challenge such evidence and depending on the nature of the crime, may become confused as to their own possible involvement if the police tell them evidence clearly indicates they committed the crime.'"); *State v. Swindler*, 296 Kan. 670, 680-81, 294 P.3d 308, 315-16 (2013) (a statement was rendered involuntary because the police obtained it by using a "bait and switch" tactic of assuring the defendant that "he was free to terminate the interrogation and leave at any time" but then breaking these "rules of engagement . . . as soon as they thought Swindler might slip away without telling them what they wanted to hear"); *People v. Thomas*, 22 N.Y.3d 629, 642-43, 8 N.E.3d 308, 314-15, 985 N.Y.S.2d 193, 199-200 (2014) (police officers' "highly coercive deceptions" – threatening the defendant that if he "continued to deny responsibility for his child's injury, his wife would be arrested and removed from his ailing child's bedside," and falsely asserting that "his disclosure of

the circumstances under which he injured his child was essential to assist the doctors attempting to save the child's life" – "were of a kind sufficiently potent to nullify individual judgment in any ordinarily resolute person and were manifestly lethal to self-determination when deployed against defendant, an unsophisticated individual without experience in the criminal justice system"); *Young v. State,* 670 P.2d 591, 594-95 (Okla. Crim. App. 1983) (statement found involuntary partly because of polygraph examiner's "gross misstatement of the law" that defendant would have to convince judge and jury that he was "'perfectly innocent'"); *State v. Caffrey,* 332 N.W.2d 269, 272-73 (S.D. 1983) (juvenile's statement found involuntary partly because of the "interrogating officers[']deliberately mislead[ing] [him] . . . into thinking that he would be compelled to submit to a lie detector test"); *United States v. Anderson*, 929 F.2d 96 (2d Cir. 1991) (a DEA agent gave defendant Anderson *Miranda* warnings and "then proceeded to tell Anderson that if he asked for an attorney, no federal agents would be able to speak to him further; the agent added 'this [is] the time to talk to us, because once you tell us you want an attorney we're not able to talk to you and as far as I [am] concerned, we probably would not go to the U.S. Attorney or anyone else to tell them how much [you] cooperated with us.' The 'if you want a lawyer you can't cooperate' language was repeated three times." (*id*. at 97); "[T]hese statements were false and/or misleading. It is commonplace for defendants who have acquired counsel to meet with federal law enforcement officials and agree to cooperate with the government." (*id*. at 100). "Under the totality of the circumstances, Agent Valentine's statements contributed to the already coercive atmosphere inherent in custodial interrogation and rendered Anderson's . . . confession involuntary as a matter of law." *Id*. at 102.); *In the Interest of Jerrell C.J.*, 2005 WI 105, 283 Wis. 2d 145, 163-64, 699 N.W.2d 110, 119 (Wis. 2005) ("pressures brought to bear on the [14-year-old] defendant" included police officers' use of "psychological techniques" during interrogation: "Not only did the detectives refuse to believe Jerrell's repeated denials of guilt, but they also joined in urging him to tell a different 'truth,' sometimes using a 'strong voice' that 'frightened' him. Admittedly, it does not appear from the record that Jerrell was suffering from any significant emotional or psychological condition during the interrogation. Nevertheless, we remain concerned that such a technique applied to a juvenile like Jerrell over a prolonged period of time could result in an involuntary confession."). *Cf*. *State v. Matsumoto*, 145 Hawai'i 313, 324, 327, 452 P.3d 310, 321, 324 (2019) ("A police officer's use of subterfuge to induce a suspect to make an incriminating statement may rise to the level of coercion, rendering the statement involuntary, untrustworthy, and inadmissible. . . . When measuring 'the legitimacy of the use of "deception" by the police in eliciting confessions or inculpatory statements from suspects and arrestees,' Hawai'i courts evaluate the use of falsehoods regarding information intrinsic to the case differently from deception that is extrinsic to the facts of the alleged offense. . . . When the police use 'deliberate falsehoods extrinsic to the facts of the alleged offense, which are of a type reasonably likely to procure an untrue statement or to influence an accused to make a confession regardless of guilt, [they] will be regarded as coercive per se.' . . . ¶ Examples of extrinsic falsehoods include assurances of divine salvation upon confession; promises of mental health treatment in exchange for a confession; assurances of treatment in a 'nice hospital' in lieu of incarceration, in exchange for a confession; promises of more favorable treatment in the event of a confession; and misrepresentations of legal principles, such as misrepresenting the consequences of a 'habitual offender' conviction and holding out that

the defendant's confession cannot be used against the defendant at trial. . . . ¶ . . . Thus, inculpatory statements elicited during a custodial interrogation from a suspect whom has previously been given falsified polygraph results in the interrogation process are coercive per se and are inadmissible at trial."). *See also* ILL. COMP. STAT. ANN. ch. 705, § 405/5-401.6 *and* ILL. COMP. STAT. ANN. ch. 725, § 5/103-2.2 (adopted, July 15, 2021) (amending, respectively, the Juvenile Court Act and the Code of Criminal Procedure to establish a presumption in delinquency and criminal proceedings that an "oral, written, or sign language confession" obtained from a minor "under 18 years of age" by a "law enforcement officer or juvenile officer" by means of "knowing use of deception" during "custodial interrogation . . . at a police station or other place of detention" is "inadmissible as evidence against the minor making the confession" unless the State overcomes the "presumption of inadmissibility" by showing "by a preponderance of the evidence that the confession was voluntarily given"; deception is defined as "the knowing communication of false facts about evidence or unauthorized statements regarding leniency"). *See generally* Christopher Slobogin, *Manipulation of Suspects and Unrecorded Questioning: After 50 Years of Miranda Jurisprudence, Still Two (or Maybe Three) Burning Issues*, 97 B.U. L. REV. 1157 (2017); Michael J. Zydney Mannheimer, *Fraudulently Induced Confessions*, 96 NOTRE DAME L. REV. 799 (2020).

Beyond their bearing on the issue of voluntariness, deceptive interrogation practices may affect the admissibility and weight of incriminating statements under other evidentiary principles. When interrogating officers ply a suspect with misleading information or use psychological ploys that create a significant risk of eliciting false confessions, counsel should urge the exclusion of any inculpatory responses as unreliable, under the court's authority to refuse to admit evidence which is substantially more prejudicial than probative. See § 30.03 *infra*. In *Aleman v. Village of Hanover Park*, 662 F.3d 897, 906-07 (7th Cir. 2011), Circuit Judge Posner wrote for the court that "[t]he question of coercion is separate from that of reliability" and that "a trick that is as likely to induce a false as a true confession renders a confession inadmissible because of its unreliability even if its voluntariness is conceded. . . . If a question has only two answers – A and B – and you tell the respondent [untruthfully] that the answer is not A, and he has no basis for doubting you, then he is compelled by logic to 'confess' that the answer is B. . . . A confession so induced is worthless as evidence, and as a premise for an arrest." (Judge Posner's concluding phrase implies that if the respondent's inculpatory statements are indispensable to the probable cause required for a subsequent arrest or search, the arrest or search is unconstitutional and any evidence which they produce is excludable on that account. See, *e.g.*, §§ 23.07, 23.17, 23.24, 23.26, 23.37, 23.40 *supra*; § 24.17 *infra*. And even if the court refuses to entirely exclude a deception-induced inculpatory statement, respondent's counsel is free to argue to the trier of fact at trial that the deceptive interrogation procedure renders the statement incredible (*see* Brian L. Cutler & Richard A. Leo, *Analyzing Videotaped Interrogations and Confessions*, 40-DEC THE CHAMPION 40 (2016); Brian L. Cutler & Richard A. Leo, *False Confessions in the 21st Century*, 40-MAY THE CHAMPION 46 (2016); Bryan L. Cutler, Jeffrey S. Neuschatz & Charles R. Honts, *An Overview of Expert Psychological Testimony in False Confession Cases*, 44-JUN THE CHAMPION 30 (2020); JAMES L. TRAINUM, HOW THE POLICE GENERATE FALSE CONFESSIONS: AN INSIDE LOOK AT THE INTERROGATION ROOM (2016)) and also casts doubt upon "the reliability of

the investigation" as a whole by "'discrediting . . . the police methods employed in assembling the case,'" *cf. Kyles v. Whitley*, 514 U.S. 419, 446 (1995).

Under some circumstances there may be a constitutionally significant distinction between "affirmative misrepresentations" by the police and their misleading of a suspect through "mere silence." *Colorado v. Spring,* 479 U.S. at 576 & n.8. In *Spring,* the Supreme Court reversed the finding of two state appellate courts that a suspect's waiver of the privilege against self-incrimination was invalid and that his incriminating statements were improperly obtained when the interrogating officers who gave him his *Miranda* warnings (see § 24.07 *infra*) failed to inform him of the specific crimes about which he would be questioned and when the context of the interrogation did not make these apparent. The Court rejected this finding on the broad ground that a suspect's knowledge of the topic of an interrogation is not a necessary precondition for a valid waiver of the Fifth Amendment privilege and that interrogating officers are therefore not obliged to inform suspects on this subject. However, in dealing with Spring's argument that his interrogators had practiced a form of trickery by failing to tell him what crimes they were investigating, the Court emphasized both that "the Colorado courts made no finding of official trickery," 479 U.S. at 575, and that "mere silence by law enforcement officials as to the subject matter of an interrogation" (*id.* at 576) is distinguishable from the "affirmative misrepresentations by the police [that were found] sufficient to invalidate a suspect's waiver of the Fifth Amendment privilege" in *Spano v. New York* [360 U.S. 315 (1959)] . . . and *Lynumn v. Illinois* [372 U.S. 528, 534 (1963)] . . ." (479 U.S. at 576 n.8). "In this case, we are not confronted with an affirmative misrepresentation by law enforcement officials as to the scope of the interrogation and do not reach the question whether a waiver of *Miranda* rights would be valid in such a circumstance." *Id. Cf. Moran v. Burbine,* 475 U.S. 412, 422-24 (1986), noted in § 24.10(a) *infra. See generally* WELSH S. WHITE, *MIRANDA*'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER *DICKERSON* 209-15 (2001); Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581 (1979); Rinat Kitai-Sangero, *Extending Miranda: Prohibition on Police Lies Regarding the Incriminating Evidence*, 54 SAN DIEGO L. REV. 611 (2017).

§ 24.05 CHARACTERISTICS OF THE RESPONDENT THAT ARE RELEVANT TO THE ASSESSMENT OF VOLUNTARINESS

The Supreme Court has long recognized that personal characteristics of a suspect that render him or her particularly vulnerable to coercion – such as youth, mental illness, intellectual disability, limited intellect, limited education, intoxication, and the effects of drugs – are significant factors in the "totality of the circumstances" that determine the voluntariness of a statement. *See, e.g., Haley v. Ohio,* 332 U.S. 596 (1948) (age of l5); *Culombe v. Connecticut,* 367 U.S. 568 (1961) (I.Q. of 64, illiteracy); *Fikes v. Alabama,* 352 U.S. 191 (1957) (less than third-grade education). See § 24.03, fourth paragraph, *supra*.

In *Colorado v. Connelly,* 479 U.S. 157 (1986), the Court made clear that a claim of involuntariness for Fourteenth Amendment Due Process purposes cannot be based *solely* on the

personal frailties of a suspect. Reversing a lower court finding of involuntariness predicated exclusively on the accused's mental illness, the Court emphasized that federal constitutional protections are triggered only by "'state action,'" *id.* at 165, and it accordingly held that some form of "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause." *Id.* at 167. *Connelly* does, however, reaffirm in *dictum* that a suspect's "mental condition is surely relevant to an individual's susceptibility to police coercion" (*id.* at 165): "as interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the 'voluntariness' calculus" (*id.* at 164). And in *Yarborough v. Alvarado*, 541 U.S. 652 (2004), the Court repeated (again in *dictum*) that "we do consider a suspect's age and [extent of prior] experience [with the criminal justice system]" when gauging, for purposes of assessing the "voluntariness of a statement," whether "'the defendant's will was overborne,' . . . a question that logically can depend on 'the characteristics of the accused.'" *Id*. at 667-68 (majority opinion); *see also id*. at 668 (the "characteristics of the accused" relevant to this assessment "can include the suspect's age, education, and intelligence, . . . as well as a suspect's prior experience with law enforcement"). *See also Procunier v. Atchley*, 400 U.S. 446, 453-54 (1971) (suspect's "[l]ow intelligence, denial of the right to counsel and failure to advise of the right to remain silent were not in themselves coercive [but] . . . were relevant . . . in establishing a setting in which actual coercion might have been exerted to overcome the will of the suspect"); *State v. Carrillo*, 156 Ariz. 125, 136, 750 P.2d 883, 894 (1988) (dictum) ("[W]e do not believe *Connelly* forbids consideration of the accused's subjective mental state. Certainly the police are not permitted to take advantage of the impoverished, the mentally deficient, the young, or the inexperienced by employing artifices or techniques that destroy the will of the weakest but leave the strong, the tough, and the experienced untouched."). Thus a suspect's vulnerable state of mind can lend coercive force to police words and actions that would not be deemed coercive in the case of a suspect with normal powers of resistance. *See, e.g., Reck v. Pate,* 367 U.S. 433, 442 (1961) (the defendant's "youth, his subnormal intelligence, and his lack of previous experience with the police" impaired "his powers of resistance to overbearing police tactics"); *Haley v. Ohio,* 332 U.S. at 599 (five hours of incommunicado interrogation rendered a confession involuntary because the defendant was only 15 years old, and "[t]hat which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens"); *United States v. Preston*, 751 F.3d 1008, 1028 (9th Cir. 2014) (en banc) ("Even if we would reach a different conclusion regarding someone of normal intelligence, we hold that the officers' use of the [interrogation] methods employed here to confuse and compel a confession from the intellectually disabled eighteen-year-old before us produced an involuntary confession"); *United States v. Blocker*, 354 F. Supp. 1195, 1201-02 (D. D.C. 1973) ("[i]n this case, defendant's age [21] and limited mental ability suggest that the defendant would be particularly susceptible to psychological coercion in the form of threats and promises of leniency"). Moreover, personal characteristics such as youth and intellectual disability may be sufficient in and of themselves to render a statement inadmissible under state-law doctrines of involuntariness. See § 24.16 *infra.*

The following are common factors that may be considered as bearing on voluntariness under a federal constitutional analysis:

§ 24.05(a) Youth

The Supreme Court "has emphasized that admissions and confessions of juveniles require special caution," *In re Gault,* 387 U.S. 1, 45 (1967), and that the courts must take "the greatest care . . . to assure that the [juvenile's] 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 (footnote omitted). In reversing the conviction of a 15-year-old in *Haley v. Ohio,* 332 U.S. 596 (1948), the Court wrote:

> What transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child – an easy victim of the law – is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.

Id. at 599. The Court similarly stressed the inherent vulnerability of young people in finding in *Gallegos v. Colorado,* 370 U.S. 49, 54 (1962), that a 14-year-old's confession was involuntary:

> "[A] 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. . . . He cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions."

In *Yarborough v. Alvarado*, the Court reiterated that the "characteristics of the accused [relevant to the assessment of the "voluntariness of a statement"] can include the suspect's age, education, and intelligence, . . . as well as a suspect's prior experience with law enforcement." 541 U.S. at 668. *See also id*. at 667-68 ("we do consider a suspect's age and experience" when gauging, for purposes of assessing the "voluntariness of a statement," whether "'the defendant's will was overborne'"). *Cf*. *Miller v. Alabama*, 567 U.S. 460, 471 (2012) (explaining, in the context of criminal sentencing, that the Court has recognized, based on "science and social science" as well as "common sense" and "what 'any parent knows,'" that "children 'are more vulnerable . . . to . . . outside pressures'").

The lower courts have similarly treated the youth of the suspect as a highly significant factor in assessing the voluntariness of a confession. *See, e.g., Woods v. Clusen,* 794 F.2d 293 (7th Cir. 1986); *Williams v. Peyton,* 404 F.2d 528 (4th Cir. 1968); *Shelton v. State,* 287 Ark. 322, 699 S.W.2d 728 (1985); *State in the Interest of A.A.*, 240 N.J. 341, 354, 222 A.3d 681, 689 (2020) ("Juveniles receive heightened protections when it comes to custodial interrogations for obvious reasons. Common sense tells us that juveniles – teenagers and children alike – are typically less mature, often lack judgment, and are generally more vulnerable to pressure than adults."); *State in the Interest of S.H.,* 61 N.J. 108, 293 A.2d 181 (1972); *People v. Ward,* 95 A.D.2d 351, 466 N.Y.S.2d 686 (N.Y. App. Div., 2d Dep't 1983); *State v. Caffrey,* 332 N.W.2d 269 (S.D. 1983); *In the Interest of Jerrell C.J.*, 2005 WI 105, 283 Wis. 2d 145, 159, 699 N.W.2d

110, 117 (Wis. 2005) ("Simply put, children are different than adults, and the condition of being a child renders one 'uncommonly susceptible to police pressures.' . . . We therefore view Jerrell's young age of 14 to be a strong factor weighing against the voluntariness of his confession."). In urging courts to recognize the need for particular solicitude to assure that juveniles' inculpatory statements are not admitted into evidence unless they are truly voluntary, counsel can point to empirical findings that a disproportionately high percentage of documented instances of false confessions (about 33%) involve juvenile suspects. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 941-43 (2004). *See also* Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257 (2007); Saul M. Kassin, Steven A. Drizin, Thomas Grisso, Gisli H. Gudjonsson, Richard A. Leo & Allison D. Redlich, *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 8-9, 19, 30-31 (2010); Allison D. Redlich, *The Susceptibility of Juveniles to False Confessions and False Guilty Pleas*, 62 RUTGERS L. REV. 943 (2010); Joshua A. Tepfer, Laura H. Nirider & Lynda Tricarico, *Arresting Development: Convictions of Innocent Youth*, 62 RUTGERS L. REV. 887, 904-08 (2010); *J.D.B. v. North Carolina*, 564 U.S. 261, 269 (2011) ("[T]he pressure of custodial interrogation is so immense that it 'can induce a frighteningly high percentage of people to confess to crimes they never committed.' Corley v. United States, 556 U.S. 303, 321 (2009) (citing Drizin & Leo, . . . [*supra*]); see also *Miranda*, 384 U.S., at 455, n. 23. . . . That risk is all the more troubling – and recent studies suggest, all the more acute – when the subject of custodial interrogation is a juvenile. See Brief for Center on Wrongful Convictions of Youth et al. as Amici Curiae 21–22 (collecting empirical studies that 'illustrate the heightened risk of false confessions from youth')."); *In the Matter of Jimmy D.*, 15 N.Y.3d 417, 431, 938 N.E.2d 970, 979, 912 N.Y.S.2d 537, 546 (2010) (Lippman, C.J., dissenting) ("So long as juveniles cannot be altogether preserved from rigors of police interrogation, it would behoove us not to minimize the now well-documented potential for false confessions when suggestible and often impulsive and impaired children are ushered into the police interview room."; "Children do resort to falsehood to alleviate discomfort and satisfy the expectations of those in authority, and, in so doing, often neglect to consider the serious and lasting consequences of their election. There are developmental reasons for this behavior which we ignore at the peril of the truth-seeking process."). A reference to these findings in briefing and argument is often useful for a couple of reasons. First, although the voluntariness and the reliability of confessions are analytically distinct issues (see § 24.22 *infra*), a judge who is persuaded that a confession poses significant risks of unreliability will, as a practical matter, be more prone to suppress it as involuntary. Second, in courts where the judge who presides at the suppression hearing is likely to be the same judge who will also sit as the trier of fact in a subsequent bench trial of the issue of the respondent's guilt or innocence (see § 22.07 *supra*), the respondent's interests are obviously best served by persuading the judge during the suppression hearing that any inculpatory statement s/he hears is not only technically suppressible but probably inaccurate.

§ 24.05(b) Mental Illness, Intellectual Disability, Limited Education

A factor such as mental illness, which impairs the suspect's "mental condition[,] is surely

relevant to an individual's susceptibility to police coercion." *Colorado v. Connelly,* 479 U.S. at 165 (discussing *Blackburn v. Alabama,* 361 U.S. 199 (1960)). *See also, e.g., Spano v. New York,* 360 U.S. 315, 322 & n.3 (1959) (emotional instability); *Fikes v. Alabama,* 352 U.S. 191, 193, 196 (1957) (schizophrenia); *Eisen v. Picard,* 452 F.2d 860, 863-66 (1st Cir. 1971); *Jackson v. United States,* 404 A.2d 911, 924 (D.C. 1979) (mental illness) ("Here, there was compelling evidence to show that appellant was mentally ill at the time of his statements: his history of mental illness, the incoherent nature of his statement, the testimony of Detective Wood and Dr. Papish, and the trial court's acknowledgement of the irrationality of appellant's statement."); William C. Follette, Richard A. Leo, & Deborah Davis, *Mental Health and False Confessions*, in ELIZABETH KELLEY (ed.), REPRESENTING PEOPLE WITH MENTAL DISABILITIES 95 (2017).

A suspect may be rendered particularly vulnerable to police coercion by intellectual disability. *See, e.g., Sims v. Georgia,* 389 U.S. 404 (1967) (limited mental capacity); *Davis v. North Carolina,* 384 U.S. 737 (1966) (low level of intelligence); *Reck v. Pate,* 367 U.S. 433 (1961) (intellectual disability); *Culombe v. Connecticut,* 367 U.S. 568 (1961) (I.Q. of 64); *United States v. Preston*, 751 F.3d 1008, 1027-28 (9th Cir. 2014) (en banc) (18-year-old with an I.Q. of 65); *Shelton v. State,* 287 Ark. 322, 699 S.W.2d 728 (1985) (juvenile who was nearly 18 but had marginal intelligence and maturity); *In the Interest of Thompson,* 241 N.W.2d 2 (Iowa 1976) (I.Q. of 71); *State in the Interest of Holifield,* 319 So.2d 471 (La. App. 1975) (intellectual disability; I.Q. of 67); *People v. Knapp*, 124 A.D.3d 36, 46, 995 N.Y.S.2d 869, 877 (N.Y. App. Div., 4th Dep't 2014) (I.Q. of 68; a defense expert testified that the "defendant is 'a suggestible and overly compliant individual, which is not unusual in [intellectually disabled] . . . individuals who are frequently "yea-saying," in turn causing him to be easily intimidated by the interrogation process'"); *In the Interest of Jerrell C.J.*, 2005 WI 105, 283 Wis. 2d at 160, 699 N.W.2d at 117 ("low average intelligence"). *See also Atkins v. Virginia*, 536 U.S. 304, 320 & n.25 (2002) (observing that there is a "possibility of false confessions" in cases of intellectually disabled defendants, and noting that the "disturbing number of inmates on death row [who] have been exonerated . . . included at least one [intellectually disabled] . . . person who unwittingly confessed to a crime that he did not commit."); Drizin & Leo, *supra* at 970-73.

Educational privation and illiteracy also are factors that can cause a suspect to be less capable of resisting domination by the police. *See, e.g., Sims v. Georgia,* 389 U.S. 404 (1967) (third-grade education and illiteracy); *Clewis v. Texas,* 386 U.S. 707 (1967) (fifth-grade education); *Culombe v. Connecticut*, 367 U.S. 568, 620-21, 624-25, 635 (1961) (illiteracy); *Fikes v. Alabama,* 352 U.S. 191, 196 (1957) (defendant was "uneducated"); *State v. Graham,* 277 Ark. 465, 642 S.W.2d 880 (1982) (limited education and illiteracy); *In the Interest of Jerrell C.J.*, 2005 WI 105, 283 Wis. 2d at 160, 699 N.W.2d at 117 ("limited education" coupled with "low average intelligence"). *Cf. Koh v. Ustich*, 933 F.3d 836, 845 (7th Cir. 2019) ("It was clear that Mr. Koh did not speak fluent English . . . . [Findings could be made that] Mr. Koh did not just suffer from a language barrier, but rather that Mr. Koh suffered a lack of understanding and confusion and that the officers were aware of this. . . . ¶ . . . The extent of Mr. Koh's understanding and the degree of his confusion are key to determining whether his confession was involuntary and coerced.").

§ 24.05(c) Effects of Drugs or Alcohol

As the Supreme Court has recognized, a suspect's will and ability to resist interrogation can be impaired by the effects of drugs. *See, e.g., Beecher v. Alabama,* 389 U.S. 35 (1967) (morphine); *Townsend v. Sain,* 372 U.S. 293 (1963) (scopolamine, a drug with "truth serum" properties). *See also Colorado v. Connelly,* 479 U.S. at 165-66 (discussing *Townsend v. Sain*). *Accord*, *United States v. Taylor*, 745 F.3d 15, 19-20, 23-26 (2d Cir. 2014) (xanax); *In re Cameron*, 68 Cal. 2d 487, 439 P.2d 633, 67 Cal. Rptr. 529 (1968) (thorazine); *People v. Fordyce,* 200 Colo. 153, 612 P.2d 1131 (1980) (morphine).

Several lower court decisions have recognized that intoxication through alcohol can have the same resistance-impairing effects as drugs and should be considered in assessing the voluntariness of a statement. *See, e.g., State v. Mikulewicz,* 462 A.2d 497 (Me. 1983); *State v. Discoe,* 334 N.W.2d 466 (N.D. 1983).

§ 24.05(d) Lack of Prior Experience with the Police

The Supreme Court has repeatedly recognized that "lack of previous experience with the police" can impair a suspect's "powers of resistance to overbearing police tactics." *Reck v. Pate,* 367 U.S. 433, 442 (1961); *see, e.g.*, *Yarborough v. Alvarado*, 541 U.S. at 667-68; *Clewis v. Texas,* 386 U.S. 707, 712 (1967); *Spano v. New York,* 360 U.S. 315, 321-22 (1959); *Yarborough v. Alvarado*, 541 U.S. 652, 667-68 (2004) (dictum). *Accord, Woods v. Clusen,* 794 F.2d 293, 297 (7th Cir. 1986); *In the Interest of Jerrell C.J.*,2005 WI 105, 283 Wis. 2d at 161, 699 N.W.2d at 117 (limited "experience with law enforcement" – two prior arrests for misdemeanor offenses that never resulted in a delinquency finding – "may have contributed to . . . [a 14-year-old's] willingness to confess"). *See also Fare v. Michael C.,* 442 U.S. 707, 726-29 (1979) (dictum) (prior "experience with the police" is relevant to assessment of the voluntariness of *Miranda* waivers). *Cf. United States v. Young*, 964 F.3d 938, 946 (10th Cir. 2020) (although "Young had prior experience with the criminal justice system," which "is relevant to our analysis of voluntariness," his "prior experience was solely in the state system" and "did not necessarily make him less susceptible to believing promises of leniency and misrepresentations by a *federal* law enforcement officer explaining his access to a federal judge and how Young could 'buy down' his sentence").

§ 24.05(e) Combination of Factors

Frequently, counsel's case will feature more than one of the foregoing factors and others – physical exhaustion, pain resulting from physical injuries, emotional depression, and so forth. Counsel should argue that the several factors combined to render the respondent particularly susceptible to coercion. *See, e.g.*, *A.M. v. Butler*, 360 F.3d 787, 800-01 (7th Cir. 2004) (11-year-old with no prior court experience); *Woods v. Clusen,* 794 F.2d 293 (7th Cir. 1986) (16-year-old with no prior court experience); *Thomas v. North Carolina,* 447 F.2d 1320 (4th Cir. 1971) (15-year-old with an I.Q. of 72 and limited education); *In the Interest of Thompson,* 241 N.W.2d 2

(Iowa 1976) (17-year-old with an I.Q. of 71 and a fourth-grade reading level); *State in the Interest of Holifield,* 319 So.2d 471 (La. App. 1975) (intellectually disabled 14-year-old with an I.Q. of 67); *In the Interest of Jerrell C.J.*, 2005 WI 105, 283 Wis. 2d at 159, 699 N.W.2d at 117 (14-year-old with an I.Q. of 84 and limited prior involvement with the juvenile justice system); *Koh v. Ustich*, 933 F.3d 836, 846 (7th Cir. 2019) ("[b]oth [lack of] sleep and medication are relevant to the inquiry of whether an individual is susceptible to coercion"). *Cf. Edmonds v. Oktibbeha County*, 675 F.3d 911, 914, 915, 916 (5th Cir. 2012) (recognizing, in the context of a section 1983 suit against police deputies, that the "thirteen-year-old[accused]'s separation from his mother, his desire to please adults, and his inexperience with the criminal justice system all weigh against [a finding of] voluntariness [of his confession]," but ultimately concluding that voluntariness was established by the totality of the circumstances, including the accused's disclosure "in his videotaped retraction (and also later on national television)" that he falsely confessed in order "to help his sister" and that "the deputies did not coerce him into confessing."). The assistance of a psychological consultant who can testify as a defense expert or advise counsel of judicially noticeable writings documenting the interactive effects of factors present in the particular case will often be important. See §§ 12.08-12.10 *supra.*

Despite the robust doctrinal recognition that suspects' weaknesses are important in the analysis of the voluntariness *vel non* of an incriminating statement, the courts are often blinded by unrealistic preconceptions of the "hardened" character of the class of persons likely to be interrogated – particularly the "usual" non-white-collar criminal suspect – when applying the doctrine to the facts of specific cases. *See*, *e.g.*, Scott E. Sundby, *The Court and the Suspect: Human Frailty, The Calculating Criminal, and the Penitent in the Interrogation Room*, 98 WASHINGTON U. L. REV. 123 (2020). Breaking this image is an important function that can be served by a defense expert witness both in confession-suppression hearings and in challenging the reliability of inculpatory admissions at trial. See § 11.01(a) subdivision 14 *supra*.

§ 24.06 APPLICABILITY OF THE INVOLUNTARINESS DOCTRINE TO COERCION BY SCHOOL OFFICIALS OR PRIVATE CITIZENS

Although the Supreme Court has not considered the applicability of the due process doctrine of involuntariness to the school setting, the logic of the Court's decisions in *Colorado v. Connelly,* 479 U.S. 157 (1986), and *New Jersey v. T.L.O.,* 469 U.S. 325 (1985), strongly suggests that the doctrine does apply to coercive action by principals, teachers, and other school officials. Because the *Connelly* case involved the traditional setting of police interrogation, the Court understandably spoke in terms of "coercive police activity" as the "predicate" for a finding of involuntariness (*id.* at 167) in holding that a suspect's mental illness alone will not support such a finding. But the Court's basic reasoning was that "some sort of 'state action' [is required] to support a claim of violation of the Due Process Clause," *id.* at 165 – some "link between coercive activity of the State, on the one hand, and a resulting confession by a defendant, on the other." *Id. See also id.* at 167 ("coercion brought to bear on the defendant by the State"); *id.* at 163 ("coercive government misconduct"); *State v. Brown*, 286 Kan. 170, 174-75, 182 P.3d 1205, 1209-10 (2008) (rejecting the state's argument that "coercive conduct must be induced by law

enforcement" in order to render a statement involuntary under *Colorado v. Connelly*, and suppressing a statement induced by a child welfare agency worker: *Connelly* requires "a link between the coercive activity of the State and the defendant's resulting confession" but does not limit "'State actors'" to "law enforcement"). And the Court has recognized on other occasions that "school authorities are state actors for purposes of the constitutional guarantees of . . . due process" (*New Jersey v. T.L.O.*, 469 U.S. at 336) and that, "[i]n carrying out searches and other disciplinary functions pursuant to ["publicly mandated educational and disciplinary policies"] . . ., school officials act as representatives of the State." *Id. See also Goss v. Lopez,* 419 U.S. 565 (1975). Thus the conclusion is inescapable that, just as a school official's search of a student is subject to Fourth Amendment restrictions (see §§ 23.33-23.34 *supra*), a school official's interrogation of a student is subject to the due process doctrine of involuntariness. *See, e.g., People v. Benedict V.,* 85 A.D.2d 747, 747, 445 N.Y.S.2d 798, 799 (N.Y. App. Div., 2d Dep't 1981) (student's statement to detective inside the principal's office was rendered involuntary by the principal's "conduct in the questioning" when the principal "expressly assumed the role of parental protector and, in furtherance of that role, encouraged defendant to make a confession").

Coercive activity by a private citizen, on the other hand, is not "state action" that will trigger the due process doctrine of involuntariness. *See Colorado v. Connelly,* 479 U.S. at 165-66. But this is not to say that coercive private conduct is wholly irrelevant to the due process inquiry. There are at least two respects in which private action can play a role in a finding that a statement was involuntary:

First, the occurrence of private coercive action will be relevant to the extent that it made the youth particularly vulnerable to any coercion exercised by the police. The Court in *Connelly* plainly recognized that, as long as due process protections are called into play by "some sort of 'state action'" (*id.* at 165), non-police-related influences such as a suspect's mental problems may be "relevant to an individual's susceptibility to police coercion," *id.* See § 24.05 *supra.* Accordingly, if a parent or other private individual exerts pressure on the respondent prior to or during the police interrogation, this may be considered in assessing the impact of coercive police activity on the respondent.

Second, the connection between a private individual and the police may implicate the general rule that private action loses its "private" character when the citizen acts at the behest of, or in conjunction with, the police. *Cf. People v. Jones,* 47 N.Y.2d 528, 393 N.E.2d 443, 419 N.Y.S.2d 447 (1979) (private security guard's questioning of suspect was subject to *Miranda* requirements because of police involvement in arresting the suspect and in creating a "custodial atmosphere" for the interrogation); *Sims v. Georgia,* 385 U.S. 538 (1967), and 389 U.S. 404 (1967) (per curiam) (brutality practiced on defendant by a private party in the presence of police officers who had the defendant in custody is given substantial weight in finding a confession involuntary). See also § 23.36 *supra;* §§ 24.12, 24.13(b) *infra.* Thus, for example, if the police request or encourage a parent to exercise a coercive influence over his or her child during police interrogation, the ensuing coercion may properly be attributed to the police. *See In the Matter of Raymond W.*, 44 N. Y.2d 438, 441, 377 N.E.2d 471, 472, 406 N.Y.S.2d 27, 28 (1978)

(explaining that "if it be established that . . . [parental] guidance or influence is not exercised by the parent independently but at the behest or on behalf of the prosecutor, such circumstance should weigh heavily to indicate the involuntariness of the child's confession").

In addition, coercive activity by a private citizen may be sufficient in and of itself to render a statement inadmissible under state law doctrines of involuntariness. See § 24.16 *infra.*

Part C. Miranda *Violations*

§ 24.07 THE *MIRANDA* DOCTRINE GENERALLY

The rule of *Miranda v. Arizona*, 384 U.S. 436 (1966), excludes any incriminating response made to custodial interrogation unless the response was preceded by specified warnings of the respondent's rights and an effective waiver by the respondent of those rights. "In order to be able to use statements obtained during custodial interrogation of the accused, the State must warn the accused prior to such questioning of his right to remain silent and of his right to have counsel, retained or appointed, present during interrogation." *Fare v. Michael C.,* 442 U.S. 707, 717 (1979) (dictum). *See, e.g.*, *Dickerson v. United States*, 530 U.S. 428, 437, 444 (2000) (reaffirming the *Miranda* doctrine and clarifying that, notwithstanding the Court's previous references to the "*Miranda* warnings as 'prophylactic'" (*id*. at 437), "*Miranda* announced a constitutional rule" (*id*. at 444)); *Doyle v. Ohio,* 426 U.S. 610, 617 (1976); *Michigan v. Mosley,* 423 U.S. 96, 99-100 & n.6 (1975) (dictum).

"Custodial interrogation" is a term of art. The *Miranda* doctrine applies only when a respondent is in "custody" – or its "functional equivalent" – (see § 24.08(a) *infra*) and makes statements in response to "interrogation," see § 24.08(b) *infra.*

If these two conditions are satisfied, *Miranda* requires the suppression of the respondent's statements whenever (a) the required warnings were not given or were defective (see § 24.09 *infra*); (b) the respondent's waiver of *Miranda* rights was involuntary (see § 24.10(a) *infra*) or was not "knowing and intelligent" (see § 24.10(b) *infra*); or (c) the police failed to honor the respondent's assertion of the right to remain silent or the right to counsel (see § 24.11 *infra*).

The *Miranda* rule governs statements made by a person in custody for any criminal offense, "regardless of the nature or severity of the offense of which he is suspected or for which he was arrested." *Berkemer v. McCarty,* 468 U.S. 420, 434 (1984) (finding constitutional error in the admission of unwarned incriminating statements made after an arrest for a "misdemeanor traffic offense," *id.* at 429). The Supreme Court has created only two exceptions to the *Miranda* rule. First, in *New York v. Quarles,* 467 U.S. 649 (1984), the Supreme Court recognized "a narrow exception to the *Miranda* rule," 467 U.S. at 658, when police officers, "in the very act of apprehending a suspect [who had been reported to be armed and who was found to be wearing an empty shoulder holster when arrested], were confronted with the immediate necessity of ascertaining the whereabouts of a gun which they had every reason to believe the suspect had just

removed from his empty holster and discarded in [a public] . . . supermarket," *id.* at 657. "[O]n these facts," *id.* at 655, and when the only question asked by the arresting officer was "about the whereabouts of the gun," *id.* at 657, the Court held that "there is a 'public safety' exception to the requirement that *Miranda* warnings be given before a suspect's answer may be admitted into evidence." 467 U.S. at 655. *Quarles* has since been described as holding that "when the police arrest a suspect under circumstances presenting an imminent danger to the public safety, they may without informing him [or her] of [the *Miranda*] . . . rights ask questions essential to elicit information necessary to neutralize the threat to the public." *Berkemer v. McCarty,* 468 U.S. at 429 n.10. *Compare Cronk v. State*, 443 N.E.2d 882, 887 (Ind. App. 1983) (the public safety exception applied to the police officers' questions to the defendant about the location of a bomb that he said he had planted but "the emergency . . . expired" after state police troopers found and dismantled the bomb, and therefore the subsequent questioning of the defendant at the jail about the bomb required *Miranda* warnings). *Cf. In the Interest of J.L.H.*, 488 S.W.3d 689, 691, 693, 701-02 (Mo. App. 2016) (a state statute requiring the police to inform an arrested juvenile of the standard *Miranda* rights and also a statutory "right to have a parent, guardian or custodian present during questioning" was not subject to "the narrow public-safety exception recognized in *New York v. Quarles*": "We necessarily conclude . . . that the General Assembly's failure to express a public-safety exception in section 211.059 was purposeful. We will not rewrite a plain and unambiguous statute to imply an unexpressed term. . . . Our conclusion recognizes the perils that the Juvenile Code is intended to protect against – that children are particularly vulnerable to the coercive effects of police custody. We would be tilting the delicate separation-of-powers balance by reading an unexpressed public-safety exception into section 211.059."). Second, in *Pennsylvania v. Muniz*, 496 U.S. 582 (1990), the Court recognized "a 'routine booking question' exception which exempts from *Miranda*'s coverage questions to secure the '"biographical data necessary to complete booking or pretrial services,"'" such as "name, address, height, weight, eye color, date of birth, and current age," as long as the questions asked are "reasonably related to the police's administrative concerns" and are not "'designed to elicit incriminatory admissions.'" *Id*. at 601-02 & n.14. *Compare United States v. Pacheco-Lopez*, 531 F.3d 420, 423-24 (6th Cir. 2008) (the "booking exception" of *Pennsylvania v. Muniz* did not apply to officer's questions to defendant about "where he was from, how he had arrived at the house, and when he had arrived" because the house was "ostensibly linked to a drug sale" and therefore questions about the defendant's "origin" and his connections to the house were "'reasonably likely to elicit an incriminating response,' thus mandating a *Miranda* warning"); *United States v. Williams*, 842 F.3d 1143, 1145, 1147-49 (9th Cir. 2016) (the "booking exception" did not apply to a deputy sheriff's question to the defendant "whether he was a gang member" and the defendant's resulting admission of gang membership, because the officer had "'reason to know that . . . [the] answer may incriminate'" the defendant; even though "no gang-related charges were then pending," a defendant "charged with a violent crime in California who is a gang member is subject to far greater jeopardy than those who are not gang members . . . [a]nd, the same is true under federal law"); *People v. Hiraeta*, 117 A.D.3d 964, 964, 986 N.Y.S.2d 217, 218-19 (N.Y. App. Div., 2d Dep't 2014) (booking exception did not apply to "the defendant's statement to a detective regarding his gang affiliation, which was probative of his identity as one of the victim's attackers"); *United States v. Phillips* with the following: 146 F. Supp. 3d 837, 848 (E.D. Mich.

2015), *ruling on another issue aff'd*, 677 Fed. Appx. 294 (6th Cir. 2017) ("the Defendant's responses to the officer's questions regarding his criminal history and the location of his vest resulted from a 'custodial interrogation,' not biographical questioning subject to the booking exception"). With these sole exceptions, "[i]n the years since the decision in *Miranda,* we have frequently reaffirmed the central principle established by that case: if the police take a suspect into custody and then ask him [or her] questions without informing him [or her] of the [*Miranda*] rights . . . , [the] responses cannot be introduced into evidence to establish . . . guilt." 468 U.S. at 429.

§ 24.08 THE PRECONDITION FOR APPLICABILITY OF *MIRANDA* PROTECTIONS: "CUSTODIAL INTERROGATION"

§ 24.08(a) "Custody"

Miranda comes into play only "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); *see also id.* at 477, 478; *Estelle v. Smith,* 451 U.S. 454, 466-67 (1981).

Thus the *Miranda* warnings and waivers are not required when investigating officers interview an unarrested suspect in his or her residence, even though "the 'focus' of [a criminal] . . . investigation may . . . have been on [him or her]," *Beckwith v. United States,* 425 U.S. 341, 347 (1976); they are not required when a suspect comes voluntarily to the police station in response to an officer's telephonic request for an interview, at least when the suspect is "immediately informed that [s/he is] . . . not under arrest" and when "there is no indication that [his or her] . . . freedom to depart [is] . . . restricted in any way," *Oregon v. Mathiason,* 429 U.S. 492, 495 (1977) (per curiam); *see also California v. Beheler,* 463 U.S. 1121 (1983) (per curiam); and they are not required when a probationer is questioned by his or her probation officer during a probation-supervision conference in the latter's office, even when attendance at such conferences is a condition of probation enforceable by its possible revocation, *Minnesota v. Murphy,* 465 U.S. 420 (1984) ("Murphy was not 'in custody' for purposes of receiving *Miranda* protection since there was no '"formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest,'" *id.* at 430). *Cf. United States v. Mandujano,* 425 U.S. 564, 578-82 (1976) (plurality opinion) (alternative ground) (subpoenaed grand jury witness has no right to *Miranda* warnings or to have counsel present in the grand jury room). "[T]he roadside questioning of a motorist detained pursuant to a traffic stop [does not] . . . constitute custodial interrogation," *Berkemer v. McCarty*, 468 U.S. 420, 423 (1984), nor does questioning during a "'*Terry* stop'" (468 U.S. at 439-40; see §§ 23.04-23.06 *supra*), unless the person stopped "is subjected to treatment that renders him [or her] 'in custody' for practical purposes," 468 U.S. at 440, under the "settled [principle] that the safeguards prescribed by *Miranda* become applicable as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest,'" 468 U.S. at 440. *See, e.g.*, *United States v. Perdue*, 8 F.3d 1455, 1464-65 (10th Cir. 1993) ("The traditional view . . . is that *Miranda* warnings are simply not implicated in the context of a valid *Terry* stop. . . . This view has prevailed because the typical police-citizen encounter envisioned

by the Court in *Terry* usually involves no more than a very brief detention without the aid of weapons or handcuffs, a few questions relating to identity and the suspicious circumstances, and an atmosphere that is 'substantially less "police dominated" than that surrounding the kinds of interrogation at issue in *Miranda*.' . . . ¶ The last decade, however, has witnessed a multifaceted expansion of *Terry*. Important for our purposes is the trend granting officers greater latitude in using force in order to 'neutralize' potentially dangerous suspects during an investigatory detention. . . . Thus, today, consonant with this trend, we held [earlier in the opinion] that police officers acted reasonably under the Fourth Amendment when they, without probable cause and with guns drawn, stopped Mr. Perdue's car, forced him to get out of his car, and demanded that he lie face down on the ground. . . . ¶ One cannot ignore the conclusion, however, that by employing an amount of force that reached the boundary line between a permissible *Terry* stop and an unconstitutional arrest, the officers created the 'custodial' situation envisioned by *Miranda* and its progeny. Mr. Perdue was forced out of his car and onto the ground at gunpoint. He was then questioned by two police officers while police helicopters hovered above. During the questioning, Mr. Perdue remained face down on the ground while the officers kept their guns drawn on him and his pregnant fiancee. . . . ¶ . . . A reasonable man in Mr. Perdue's position could not have misunderstood the fact that if he did not immediately cooperate, his life would be in danger. Any reasonable person in Mr. Perdue's position would have felt 'completely at the mercy of the police.' . . . We therefore find as a matter of law that Mr. Perdue was in police custody during the initial questioning by Officer Carreno."). And see §§ 23.04(d), 23.04(e), 23.06 *supra*.

However, *Miranda* applies to the questioning of a person who is handcuffed and surrounded by police officers, even in a public place. *New York v. Quarles,* 467 U.S. 649, 654 n.4, 655 (1984) (dictum); *and see Berkemer v. McCarty,* 468 U.S. at 441 n.34, 442 n.36, giving other examples of street-arrest questioning that constitute "custodial interrogation." And it applies to any questioning of a person involuntarily detained in closed quarters, even though those quarters may be the person's own home and even though the questioning may be wholly unrelated to the reason for the detention. *Mathis v. United States,* 391 U.S. 1 (1968) (state prison inmate questioned in prison by federal revenue agent shortly before federal authorities decide to pursue a criminal tax investigation); *Orozco v. Texas,* 394 U.S. 324 (1969) (suspect arrested and questioned by police officers in his boardinghouse bedroom); *United States v. Hashime*, 734 F.3d 278, 280-81, 283-84, 285 (4th Cir. 2013) (the interrogation of a 19-year-old was "custodial" even though it took place in his home, the officers said that "they were not there to arrest anyone but rather to execute a search warrant," "the door to the room in which he was interrogated was open," the officers told him that he "was free to leave," and the officers offered him "multiple breaks" during the interrogation: although these factors "do cut against custody, they are decidedly outweighed" by the "sheer length" of the three-hour interrogation, the number of federal and state law enforcement officers who "streamed into the house with their guns drawn," and the fact that Hashime "'was rousted from bed at gunpoint, . . . not allowed to move unless guarded, and ultimately separated from his family'" during the interrogation.); *United States v. Craighead*, 539 F.3d 1073, 1084-89 (9th Cir. 2008) (the court finds an in-home interrogation "custodial" for *Miranda* purposes under a standard that considers: "(1) the number of law

enforcement personnel and whether they were armed; (2) whether the suspect was at any point restrained, either by physical force or by threats; (3) whether the suspect was isolated from others; and (4) whether the suspect was informed that he was free to leave or terminate the interview, and the context in which any such statements were made."); *In re I.J.*, 906 A.2d 249, 262-63 (D.C. 2006) (16-year-old juvenile, who was residing in a youth center pursuant to a court order of probation, was in "custody" for *Miranda* purposes when he was questioned by a police officer, in an office of the center, about a crime the youth allegedly committed on the premises). *See also State v. McKenna*, 166 N.H. 671, 675, 686, 103 A.3d 756, 760, 769 (2014) (court holds on state constitutional grounds that the defendant was in "custody" for *Miranda* purposes when police officers questioned him as he was walking around the grounds of his restaurant and campground for an hour and a half, at least at the point at which they stopped him from walking into a wooded area and told him to remain in the open areas; "Although the defendant was informed that he was not under arrest, there is no evidence that the officers ever informed the defendant that he was free to terminate the interrogation. In addition, we accord substantial weight to the fact that the officers' questions were accusatory and focused on the defendant's alleged criminal activity."). *Cf. Howes v. Fields*, 565 U.S. 499, 512, 515 (2012) (questioning of a prison inmate does not automatically trigger *Miranda*'s requirements because "service of a term of imprisonment, without more, is not enough to constitute *Miranda* custody"; *Miranda* "custody" was not established on a record showing that the inmate was taken aside and questioned in private about "events that took place outside the prison" because "'[a]ll of the[ ] objective facts are consistent with an interrogation environment in which a reasonable person would have felt free to terminate the interview and leave'": the inmate "was told at the outset of the interrogation, and was reminded again thereafter, that he could leave and go back to his cell whenever he wanted"; the inmate "was not physically restrained or threatened and was interviewed in a well-lit, average-sized conference room, where he was 'not uncomfortable'"; and the inmate "was offered food and water, and the door to the conference room was sometimes left open.").

The determination "whether a suspect is 'in custody' is an objective inquiry" that involves the following "'[t]wo discrete inquiries'":

> "'first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with formal arrest.'" (*J.D.B. v. North Carolina*, 564 U.S. 261, 270 (2011) (quoting *Thompson v. Keohane*, 516 U.S. 99, 112 (1995)).

Accord, *Berkemer v. McCarty*, 468 U.S. at 442; *Stansbury v. California*, 511 U.S. 318, 322-25 (1994) (per curiam). In the case of a minor, the Supreme Court has recognized that this "reasonable person" test must take into account the age of the child "so long as the child's age was known to the officer at the time of police questioning, or would have been objectively

apparent to a reasonable officer." *J.D.B. v. North Carolina*, 564 U.S. at 277. *See id*. at 264-65 ("It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave. Seeing no reason for police officers or courts to blind themselves to that commonsense reality, we hold that a child's age properly informs the *Miranda* custody analysis."); *id*. at 272-73 ("A child's age is far 'more than a chronological fact.' . . . It is a fact that 'generates commonsense conclusions about behavior and perception.' . . . Such conclusions apply broadly to children as a class. . . . Time and again, this Court has drawn these commonsense conclusions for itself. We have observed that children 'generally are less mature and responsible than adults,' . . . that they 'often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,' . . . that they 'are more vulnerable or susceptible to . . . outside pressures' than adults, ... Addressing the specific context of police interrogation, we have observed that events that 'would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.' . . . Describing no one child in particular, these observations restate what 'any parent knows' – indeed, what any person knows – about children generally."); *id*. at 269 ("By its very nature, custodial police interrogation entails 'inherently compelling pressures.' . . . Even for an adult, the physical and psychological isolation of custodial interrogation can 'undermine the individual's will to resist and . . . compel him to speak where he would not otherwise do so freely.' . . . Indeed, the pressure of custodial interrogation is so immense that it 'can induce a frighteningly high percentage of people to confess to crimes they never committed.' . . . That risk is all the more troubling – and recent studies suggest, all the more acute – when the subject of custodial interrogation is a juvenile."). *Accord, e.g.*, *In the Matter of Delroy S.*, 25 N.Y.3d 1064, 1066, 33 N.E.3d 1289, 1291, 12 N.Y.S.3d 19, 21 (2015) (11-year-old juvenile respondent was in "custody" for purposes of *Miranda* when police officers went into his family's apartment, at the invitation of his older sister, and asked him "what happened?"; "'a reasonable 11 year old would not have felt free to leave'"); *Matter of D.A.H.*, 2021-NCCOA-135, 277 N.C. App. 16, 17, 27-29, 857 S.E.2d 771, 775, 781-82 (2021) (addressing the question "whether a juvenile is entitled to *Miranda* warnings prior to being interrogated by his school principal, when the school resource officer ('SRO') is present but does not ask questions": "Today we harmonize our prior opinions on this issue in light of the United States Supreme Court's holding in *J.D.B.* and the holdings of our sister courts in other states. There can be no doubt that educators and law enforcement are increasing their collaboration in the school setting and that school officials are increasingly becoming active participants in the criminal justice system. While potentially warranted for both the educational and safety needs of our children, this cooperation must be consistent with the Fifth Amendment's guarantee against self-incrimination. As the United States Supreme Court recognized in *J.D.B.*, the Fifth Amendment requires that minors under criminal investigation be protected against making coerced, inculpatory statements, even when – and perhaps, in some cases, particularly because – they are on school property. *J.D.B.* . . . . Increased cooperation between educators and law enforcement cannot allow the creation of situations where no *Miranda* warnings are required just because a student is on school property. ¶ . . . [W]hen a student is interrogated in the presence of an SRO – even when the SRO remains silent – the presence of the officer can create a coercive environment that goes above and beyond the restrictions normally imposed during school, such that a reasonable student would readily believe

they are not free to go. This holding recognizes the 'reality that courts cannot simply ignore' – that juveniles are uniquely susceptible to police pressure and may feel compelled to confess when a reasonable adult would not. *J.D.B.*"); *State v. Ahmad*, 246 N.J. 592, 252 A.3d 968 (2020) (the 17-year-old defendant had been shot several times and was taken to a hospital where he was heavily medicated and underwent surgery to remove a bullet from his leg; at the hospital, he was asked by a detective where he had been shot and how he was brought to the hospital; his reply portrayed himself as the innocent victim of a shooting; when he was released from the hospital on crutches, he was told that he had to report to the police, and officers drove him to a stationhouse in a squad car; after several hours, he and his father were told to go to a prosecutor's office for questioning and were escorted there by police; the defendant was then questioned by two detectives, one of whom testified at a suppression hearing that they did not, at that time, suspect the defendant of having committed a crime; the trial court found that his unwarned questioning was not custodial for *Miranda* purposes because he "was interrogated as a shooting victim, not a suspect" (*id*. at 604, 252 A.3d at 975), but the New Jersey Supreme Court finds a *Miranda* violation and reverses his conviction, concluding that he was in custody because: "Defendant was a minor, still in high school. He suffered the significant trauma of being shot multiple times. Immediately upon release from the hospital, he was placed in the back of a patrol car – where arrestees are normally held – and taken to the police station. We doubt there are many, if any, reasonable 17-year-olds who would think they were free to leave after such events. Accordingly, our decision today simply honors the long-held standard of whether a reasonable person in the defendant's position would have believed they were free to leave." *Id*. at 613-14, 252 A.3d at 980.). *See generally* Martin Guggenheim & Randy Hertz, J.D.B. *and the Maturing of Juvenile Confession Suppression Law*, 38 WASH. U. J. L. & SOC. POLICY 109 (2012). Even before the United States Supreme Court's *J.D.B.* decision, with its notable insistence that the special vulnerabilities of youth are an important factor for consideration, a number of state courts had recognized that a respondent's age must be taken into account in determining whether a minor is "in custody" for *Miranda* purposes. *See, e.g.*, *People v. Howard*, 92 P.3d 445, 450 (Colo. 2004); *In the Interest of Doe*, 130 Idaho 811, 818, 948 P.2d 166, 173 (Idaho App.1997); *People v. Lopez*, 229 Ill. 2d 322, 346, 353-54, 892 N.E.2d 1047, 1061, 1065-66, 323 Ill. Dec. 55, 69, 73-74 (2008); *In re D.A.R.*, 73 S.W.3d 505, 510-11 (Tex. App. 2002).

If the respondent was formally arrested or was placed under physical restraint "of the 'degree associated with a formal arrest,'" this plainly suffices to establish "custody" for *Miranda* purposes. *New York v. Quarles,* 467 U.S. at 655 (dictum). If s/he was not, the "custody" issue requires "'examin[ation] [of] all of the circumstances surrounding the interrogation,' . . . including any circumstance that 'would have affected how a reasonable person' in the suspect's position 'would perceive his or her freedom to leave.'" *J.D.B. v. North Carolina*, 564 U.S. at 271. *See also id*. (the custody test "ask[s] how a reasonable person in the suspect's position would understand his freedom to terminate questioning and leave"; "On the other hand, the 'subjective views harbored by either the interrogating officers or the person being questioned' are irrelevant."). Relevant factors include (i) whether the detention was merely "temporary and brief" or was "prolonged" *(Berkemer v. McCarty,* 468 U.S. at 437-38; *see also id.* at 441); (ii) whether the respondent was subjected to only a "modest number of questions" or was subjected to

"'persistent questioning'" (*id.* at 442 & n.36; *see also id.* at 438); and (iii) whether the questioning took place in a public location, where "exposure to public view both reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and diminishes the [suspect's] . . . fear that, if he does not cooperate, he will be subjected to abuse" (*id.* at 438). "Some of the factors relevant to whether a reasonable person would believe he was free to leave include 'the purpose, place, and length of interrogation,' along with 'the extent to which the defendant is confronted with evidence of guilt, the physical surroundings of the interrogation, the duration of the detention, and the degree of pressure applied to the defendant.'" *State v. Snell*, 2007-NMCA-113, 142 N.M. 452, 456, 166 P.3d 1106, 1110 (N.M. App. 2007), quoting *State v. Munoz*, 1998-NMSC-048, 126 N.M. 535, 544, 972 P.2d 847, 856 (N.M. 1998); *United States v. Mora-Alcaraz*, 986 F.3d 1151 (9th Cir. 2021), finding the questioning of a suspect in a public shopping mall "custodial" under a multi-factor test: "These factors are: '(1) the language used to summon the individual; (2) the extent to which the defendant is confronted with evidence of guilt; (3) the physical surroundings of the interrogation; (4) the duration of the detention; and (5) the degree of pressure applied to detain the individual.'" *Id*. at 1156. "Here, the police took physical custody of Mora-Alcaraz's seven-year-old son and eventually led him inside a large store and out of Mora-Alcaraz's sight. Despite the lack of physical restraints, Mora-Alcaraz was subjected to severe pressure as a result of the police separating him from his son. Although the government argues the situation was relatively benign, because there was no threat of harm to the child, the police were well aware that a father would not walk away from a public place and leave his young son with strangers. No physical restraint of Mora Alcaraz was necessary so long as the police kept him separated from his son. He could not leave." *Id*. at 1156-57. *And see State v. E.R.*, 123 N.E.3d 675, 677-78 (Ind. 2019) (affirming a trial-court order finding that police questioning was custodial and excluding the defendant's incriminating statements under *Miranda*: "In granting the motion, the court recognized – rightly – that whether E.R. was in custody turns on objective circumstances. It then determined that the environment was 'a police setting' in which multiple officers questioned E.R. in an accusatory and focused way in a room behind several closed doors. The court observed that although E.R. went to the police station on his own, he 'had to be buzzed into the area or taken into the area of a secure room.' And although the first officer told E.R. he could walk out of the interrogation-room door, the court found that statement, in this specific context, would not make a reasonable person feel free to leave. The court emphasized that after the second officer later entered the room, shut the door, and took on the role of interrogator, E.R. was not told that he could leave or that the first officer's initial statement remained valid."). When officers are able to testify credibly that a suspect was told s/he was not under arrest but expressed a willingness to answer police questioning and cooperated with their investigation, the chances that the court will find the interrogation "custodial" are drastically reduced, despite the presence of factors that would otherwise plainly establish custody. *See United States v. Leal*, 1 F.4th 545 (7th Cir. 2021) (FBI agents lured the defendant to a residence that they used as the center of a sting operation; he became suspicious and fled in his car; three federal officers pursued him and stopped the car; they asked him for his car keys (which he gave them and which they retained throughout the episode); they asked him to return to the sting site and he agreed to do so; there he was confronted by several additional federal law enforcement officers and subjected to an audiotaped

interrogation by two of them in a closed room; he began making incriminating statements two minutes into an eighteen-minute interview; the Seventh Circuit credits the officers' testimony that he willingly agreed to participate in this entire scenario, and it therefore finds that he was never in custody until formally arrested after he confessed.); *United States v. Woodson*, 30 F.4th 1295 (11th Cir. 2022).

For discussion of whether a school official's interrogation of a student inside the principal's office is sufficiently "custodial" to trigger *Miranda* protections, see § 24.12 *infra.*

§ 24.08(b) "Interrogation"

The *Miranda* concept of "interrogation" encompasses:

> "express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* 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." (*Rhode Island v. Innis,* 446 U.S. 291, 300-01 (1980)).

Accord, Arizona v. Mauro, 481 U.S. 520, 525-27 (1987); *Grueninger v. Director, Virginia Department of Corrections*, 813 F.3d 517, 524-28 (4th Cir. 2016); *State v. Wright*, 444 N.J. Super. 347, 363-67, 133 A.3d 656, 666-68 (2016).

As the Court has explained, the police-should-know test "focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police." *Rhode Island v. Innis,* 446 U.S. at 301. The assessment of the suspect's perceptions is predicated upon a "reasonable person" standard rather than a subjective standard, because "the police surely cannot be held accountable for the unforeseeable results of their words or actions." *Id.* at 301-02. Accordingly, "the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." *Id.* at 302 (emphasis in original).

"In deciding whether particular police conduct is interrogation," the courts have been admonished to "remember the purpose behind [the] . . . decisions in *Miranda* and *Edwards* [*v. Arizona,* 451 U.S. 477 (1981)]: preventing government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment." *Arizona v. Mauro,* 481 U.S. at 529-30. Thus if the police set in motion "compelling influences [or] . . . psychological ploys" (*id.* at 529) that "implicate this purpose" (*id.* at 530) and create an "atmosphere of oppressive police conduct" (*id.* at 528 n.5), their behavior "properly could be treated as the functional equivalent of interrogation." *Id.* at 527.

In urging that police conduct short of explicit questioning amounted to "interrogation," counsel can point to the following sorts of factors:

(i) "the police carried on a lengthy harangue in the presence of the suspect" rather than simply "a few offhand remarks" (*Rhode Island v. Innis,* 446 U.S. at 303).

(ii) "under the circumstances, the officers' comments were particularly 'evocative'" (*id.*). *See, e.g.*, *State v. Bond*, 2000 WI App 118, 237 Wis. 2d 633, 642-43, 647, 614 N.W.2d 552, 556-57, 558 (Wis. App. 2000) (a police officer's statement to the defendant in a witness-intimidation case that "'you're the man behind the man,'" implying that the defendant was "'the man who does the dirty work, . . . the muscle,'" was "'particularly "evocative"' or provocative," and "the functional equivalent of interrogation"); *People v. Stephans*, 168 A.D.3d 990, 995, 93 N.Y.S.3d 317, 324 (N.Y. App. Div., 2d Dep't 2019) ("Officer Persaud should have known that in telling the defendant that she needed to come to the precinct station house in connection with his investigation into the allegations her husband had made against her [that she had assaulted him], allegations about which she had already been told she would be arrested, placing her in an interview room, and then confronting her with the allegations and the evidence against her, including the existence of the order of protection, he was reasonably likely to elicit from the defendant an incriminating response").

(iii) the police used "psychological ploys, such as to 'posi[t]' 'the guilt of the subject,' to 'minimize the moral seriousness of the offense,' and 'to cast blame on the victim or on society'" (*Rhode Island v. Innis,* 446 U.S. at 299 (quoting *Miranda*, 384 U.S. at 450)). *See also Arizona v. Mauro,* 481 U.S. at 526, 529. The *Miranda* opinion cites a number of police manuals describing sophisticated interrogation techniques; counsel will often find it helpful to peruse these and other "police science" hornbooks because any similarity between the techniques they advise to elicit incriminating statements and the behavior of the officers in counsel's own case will be highly persuasive that the latter behavior was "interrogation." *See, e.g.*, *Hill v. United States*, 858 A.2d 435, 443 (D.C. 2004) (finding that the officer's statement to the defendant that "'he was being charged with second-degree murder and that . . . [his friend] "told [the police] what happened"'" was the "functional equivalent of interrogation" because the officer employed "classic interrogation techniques" recommended in the Reid manual on criminal interrogations, which was cited in the *Miranda* opinion); *United States v. Rambo*, 365 F.3d 906, 909-10 (10th Cir. 2004) ("While the district court concluded that the lack of questions indicated there was no interrogation by Moran, the use of questions is not required to show that interrogation occurred. . . . ¶ The portion of the interview available on videotape opens with Moran informing Rambo that much of the blame will fall on Rambo's shoulders. As the Supreme Court has recognized, one of the techniques used by police during interrogation is to 'posit

the guilt of the subject.' . . . Thus, Moran's first comments are an example of interrogation explicitly recognized by the Supreme Court. Moreover, other questions and comments recorded on the videotape support the conclusion that Rambo was under interrogation. ¶ Given the context, Moran's comment 'if you want to talk to me about this stuff, that's fine,' is fairly understood as an attempt to refocus the discussion on the robberies. Moran reiterates this invitation four times during the course of the interview. . . . ¶ While the government claims that Moran's only goal was to obtain a waiver of the right to remain silent, that assertion ignores the appropriate test for determining if an interrogation occurred. It is true that an investigating officer's intention may be relevant, but it is the objectively measured tendency of an action to elicit an incriminating response which is ultimately determinative. . . . Moran's interaction with Rambo was reasonably likely to produce incriminating information and, therefore, Rambo was under interrogation."); *In re Elias V.*, 237 Cal. App. 4th 568, 571, 579, 583, 588, 188 Cal. Rptr. 3d 202, 204, 211, 214, 218 (2015), quoted in § 24.04(d), second paragraph, *supra*. *See also* the Cutler & Leo articles cited in the penultimate paragraph of § 24.04(d).

(iv) the police were aware that the suspect was:

(A) "unusually disoriented or upset at the time of his arrest" (*Rhode Island v. Innis,* 446 U.S. at 302-03). *See, e.g.*, *Xu v. State*, 191 S.W.3d 210, 217 (Tex. App. 2005) ("the officers should have known their interrogation would result in Xu's oral statement. . . . The detectives described Xu as emotional and upset throughout the day. He was described as 'hysterical.' He repeatedly wept and clutched a picture of his wife and daughter. The detectives knew Xu's English was broken and that he came from China, where the culture is far different than that of the United States.").

(B) "unusual[ly] susceptib[le] . . . to a particular form of persuasion" (*Rhode Island v. Innis,* 446 U.S. at 302 n.8) because of young age, intellectual disability, mental illness, or the effects of alcohol or other substances. *See, e.g.*, *Benjamin v. State*, 116 So.3d 115, 123 (Miss. 2013) (a police officer's "tactics" of "foster[ing] the suspect's mistaken belief that talking would allow him to avoid a night in jail" and encouraging the suspect's mother to "pressure" him to talk to the police "constituted the functional equivalent of interrogation" because the police should have known that these "psychological ploys . . . were reasonably likely to elicit an incriminating response from fourteen-year-old Benjamin"); *In the Matter of Ronald C.*, 107 A.D.2d 1053, 486 N.Y.S.2d 575 (N.Y App. Div., 4th Dep't 1985) (because the accused was only 13 years old and was unaccompanied by a parent or counsel, the police should have known that placing the alleged burglar's tools in front of him was likely to elicit an incriminating

response). *See also State in the Interest of A.A.*, 240 N.J. 341, 345, 222 A.3d 681, 684 (2020) (the police engaged in "the functional equivalent of interrogation" by summoning the 15-year-old arrestee's mother to the police station (as state law required), bringing "her to see him at her request," and then "listen[ing] to the conversation between mother and son – which took place on opposite sides of the gate of a holding cell").

(C) "unusual[ly] susceptib[le]" (*Rhode Island v. Innis*, 446 U.S. at 302 n.8) to priming for any other reason. *See, e.g.*, *State v. Juranek*, 287 Neb. 846, 856, 844 N.W.2d 791, 801 (2014) ("the detective knew about Juranek's propensity to talk without being interrogated and should have expected that if asked about the incident, Juranek would confess again").

(v) the police *intended* to elicit an admission. Even though the officers' intentions are not controlling, the "intent of the police . . . may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response" (*Rhode Island v. Innis,* 446 U.S. at 301 n.7, 303 n.9). *See, e.g.*, *Drury v. State*, 368 Md. 331, 332, 341, 793 A.2d 567, 568, 573 (2002) (a police officer's action in showing the defendant "physical evidence" and telling him "that the evidence would be processed for fingerprints" was the "functional equivalent of interrogation": the officer's "actions were aimed at invoking an incriminating remark"; "indeed, there is no explanation for his conduct but that he expected to elicit such statements."); *State v. Brooks*, 2013 VT 27, 193 Vt. 461, 464, 468, 70 A.3d 1014, 1016-17, 1019 (2013) ("the interaction [between the detective and the defendant] at the holding cell" – in which the "[d]efendant asked 'what was going on' in the case, and Detective Plusch informed him of the current police investigation," whereupon the defendant made an incriminating statement – "was an interrogation, regardless of how casual a conversation it might appear. Detective Plusch admitted that he hoped informing defendant about the investigation would produce some admission of guilt."). *Cf.* § 23.04(b) second paragraph *supra*.

§ 24.09 VALIDITY OF THE *MIRANDA* WARNINGS

Miranda requires that the police preface any custodial interrogation with the following warnings to the suspect:

(a) that s/he has a right to remain silent, *Miranda v. Arizona,* 384 U.S. at 467-68;

(b) that any statement s/he makes can and will be used in court as evidence against him or her, *id.* at 469; *Estelle v. Smith,* 451 U.S. 454, 466-67 (1981);

(c) that s/he has a right "to consult with a lawyer and to have the lawyer with him [or

her] during interrogation," *Miranda v. Arizona,* 384 U.S. at 471; and

(d) that if s/he cannot afford a lawyer, s/he has a right to have a lawyer appointed, "prior to interrogation," to represent him or her without cost, *id.* at 474.

See generally id. at 444, 467-73.

Some jurisdictions require that an additional warning be given to any juvenile who may be subject to transfer to adult court, advising him or her of the possibility of transfer. *See, e.g., State v. Benoit,* 126 N.H. 6, 18-19, 490 A.2d 295, 303-04 (1985); *State v. Simon*, 680 S.W.2d 346, 353 (Mo. App. 1984). *See also In the Interest of J.M.J.*, 726 N.W.2d 621, 628 (S.D. 2007) ("advisement of the possibility of being tried as an adult, although not a per se rule, is 'a significant factor in evaluating the voluntariness of a statement or confession under the totality of the circumstances.'"). (For discussion of transfer, see Chapter 13.) One state court has ruled on state constitutional grounds that a juvenile must be given a supplementary *Miranda* warning advising him that "'if his counsel, parent, or guardian is not present, . . . he has a right to communicate with them, and that, if necessary, reasonable means will be provided for him to do so.'" *Ex Parte Whisenant,* 466 So.2d 1006, 1007 (Ala. 1985). *See also* ALA. CODE § 12-15-202(a)(2), (b)(4) (2022) (codifying the *Whisenant* rule in a statutory roster of "[r]ights of the child when taken into custody" and "[r]ights of the child before being questioned while in custody" by requiring that juveniles be advised, both at the time they are taken into custody and before being questioned while in custody, that "the child has the right to communicate with his or her parent, legal guardian, or legal custodian whether or not that person is present," and that, "[i]f necessary, reasonable means will be provided for the child to do so").

Each of the *Miranda* warnings must be given expressly, and an incriminating statement made during custodial interrogation is inadmissible unless a foundation is laid for it by an affirmative showing in the trial record that all of the warnings were given. *See Clark v. Smith,* 403 U.S. 946 (1971) (per curiam) (reversing a conviction for admission of a confession made after three of the four *Miranda* warnings were given; only the right of an indigent to have state-paid counsel was omitted); *accord, Michigan v. Tucker,* 417 U.S. 433, 445 (1974) (dictum). Proof by the prosecution that the respondent knew his or her *Miranda* rights will not excuse a failure to warn. *Miranda v. Arizona,* 384 U.S. at 468-69, 471-73.

The police need not precisely parrot the language of *Miranda* when they give *Miranda* warnings. *Duckworth v. Eagan,* 492 U.S. 195, 201 (1989) (upholding a warning which included the statement "'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,'" *id.* at 198, on the ground that the warning *also* said explicitly, "'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,'" *id.*; the Court viewed this combination of advice as conveying the accurate information that, although the police were not obliged to furnish the arrested person with a lawyer, they were obliged to stop questioning him if he requested a lawyer, *id.* at 202-03.); *Florida v. Powell*, 559 U.S. 50, 53, 62 (2010) (the *Miranda* requirement that an

individual must be "'clearly informed,' prior to custodial questioning, that he has, among other rights, 'the right to consult with a lawyer and to have the lawyer with him during interrogation'" was satisfied by a police officer's advising the defendant that he "has 'the right to talk to a lawyer before answering any of . . . [the law enforcement officers'] questions'"; that "'[i]f you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning'"; and that "'[y]ou have the right to use any of these rights at any time you want during this interview'" (*id*. at 53), because "[i]n combination, the two warnings reasonably conveyed . . . [the suspect's] right to have an attorney present, not only at the outset of interrogation, but at all times."); *see also California v. Prysock,* 453 U.S. 355 (1981) (per curiam). What is required is that the warnings be "'*a fully effective equivalent*'" of the *Miranda* cautions, *Duckworth v. Eagan,* 492 U.S. at 202, quoting *Miranda,* 384 U.S. at 476 (emphasis in the original *Duckworth* opinion), and "reasonably 'conve[y] to [a suspect] his rights as required by *Miranda,'"* 492 U.S. at 203, quoting *California v. Prysock,* 453 U.S. at 361. *Cf. United States v. Botello-Rosales*, 728 F.3d 865, 867-68 (9th Cir. 2013) (per curiam) ("the Spanish-language [*Miranda*] warning administered to Botello before he was interrogated failed to 'reasonably convey'" the "government's obligation to appoint an attorney for an indigent suspect who wishes to consult one" because "the Spanish word 'libre' [used by the detective] to mean 'free,' or without cost" actually "translates to 'free' as being available or at liberty to do something"; this "constitutional infirmity" was not "cure[d]" by the officers' prior administration of "correct *Miranda* warnings in English to Botello" because "[e]ven if Botello understood the English-language warnings, there is no indication in the record that the government clarified which set of warnings was correct."); *Commonwealth v. Rosario*, 99 Mass. App. Ct. 1118, 167 N.E.3d 892 (Table), 2021 WL 1263892 (2021) (among other defects in the administration of *Miranda* warnings, a Spanish translation telling the defendant "If you don't have a lawyer to pay, the state gets you one" did not unequivocally convey the information that the lawyer would be provided without cost); *Soares v. State*, 248 Md. App. 395, 241 A.3d 981 (Ct. Special App. 2020) (finding numerous problems in the implementation of *Miranda* when an interpreter overstepped his proper role both in the police interrogation itself and in the suppression hearing); *United States v. Murphy*, 703 F.3d 182, 193 (2d Cir. 2012) (a police officer's "instruct[ion] [to] the defendants that they could 'decide at anytime to give up these rights, *and* not talk to us' . . . ¶ . . . failed to 'ensure that the person in custody ha[d] sufficient knowledge of his . . . constitutional rights relating to the interrogation'": the officer's "incorrect formulation strongly suggested that the defendants *should* talk if they wished to exercise their rights – or, put another way, that they would waive their rights if they remained silent."); *United States v. Wysinger*, 683 F.3d 784, 798-800 (7th Cir. 2012) (an admonition to a suspect that he had the "'right to talk to a lawyer for advice before we ask any questions or have one – have an attorney with you during questioning'" (*id*. at 798) was inadequate because it told the suspect "that he could talk to an attorney before questioning *or* during questioning" when "[i]n fact, Wysinger had a right to consult an attorney both before *and* during questioning" (*id*.): "A person given a choice between having a lawyer with him before questioning or during questioning might wait until it is clear that questioning has begun before invoking his right to counsel" (*id*. at 800); here, the interrogating agent "implied that Wysinger could decide whether to exercise his rights after [the] Agent . . . 'la[id] it out for' him and told him 'what the story is,' and that, in the meantime, he should 'listen for a minute.' The time to

invoke his rights, in other words, had not yet arrived." (*id*. at 801); an incorrectly worded *Miranda* warning, one that suggests that *Miranda* rights apply only to direct questioning or to the time before direct questioning, followed by diversionary tactics that redirect the suspect away from asserting those rights, frustrates the purpose of the *Miranda* protections" (*id*. at 800)); *State v. Dorff*, 468 N.J. Super. 633, 260 A.3d 904 (2021) (after being given *Miranda* warnings, the defendant said she did not know how to trust the officers and that "That's why I feel I might need a lawyer"; a detective told her "But if you didn't do anything, you certainly don't need to have, I mean that's — " and the defendant responded: "I didn't. I feel like I didn't do anything wrong"; thereafter, the defendant and detectives engaged in an extensive dialogue in which she repeatedly asked whether she should get a lawyer; they repeatedly replied that that was a decision she alone could make; their replies increasingly expressed impatience and an insistence that she make the decision one way or the other; finally, they told her "That's up to you. Do you want to talk to us?"; she said "As much as I, as much as I feel comfortable with yeah, if that's okay?" and went on to make damaging admissions (468 N.J. Super. at 641-43, 260 A.3d at 909-10); the court finds that this scenario violated *Miranda* and *Edwards v. Arizona*, 451 U.S. 477 (1981) (discussed in § 24.11(c) *infra*) because "the State bears the burden to show scrupulous compliance with *Miranda* and *Edwards*": "Nor does it matter whether the detective's offhand remark was 'an attempt to coerce a confession.' In determining whether *Miranda* rights were scrupulously honored, we do not examine whether an interrogating officer intended to undermine the *Miranda* warnings and coerce a confession, but rather whether the officer's words and actions complied with *Miranda*'s strict requirements. There is no 'good faith' exception to *Miranda*." 468 N.J. Super. at 651-52, 260 A.3d at 915-16); *People v. Mathews*, 324 Mich. App. 416, 438, 922 N.W.2d 371, 383 (2018) (reviewing the conflicting *Miranda* caselaw and concluding that "a warning preceding a custodial interrogation is deficient when the warning contains only a broad reference to the 'right to an attorney' that does not, when the warning is read in its entirety, reasonably convey the suspect's right to consult with an attorney and to have an attorney present during the interrogation"); *Lujan v. Garcia*, 734 F.3d 917, 931-32 (9th Cir. 2013) ("The problem here is that the words used by law enforcement did not reasonably convey to Petitioner that he had the right to speak with an attorney present at all times – before and during his custodial interrogations. In the end, we find that the 'choice' communicated to Petitioner was that he could speak without an attorney or he could remain silent throughout his interrogations. Speaking with an attorney present was not an option presented to Petitioner. Thus, *Miranda* was never satisfied. ¶ Before his first interrogation, Petitioner was told the following regarding his *Miranda* rights: ¶ Your rights are you have the right to remain silent, whatever we talk about or you say can be used in a court of law against you, and if you don't have money to hire an attorney one's appointed to represent you free of charge. So, those are your rights. If you have questions about the case, if you want to tell us about what happened tonight, we'll take your statement, take your statement from beginning to end. We'll give you an opportunity to explain your side of the story. That's what we're looking for and we're looking for the truth. So you understand' all that? ¶ . . . [The state] argues that, during Petitioner's third interrogation, Detective Rodriguez provided an 'enhanced *Miranda* warning' that advised Petitioner above what the *Miranda* warning itself provides by telling Petitioner that his legal counsel would likely advise against making any statements to the police. The detective advised Petitioner, 'I doubt that if you hire an attorney

they'll let you make a statement, usually they don't. That's the way it goes. So, that's your prerogative, that's your choice.' This advice did not inform Mr. Lujan of his constitutional right to counsel. It was improper, unauthorized legal advice."); *United States v. San Juan-Cruz*, 314 F.3d 384, 388-89 (9th Cir. 2002) (a Border Patrol agent's administration of the *Miranda* warning about the right to a lawyer free of cost was rendered ineffective by the agent's having previously informed the defendant, who was a Mexican national questioned "about his immigration status and intent," that he had the right under immigration laws "to have an attorney present during questioning but 'not at the [G]overnment's expense'"; "When a warning, not consistent with *Miranda*, is given prior to, after, or simultaneously with a *Miranda* warning, the risk of confusion is substantial, such that the onus is on the Government to clarify to the arrested party the nature of his or her rights under the Fifth Amendment."); *People v. Dunbar*, 24 N.Y.3d 304, 308, 316, 23 N.E.3d 946, 947-48, 953, 998 N.Y.S.2d 679, 680, 681, 686 (2014) (local booking practice, in which a detective investigator of the D.A.'s office advised suspects that "'this is your opportunity to tell us your story,' and 'your only opportunity' to do so before going before a judge," fatally "undermined the subsequently-communicated *Miranda* warnings" by conveying to suspects that "remaining silent or invoking the right to counsel would come at a price – they would be giving up a valuable opportunity to speak with an assistant district attorney, to have their cases investigated or to assert alibi defenses. . . . By advising them that speaking would facilitate an investigation, the interrogators implied that these defendants' words would be used to help them, thus undoing the heart of the warning that anything they said could and would be used against them."); *People v. Alfonso*, 142 A.D.3d 1180, 1180-81, 38 N.Y.S.3d 566, 568-69 (N.Y. App. Div., 2d Dep't 2016) (the interrogating detective "undermined the *Miranda* warnings and rendered them ineffective" by saying to the defendant that he had "'an opportunity now to tell [his] side of the story, if [he] want[ed] to,'" and that "'obviously, anything that you say can also help you and benefit you in certain ways, you know what I mean' . . . 'potentially'"; "indicat[ing] that in his 'younger days,' he [the detective] would have bounced the defendant off 'about . . . five walls'"; "reiterat[ing] that he was going to give the defendant an opportunity to give his side of the story, and promis[ing] him that he 'potentially [could] help [himself]'"; and, as "the defendant ultimately began to give a statement, . . . interrupt[ing] him and, referring to the *Miranda* warnings form, [and] indicat[ing] that it was a 'bullshit form that [he] had to get past'"). A state court is, of course, free to construe its state constitution as requiring strict conformity with the language of *Miranda.* See § 7.09 *supra.*

§ 24.10 VALIDITY OF THE RESPONDENT'S WAIVER OF *MIRANDA* RIGHTS

In addition to showing that the respondent received valid *Miranda* warnings (see § 24.09 *supra*), the prosecution must show that the respondent made a voluntary, knowing, and intelligent waiver of the *Miranda* rights. *Edwards v. Arizona,* 451 U.S. 477, 482-84 (1981); *see, e.g., Garner v. United States,* 424 U.S. 648, 657 (1976) (dictum); *Fare v. Michael C.,* 442 U.S. 707, 724-27 (1979) (dictum); *United States v. Garibay*, 143 F.3d 534 (9th Cir. 1998); *United States v. Lall*, 607 F.3d 1277, 1282-84 (11th Cir. 2010). The element of "voluntariness" is discussed further in § 24.10(a) *infra,* and the "knowing and intelligent" element in § 24.10(b). The waiver must be made by the respondent himself or herself; parents cannot waive *Miranda*

rights on behalf of their children. *See, e.g., Smith v. State,* 484 So.2d 560, 561 (Ala. Crim. App. 1986); *In the Matter of the Welfare of S.W.T.,* 277 N.W.2d 507, 512-13 (Minn. 1979). *See also In the Matter of H.K.D.S.*, 305 Or. App. 86, 88, 469 P.3d 770, 771 (2020) (the state constitution bars the police from "obtain[ing] a DNA sample from a juvenile suspect without a warrant if the child's parents consent to the search but the child does not").

A waiver needs not be express: "[I]n at least some cases waiver can be clearly inferred from the actions and words of the person interrogated." *North Carolina v. Butler,* 441 U.S. 369, 373 (1979). In certain circumstances, "a waiver of *Miranda* rights may be implied through 'the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver.'" *Berghuis v. Thompkins*, 560 U.S. 370, 385 (2010) (quoting *North Carolina v. Butler,* 441 U.S. at 369). *See Berghuis*, 560 U.S. at 385-86 ("[t]he record in this case shows that Thompkins waived his right to remain silent," notwithstanding the absence of an explicit waiver, because "[t]here was more than enough evidence in the record to conclude that Thompkins understood his *Miranda* rights" and thus that "he chose not to invoke or rely on those rights when he did speak; Thompkins's answer to the interrogating officer's question was "a 'course of conduct indicating waiver' of the right to remain silent," and "there is no evidence that Thompkins's statement was coerced.").

For discussion of the state's burden of persuasion in showing a waiver *of Miranda* rights, see § 22.03(d)(ii) *supra.*

§ 24.10(a) The Requirement That *Miranda* Waivers Be Voluntary

A waiver *of Miranda* rights, "[o]f course, . . . must at a minimum be 'voluntary' to be effective against an accused." *Colorado v. Connelly,* 479 U.S. 157, 169 (1986) (dictum); *Miranda,* 384 U.S. at 444, 476. "'[T]he 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.'" *Colorado v. Spring,* 479 U.S. 564, 573 (1987) (dictum); *Moran v. Burbine,* 475 U.S. 412, 420 (1986) (dictum); *Fare v. Michael C.,* 442 U.S. at 725.

The Court has indicated that the "indicia of coercion" recognized in the context of the due process issue of the voluntariness of statements (see §§ 24.03-24.05 *supra*) are also relevant to the voluntariness of a waiver of *Miranda* rights. *See Colorado v. Spring,* 479 U.S. at 573-74; *Colorado v. Connelly,* 479 U.S. at 169-70. The decisive question is whether the respondent's "'will [was] overborne and his capacity for self-determination critically impaired' because of coercive police conduct." *Colorado v. Spring,* 479 U.S. at 574. In making that inquiry, the courts may consider: "'the duration and conditions of detention . . ., the manifest attitude of the police toward . . . [the accused], his physical and mental state, [and] the diverse pressures which sap or sustain his powers of resistance and self-control.'" *Id.* (quoting *Culombe v. Connecticut,* 367 U.S. 568, 602 (1961) (opinion of Justice Frankfurter)).

Excessively long detention or detention under oppressive conditions can suffice to render

a *Miranda* waiver involuntary. See § 24.04(b) *supra. Miranda* says expressly that the fact that an accused's statement was made after "lengthy interrogation *or* incommunicado incarceration . . . is inconsistent with any notion of a voluntary relinquishment of the privilege [against self-incrimination]." *Miranda v. Arizona,* 384 U.S. at 476 (emphasis added). One aspect of incommunicado detention of juveniles that has received substantial attention in the caselaw is denial of access to a parent or other "interested adult." For discussion of the relevance of this factor in assessing voluntariness of a juvenile's waiver, see § 24.14 *infra.*

The voluntariness of a *Miranda* waiver can also be undermined by a police officer's use of force or the threat of force (see § 24.04(a) *supra*) or by police promises of leniency or threats of adverse governmental action (see § 24.04(c) *supra*). "[E]vidence that the accused was . . . tricked . . . into a waiver will, of course, show that the defendant did not voluntarily waive his [Fifth Amendment] privilege." *Miranda,* 384 U.S. at 476. *Accord*, *United States v. Lall*, 607 F.3d 1277, 1282-84 (11th Cir. 2010), summarized in § 24.04(d) second paragraph *supra*. *See also Miranda*, 384 U.S. at 449-55 (describing the methods by which "interrogators . . . induce a confession out of trickery" (*id.* at 453)). *Cf. Moran v. Burbine,* 475 U.S. 412 (1986) (accepting the basic proposition that police "'trick[ery]' . . . can vitiate the validity of a waiver," *id.* at 423, but concluding that police misrepresentations to the suspect's attorney did not undermine the voluntariness of waivers by a suspect who was unaware of the misrepresentations). And see the discussion of *Colorado v. Spring,* 479 U.S. 564 (1987), in the concluding paragraph of § 24.04(d) *supra*; *see generally* Christopher Slobogin, *Manipulation of Suspects and Unrecorded Questioning: After 50 Years of Miranda Jurisprudence, Still Two (or Maybe Three) Burning Issues*, 97 B.U. L. REV. 1157 (2017).

As in the due process voluntariness context (see § 24.05 *supra*), the respondent's "mental condition is surely relevant to an individual's susceptibility to police coercion," *Colorado v. Connelly,* 479 U.S. at 165 (dictum); *see J.D.B. v. North Carolina*, 564 U.S. 261, 272 (2011) (discussed in § 24.10(b) *infra*), and thereby to the assessment of the voluntariness of a waiver of *Miranda* rights. *See Colorado v. Spring,* 479 U.S. at 573-74 (dictum); *see also Fare v. Michael C.,* 442 U.S. at 725 (dictum). A waiver by a juvenile must be scrutinized with "special caution," *In re Gault,* 387 U.S. 1, 45 (1967); *see also Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012) (explaining, in the context of criminal sentencing, that the Court has recognized, based on "science and social science" as well as "common sense" and "what 'any parent knows,'" that "children 'are more vulnerable . . . to . . . outside pressures'"), especially when the natural vulnerability of youth has been exacerbated by other factors, such as intellectual disability, illiteracy, intoxication, or lack of prior experience with the court system. Counsel should develop any factor bearing on a respondent's psychological or emotional vulnerability. *See, e.g., Rodriguez v. McDonald*, 872 F.3d 908, 922-23 (9th Cir. 2017) (14-year-old with "Attention Deficit Hyperactivity Disorder and a 'borderline' I.Q. of seventy-seven"); *Woods v. Clusen,* 794 F.2d 293 (7th Cir. 1986) (16-year-old with no prior court experience); *United States v. Blocker,* 354 F. Supp. 1195 (D. D.C. 1973) (21-year-old with "low intelligence" and only one prior arrest); *In re Estrada,* 1 Ariz. App. 348, 403 P.2d 1 (1965) (14-year-old with low level of education and literacy); *In re Roderick P.*, 7 Cal. 3d 801, 500 P.2d 1, 103 Cal. Rptr. 425 (1972)

(intellectually disabled 14-year-old with no prior arrests); *In re S.W.*, 124 A.3d 89, 104 (D.C. 2015) ("emphasiz[ing] the role of [the 15-year-old] appellant's juvenile status" in the court's conclusion that the interrogating detective's "veiled threat to throw appellant to the 'lions'" rendered the youth's *Miranda* waiver involuntary; "in the juvenile context, . . . [the] courts must exercise 'special caution' in conducting a voluntariness analysis."); *In the Interest of Thompson,* 241 N.W.2d 2 (Iowa 1976) (17-year-old with an I.Q. of 71); *State in the Interest of Holifield,* 319 So.2d 471 (La. App. 1975) (14-year-old with an I.Q. of 67); *Commonwealth v. Cain,* 361 Mass. 224, 279 N.E.2d 706 (1972) (15-year-old with no prior experience with police, who was denied access to his father).

§ 24.10(b) The Requirement That *Miranda* Waivers Be "Knowing and Intelligent"

A *Miranda* 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. Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *Moran v. Burbine,* 475 U.S. 412, 421 (1986) (dictum); *see Colorado v. Spring,* 479 U.S. 564, 573-74 (1987) (dictum). *And see United States v. Outland*, 993 F.3d 1017, 1019 (7th Cir. 2021) (holding that the trial court erred in prematurely denying a suppression motion by an arrestee who made incriminating statements in a hospital shortly after recovering from a drug overdose; the motion raised claims of both involuntariness and ineffective waiver of *Miranda* rights, and the circuit court explains that "[t]he district court denied Outland's motion, finding that his statements were voluntary. At no point, though, did the district court analyze or answer whether Outland knowingly and intelligently waived his *Miranda* rights. The questions are not one and the same: to the contrary, whether a defendant knowingly and intelligently waived his rights at the outset of a police interview is a distinct and separate inquiry from whether, in the circumstances of the interview as a whole, the defendant's statements were voluntary. Given that Outland was unconscious and entirely incapacitated from an overdose just two hours before police questioned him, a finding on the former question matters. We therefore remand for the district court to make a determination on the validity of Outland's *Miranda* waiver in the first instance."); *State v. Lujan*, 634 S.W.3d 862, 865-66 (Tex. Crim. App. 2021) (after the defendant was given *Miranda* warnings at a police station in what she was told was "a formal interview," she waived her rights and confessed to involvement in a homicide; she then agreed to accompany detectives in a squad car to show them the site where she had last seen the victim's body; as they left the interrogation room, one detective told the defendant "when we come back, we can continue, if you like, okay?"; during the squad-car ride, a detective electronically recorded the conversation without the defendant's knowledge as she gave an extensive, free-wheeling recounting of her role in the crime; the Texas Court of Criminal Appeals, applying *Miranda* and a Texas statute implementing *Miranda*, affirms a trial-court ruling suppressing this recounting because it was not made with the requisite understanding: "The waiver's validity depends on, among other things, a showing that the defendant 'was aware of the State's intention to use his statements to secure a conviction[.]' *Burbine* . . . Deception is relevant to the waiver inquiry if the deception 'deprives a defendant of knowledge essential to his ability to understand the nature

of his rights and the consequences of abandoning them.'"); *State v. Sims*, 466 N.J. Super. 346, 354, 246 A.3d 814, 818-19 (2021) ("This appeal requires us to determine as a matter of first impression whether the Supreme Court's holdings in *State v. A.G.D.*, 178 N.J. 56, 835 A.2d 291 (2003), and *State v. Vincenty*, 237 N.J. 122, 202 A.3d 1273 (2019), requiring that police inform a defendant subject to custodial interrogation of specific charges filed against him before he can waive his *Miranda* rights, also apply to an interrogee who was arrested and questioned prior to any charges being filed, where the arrest was based upon information developed through an earlier police investigation. . . . [W]e hold that the same requirement applies because without being correctly informed of the crime for which he was arrested, a defendant cannot knowingly and intelligently waive his right against self-incrimination.").

The requirement of a "knowing and intelligent" waiver assumes particular importance in juvenile cases because, as the empirical evidence demonstrates, most juveniles – simply by reason of their age and limited education – fail to comprehend the language traditionally employed in *Miranda* warnings and the concepts embodied in the warnings. *See* THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE (1981) [hereafter Grisso I]; Rona Abramovitch, Karen Higgins-Bass & Stephen Bliss, *Young Persons' Comprehension of Waivers in Criminal Proceedings*, CANADIAN J. OF CRIMINOLOGY 309 (1993); Barry C. Feld, *Behind Closed Doors: What Really Happens When Cops Question Kids*, 23 CORNELL J.L. & PUB. POL'Y 395 (2013); Barry C. Feld, *Juveniles' Competence to Exercise* Miranda *Rights: An Empirical Study of Policy and Practice*, 91 MINN. L. REV. 26 (2006); Barry C. Feld, *Real Interrogation: What Actually Happens When Cops Question Kids*, 47 LAW & SOC'Y REV. 1 (2013); A. Bruce Ferguson & Alan C. Douglas, *A Study of Juvenile Waiver*, 7 SAN DIEGO L. REV. 39 (1970); Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis,* 68 CALIF. L. REV. 1134 (1980) [hereafter Grisso II]; Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of* Miranda *Rights*, 2006 WIS. L. REV. 431; Michele LaVigne & Gregory J. Van Rybroek, *Breakdown in the Language Zone: the Prevalence of Language Impairments among Juvenile and Adult Offenders and Why it Matters*, 15 U.C. DAVIS J. JUV. L. & POL'Y 37, 74-77 (2011); *see also* THOMAS GRISSO, EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS 113-55 (1986); Thomas Grisso, *Adolescents' Decision Making: A Developmental Perspective on Constitutional Provisions in Delinquency Cases*, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3 (Winter 2006).

On the basis of a three-year series of empirical studies of delinquent youth and adult criminal offenders, Grisso concluded that: "[a]s a class, juveniles of ages 14 and below demonstrate incompetence to waive their rights to silence and legal counsel"; and "[a]s a class, juveniles of ages 15 and 16 who have I.Q. scores of 80 or below lack the requisite competence to waive their rights to silence and counsel." Grisso I at 193-94; Grisso II at 1160. Juveniles aged 15 and 16 with I.Q. scores above 80 exhibited "a level of understanding and perception" comparable to the sample population of 17-to-21 year-olds and thus could not be distinguished as a class from adults; nevertheless, approximately one third to one half of the 15 and 16 year-olds with I.Q. scores above 80 proved incapable of adequately understanding *Miranda* rights. Grisso I

at 194; Grisso II at 1160.

In a study of sample populations of delinquent and nondelinquent youths, Ferguson and Douglas similarly found that more than 90 per cent of the juveniles failed to fully comprehend *Miranda* warnings, and that even the use of a simplified version of the language of the *Miranda* warnings did not remedy these deficiencies in comprehension. Ferguson & Douglas, *supra* at 53-54.

To test the validity of the findings of psychological studies such as the foregoing in actual interrogation situations, Feld examined "quantitative and qualitative data – interrogation tapes and transcripts, police reports, juvenile court filings, and probation and sentencing reports – of the routine police interrogation of sixty-six juveniles sixteen years of age or older whom prosecutors charged with a felony offense." Feld, *Juveniles' Competence to Exercise* Miranda *Rights: An Empirical Study of Policy and Practice*, *supra* at 28. As he explains, the findings of his "study are very consistent with laboratory research . . . [and] tend[ ] to bolster the validity of developmental psychologists' experimental findings that younger juveniles do not understand their *Miranda* rights, lack adjudicative competence, and remain at greater risk to give false confessions." *Id*. at 99. *See also* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 941-943 (2004), discussed in § 24.05(a) *supra*.

Some courts have cited such empirical studies as evidence that a substantial portion of the juvenile population is unable to comprehend *Miranda* warnings. *See, e.g.*, *A.M. v. Butler*, 360 F.3d 787, 801 n.11 (7th Cir. 2004); *State v. Benoit,* 126 N.H. 6, 13-14, 490 A.2d 295, 300-01 (1985); *In the Matter of B.M.B.*, 264 Kan. 417, 429-33, 955 P.2d 1302, 1310-13 (1998); *Commonwealth v. A Juvenile (No. 1),* 389 Mass. 128, 131-32, 449 N.E.2d 654, 656 (1983); *see also State in the Interest of S.H.,* 61 N.J. 108, 115, 293 A.2d 181, 184-85 (1972) (treating it as axiomatic that "[r]ecitation of the *Miranda* warnings to a boy of 10 even when they are explained is undoubtedly meaningless"); *In the Interest of Jerrell C.J.*, 2005 WI 105, 283 Wis. 2d 145, 159 n.6, 699 N.W.2d 110, 117 n.6 (Wis. 2005) (referring generally to "scholarly research" as supporting the proposition that "children are less likely to understand their *Miranda* rights" "[b]ecause their intellectual capacity is not fully developed"). *But cf. State v. Griffin*, 273 Conn. 266, 286-87, 869 A.2d 640, 652 (2005) (in holding that the judge at a suppression hearing was not required to admit the testimony of a defense expert who used a protocol developed by Thomas Grisso to evaluate the 14-year-old defendant's competency to understand *Miranda* warnings, the Connecticut Supreme Court says: "On the basis of the evidence presented at the suppression hearing, we simply cannot say that the trial court abused its discretion in ruling that the Grisso test [*i.e.*, Grisso's protocol for evaluating competency] did not satisfy the [state law] . . . standard [for admissibility of expert testimony] . . . [but] [o]f course, we do not foreclose the possibility that, in a future case, sufficient evidence regarding the reliability of the Grisso test will be presented such that it may be found to pass muster"). The New Hampshire Supreme Court in *State v. Benoit* ruled on state constitutional grounds that "before a juvenile can be deemed to have voluntarily, knowingly and intelligently waived" *Miranda* rights, "he or she must

be informed, in language understandable to a child, of his or her rights," 126 N.H. at 18-19, 490 A.2d at 304, and the court set forth a simplified juvenile rights form in an appendix to its opinion, *id*. at 22-24, 490 A.2d at 306-07. The Kansas Supreme Court in *In the Matter of B.M.B.* and the Massachusetts Supreme Judicial Court in *Commonwealth v. A Juvenile (No. 1)* responded to the problem of juveniles' inability to comprehend *Miranda* warnings by establishing requirements that a parent or other concerned adult be present during police interrogation, and that the juvenile be permitted to consult with the adult. See § 24.14 *infra*.

In addressing the relevance of a suspect's young age for another aspect of the *Miranda* doctrine – the assessment of whether a suspect is in "custody" for purposes of *Miranda* (see generally § 24.08(a)) – the Supreme Court in *J.D.B. v. North Carolina*, 564 U.S. 261 (2011) observed that "[t]ime and again," the Court has taken into account the constitutional implications of the inherent immaturity and vulnerability of youth, including in "the specific context of police interrogation":

> "We have observed that children 'generally are less mature and responsible than adults,' *Eddings*, 455 U.S., at 115–116; that they 'often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,' *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (plurality opinion); that they 'are more vulnerable or susceptible to . . . outside pressures' than adults, *Roper*, 543 U.S., at 569; and so on. See *Graham v. Florida*, 560 U.S. [48, 68,] . . . (2010) (finding no reason to 'reconsider' these observations about the common 'nature of juveniles'). Addressing the specific context of police interrogation, we have observed that events that 'would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.' *Haley v. Ohio*, 332 U.S. 596, 599 (1948) (plurality opinion); see also *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) ('[N]o matter how sophisticated,' a juvenile subject of police interrogation 'cannot be compared' to an adult subject). Describing no one child in particular, these observations restate what 'any parent knows' – indeed, what any person knows – about children generally. *Roper*, 543 U.S., at 569.[FN5]
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> > " [FN5]Although citation to social science and cognitive science authorities is unnecessary to establish these commonsense propositions, the literature confirms what experience bears out. See, e.g., *Graham v. Florida*, [560 U.S. 48, 68,] 130 S. Ct. 2011, 2026 (2010) ('[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds')."

(*J.D.B. v. North Carolina*, 564 U.S. at 272-73 & n.5.)

See also Miller v. Alabama, 567 U.S. 460, 471 (2012) (explaining that the Court has recognized, based on "science and social science" as well as "common sense" and "what 'any parent knows,'" that "children are constitutionally different from adults for purposes of sentencing" because, *inter alia*, "children have a '"lack of maturity and an underdeveloped sense of responsibility,"' leading to recklessness, impulsivity, and heedless risk-taking," and "children

'are more vulnerable . . . to . . . outside pressures'"). The lower courts similarly have recognized that the very nature of adolescence causes juveniles to be less able than adults to weigh consequences and to make informed, meaningful judgments, even on highly important matters. *See, e.g.*, *People v. Mitchell*, 2 N.Y.3d 272, 275-76, 810 N.E.2d 879, 881-82, 778 N.Y.S.2d 427, 429-30 (2004) (establishing a more protective rule for the invocation of the state constitutional right to counsel in juvenile delinquency and juvenile offender cases because "[c]hildren of tender years lack an adult's knowledge of the probable cause of their acts or omissions and are least likely to understand the scope of their rights and how to protect their own interests . . . [and they] may not appreciate the ramifications of their decisions or realize all the implications of the importance of counsel"); *In the Matter of Benjamin L.*, 92 N.Y.2d 660, 669, 708 N.E.2d 156, 161, 685 N.Y.S.2d 400, 405 (1999) (establishing a more protective rule for the operation of the state constitutional right to a speedy trial in juvenile delinquency cases because "[t]ypically, a juvenile . . . is unlikely to appreciate the importance of taking affirmative steps toward the ultimate resolution of the case, and is just as unlikely to possess the means and sophistication to do so" and "[m]oreover, many youths in juvenile proceedings suffer from educational handicaps and mental health problems, which undermine their capacity to anticipate a future presentment and to appreciate the need to take self-protective measures").

The most effective way for counsel to use the published empirical studies in an individual case is by presenting expert testimony that combines a discussion of the general statistics with a finding by a psychiatrist or psychologist, based upon a clinical examination of the respondent, that this particular youth is unable to comprehend the *Miranda* warnings in the form in which they were administered to him or her by the police. Social scientists have developed forensic tests for assessing a juvenile's ability to comprehend *Miranda* rights; counsel can find an expert conversant with such tests by consulting local psychiatrists and psychologists and the relevant departments of the state university. *Cf. In re Ariel R.*, 98 A.D.3d 414, 417, 419, 950 N.Y.S.2d 17, 21 (N.Y. App. Div., 1st Dep't 2012) (respondent's treating psychiatrist, who was called as a witness for the defense at a confession suppression hearing, should have been allowed to "render an opinion as to whether appellant could have understood the juvenile *Miranda* warnings read to him"; although the psychiatrist "did not perform any tests on appellant that were specifically designed to determine appellant's competency to waive *Miranda,*" the psychiatrist's "evaluations of appellant's receptive communication skills and IQ . . . [were] sufficient to enable him to form an opinion as to the ultimate question of whether appellant had adequate language and cognitive skills to understand the *Miranda* warnings."); *Smith v. State*, 918 A.2d 1144 (Del. 2007) (the denial of a suppression motion presented without the benefit of expert testimony was required to be reversed in the light of expert testimony presented at a subsequent competency hearing). For general discussion of the use of expert witnesses and the right to court funds for retention of experts when representing indigent respondents, see Chapter 11 and §§ 12.08-12.10 *supra.*

To put together a persuasive presentation, counsel also should obtain the respondent's school records and should consult any teachers who could testify regarding the respondent's reading and comprehension abilities. If the child is in special education classes because of his or her learning disabilities or educational deficits, there may be extensive evaluations in the child's

school file, and counsel should consider presenting the testimony of the special education teachers who prepared the reports. *See, e.g., Cooper v. Griffin,* 455 F.2d 1142 (5th Cir. 1972) (on the basis of special education teachers' testimony concerning the low I.Q. scores and comprehension levels of the juvenile defendants, the court concludes that their *Miranda* waivers were not "knowing and intelligent").

Counsel should also consider putting the respondent on the witness stand at the suppression hearing to testify about his or her understanding of the meaning of the various *Miranda* warnings. Such testimony can be dramatic and persuasive, providing the judge with a first-hand view of the child's limitations. *See, e.g., State in the Interest of Holifield,* 319 So.2d 471, 472-73 (La. App. 1975).

Other personal characteristics of a respondent that were identified in previous sections as bearing on the voluntariness of a statement (see § 24.05 *supra*) and the voluntariness of a *Miranda* waiver (see § 24.10(a) *supra*) also are relevant to a determination of whether a respondent's waiver of *Miranda* rights was "knowing and intelligent." Thus, a respondent may have been unable to comprehend the language employed in *Miranda* warnings and/or the concepts embodied in the warnings because of:

(i) *Intellectual disability*. *See, e.g.*, *Cooper v. Griffin*, 455 F.2d 1142, 1145-46 (5th Cir. 1972) (two juveniles, who were 15 and 16 years old, and whose I.Q. "was said to range between 61 and 67" (*id*. at 1145) "could not have made a 'knowing and intelligent' waiver of their rights" (*id*. at 1146): they "surely had no appreciation of the options before them or of the consequences of their choice. Indeed it is doubtful that they even comprehended all of the words that were read them" (*id*.)); *People v. Jiminez*, 863 P.2d 981, 982, 985 (Colo. 1993) (the defendant who was found by a psychologist to be "'function[ing] at about the 6 year old level,'" and who had never been to school and had "'a very limited vocabulary,'" did not make a "knowing and intelligent" waiver of his *Miranda* rights); *Smith v. State*, 918 A.2d 1144 (Del. 2007) (an intellectually disabled 14-year-old, who "was functioning at a second grade level" (*id. at* 1151), "could not sign his name because he did not know how" (*id.*) and who "could not read the *Miranda* warnings himself, [and] so was given a quick and confusing explanation of what they supposedly meant" (*id.*) did not make a "knowing" waiver of his *Miranda* rights (*id.*)); *State v. Thorpe*, 274 N.C. 457, 461, 164 S.E.2d 171, 174 (1968) (an intellectually disabled 20-year-old, "who had left school before he completed the third grade," did not make a valid waiver of his right to counsel during questioning); *People v. Kadow*, 2021 IL App (4th) 190103, 182 N.E.3d 814, 450 Ill. Dec. 1002 (2021). For a discussion of the relevant forensic testing materials, *see* Sydnee L. Erickson, Karen L. Salekin, Lauren N. Johnson & Stephanie C. Doran, *The Predictive Power of Intelligence: Miranda Abilities of Individuals with Intellectual Disability*, 44 (No. 1) LAW AND HUMAN BEHAVIOR 60 (2020).

(ii) *Mental illness*. *See, e.g.*, *Commonwealth v. Hilton*, 443 Mass. 597, 603, 607, 823 N.E.2d 383, 390, 393 (2005) (defendant who "suffer[ed] from schizophenia and ha[d] a schizotypal personality disorder," did not understand "the *Miranda* warnings" and thus could not have made a "knowing and intelligent" waiver).

(iii) *Intoxication or the effects of drugs*. *See, e.g.*, *United States v. Outland*, *supra*; *Commonwealth v. Anderl*, 329 Pa. Super. 69, 81, 477 A.2d 1356, 1362 (1984) ("we conclude that the appellee's waiver of his *Miranda* rights was vitiated by his intoxication and that the statements made by the appellee while in custody should be suppressed"); *State v. Young*, 1994-NMCA-061, 117 N.M. 688, 692, 875 P.2d 1119, 1123 (1994) ("[V]oluntary intoxication is relevant to determining whether a waiver was knowing and intelligent. See . . . 1 Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 6.9, at 527 (1984). On remand, the trial court shall consider the evidence of Defendant's intoxication in determining whether Defendant knowingly and intelligently waived his rights."); *State v. Kinn*, 288 Minn. 31, 36, 178 N.W.2d 888, 891 (1970), *partially overruled on an unrelated point, State v. Herem*, 384 N.W.2d 880 (Minn. 1986) ("The lower court's attention is called to the fact that the evidence indicates that defendant was obviously intoxicated during all of the time that the investigation and arrest took place. In view of this circumstance, the court should consider the evidence as it bears upon the question of whether defendant was mentally competent to waive his constitutional rights at any point."); *People v. Knedler*, 2014 CO 28, 329 P.3d 242, 245-46 (Colo. 2014) (recognizing that "a defendant's level of intoxication at the time of the *Miranda* advisement is relevant to a waiver's validity" and that a defendant may be so "intoxicated that he or she could not have made a knowing and intelligent waiver," and explaining the "set of subfactors to [be used in] assess[ing] a defendant's competence in cases involving intoxication," but ultimately concluding that the totality of the circumstances adequately established that "Knedler's decision to waive his rights was informed and deliberate").

Even if a respondent had the intellectual capacity to comprehend *Miranda* warnings, there will be substantial questions about whether a waiver was "knowing and intelligent" in any case in which s/he was not a native English speaker and in which the *Miranda* warnings were read to him or her in English rather than in his or her native language. *See, e.g.*, *United States v. Barry*, 979 F. Supp. 2d 715, 719 (M.D. La. 2013) (a *Miranda* waiver was not voluntary, knowing and intelligent because "the warnings were not in Barry's native tongue, there was no use of a translator, the rights were not explained to him at length, and his understanding was assumed but not confirmed"); *see also United States v. Botello-Rosales*, 728 F.3d 865, 867-68 (9th Cir. 2013) (per curiam), summarized in § 24.09 fourth paragraph *supra*; Aneta Pavlenko, Elizabeth Hepford & Scott Jarvis, *An illusion of understanding: How native and non-native speakers of English understand (and misunderstand) their* Miranda *rights*, 26 (No. 6) INTERNATIONAL JOURNAL OF SPEECH, LANGUAGE AND THE LAW 181 (2019).

§ 24.11 STATEMENTS TAKEN AFTER THE RESPONDENT HAS ASSERTED HIS OR HER *MIRANDA* RIGHTS TO SILENCE OR COUNSEL

The discussion in § 24.10 *supra* described the normal standard for assessing waivers of *Miranda* rights. If, instead of making an immediate and final waiver of *Miranda* rights, the respondent asserts at any time the right to silence or the right to counsel, there are more stringent standards for determining the validity of any subsequent *Miranda* waivers.

Provided that the respondent has used language adequate to assert the right (see § 24.11(a) *infra*), the standard to be applied following an assertion of the right to silence is the one discussed in § 24.11(b) *infra,* and the standard to be applied after an assertion of the right to counsel is the one discussed in § 24.11(c) *infra.*

§ 24.11(a) Sufficiency of the Language Used in Asserting the Right

An assertion of *Miranda* rights needs not expressly refer to the rights: As long as the respondent's statements manifest a "clear indication[ ]" of his or her desire to exercise a particular right, they are sufficient to invoke the right. *Brewer v. Williams,* 430 U.S. 387, 404-05, 412 n.1 (1977) (discussing invocation of the right to counsel); *Miranda v. Arizona,* 384 U.S. at 444-45 (the right to counsel is asserted whenever the suspect "indicates in any manner" that s/he wants a lawyer); *Davis v. United States*, 512 U.S. 452, 459 (1994) (dictum) (the right to counsel is invoked if a suspect makes a "'statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney'"). *See, e.g., Michigan v. Mosley,* 423 U.S. 96 (1975) (by implication) (the right to silence was invoked when a suspect told the police that he did not want to say "[a]nything about the robberies," *id.* at 105 n.11); *Smith v. Illinois,* 469 U.S. 91 (1984) (per curiam) (the right to counsel was invoked when, in response to administration of *Miranda* warnings, defendant said: "'Uh, yeah, I'd like to do that,'" *id.* at 93). *See also Arizona v. Roberson,* 486 U.S. 675, 681-84 (1988); *Connecticut v. Barrett,* 479 U.S. 523, 529 (1987) (dictum); *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938); *Jones v. Harrington*, 829 F.3d 1128 (9th Cir. 2016) (the defendant "simply and unambiguously" invoked the right to silence (*id*. at 1142) by saying, after "hours of questioning," "'I don't want to talk no more'" (*id*. at 1132), which "means the government cannot use against Jones anything he said after his invocation. And that includes using Jones's subsequent statements to 'cast retrospective doubt on the clarity of [Jones's] initial request itself.'" (*id*.)); *Garcia v. Long*, 808 F.3d 771 (9th Cir. 2015) (the defendant asserted his right to silence by responding to the officer's question "'do you wish to talk to me?'" with "a simple 'no'" (*id*. at 773); notwithstanding "other statements Garcia made during the interview" (*id*.), "'no' meant 'no.'" (*id*.)); *Tobias v. Arteaga*, 996 F.3d 571, 580-81 (9th Cir. 2021) ("Tobias's statement – 'Could I have an attorney? Because that's not me' – was an unequivocal invocation of his right to counsel under clearly established law. . . . In modern usage, 'Can I' and 'Could I' are both well understood ways of asking a direct question – the only distinction is that 'could' is considered a more polite form of request than 'can.' . . . . The second half of Tobias's statement, 'Because that's not me,' does nothing to undermine his initial question . . . . ¶ The LAPD detectives suggest that Tobias's question was not clearly established

as unambiguous because we have found statements such as 'I think I would like to talk to a lawyer,' 'Maybe he ought to see an attorney,' and '[I] might want to talk to a lawyer,' ambiguous. . . . Tobias, by contrast, 'did not equivocate in his invocation by using words such as "maybe" or "might" or "I think."' . . . . He asked directly for an attorney, a request the officers ignored."); *Hurd v. Terhune*, 619 F.3d 1080, 1088-89 (9th Cir. 2010) ("Hurd unambiguously invoked his right to silence when the officers requested that he reenact the shooting . . . [and] Hurd responded to the officers' requests by saying, among other things, 'I don't want to do that,' 'No,' 'I can't,' and 'I don't want to act it out because that – it's not that clear.'"); *United States v. Abdallah*, 911 F.3d 201 (4th Cir. 2018) (Halfway through an initial reading of the *Miranda* warnings, the defendant interrupted to tell the interrogating officers that he "wasn't going to say anything at all." An interrogator responded by stating, "Well, just let me finish your Warning first." After the warning, the interrogator asked, "Do you even know why you're under arrest?" Defendant responded, "No, tell me." The interrogator then repeated the *Miranda* warnings; the defendant did not interrupt; he indicated that he understood his rights; he made incriminating statements. The court finds a *Miranda* violation because the defendant's invocation of the right to silence was unambiguous.); *United States v. Rodriguez*, 518 F.3d 1072, 1077-78, 1081 (9th Cir. 2008) (the defendant, who responded to a question whether he wanted to talk to a law enforcement official by stating "'I'm good for tonight,'" had "at best, [made] an ambiguous invocation of the right to silence," but his subsequent statement had to be suppressed "because his interrogator failed to clarify [defendant's] . . . wishes with regard to his *Miranda* warnings" before commencing interrogation); *Anderson v. Terhune*, 516 F.3d 781, 787 (9th Cir. 2008) (en banc) ("Following the issuance of *Miranda* in 1966 and the literally thousands of cases that repeat its rationale, we rarely have occasion to address a situation in which the defendant not only uses the facially unambiguous words 'I plead the Fifth,' but surrounds that invocation with a clear desire not to talk any more. The state court accurately recognized that under *Miranda*, 'if [an] individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease,' . . . but then went on to eviscerate that conclusion by stating that the comments were 'ambiguous in context ¶ . . . because they could have been interpreted as not wanting officers to pursue the particulars of his drug use as opposed to not wanting to continue the questioning at all. By asking defendant what he meant by pleading the fifth, the officer asked a legitimate clarifying question.['] ¶ Using 'context' to transform an unambiguous invocation into open-ended ambiguity defies both common sense and established Supreme Court law. It is not that context is unimportant, but it simply cannot be manufactured by straining to raise a question regarding the intended scope of a facially unambiguous invocation of the right to silence."); *Deviney v. State*, 112 So.3d 57 (Fla. 2013) (a suspect's repeated declarations during interrogation that he was "done" and "ready to go home" (*id.* at 77) "represented an unequivocal invocation of his right to remain silent" (*id*.) particularly when "Deviney further indicated his desire to end questioning by standing and attempting to leave the interrogation room" (*id.* at 78)); *State v. Maltese*, 222 N.J. 525, 546, 120 A.3d 197, 209 (2015) (the "defendant affirmatively asserted his right to remain silent" by "repeatedly stat[ing] that he wanted to speak with his uncle, whom he considered 'better than a freaking attorney,' before answering any further questions," and "specifically stat[ing] that he wanted to consult with his uncle about 'what to do'"); *State v. King*, 2013-NMSC-014, 300 P.3d 732, 733 (N.M. 2013)

("King clearly invoked his right to remain silent" (*id.* at 735) when he responded to the officer's inquiry "'Do you wish to answer any questions?'" by stating "'Not at the moment. Kind of intoxicated.'" (*id.* at 733): "There is nothing ambiguous about his statement, which made it clear that he did not want to speak with the police. The adverb 'not' is unequivocally a negative expression" (*id.* at 735); "Although King's statement suggested that he might want to talk at a later time, there was absolutely no respite from the interrogation in this case (*id.* at 736)"); § 24.11(c) *infra* (further discussing the standards governing the invocation of the right to counsel).

In determining whether the words used by the respondent constituted an assertion *of Miranda* rights, the courts may properly take into account the "age and experience of a juvenile." *Fare v. Michael C.,* 442 U.S. 707, 725 (1979). *See, e.g., In the Interest of Thompson,* 241 N.W.2d 2, 7 (Iowa 1976) (17-year-old with low I.Q. asserted the right to counsel when, in response to a police inquiry whether he had a lawyer, he named an attorney; the court observes that such a child "should not be expected to persistently, repeatedly and articulately invoke his constitutional rights before they will be recognized").

Newly arrested juveniles frequently ask to speak to their parents, and some juveniles who are already on probation ask to speak to their probation officer. In *Fare v. Michael C.,* the Court rejected the argument that a request to speak with one's probation officer can "constitute[ ] a *per se* request to remain silent," 442 U.S. at 723, or a request for counsel, *id.* at 722-23. However, the Court recognized that in a particular case, the "age and experience of a juvenile [may] indicate that his request for his probation officer or his parents is, in fact, an invocation of [the] . . . right to remain silent." *Id.* at 725. *Accord, United States ex rel. Riley v. Franzen,* 653 F.2d 1153 (7th Cir. 1981) (recognizing that, in an appropriate case, a juvenile's request for a parent could constitute either an invocation of the right to silence or the right to counsel); *In the Matter of H.V.*, 252 S.W.3d 319, 326-27 (Tex. 2008) (sixteen-year-old unambiguously asserted the right to counsel by asking to speak to his mother and then, in response to a police denial of that request, stating that he "'wanted his mother to ask for an attorney'"). *See also People v. Rivera,* 41 Cal. 3d 388, 710 P.2d 362, 221 Cal. Rptr. 562 (1985) (ruling on state constitutional grounds that a juvenile suspect's request to speak with a parent will be deemed a *per se* invocation of the privilege against self-incrimination and will bar further interrogation).

If the respondent's initial assertion is adequately clear, then it is not rendered ambiguous by subsequent statements indicating a willingness to speak with the police. *Smith v. Illinois,* 469 U.S. 91 (1984) (per curiam). *Accord*, *Jones v. Harrington*, 829 F.3d at 1132, 1136, 1140. Such "subsequent statements are relevant only to the question whether the accused [later] *waived* the right he had invoked. Invocation and waiver are entirely distinct inquiries, and the two must not be blurred." *Smith v. Illinois*, 469 U.S. at 98.

The courts will honor a partial assertion of *Miranda* rights and give effect to the limitations established by the suspect if those limitations are clearly and unequivocally stated. Thus, in *Connecticut v. Barrett,* 479 U.S. 523 (1987), the Court recognized that the defendant's

statement "'he was willing to talk about [the incident] verbally but he did not want to put anything in writing until his attorney came,'" *id.* at 526, constituted an invocation of the right to counsel with respect to written, but not oral, statements. *See also United States v. Jumper*, 497 F.3d 699, 706 (7th Cir. 2007) (the defendant asserted his right to silence with respect to specific questions by saying, in answer to these questions, "'I don't want to answer that'.").

The respondent can invoke his or her right to silence or to counsel even after initially waiving such rights. "The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned." *Miranda v. Arizona,* 384 U.S. at 444-45.

§ 24.11(b) Assertion of the Right to Silence

"If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Miranda v. Arizona,* 384 U.S. at 473-74; *see Michigan v. Mosley*, 423 U.S. 96, 100-01 (1975) (dictum). However, this does not mean that an arrested individual who has once declined to answer questions "can never again be subjected to custodial interrogation by any police officer at any time or place on any subject." *Mosley*, 423 U.S. at 102.

In *Mosley*, the Court sustained the admission of a murder confession by a defendant, notwithstanding his earlier assertion of his right to silence, because the unusual facts of the case showed that his assertion had been "'scrupulously honored'" (*id.* at 104) by the police. The defendant had been arrested for several robberies and, upon administration of full *Miranda* warnings, told the arresting officer that he did not want to say "'[a]nything about the robberies.'" *Id.* at 105 n.11. The arresting officer respected that assertion of the right to silence by "promptly ceas[ing] the interrogation," *id.* at 97, and the defendant was never again questioned about the robberies for which he had been arrested. *See id.* at 105-06. "After an interval of more than two hours," *id.* at 104, the defendant was taken from his cell to "another location" in the building, *id.,* "by another police officer," *id.,* who was not shown to have had any connection with the earlier questioning, *see id.* at 105. This second police officer gave the defendant another complete set of *Miranda* warnings and then questioned the defendant "about an unrelated holdup murder." *Id.* at 104. In response to the second administration of *Miranda* warnings, the defendant signed a *Miranda* "notification form" and then proceeded to answer questions, initially denying the murder and then, within 15 minutes, admitting guilt. *See id.* at 98. During all of these proceedings the defendant never asked to see a lawyer. *Id.* at 101 n.7. The Supreme Court held that "the admissibility of statements obtained after [a] . . . person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored,'" *id.* at 104, and that, on this record, Mosley's "'right to cut off questioning' was fully respected," *id.* "This is not a case . . . where the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and

make him change his mind." *Id.* at 105-06.

Under *Mosley*, the courts will find that the police failed to "scrupulously honor" a suspect's invocation of the right to remain silent and will suppress any ensuing statement if the police (a) do not cease questioning as soon as the suspect invokes his or her right to silence, *see, e.g., Anderson v. Smith,* 751 F.2d 96, 102-03 (2d Cir. 1984); *State v. Aguirre*, 301 Kan. 950, 349 P.3d 1245 (2015), or (b) engage in "repeated rounds of questioning to undermine the will of the person being questioned," *Michigan v. Mosley*, 423 U.S. at 102; *see, e.g., United States v. Hernandez,* 574 F.2d 1362, 1368-69 (5th Cir. 1978); *United States v. Rambo*, 365 F.3d 906, 910-911 (10th Cir. 2004) ("If Rambo invoked his right to remain silent and Moran failed to 'scrupulously honor[ ]' that right, Rambo's confession must be suppressed. . . . The government contends that it was Rambo who reinitiated communication after invoking his right to remain silent and, therefore, Moran was not required to terminate the interview. That argument ignores Moran's active role in continuing the interview after Rambo invoked his rights. When Rambo stated that he did not want to discuss the robberies, Moran made no move to end the encounter. Instead he acknowledged Rambo's request, but told Rambo that he would be charged with two aggravated robberies and that other agencies would want to speak with Rambo. Those comments reflect both further pressure on Rambo to discuss the crimes and a suggestion that despite Rambo's present request to terminate discussion of the topic, he would be questioned further."); *People v. Jackson*, 103 A.D.3d 814, 816-17, 959 N.Y.S.2d 540, 543 (N.Y. App. Div., 2d Dep't 2013) (an "arresting officer failed to 'scrupulously honor' the defendant's [assertion of the right to silence] . . . when he deliberately engaged the defendant in conversation . . . [and] told the defendant that, unless someone confessed to ownership of the gun, all three occupants of the car would be charged with its possession, . . . [thereby] engaging in the functional equivalent of interrogation in that he knew or should have known that his comments were reasonably likely to elicit an incriminating response").

When litigating cases in which interrogation was resumed after a respondent's assertion of the right to silence, counsel may be advised to seek a state constitutional ruling forbidding such a resumption even under circumstances in which *Mosley* would allow it. *See, e.g., State v. O'Neill,* 193 N.J. 148, 176-78, 936 A.2d 438, 454-55 (2007); and see generally § 7.09 *supra.*

§ 24.11(c) Assertion of the Right to Counsel

"If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." *Miranda v. Arizona,* 384 U.S. at 474; *Lujan v. Garcia*, 734 F.3d 917, 932 (9th Cir. 2013). A request for an attorney triggers "additional safeguards" beyond those recognized in *Mosley* as attending an invocation of the right to remain silent. *Edwards v. Arizona,* 451 U.S. 477, 484 (1981); *Radovsky v. State*, 296 Md. 386, 464 A.2d 239 (1983).

> "[W]e . . . hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been

> advised of his rights. We further hold that an accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." (*Id.* at 484-85.)

See also Minnick v. Mississippi, 498 U.S. 146, 150 (1990); *Shea v. Louisiana,* 470 U.S. 51, 54-55 (1985); *Commonwealth v. Gonzalez*, 487 Mass. 661, 670, 169 N.E.3d 485, 494 (2021) ("We conclude that there was no error in the judge's findings . . . that the Commonwealth failed to meet its burden to show, beyond a reasonable doubt, that the defendant had reinitiated conversation with police. Accordingly, the order allowing suppression of the defendant's statements after he invoked his right to counsel must be affirmed."); *Moore v. Berghuis*, 700 F.3d 882 (6th Cir. 2012) (a murder suspect turned himself in and asked the police to call the number on his attorney's business card; an officer called and got the attorney's answering service; the officer told the suspect that he had reached only the attorney's answering device, not the attorney. (*Id*. at 884.) The officer then "'asked [Moore] did he want to talk to [the officer] and [Moore] said yes he did.' The officer . . . then had Moore sign a form waiving his constitutional rights, and 'asked [Moore] could he tell [the officer] about . . . the fatal shooting . . . .'" (*Id*. at 888.) "[T]o demonstrate that Moore waived his asserted right to counsel and was therefore 'not subject to further interrogation by the authorities until counsel [was] made available to him,' the government must have shown that Moore 'himself initiate[d] further communication, exchanges, or conversations with the police.' *Edwards*, . . . Though the Supreme Court in [*Berghuis v.*] *Thompkins*, [560 U.S. 370 (2010), summarized in § 24.10] recently addressed the issue of waiver of *Miranda* rights, we do not read *Thompkins*'s waiver analysis to alter the *Edwards* rule regarding waiver of the right to counsel. In *Thompkins*, the Court did not alter, or even speak to, the *Edwards* analysis regarding the waiver of the right to counsel; instead, *Thompkins* clarifies the waiver analysis for the right to remain silent." 700 F.3d at 888.); *Davis v. United States*, 512 U.S. 452, 458 (1994) (dictum); *McNeil v. Wisconsin*, 501 U.S. 171, 176-77 (1991) (dictum); *Montejo v. Louisiana*, 556 U.S. 778, 794-95 (2009) (dictum). *But see Maryland v. Shatzer*, 559 U.S. 98, 109, 110 (2010) (the *Edwards* rule does not bar "reinterrogat[ion] after a break in custody that is of sufficient duration to dissipate . . . [the] coercive effects" of the initial period of "*Miranda* custody"; this will ordinarily be the case when the "break in custody" has been at least "14 days," a period of time that "provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody."); *United States v. Rought*, 11 F.4th 178, 182-83 (3d Cir. 2021) ("In *Connecticut v. Barrett*, 479 U.S. 523 (1987) [summarized in § 26.9.1 third paragraph *supra*], the Supreme Court held that invocations of the right to counsel during custodial interrogations can be 'limited.' . . . After a limited invocation, interrogation can continue on topics not covered by the invocation. If the suspect, without prompting from law enforcement, then voluntarily reinitiates discussion of a covered topic and waives her previously invoked rights, it 'is quite consistent with the Fifth Amendment' for the suspect's statements about a covered topic to be admissible at trial.").

"Edwards set forth a 'bright-line rule' that all questioning must cease after an accused requests counsel." *Smith v. Illinois,* 469 U.S. 91, 98 (1984) (per curiam). "*Edwards* is 'designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights.' . . . The rule ensures that any statement made in subsequent interrogation is not the result of coercive pressures." *Minnick v. Mississippi*, 498 U.S. at 150-51. *See also Smith v. Illinois*, 469 U.S. at 97-99 (rejecting arguments that a request for counsel made partway through the administration of *Miranda* warnings was insufficient to trigger the *Edwards* rule and that equivocations in the suspect's responses to the remaining warnings could be considered as rendering his initial request for counsel ambiguous). "The *Edwards* rule . . . is *not* offense specific: Once a suspect invokes the *Miranda* right to counsel for interrogation regarding one offense, he may not be reapproached regarding *any* offense unless counsel is present." *McNeil v. Wisconsin*, 501 U.S. at 177 (dictum). *Accord*, *Arizona v. Roberson*, 486 U.S. 675, 682 (1988); *Vega v. Tekoh*, 142 S. Ct. 2095, 2104 (2022) (dictum). "Furthermore, it is well settled that, where a defendant directs a request for counsel to one police officer, the knowledge of that request is imputed to all other officers. . . . 'To hold otherwise could make it possible to nullify an accused's request for the assistance of counsel by the expedient of transferring his custody for questioning to an officer who would be unaware of the request for an attorney.'" *People v. Williams*, 2021 IL App (3d) 180282, 185 N.E.3d 848, 852, 452 Ill. Dec. 443, 447 (2021).

"Invocation of the *Miranda* right to counsel 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.' . . . [I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, . . . [the Supreme Court's] precedents do not require the cessation of questioning. . . . Although a suspect need not 'speak with the discrimination of an Oxford don,' . . . he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Davis v. United States*, 512 U.S. at 459. S*ee also id*. at 462 (upholding determination of "courts below . . . that . . . [Davis'] remark to the . . . agents – 'Maybe I should talk to a lawyer' – was not a request for counsel" and that the agents could continue questioning "to clarify whether [Davis] . . . in fact wanted a lawyer"); *Connecticut v. Barrett*, 479 U.S. 523, 529 (1987) (the *Edwards* rule was not triggered by a defendant's announcement that he would not give the police a written statement unless his lawyer was present but had no problem in talking about the incident: "Barrett's limited requests for counsel . . . were accompanied by affirmative announcements of his willingness to speak with the authorities."); *People v. Nelson*, 53 Cal. 4th 367, 381, 266 P.3d 1008, 1019, 135 Cal. Rptr. 3d 312, 325 (2012) ("Where, as here, a juvenile has made a valid waiver of his *Miranda* rights and has agreed to questioning, a postwaiver request for a parent is insufficient to halt questioning unless the circumstances are such that a reasonable officer would understand that the juvenile is *actually* invoking – as opposed to *might be* invoking – the right to counsel or silence."). *Compare Sessoms v. Grounds*, 776 F.3d 615, 617-18, 630-31 (9th Cir. 2015) (en banc) (the defendant's question to the interrogating officers "'There wouldn't be any possible way that I could have a – a lawyer present while we do this?'" combined with his follow-up statement "'that's what my dad asked me to ask

you guys . . . uh, give me a lawyer,'" constituted "an unambiguous request for counsel, which should have cut off any further questioning"); *United States v. Hunter*, 708 F.3d 938, 948 (7th Cir. 2013) ("Given the decisive language and the prior context of Hunter's request to Detective Karzin, we find that Hunter's request, 'Can you call my attorney?' was an unambiguous and unequivocal request for counsel"); *United States v. Wysinger*, 683 F.3d 784, 795-96 (7th Cir. 2012) (defendant unequivocally invoked his right to counsel in an exchange with the interrogating officer that began with the defendant's asking "I mean, do you think I should have a lawyer? At this point?," to which the officer responded "If you want an attorney, by all means, get one," and the defendant replied "I mean, but can I call one now? That's what I'm saying."); *Wood v. Ercole*, 644 F.3d 83, 92 (2d Cir. 2011) (the defendant "unambiguously asserted his right to counsel" by saying 'I think I should get a lawyer'"); *Yenawine v. Motley*, 402 Fed. Appx. 997, 998 (6th Cir. 2010) (defendant's request for counsel was sufficient to trigger *Edwards*'s protection and to require the exclusion of his inculpatory statement where "(1) the . . . [defendant] was under police interrogation when he stated, '[M]aybe I should talk to an attorney'; (2) the . . . [defendant] named his attorney and gave the police officer his attorney's business card; and (3) shortly thereafter, the police continued questioning the . . . [defendant] and he gave a statement"); *People v. Henderson*, 9 Cal. 5th 1013, 1020, 1023-24, 470 P.3d 71, 77, 79, 266 Cal. Rptr. 3d 365, 372, 374 (2020) (the defendant's statement, "I . . . uh, want to, speak to an attorney first, because I, I take responsibility for me, but there's other people that . . . ." was unequivocal and triggered *Edwards*' protection: the prosecution's argument that "a reasonable officer could understand defendant's reference to taking responsibility as an indication that he was willing to continue speaking to the officers about his own liability notwithstanding his request for counsel" is untenable: "Defendant clearly said he wanted to talk to a lawyer. Although not required, he went on to explain why he wanted counsel. Further, his explanation did not create an ambiguity. There is nothing inconsistent or ambiguous about wanting to speak to an attorney before taking responsibility, and defendant made clear that he wanted to speak to an attorney 'first.' One can take responsibility in ways other than giving an uncounseled confession to the police."); *State v. Negrete*, 630 S.W.3d 460 (Tex. App. 2021) (finding that the defendant made "an unambiguous and unequivocal invocation of his right to counsel" (*id*. at 468) and rejecting the State's arguments that the defendant's "statement, 'I don't want to snitch without a lawyer,' was not an unambiguous invocation of his Fifth Amendment right to counsel because the word 'snitch' is informal or slang and 'it is not exactly clear when a criminal defendant snitches,' thus, making the term 'snitch' itself ambiguous . . . [and f]urther, . . . [that the defendant's] statement only indicated that his 'desire for an attorney [was] condition[ed] on when he snitche[d],' and it was not a blanket request for an attorney" (*id*. at 466)); *People v. Firestine*, 2019 IL App (5th) 180264, 132 N.E.3d 886, 889, 892-93, 433 Ill. Dec. 636, 639, 642-43 (2019) (asked whether he shot his brother in the foot, the defendant responded, 'I don't want to answer that question without my lawyer'; interrogation continued and the defendant made incriminating statements which trial judge suppressed under *Miranda*; on appeal from the suppression order, the State invokes *Connecticut v. Barrett*, *supra*, to argue that, "by using the phrase 'that question,' the defendant unambiguously made only a limited invocation of his right to counsel", but the Appellate Court distinguishes *Barrett* and affirms the suppression order: "Here, unlike in *Barrett*, the defendant's invocation of his right to counsel was not accompanied

by an affirmative statement that there were any topics he was willing to discuss. . . . ¶ The defendant refused to answer the first question he was asked about the incident in which his brothers were shot. Under these circumstances, we believe it should have been clear to a reasonable police officer that he did not wish to discuss that incident further without an attorney."); *N.J.O. v. State*, 292 So.3d 491, 495-96 (Fla. App. 2020) (a juvenile respondent's statement, made after he was read the *Miranda* warnings and was given a *Miranda* waiver form to sign, "I don't know what all these legal questions mean, so I want to, like have somebody with me. I'm not trying to be difficult or anything. Like, I just don't know, because you guys word stuff funny sometimes" was sufficient to invoke his right to counsel and require interrogation to stop); *Ballard v. State*, 420 Md. 480, 491, 24 A.3d 96, 102 (2011) (the defendant "unambiguous[ly] and unequivocal[ly] assert[ed] . . . the right to counsel" by stating: "'You mind if I not say no more and just talk to an attorney about this'"); *People v. Slocum*, 133 A.D.3d 972, 975-76, 20 N.Y.S.3d 440, 444 (N.Y. App. Div., 3d Dep't 2015) (the defendant unequivocally invoked his right to counsel by responding to the officer's question "'if he felt that he should have an attorney or if he wanted to be represented by the Public Defender's office'" by saying "'Yeah, probably.'"); *State v. Rose*, 604 A.2d 24 (Me. 1992) (the defendant was indicted in Maine while incarcerated in an Arizona prison; he transmitted to Maine authorities a written request for trial under the Interstate Agreement on Detainers (see § 28.5.3 *infra*), circling the statement "I request the court to appoint counsel" on the I.A.D. form; a Maine police officer sent to bring the defendant to Maine for trial told the defendant that, once aboard the plane, the officer would advise the defendant of his *Miranda* rights and then, if the defendant wished to talk with the officer, he could; the defendant replied that he might want to talk with a lawyer but would think about it; after being *Mirandized* on the plane, he waived his rights and made inculpatory statements which were admitted against him at trial; the Maine Supreme Court holds that his submission of the written I.A.D. form requesting the appointment of counsel constituted an effective invocation of this Sixth Amendment right and required the suppression of the statements made on the plane; note that although the court's decision was grounded on the Sixth Amendment rule of *Michigan v. Jackson*, which has since been overruled (see § 26.10.3 *infra*), its finding that the defendant effectively invoked his right to counsel should be equally persuasive under *Edwards v. Arizona*). *Cf. State v. Culbreath*, 340 Conn. 167, 263 A.3d 350 (2021) (in *State v. Purcell*, 331 Conn. 318, 321, 203 A.3d 542, 544-45 (2019) "we held . . . that article first, § 8, of the Connecticut constitution provides greater protection for a criminal defendant's *Miranda* rights than the federal constitution. . . . 'In *Davis v. United States*, 512 U.S. 452, 459-60 (1994) . . . , the United States Supreme Court determined that, after a defendant has been informed of his *Miranda* rights, the police officers conducting a custodial interrogation have no obligation to stop and clarify an ambiguous invocation by the defendant of his right to have counsel present. Instead, they must cease interrogation only upon an objectively unambiguous, unequivocal invocation of that right. . . .' . . . In *Purcell*, we held that *Davis*' clear and unequivocal standard fails to satisfy the state constitution and that, 'to adequately safeguard the right against compelled self-incrimination under article first, § 8, of the Connecticut constitution, police officers are required to clarify an ambiguous request for counsel before they can continue the interrogation.' . . . Thus, 'our state constitution requires that, if a suspect makes an equivocal statement that arguably can be construed as a request for counsel, interrogation

must cease except for narrow questions designed to clarify the earlier statement and the suspect's desire for counsel.' 340 Conn. at 183, 263 A.3d at 361. Here "defendant . . . invoked his right to counsel approximately three hours . . . [into] the interview, when he asked, '[i]s there anybody I can talk to . . . [l]ike an attorney or something?' The defendant's question about the availability of 'an attorney' or someone else to 'talk to' is precisely the type of conditional and equivocal inquiry that reasonably can be construed as a request for counsel. . . . Accordingly, . . . [Detective Rykowski] had an obligation . . . to stop the interview and to clarify whether the defendant desired the presence of counsel or, alternatively, to terminate the interview altogether. ¶ The state contends that Rykowski complied with *Purcell*'s 'stop and clarify' rule by asking clarifying questions, such as '[i]s that what you want,' and stopping the interview for approximately twenty minutes. We disagree for two reasons. First, although some of Rykowski's responses sought clarification of the defendant's intent to invoke his right to counsel, other responses plainly 'attempted to convince the defendant that it was against his interests not to continue the interview.' . . . Rykowski informed the defendant that, if he had an attorney present, the attorney 'probably won't let me talk to you,' and 'the cards [will] fall the way they will' without the defendant telling the 'story' of 'the why or the who or the what reason.' . . . Furthermore, Rykowski's suggestion that an attorney's financial interest would induce the attorney to advise the defendant, contrary to the defendant's interests, to stop answering questions was entirely inappropriate. We conclude that these statements exceeded the 'limited inquiry permissible after an equivocal request for legal counsel. . . .") 340 Conn. at 188-90, 263 A.3d at 364-65.); *State v. Gonzalez*, 249 N.J. 612, 619-20, 268 A.3d 329, 333 (2022) ("In the middle of the [police] interview, defendant asked, 'But now what do I do about an attorney and everything?' Rather than seek clarification, the interviewing detective merely advised defendant, 'That is your decision. I can't give you an opinion about anything.' . . . ¶ . . . We conclude that defendant's question about the attorney was an ambiguous invocation of her right to counsel and that, under settled New Jersey law, *see, e.g.*, . . . [*State v. Reed*, 133 N.J. 237, 253, 627 A.2d 630 (1993)], the detective was required to cease questioning and clarify whether defendant was requesting counsel during the interview.").

"[I]f a suspect requests counsel [with the degree of clarity described in the preceding paragraph] at any time during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation." *Davis v. United States*, 512 U.S. at 458 (dictum). With the sole exception of the situation in which the suspect has "reinitiate[d] conversation," the invocation of the *Miranda* right to counsel "bar[s] police-initiated interrogation unless the accused has counsel with him at the time of questioning." *Minnick v. Mississippi*, 498 U.S. at 153. *See also id*. ("when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney"); *Martinez v. Cate*, 903 F.3d 982 (9th Cir. 2018) (after Martinez invoked his right to counsel and "[a]fter Detective Navarro told Martinez that he was not sure if his lawyer was available, Detective Navarro stated, '[a]ll I wanted was your side of the story. That's it. OK. So, I'm pretty much done with you then. Um, I guess I don't know another option but to go ahead and book you. OK. Because . . . .' Martinez cut in, '[w]hat am I being booked under?' to which Navarro replied '[y]our [sic] going to be booked for murder

because I only got one side of the story. OK.'" (*Id*. at 994.) These statements "constituted the functional equivalent of express questioning" (*id*.) and required the suppression of Martinez's ensuing admissions as a violation of *Edwards*.).

In order to sustain the admissibility of an incriminating statement under the *Edwards* exception for a suspect's reinitiation of discussions with the police, the prosecution must show not only that the respondent took the initiative in resuming the interchange by broaching or specifically requesting further conversation with police officers or prosecuting authorities but also that, in the ensuing interchange, any responses made by the respondent to police interrogation (as defined in § 24.08(b) *supra*) manifested a valid waiver of the rights to remain silent and to have counsel (under the standards described in § 24.10 *supra*). *See Minnick v. Mississippi*, 498 U.S. at 156 ("*Edwards* does not foreclose" further police questioning if "the accused . . . initiated the conversation or discussions with the authorities" and if there was "a waiver of Fifth Amendment protections"); *Smith v. Illinois*, 469 U.S. at 94-95 ("if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked"); *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983) (plurality opinion) (dictum) ("even if a conversation . . . is initiated by the accused, where reinterrogation follows, the burden remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation"); *Rodriguez v. McDonald*, 872 F.3d 908, 924-25 (9th Cir. 2017) ("[B]y suggesting to Mr. Rodriguez that he would be imminently charged with murder but that cooperation would result in more lenient treatment from the court, the probation office, and from the police themselves, the officers 'effectively told [Mr. Rodriguez] he would be penalized if he exercised rights guaranteed to him under the Constitution of the United States.' . . . Because this pressure followed Mr. Rodriguez's invocation of his right to counsel, it constituted 'badgering' in direct violation of *Miranda* and *Edwards*. . . . Particularly in light of Mr. Rodriguez's special vulnerabilities to coercion [due to his young age of 14, Attention Deficit Hyperactivity Disorder, and "borderline" I.Q. of 77], . . . we hold that these coercive police tactics overbore Mr. Rodriguez's will, and that his waiver of his previously invoked right to counsel was not voluntary."); *Benjamin v. State*, 116 So.3d 115, 123 (Miss. 2013) (even if the police officer's post-assertion interactions with the 14-year-old suspect had been initiated by the suspect himself rather than improperly engineered by the officer, the resulting statement nonetheless would have to be suppressed because "we cannot say that the record demonstrates that Benjamin's waiver was made with full awareness of the nature of the right and the consequences of abandoning it": "Benjamin's youth rendered him particularly susceptible to parental pressure" and "[i]t is manifestly apparent that Benjamin conceded to pressure from his mother and to his desire to avoid a night in jail in deciding to waive his rights.").

The Supreme Court has not yet established definitive criteria for the kind of communication from a detained individual to his or her custodians that will satisfy the "initiation" prong of the *Edwards* rule. In *Oregon v. Bradshaw,* the Court split 4-to-4 on whether a defendant's question to officers "'Well, what is going to happen to me now?'" manifested a

"willingness and a desire for a generalized discussion about the investigation" or was "merely a necessary inquiry arising out of the incidents of the custodial relationship" that could not "be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation." 462 U.S. at 1045-46 (plurality opinion). The confession in *Bradshaw* was held admissible, but only through the concurring vote of Justice Powell, who adopted an analysis that was rejected by all eight other members of the Court. *Compare Martinez v. Cate*, 903 F.3d at 996-97 ("The government argues that Martinez initiated further conversation by asking, '[w]hat am I being booked under?'" . . . ¶ No fairminded jurist could interpret Martinez's statement as a re-initiation of the conversation. For one, the conversation between [Detective] Navarro and Martinez never stopped. Initiate means 'to begin' and no reasonable jurist could review the transcript of the interaction between Detective Navarro and conclude that Martinez *began* the exchange about being booked for murder. . . . ¶ Similarly, Martinez's question 'what did you want to talk to me about?' also came in the same conversation. In every other case where the Supreme Court has held that a defendant initiated the communication with the police, there was some break in questioning."); *Ferguson v. Commonwealth*, 52 Va. App. 324, 663 S.E.2d 505 (2008) (en banc) (a police investigator began a police-station interview of the defendant by requesting permission to search the defendant's car for the proceeds of a burglary; the defendant replied "Nah, I want a lawyer, you know what I'm saying?"; the investigator said, "Okay. But anyway . . .," read the defendant his *Miranda* rights, and continued: "I'll just tell you what the offense was that we were talking about uh, do you want to go ahead and talk with me?"; the defendant responded: "Uh, my moma [sic] said that if I get in any more trouble I need a lawyer"; the investigator said: "Okay, well, you don't have to talk to me. Let me talk to you now" and told the defendant that the police had a positive identification of the defendant's car leaving the burglary site, so "[i]f you want to go ahead and talk to me about this fine, if you don't, you know you're in trouble right now"; after a few additional questions, the investigator told defendant that he was going to let him "sit here for a few minutes" and that "this concludes the interview," turned off the tape recorder, and went out of the room, leaving the defendant and the police chief – who had some previous acquaintance with the defendant – sitting together in silence; after about 20 minutes, the defendant said either "I messed up" or "This is messed up"; the chief "testified that they then began to discuss . . . [defendant's] family and his job status, and . . . [the chief] told . . . [the defendant] that 'he needed to help his [sic] self'" (*id*. at 332, 663 S.E.2d at 509) ; the chief called the investigator back into the room and read the defendant his *Miranda* rights again before asking whether the defendant would feel more comfortable speaking with the chief than with the investigator; the defendant said he would and proceeded to make incriminating statements; the court holds that the defendant unequivocally invoked his right to counsel ("nothing in . . . [his] first statement indicated that he wanted a lawyer only if the police were going to search his vehicle" (*id*. at 337, 663 S.E.2d at 511), and that the defendant did not thereafter re-initiate conversation with the police: "Any consideration of whether a defendant 're-initiated' the dialogue with police necessarily presumes that police officers have stopped the interrogation upon a defendant's request for counsel. . . . Here . . ., despite . . .[defendant's] invocation of his right to counsel, the interview never ceased." *Id*. at 340, 663 S.E.2d at 512.); *Commonwealth v. Frein*, 651 Pa. 635, 670, 206 A.3d 1049, 1069-70 (2019) (dictum) (holding that the defendant's statements during a post-arrest videotaped

interrogation should have been suppressed but finding that their admission into evidence was harmless error: "We reject the Commonwealth's suggestion that Appellant's question to Corporal Clark and Trooper Mulvey as to whether the officers were fathers, and Appellant's subsequent observation that "[t]here was a father that didn't come home [apparently referring to the murder victim]," amounted to an initiation of further conversation with police as contemplated by *Edwards*. First, we note that, unlike *Bradshaw* . . . in the instant case, there was *no break* in questioning once Appellant stated that he did not want to talk about the crimes, or, indeed, at any time during the interview. Rather, Corporal Clark and Trooper Mulvey continued their questioning of Appellant for more than three hours, simply redirecting the subject of the conversation whenever Appellant indicated that he did not want to talk about his crimes or stated that he did not want to provide the police with additional information without first speaking with a lawyer. Without a stop or a break in conversation, we fail to see how there could be a subsequent *reinitiation* of conversation. Further, unlike the officer in *Bradshaw*, Corporal Clark and Trooper Mulvey did not remind Appellant that he had a right not to speak." (emphasis in original)).

In applying the "initiation" requirement, the lower courts have found waivers to be invalid when the police prompted or stimulated the suspect's initiation of communications by, for example, reciting incriminating evidence in detail, *see, e.g., Wainwright v. State,* 504 A.2d 1096 (Del. 1986); *Koza v. State,* 718 P.2d 671 (Nev. 1986), or informing the suspect that his or her accomplices have given confessions incriminating him or her, *see, e.g., State v. Quinn,* 64 Md. App. 668, 498 A.2d 676 (1985), or telling the suspect about further investigation that police officers are conducting to gather incriminating evidence, *State v. McKnight*, 131 Hawai'i 379, 393-34, 319 P.3d 298, 312-13 (2013) (officer told the defendant "that they planned to execute a search warrant on his residence"). *Cf. United States v. Rambo*, 365 F.3d 906, 910-11 (10th Cir. 2004), summarized in § 24.11(b), third paragraph, *supra.*

§ 24.12 APPLICABILITY OF *MIRANDA* REQUIREMENTS TO INTERROGATION BY SCHOOL OFFICIALS OR PRIVATE CITIZENS

Questioning by any "agent of the State" falls within *Miranda. See, e.g., Estelle v. Smith,* 451 U.S. 454, 466-67 (1981) ("That [the defendant] . . . was questioned by a psychiatrist designated by the trial court to conduct a neutral competency examination, rather than by a police officer, government informant, or prosecuting attorney, is immaterial," once the answers to the questioning are sought to be used against the defendant at trial); *Jackson v. Conway*, 763 F.3d 115, 138-40 (2d Cir. 2014) (*Miranda* requirements applied to a Child Protective Services caseworker's post-arrest questioning of the defendant "in connection with 'an independent civil investigation for possible family court action.'"; "While her investigation was civil in nature, if she discovered during the course of that investigation that [the defendant] sexually abused [the complainant], [the Child Protective Services worker] was required by New York law to report that finding to the 'appropriate local law enforcement' authorities."); *United States v. Fowler,* 476 F.2d 1091 (7th Cir. 1973) (interrogation of a juvenile by a postal inspector is controlled by *Miranda).* Questioning by a private citizen is also subject to the *Miranda* requirements if the

citizen acted at the behest of, or in conjunction with, the police. *See, e.g., People v. Jones,* 47 N.Y.2d 528, 533, 393 N.E.2d 443, 445, 419 N.Y.S.2d 447, 450 (1979) (the state cannot avoid the *Miranda* "restrictions by using a private individual as its agent . . . nor can it claim that only a private act is involved when government officers, subject to constitutional limitations, have participated in the act"); *see also Broom v. United States*, 118 A.3d 207, 212-16 (D.C. 2015) (the statements and behavior of the defendant's companion, which "'contributed materially to an atmosphere of coercion and custody'" for purposes of the *Miranda* rule, were "attributable to the police": "the officers had made a statement that would reasonably be understood as a highly coercive threat to take . . . the child [of the defendant's companion, Ms. Hagans] into state custody, which predictably led Ms. Hagans to cry and beg [the defendant] Mr. Broom to cooperate with the officers; and Mr. Broom would reasonably have viewed Ms. Hagans's implicit accusation as strengthening the evidence that the officers had against Mr. Broom"); *cf. In the Matter of Raymond W.,* 44 N.Y.2d 438, 439, 377 N.E.2d 471, 472, 406 N.Y.S.2d 27, 28 (1978) (coercive influence by a parent upon a child during interrogation would lose its private character if the parent acted "at the behest or on behalf of the prosecutor"). For discussion of this doctrine in other contexts, see § 24.06 *supra* (due process voluntariness); § 23.36 *supra* (Fourth Amendment); § 24.13(b) *infra* (Sixth Amendment).

While school officials are clearly "representatives of the State" (*cf. New Jersey v. T.L.O.,* 469 U.S. 325, 336 (1985)) for purposes *of Miranda,* the application of the *Miranda* rule to the school setting requires resolution of the separate threshold issue whether the school setting is sufficiently "custodial" (see § 24.08(a) *supra*) to trigger *Miranda* protections. In holding in *Minnesota v. Murphy,* 465 U.S. 420 (1984), that a probation interview in the probation officer's office was not "custodial" for *Miranda* purposes, the Court indicated the factors to be considered in assessing whether a nonpolice setting is custodial:

> "Custodial arrest is said to convey to the suspect a message that he has no choice but to submit to the officers' will and to confess. . . . It is unlikely that a probation interview, arranged by appointment at a mutually convenient time, would give rise to a similar impression. Moreover, custodial arrest thrusts an individual into "an unfamiliar atmosphere"or "an interrogation environment . . . created for no purpose other than to subjugate the individual to the will of his examiner." . . . Many of the psychological ploys discussed in *Miranda* capitalize on the suspect's unfamiliarity with the officers and the environment. Murphy's regular meetings with his probation officer should have served to familiarize him with her and her office and to insulate him from psychological intimidation that might overbear his desire to claim the privilege. Finally, the coercion inherent in custodial interrogation derives in large measure from an interrogator's insinuations that the interrogation will continue until a confession is obtained. . . . Since Murphy was not physically restrained and could have left the office, any compulsion he might have felt from the possibility that terminating the meeting would have led to revocation of probation was not comparable to the pressure on a suspect who is painfully aware that he literally cannot escape a persistent custodial interrogator." (465 U.S. at 433.)

When a similar analysis is applied to interrogation of students inside a principal's or assistant principal's office, it becomes evident that such a setting, unlike the probation interview considered in *Murphy,* is "custodial." A mandatory directive to leave class and report to the principal's office stands in sharp contrast to "a probation interview, arranged by appointment at a mutually convenient time." *Id.* The principal's office is hardly a familiar or supportive setting for a student, since students normally are called into the office for disciplinary reasons. Given children's susceptibility to intimidation (see §§ 24.05(a), 24.10 *supra*) and the principal's unique position of authority over the children in his or her school, there is a high probability of "psychological intimidation that might overbear [the child's] desire to claim the [Fifth Amendment] privilege." 465 U.S. at 433. Finally, children ordered to report to a principal's office do not have the luxury of simply leaving the office at any time they choose; rather, they are "painfully aware that [they] . . . literally cannot escape a persistent custodial interrogator." *Id.* Accordingly, the logic of *Murphy* calls for the application of *Miranda* protections to questioning in the school setting, at least when such questioning occurs in the intimidating environment of a principal's or assistant principal's office. *See generally* Paul Holland, *Schooling* Miranda*: Policing Interrogation in the Twenty-First Century Schoolhouse*, 52 LOY. L. REV. 39 (2006). *A fortiori*, "custody" is established when a student is summoned by a school administrator to his or her office and questioned there by a police officer. *See, e.g.*, *In the Interest of Doe*, 130 Idaho 811, 818-19, 948 P.2d 166, 174 (Idaho App. 1997); *N.C. v. Commonwealth*, 396 S.W.3d 852, 855, 865 (Ky. 2013); *In the Interest of C.H.*, 277 Neb. 565, 574-75, 763 N.W.2d 708, 715-16 (2009); *In re D.A.R.*, 73 S.W.3d 505, 512 (Tex. App. 2002); *State v. D.R.*, 84 Wash App. 832, 836-38, 930 P.2d 350, 353 (1997), *rev. denied*, 132 Wash. 2d 1015, 943 P.2d 662 (1997). *See also State v. Antonio T.*, 352 P.3d 1172, 1179-80 (N.M. 2015) (deputy sheriff's "mere presence during Principal Sarna's questioning of Antonio converted the school disciplinary interrogation into a criminal investigatory detention, and it therefore triggered the protections" of a state statute requiring that the child be "advised of his or her statutory right to remain silent" and the ramifications of waiving that right, even though "Deputy Charley did not escort Antonio to Principal Sarna's office, ask Antonio any questions himself, or tell Principal Sarna which questions to ask Antonio": "Deputy Charley's mere presence in Principal Sarna's office as Principal Sarna questioned Antonio subjected Antonio to an investigatory detention" and thereby triggered the statutory protections; "Deputy Charley's presence in the room not only created a coercive and adversarial environment, it also granted him access to evidence necessary to prosecute criminal delinquent behavior"); *In the Matter of J.J.*, 2022 WL 400846, at *7-*8 (Tex. App. 2022) (a 14-year-old who was questioned by the police at a Disciplinary Alternative Education Program school was in "custody" and therefore TEX. FAM. CODE § 51.095(d) required that the police bring him to a magistrate for administration of Miranda warnings before police interrogation: "this was not an average HISD school, but a Disciplinary Alternative Education Program school where Joshua had been recently sent after he was removed from his regular middle school. . . . The heightened disciplinary environment meant that Joshua was expected to cooperate with authority figures beyond what would be expected in a typical school. If he failed to comply, he might jeopardize his return to his usual middle school. Thus, the pressure to comply with requests from authority figures was heavier than the typical school environment. At the disciplinary alternative school, the interview took place not outside, in a classroom, or in a

school administrator's office, but in a closed-door room away from other people near the school police office. . . . Indeed, the setting the police chose limited Joshua's access to a trusted adult. Schools limit students' access to phones and other electronic devices that Joshua might have used to contact his mother in another environment that allowed access to those devices.").

Part D. Other Constitutional, Common-Law, and Statutory Bases for Suppressing Statements

§ 24.13 SUPPRESSION UNDER THE SIXTH AMENDMENT RIGHT TO COUNSEL: THE *MASSIAH* PRINCIPLE

In *Massiah v. United States*, 377 U.S. 201 (1964), the Court held that the Sixth Amendment right to counsel required the exclusion of an incriminating statement made by a defendant to an electronically bugged police undercover informer in the absence of the defendant's lawyer after indictment. As construed in subsequent cases, the *Massiah* rule reaches all statements '"deliberately elicited'" by any overt or covert government agent from an accused who neither has a lawyer present nor has waived the right to have a lawyer present at any time after the "initiation of adversary . . . proceedings." *United States v. Henry*, 447 U.S. 264, 273-74 n.11 (1980); *Maine v. Moulton,* 474 U.S. 159, 171-76 (1986); *Kuhlmann v. Wilson,* 477 U.S. 436, 456-59 (1986) (dictum); *Kansas v. Ventris*, 556 U.S. 586, 590 (2009) (dictum); *see also State v. Marshall*, 882 N.W.2d 68, 81-106 (Iowa 2016) (a thoroughgoing analysis of all elements of the *Massiah* doctrine, based on an extensive collection of caselaw); *Blakeney v. State*, 236 So.3d 11, 24-26 (Miss. 2017).

Unlike the *Miranda* doctrine (see § 24.08(a) *supra*), the *Massiah* principle is not limited to situations in which the accused is in "custody." *Rhode Island v. Innis,* 446 U.S. 291, 300 n.4 (1980) (dictum); *United States v. Henry,* 447 U.S. at 273-74 & n.11 (dictum); *Massiah,* 377 U.S. at 206. Massiah himself was at large on bond when he made his incriminating statement, and the circumstances of its making were in no way coercive. *See id*. at 202-03.

The central issues in applying *Massiah* are whether the respondent's statement was made at a "critical stage" of the proceedings (§ 24.13(a) *infra*), whether it was "deliberately elicited" by the authorities (§ 24.13(b) *infra*), and, in cases in which the prosecution claims that the respondent waived the right to counsel, whether that waiver was valid (§ 24.13(c) *infra*).

§ 24.13(a) "Critical Stages" of the Proceedings

The *Massiah* doctrine applies to "any interrogation occurring after the first formal charging proceeding, the point at which the Sixth Amendment right to counsel initially attaches." *Moran v. Burbine,* 475 U.S. 412, 428 (1986) (dictum); *see also id.* at 429-32. "[O]nce the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings," and "[i]nterrogation by the State is such a stage." *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009) (dictum). *See also Brewer v. Williams,* 430 U.S. 387, 398 (1977) ("a person is entitled to the help

of a lawyer at or after the time that judicial proceedings have been initiated against him – 'whether by way of formal charge, preliminary hearing, indictment, information or arraignment'"); *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, 194 (2008) ("the right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty"); *id.* at 198, 213; *compare Gerstein v. Pugh,* 420 U.S. 103, 122-25 (1975) (when the "state system[ ] of criminal procedure" (*id.* at 123) assigns only a "limited function and . . . nonadversary character" (*id.* at 122) to probable cause determinations, such determinations are not "critical stages" for purposes of the right to counsel); *Moss v. Weaver,* 525 F.2d 1258 (5th Cir. 1976) (applying *Gerstein* to juvenile court proceedings conducted under the same Florida procedures considered in *Gerstein).*

In most jurisdictions the "Initial Hearing" in a juvenile case involves arraignment on the Petition. See §§ 4.12-4.14 *supra.* Accordingly, the *Massiah* protections would commence at Initial Hearing. For discussion of variations in procedure at the Initial Hearing and their implications for the right to counsel, see § 4.03 *supra. See also, e.g.*, *State in the Interest of P.M.P.*, 200 N.J. 166, 177-78, 975 A.2d 441, 447-48 (2009) (state statutory right to counsel, which applies to "'every critical stage of the proceeding which, in the opinion of the court may result in the institutional commitment of the juvenile,'" is triggered when "the Prosecutor's Office initiates a juvenile complaint and obtains a judicially approved arrest warrant," and therefore "[t]he State's questioning of [a juvenile] defendant and the receipt of his statement in the absence of counsel" at this pre-arraignment stage requires suppression of the statement).

The Supreme Court has rejected the proposition that *Massiah* applies prior to the commencement of adversary proceedings on a particular charge if the suspect is already represented by an attorney in connection with other charges on which adversary proceedings have commenced. *See Texas v. Cobb*, 532 U.S. 162, 168 (2001) ("a defendant's statements regarding offenses for which he ha[s] not been charged . . . [are] admissible notwithstanding the [prior] attachment of his Sixth Amendment right to counsel on other charged offenses," even if those other charges are "'factually related'"; the attachment of the right to counsel on one charge will carry over to other offenses only when those offenses, whether or not formally charged, "would be considered the same offense [as the charged offense] under the . . . test [of *Blockburger v. United States*, 284 U.S. 299 (1932), discussed in § 17.08(b)(2) *supra*]"); *McNeil v. Wisconsin*, 501 U.S. 171, 175-76 (1991); *Moran v. Burbine*, 475 U.S. at 428-32; *see also Maine v. Moulton*, 474 U.S. at 180 n.16 (dictum); *Honeycutt v. Donat*, 535 Fed. Appx. 624, 629 (9th Cir. 2013). This is the rule in most jurisdictions. *See, e.g., State v. Sparklin,* 296 Or. 85, 672 P.2d 1182 (1983); *State v. Clawson,* 270 S.E.2d 659 (W. Va. 1980). *Cf. Rubalcado v. State*, 424 S.W.3d 560, 571-73 (Tex. Crim. App. 2014) (applying the rule of *Texas v. Cobb* but nonetheless concluding that the attachment of the right to counsel in a case in one county required the suppression of statements a police agent elicited from the defendant about uncharged conduct in another county because those statements "incriminate[d] [the] defendant with regard to [the] two separate offenses simultaneously" and the state ultimately used the statements against the defendant at trial in the case in which the right to counsel had already attached). Nevertheless, in

States in which the courts have not yet ruled on the protections afforded by the state constitutional right to counsel in this context, counsel should urge them to adopt a state constitutional rule that an accused has the right to have counsel present during interrogation once the accused is represented by an attorney, regardless of whether that representation is on the charges about which the suspect is being interrogated or on other charges. *See, e.g.*, *People v. Cohen*, 90 N.Y.2d 632, 638-39 & n.*, 687 N.E.2d 1313, 1316-17 & n.*, 665 N.Y.S.2d 30, 33-34 & n.* (1997) (the attachment of the state constitutional right to counsel on one charge will bar questioning on another, not-yet-charged offense if "the two criminal matters are so closely related transactionally, or in space or time, that questioning on the unrepresented matter would all but inevitably elicit incriminating responses regarding the matter in which there had been an entry of counsel" or if the "defendant is in custody on the charge upon which the right to counsel has indelibly attached," regardless of whether the new matter is "related or unrelated" to the charge for which the defendant is in custody); and see generally § 7.09 *supra*.

In *Escobedo v. Illinois,* 378 U.S. 478 (1964), the Court indicated that a suspect's retention of counsel before interrogation can activate the Sixth Amendment right to counsel during pre-arraignment interrogation, at least when the suspect explicitly requests the presence of counsel during interrogation. Later cases have, however, reinterpreted *Escobedo* as based on the Fifth Amendment privilege against self-incrimination rather than the Sixth Amendment, *see Moran v. Burbine,* 475 U.S. at 428-31; *United States v. Gouveia,* 467 U.S. 180, 188 n.5 (1984), and have rejected the argument that pre-arraignment retention of an attorney alters the general rule that Sixth Amendment protections commence at the first formal charging proceeding. *Moran v. Burbine,* 475 U.S. at 429-32. Counsel can, of course, urge the state courts to adopt a more protective rule on state constitutional grounds. *See, e.g., People v. Grice*, 100 N.Y.2d 318, 321, 794 N.E.2d 9, 10-11, 763 N.Y.S.2d 227, 229 (2003) ("A suspect's [state constitutional] right to counsel can . . . attach before an action is commenced when a person in custody requests to speak to an attorney or when an attorney who is retained to represent the suspect enters the matter under investigation"); *People v. Mitchell*, 2 N.Y.3d 272, 275-76, 810 N.E.2d 879, 881-82, 778 N.Y.S.2d 427, 429-30 (2004) ("the parent or legal guardian of a juvenile delinquent or juvenile offender [youths who are 13, 14, or 15 years old and are prosecuted in adult court] may invoke the [state constitutional] right to counsel on his or her child's behalf": "[a]lthough a third party cannot invoke counsel on behalf of an adult defendant," "[c]hildren of tender years lack an adult's knowledge of the probable cause of their acts or omissions and are least likely to understand the scope of their rights and how to protect their own interests . . . [and] may not appreciate the ramifications of their decisions or realize all the implications of the importance of counsel"); *People v. Houston,* 42 Cal. 3d 595, 724 P.2d 1166, 230 Cal. Rptr. 141 (1986) (abrogated by a subsequent initiative constitutional amendment) (rejecting *Moran v. Burbine* on state constitutional grounds and holding that the right to counsel protects a suspect's relationship with retained counsel even earlier than the first formal charging proceeding); *State v. Stoddard,* 206 Conn. 157, 537 A.2d 446 (1988) (rejecting *Moran v. Burbine* on state constitutional grounds and construing the due process clause of the state constitution to require that "a suspect . . . be informed promptly of timely efforts by counsel to render pertinent legal assistance [and that] . . . [a]rmed with that information, the suspect . . . be permitted to choose whether he wishes to speak

with counsel, in which event interrogation must cease," 206 Conn. at 166-67, 537 A.2d at 452); and see generally § 7.09 *supra.*

§ 24.13(b) Statements "Deliberately Elicited" by the Government

The *Massiah* protections apply to ordinary police interrogation (*see Brewer v. Williams,* 430 U.S. 387 (1977); *Montejo v. Louisiana*, 556 U.S. 778, 786-87 (2009) (dictum)), to court-ordered psychiatric examinations of the respondent whose products are used to incriminate him or her, *Estelle v. Smith,* 451 U.S. 454, 469-71 & n.14 (1981); *Powell v. Texas,* 492 U.S. 680 (1989) (per curiam), to conversations between the respondent and police spies or state-activated jailhouse snitches, *United States v. Henry*, 447 U.S. 264 (1980), and to similar "investigatory techniques that are the equivalent of police interrogation." *Kuhlmann v. Wilson,* 477 U.S. 436, 459 (1986) (dictum). *See also, e.g.*, *Commonwealth v. Hilton*, 443 Mass. 597, 603-04, 614-15, 823 N.E.2d 383, 391, 398-99 (2005) ("for purposes of a Sixth Amendment analysis, court officer Marrin ["whose job responsibilities included the transportation of detainees between the holding cells and the court room, maintaining order in the court room, and providing security for the judges and the public" and who conversed with the defendant as "Marrin was escorting the defendant back to the holding area"] must be viewed as an agent of law enforcement"; "[o]nce the Sixth Amendment right to counsel has attached, the *Massiah* line of cases . . . prohibits '*government efforts* to elicit information from the accused' . . . , including interrogation by '*the government* or someone acting on its behalf'"; references in the caselaw to "the Sixth Amendment as prohibiting questioning by 'the police' and their agents . . . do not mean that the Sixth Amendment's protections are implicated only by actions involving the 'police,' but merely operate to describe the most common fact pattern raised by such cases."); *State v. Oliveira*, 961 A.2d 299, 310-11 (R.I. 2008) (a child protective services investigator was an "agent of the state" for Sixth Amendment purposes, even though she "did not interview defendant at the direct behest of the police or prosecution," because the agency's "protocol required that she work cooperatively with law enforcement personnel," she had already "exchanged information" with the police about the case, and she acknowledged that "one of her purposes in interviewing defendant was to 'add to the evidence'"); *Rubalcado v. State*, 424 S.W.3d 560, 574-76 (Tex. Crim. App. 2014) (the complaining witness was a "government agent" for Sixth Amendment purposes because the "police encouraged [her] to call appellant for the purpose of eliciting a confession" and "supplied [her] with the recording equipment, and an officer was present during those calls").

When a police officer, informer, or agent "stimulate[s]" conversations with the respondent for the purpose of "elicit[ing] [incriminating] information," this "'indirect and surreptitious interrogatio[n]'" comes within *Massiah*'s strictures against deliberately eliciting incriminating statements. *United States v. Henry,* 447 U.S. at 273. Similarly, if the agent engages the respondent "in active conversation about [his or her] . . . upcoming trial [in a manner that is] . . . certain to elicit" incriminating statements, the agent's "mere[ ] participat[ion] in this conversation [will be deemed] . . . 'the functional equivalent of interrogation'" in violation of *Massiah. Maine v. Moulton,* 474 U.S. at 177 n.13; *Kuhlmann v. Wilson,* 477 U.S. at 459

(dictum). *See also, e.g.*, *Fellers v. United States*, 540 U.S. 519, 524-25 (2004) (the lower court "erred in holding that the absence of an 'interrogation' foreclosed petitioner's [Sixth Amendment] claim": "the officers in this case 'deliberately elicited' information from petitioner" by informing him, upon "arriving at petitioner's house, . . . that their purpose in coming was to discuss his involvement in the distribution of methamphetamine and his association with certain co-conspirators" as well as to arrest him in connection with his indictment on a methamphetamine conspiracy charge; the Sixth Amendment right to counsel applies in this situation even though the interchange between the petitioner and the arresting officers was no longer than 15 minutes and the petitioner apparently made his inculpatory admissions immediately upon being advised of the arresting officers' purpose.); *Ayers v. Hudson*, 623 F.3d 301, 311-12 (6th Cir. 2010) ("agency in the *Massiah* context [is not limited] to cases where the State gave the informant instructions to obtain evidence from a defendant"; "[t]o hold otherwise would allow the State to accomplish 'with a wink and a nod' what it cannot do overtly").

On the other hand, there is no *Massiah* violation if the police plant a stool pigeon in an accused's jail cell as a cellmate but the "police and their informant" take no additional "action, beyond merely listening, that [is] . . . designed deliberately to elicit incriminating remarks." *Kuhlmann v. Wilson,* 477 U.S. at 459. "[A] defendant does not make out a violation of [*Massiah*] . . . simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police." *Kuhlmann v. Wilson,* 477 U.S. at 459.

If a civilian informer deliberately elicits statements from an accused within the foregoing principles, the courts will find a *Massiah* violation even though the government agents who employed the informer instructed him or her to refrain from questioning the accused (*United States v. Henry,* 447 U.S. at 268, 271) or to refrain from inducing the suspect to make incriminating statements, *Maine v. Moulton,* 474 U.S. at 177 n.14. *Compare Kulhmann v. Wilson,* 477 U.S. at 460-61 (finding no *Massiah* violation found when the informant not only was instructed to refrain from questioning or eliciting incriminating statements but "followed those instructions").

§ 24.13(c) Waiver

"[T]he Sixth Amendment right to counsel may be waived by a defendant [or respondent], so long as relinquishment of the right is voluntary, knowing, and intelligent." *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009) (citing, *inter alia*, *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938)). *See also*, *e.g., Carnley v. Cochran*, 369 U.S. 506, 513-16 (1962); *Montejo*, 556 U.S. at 797-98 (remanding so that Montejo can "press any claim he might have that his Sixth Amendment waiver was not knowing and voluntary, *e.g.*, his argument that the waiver was invalid because it was based on misrepresentations by police as to whether he had been appointed a lawyer"). It is "incumbent upon the State to prove 'an intentional relinquishment or abandonment of a known right or privilege' . . . [and] courts [assessing "an alleged waiver of the right to counsel" must] indulge in every reasonable presumption against waiver." *Brewer v. Williams,* 430 U.S. 387, 404 (1977). *See also Satterwhite v. Texas,* 486 U.S. 249, 256 (1988).

Federal and state caselaw calling for particular scrutiny when assessing a juvenile's waiver of *Miranda* rights (see § 24.10 *supra*) should be equally applicable in this context. *See, e.g.*, *State v. Rivas*, 398 P.3d 299, 313 (N.M. 2017) ("The defining characteristics of youth recognized by those [Fifth Amendment] cases and the attendant risks, coupled with the various legislative directives of our Children's Code provisions, compel us to conclude that children are different and must be treated differently [from adults] for purposes of the Sixth Amendment counsel analysis. Accordingly, the juvenile Sixth Amendment right to counsel is absolute and indelible; once the right has attached, it may not be waived outside the presence of counsel.").

When the respondent's incriminating statement was made to any sort of a police spy, there can obviously be no waiver: The fact that the accused is unaware s/he is making a statement for government consumption suffices to exclude the possibility of a waiver as defined by *Johnson v. Zerbst,* 304 U.S. at 464: – that is, an "intentional relinquishment or abandonment of a known right or privilege." When the statement was made to a person whom the respondent knew to be a government agent, the test of a valid waiver of the right to counsel is basically similar in the Sixth Amendment context of *Massiah* and in the Fifth Amendment context of *Miranda*. *See Patterson v. Illinois,* 487 U.S. 285 (1988); *Montejo v. Louisiana*, 556 U.S. at 786, 794-95. The principles and precedents discussed in § 24.10 *supra* are generally controlling. *See, e.g., Brewer v. Williams,* 430 U.S. at 401-06. For example, a waiver made after administration of the ordinary *Miranda* warnings will "typically" be effective. *Montejo v. Louisiana*, 556 U.S. at 786, 794-95; *Patterson v. Illinois*, 487 U.S. at 300. However, because the Sixth Amendment imposes on "the prosecutor and the police . . . an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel," *Maine v. Moulton,* 474 U.S. at 171, some waivers that would be valid in the *Miranda* setting are not valid in the *Massiah* setting. *See Patterson v. Illinois,* 487 U.S. at 297 n.9 (dictum) ("we have permitted a *Miranda* waiver to stand where a suspect was not told that his lawyer was trying to reach him during questioning [citing *Moran v. Burbine,* 475 U.S. 412 (1986)]; in the Sixth Amendment context, this waiver would not be valid"); *cf. Powell v. Texas,* 492 U.S. 680 (1989) (per curiam) (holding, in the context of a court-ordered pretrial psychiatric examination, that a determination that "the defendant waived his Fifth Amendment privilege by raising a mental-status defense [at trial] . . . [does] not suffice to resolve the defendant's separate Sixth Amendment claim" (*id.* at 685), and that the lower court erred by "conflat[ing] . . . the Fifth and Sixth Amendment analyses" (*id.* at 683) and by treating the defendant's waiver of his Fifth Amendment right to remain silent as also waiving the Sixth Amendment right to counsel).

In *Michigan v. Jackson,* 475 U.S. 625 (1986), the Supreme Court established a now-defunct "prophylactic rule that once a criminal defendant invokes his Sixth Amendment right to counsel, a subsequent waiver of that right – even if voluntary, knowing, and intelligent under traditional standards – is presumed invalid if secured pursuant to police-initiated conversation." *Michigan v. Harvey*, 494 U.S. 344, 345-46 (1990). In *Montejo v. Louisiana*, the Court overruled *Jackson* and eliminated this "prophylactic rule," explaining that even "after arraignment, when Sixth Amendment rights have attached," a defendant is adequately protected by the "three layers of prophylaxis" that apply both before and after arraignment: "Under *Miranda*'s prophylactic

protection of the right against compelled self-incrimination, any suspect subject to custodial interrogation has the right to have a lawyer present if he so requests, and to be advised of that right. 384 U.S., at 474. Under *Edwards* [*v. Arizona*]'[s] prophylactic protection of the *Miranda* right, once such a defendant 'has invoked his right to have counsel present,' interrogation must stop. 451 U.S. [477], at 484 [(1981)]. And under *Minnick* [*v. Mississippi*]'s prophylactic protection of the *Edwards* right, no subsequent interrogation may take place until counsel is present, 'whether or not the accused has consulted with his attorney.' 498 U.S. [146], at 153 [(1990)]." *Montejo*, 556 U.S. at 794-95. State courts are free to retain the *Jackson* rule as a matter of state constitutional law. *See, e.g.*, *State v. Bevel*, 231 W. Va. 346, 348, 745 S.E.2d 237, 239 (2013) ("we decline to adopt *Montejo* and find that the right to counsel that has been recognized in this state for more than a quarter century continues to be guaranteed by article III, section 14 of the West Virginia Constitution"); and see generally § 7.09 *supra.*

§ 24.14 CONSTITUTIONAL AND STATUTORY STANDARDS GOVERNING INVOLVEMENT OF A RESPONDENT'S PARENT OR GUARDIAN DURING POLICE INTERROGATION

§ 24.14(a) Constitutional Standards

In *Gallegos v. Colorado,* 370 U.S. 49 (1962), the Court indicated that the assessment of the voluntariness of a juvenile's statement should take into account the presence or absence of the child's parent or other concerned adults during police interrogation. Invalidating the confession of a fourteen-year-old as involuntary under the Due Process Clause, the Court explained:

> "A lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not. Adult advice would have put him on a less unequal footing with his interrogators. Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had." (*Id. at* 54.)

In *In re Gault,* 387 U.S. 1 (1967), the Court again recognized the important role of parents in safeguarding their children's rights during interrogation, indicating that "the presence and competence of parents" are relevant considerations in gauging the validity of a child's waiver of the right to self-incrimination. *Id.* at 55. The Court cited approvingly to requirements of parental presence in a State statute, state court caselaw, and the Standards for Juvenile and Family Courts. *See id.* at 48-49. However, the *Gault* decision itself was concerned solely with "admissions in court" (*id.* at 56) and did not resolve "the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process." *Id.* at 13.

Subsequently, in *Fare v. Michael C.*, 442 U.S. 707 (1979), the Court failed to include parental presence in its roster of factors relating to the voluntariness of a juvenile's waiver, *see id.* at 725, although this has little significance because the Court was not purporting to set forth

an exclusive roster. *See id.* at 725 (factors specifically mentioned are "include[d]" among the relevant factors). *See, e.g., Quick v. State,* 599 P.2d 712, 719 (Alaska 1979) (treating the Court's roster in *Michael C.* as self-evidently non-exclusive, and adding to the roster the consideration of "whether there has been any prior opportunity to consult with a parent, guardian, or attorney"). The Court in *Michael C.* found the juvenile respondent's waiver voluntary notwithstanding the absence of his parents during his interrogation. However, this holding also is of limited significance on the issue of parental presence because the Court did not have before it any claims that the absence of Michael C.'s parents was relevant to the constitutional analysis. *See id.* at 712-16. Moreover, even if the respondent in *Michael C.* had claimed that the absence of his parents impaired the voluntariness of his waiver, the Court could have found on the facts of that case that Michael C.'s advanced age, intelligence, and experience with the courts made him peculiarly unlikely to need parental support under a totality-of-the-circumstances analysis. *See id.* at 726 (emphasizing that the respondent "was a 16-½-year-old juvenile with considerable experience with the police[,] . . . [who] had a record of several arrests[,] . . . had served time in a youth camp, and . . . had been on probation for several years" and that "[t]here is no indication that he was of insufficient intelligence to understand the rights he was waiving, or what the consequences of that waiver would be"); *cf. id.* at 725-26 (explaining that different standards of waiver might apply in cases of "young persons . . . with limited experience and education and with immature judgment"); *see, e.g., Quick v. State,* 599 P.2d at 719-20 (having construed *Fare v. Michael C.* as permitting consideration of parental presence during interrogation as a factor in the totality of the circumstances, the Alaska Supreme Court follows *Michael C.*'s reasoning in upholding the admissibility of a confession of a 17-year-old with extensive prior court experience, notwithstanding the absence of his parents during the interrogation).

Several state court decisions, both before and after the Supreme Court's decision in *Fare v. Michael C.,* have concluded that parental presence is a relevant consideration in the totality of the circumstances (see § 24.10 *supra*) bearing upon the question whether a juvenile's waiver of *Miranda* rights was sufficiently voluntary, knowing, and intelligent. *E.g., In re Andre M.*, 207 Ariz. 482, 485-86, 88 P.3d 552, 555-56 (2004) ("'presence of the child's parents'" is always a factor to be considered in a totality-of-the-circumstances assessment of the validity of a juvenile's waiver of *Miranda* rights but it is a "particularly significant factor" in any case in which "law enforcement personnel . . . frustrates a parent's attempt to confer with his or her child"; and in the absence of a state showing of "good cause for barring a parent from a juvenile's interrogation, a strong inference arises that the state excluded the parent in order to maintain a coercive atmosphere or to discourage the juvenile from fully understanding and exercising his constitutional rights"); *In the Interest of Thompson,* 241 N.W.2d 2 (Iowa 1976); *State v. Fernandez*, 712 So.2d 485, 489 & n.5 (La. 1998); *McIntyre v. State,* 309 Md. 607, 526 A.2d 30 (1987); *State v. Hogan,* 297 Minn. 430, 440, 212 N.W.2d 664, 671 (1973); *State in the Interest of A.A.*, 240 N.J. 341, 358-59, 222 A.3d 681, 691-92 (2020) ("The police should advise juveniles in custody of their *Miranda* rights – in the presence of a parent or legal guardian – before the police question, or a parent speaks with, the juvenile. Officers should then give parents or guardians a meaningful opportunity to consult with the juvenile in private about those rights. . That approach would enable parents to help children understand their rights and decide whether

to waive them . . If law enforcement officers do not allow a parent and juvenile to consult in private, absent a compelling reason, that fact should weigh heavily in the totality of the circumstances to determine whether the juvenile's waiver and statements were voluntary."); *Commonwealth v. Williams,* 504 Pa. 511, 475 A.2d 1283 (1984); *Theriault v. State,* 66 Wis. 2d 33, 223 N.W.2d 850 (1974).

State courts have also concluded that parental presence is a significant factor in the totality-of-the-circumstances test commonly used to assess the voluntariness of a juvenile's statement under the Due Process Clause (see §§ 24.03-24.06 *supra*). *E.g., State in the Interest of S.H.,* 61 N.J. 108, 293 A.2d 181 (1972) (finding juvenile's statement involuntary, in part because police denied access to a parent); *Commonwealth v. Williams,* 504 Pa. at 521, 475 A.2d at 1288 (holding that parental access is a relevant factor in both *Miranda* and due process voluntariness analyses); *In the Interest of Jerrell C.J.*, 2005 WI 105, 283 Wis. 2d 145, 161-62, 699 N.W.2d 110, 118 (Wis. 2005) (finding 14-year-old's statement to be involuntary because, *inter alia*, "the police specifically denied Jerrell's requests to call his parents": "we view the denial of Jerrell's requests to talk to his parents as strong evidence of coercive police conduct").

Some state courts have gone beyond the totality-of-the-circumstances tests and have established a prophylactic rule requiring that a parent (or guardian or other "interested adult") be present at the interrogation of a juvenile and that the juvenile be permitted to consult privately with that adult prior to answering questions. Such a rule has been established through a variety of constitutional rationales, relying either on federal constitutional provisions, *see, e.g., Lewis v. State,* 259 Ind. 431, 288 N.E.2d 138 (1972) (in light of juveniles' susceptibility to coercion and their inability to appreciate the full consequences of their actions, the court adopts the "interested adult" requirement as a prerequisite to either voluntary or knowing and intelligent *Miranda* waivers); *In the Matter of B.M.B.*, 264 Kan. 417, 432-33, 955 P.2d 1302, 1312-13 (1998) (relying on empirical data on juveniles' inability to comprehend *Miranda* warnings and also caselaw from other jurisdictions to "conclude that the totality of the circumstances [standard] is not sufficient to ensure that . . . ["a juvenile under 14 years of age"] makes an intelligent and knowing waiver of his rights," given "the immaturity and inexperience of a child under 14 years of age and the obvious disadvantage such a child has in confronting a custodial police interrogation," and "hold[ing], therefore, that a juvenile under 14 years of age must be given an opportunity to consult with his or her parent, guardian, or attorney as to whether he or she will waive his or her rights to an attorney and against self-incrimination"); *Commonwealth v. A Juvenile (No. 1),* 389 Mass. 128, 449 N.E.2d 654 (1983) (focusing solely on the "knowing and intelligent" prong of the *Miranda* waiver requirements, the court relies on empirical evidence of juveniles' inability to comprehend *Miranda* rights to establish the "interested adult" rule as an indispensable requirement for knowing and intelligent waiver by a child under 14, and as important, but not decisive, in assessing whether a waiver by a child 14 or over was knowing and intelligent); *accord, Commonwealth v. Alfonso A.*, 438 Mass. 372, 780 N.E.2d 1244 (2003) (holding, in the case of a child over 14, that the "interested adult" rule precludes a waiver unless the adult is physically present or otherwise actually engaged in the interaction between the police and the juvenile – as, for example, by "participating through speaker telephone," 438 Mass. at 382, 780

N.E.2d at 1252 – and unless the adult is informed by the police of the juvenile's rights; recognizing that "'a juvenile in trouble may be embarrassed to ask for an adult's help,'" and that, unless the interested adult is actually engaged in the interaction "[t]here is too great a risk that a juvenile will engage in a show of bravado rather than admit to any desire or need to consult with an adult," 438 Mass. at 383, 780 N.E.2d at 1253); *State v. Presha*, 163 N.J. 304, 315-16, 748 A.2d 1108, 1114-15 (2000) (reaffirming the court's prior ruling in *In re S.H.* that "[i]n respect of confessions by juveniles of any age, courts should consider the adult's absence as a highly significant factor among all other facts and circumstances . . . [and] should give that factor added weight when balancing it against all other factors," and, in light of the changes in the juvenile justice process that have resulted in an "increased focus on the apprehension and prosecution of youthful offenders" and a correspondingly enhanced "significance" of "the parent's role in an interrogation setting," especially "[w]hen younger offenders are in custody," adopting a """bright-line""" rule for cases involving "a juvenile under the age of fourteen" that "when a parent or legal guardian is absent from an interrogation involving a juvenile that young, any confession resulting from the interrogation should be deemed inadmissible as a matter of law, unless the adult was unwilling to be present or truly unavailable"), or state constitutional provisions, *see, e.g., In re E.T.C.,* 141 Vt. 375, 449 A.2d 937 (1982) (stressing the immaturity and limited capacity of juveniles, the court construes its state constitution to require parental presence and consultation as a prerequisite to voluntary and intelligent waiver of *Miranda* rights). The decisions employing a voluntariness analysis (under either the Due Process Clause or *Miranda*) can be squared with the Supreme Court's insistence in *Colorado v. Connelly,* 479 U.S. 157 (1986), that any finding of involuntariness rest upon coercive acts by the police, because a denial of a juvenile's access to his or her parents is a particularly coercive form of incommunicado detention. *See id.* at 163-64 & n.1 (recognizing that incommunicado detention satisfies the coercion requirement); see also §§ 24.04(b), 24.10(a) *supra.*

§ 24.14(b) Statutory Requirements

In addition to the constitutional grounds described in the foregoing section, several jurisdictions have statutes mandating parental presence during police interrogation of a juvenile that provide a statutory basis for suppression of juveniles' statements. *See, e.g., People v. Maes,* 194 Colo. 235, 571 P.2d 305 (1977) (statement held inadmissible because of the violation of a state statute requiring the presence of a parent or custodian during interrogation; social services caseworker could not act as the custodian because the statute requires that the child be "advised and counseled concerning his constitutional rights by someone whose interests are clearly with the child," *id* at 238, 571 P.2d at 306); *In the Interest of J.A.N.,* 346 N.W.2d 495 (Iowa 1984) (statement held inadmissible because of the violation of a state statute requiring parents' written consent to the waiver of the right to counsel when the child is under the age of 16); *In the Matter of Z.M.*, 337 Mont. 278, 292, 160 P.3d 490, 501 (2007) (suppressing a 14-year-old's statement because the police violated a state statute requiring that children below 16 years of age be afforded an opportunity to consult with a parent or counsel on "whether or not to waive his [or her] rights"); *State v. Smith,* 317 N.C. 100, 343 S.E.2d 518 (1986) (statement held inadmissible because the police violated a state statute requiring that the police cease all questioning if a

juvenile suspect, after being advised of his or her statutory right to parental presence during police questioning, requests the presence of a parent); *State v. Branham*, 153 N.C. App. 91, 98-99, 569 S.E.2d 24, 28-29 (2002) (statement held inadmissible under a state statute because the 16-year-old suspect "requested his mother's presence during his statement" but the "officers neither produced her nor ceased the questioning"; the "defendant's mother['s] refus[al] to see him" does not render the statutory requirement inapplicable because "she did not have the ability to, in effect, waive [her son's] right to have her present during interrogation"); *J.T.P. v. State,* 544 P.2d 1270 (Okla. Crim. App. 1975) (statement held inadmissible because of the violation of a state statute requiring that a parent or guardian or attorney be present during the questioning of a juvenile and be advised of the child's rights).

Even States which do not specifically require parental presence during interrogation have statutes requiring that the police notify parents and guardians of a child's arrest. Violations of these notification requirements may provide a basis for suppression of the child's statements. *See, e.g., United States v. C.M. (A Juvenile)*, 485 F.3d 492, 499-501, 505 (9th Cir. 2007) (violations of the federal Juvenile Delinquency Act, including the Act's parental notification provisions, required exclusion of the ensuing statement); *State v. Walker,* 352 N.W.2d 239 (Iowa 1984) (statement held inadmissible because police violated a statute by failing to inform a father of the nature of the charge and of the father's right to speak to, and confer with, his son); *In the Matter of Michelet P.,* 70 A.D.2d 68, 419 N.Y.S.2d 704 (N.Y. App. Div., 2d Dep't 1979) (statement held inadmissible because police failed to comply with statutory requirement of parental notification); *Sublette v. State,* 365 So.2d 775 (Fla. App. 1978), *app. dism'd,* 378 So.2d 349 (Fla. 1979) (violation of statutory requirement of parental notification held to require suppression of children's statements, particularly where a child requests that officers contact his or her parent); *In the Interest of Jerrell C.J.*, 2005 WI 105, 283 Wis. 2d 145, 166 & n.9, 699 N.W.2d 110, 120 & n.9 (Wis. 2005) ("remind[ing] law enforcement officials that [a] Wisconsin [statute] . . . requires an 'immediate attempt' to notify the parent when a juvenile is taken into custody," and reaffirming a state common law rule that "the failure 'to call the parents for the purpose of depriving the juvenile of the opportunity to receive advice and counsel' will be considered 'strong evidence that coercive tactics were used to elicit the incriminating statements'" and that the resulting statement should be deemed involuntary in violation of due process).

§ 24.15 STATEMENTS OBTAINED DURING A PERIOD OF UNNECESSARY DELAY FOLLOWING ARREST

In *McNabb v. United States,* 318 U.S. 332 (1943), and *Mallory v. United States,* 354 U.S. 449 (1957), the Supreme Court exercised its supervisory powers over the federal courts to enforce prompt-arraignment requirements (currently contained in Federal Rule of Criminal Procedure 5(a)) by excluding confessions obtained from arrested persons during a period of unlawful delay in bringing them before a judicial officer for a determination of probable cause. As a result of subsequent legislative enactments described in detail in *Corley v. United States*, 556 U.S. 303 (2009), the *McNabb-Mallory* rule has been modified to provide a basis for

excluding confessions obtained during "unreasonable or unnecessary" delays of more than six hours before preliminary arraignment in federal prosecutions (*Corley*, 556 U.S. .at 322). *See, e.g.*, *United States v. Thompson*, 772 F.3d 752, 762-63 (3d Cir. 2014) ("Thompson's confession[,] [which] came considerably after the six-hour period had run," is suppressed under the *McNabb-Mallory* rule because "the government delayed Thompson's arraignment so that they could continue to persuade him to cooperate," and the court "hold[s] that pursuit of cooperation is not a reasonable excuse for delay in presentment"); *United States v. Pimental*, 755 F.3d 1095, 1101, 1104 (9th Cir. 2014) (suppressing "incriminating statements that Torres Pimental made to Agent Aradanas on Sunday morning, about forty-eight hours after his Friday morning arrest, and before he was presented to a magistrate judge on Tuesday," because "[i]t is undisputed that Torres Pimental's incriminating statements . . . were made more than six hours after his . . . arrest and before his . . . initial appearance," and this "delay was not a result of the distance to be traveled to the nearest available magistrate holding a presentment calendar that Friday," and the "delay in presenting Torres Pimental [also] does not fall within" other "'reasonable delays apart from transportation, distance, and the availability of a magistrate'").

The juvenile court statutes of most States contain provisions requiring prompt delivery of a newly arrested juvenile to court or to a juvenile facility. These provisions supply a predicate for state-law exclusionary rules analogous to the *McNabb-Mallory* rule. *See, e.g., People v. Jordan,* 149 Mich. App. 568, 386 N.W.2d 594 (1986) (adopting "the exclusionary principle of *McNabb," id.* at 576, 386 N.W.2d at 598, and excluding a juvenile's statement because the police violated the statutory requirement that a child under the age of 17 be taken "immediately before the juvenile division of the probate court"); *State v. Wade,* 531 S.W.2d 726, 727 (Mo. 1976) (statement held inadmissible because police violated statutory requirement that a juvenile "shall be taken immediately and directly before the juvenile court or delivered to the juvenile officer or person acting for him"); *J.T.P. v. State,* 544 P.2d 1270 (Okla. Crim. App. 1975) (statement held inadmissible because the police violated a statutory requirement that a child "shall be taken immediately to the court"); *State v. George Anthony W.*, 200 W. Va. 86, 88, 92-94, 488 S.E.2d 361, 363, 367-69 (1996) (the statements of two juveniles are held inadmissible, and orders transferring the juveniles to adult court based on these statements are set aside, because the police violated a statutory requirement that "when a juvenile is taken into custody, he must immediately be taken before a referee, circuit judge, or magistrate," and the "evidence supports the conclusion" that the "primary purpose" of the delay was to question the juveniles about a homicide).

Arguably, the decision in *Gerstein v. Pugh,* 420 U.S. 103 (1975), lays a federal constitutional foundation for something akin to the *McNabb-Mallory* exclusionary rule in state prosecutions. As explained in § 4.28(a) *supra, Gerstein* establishes a Fourth Amendment right to a prompt judicial determination of probable cause following a warrantless arrest. *See, e.g.*, *Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911 (2017); *Fisher v. Washington Metropolitan Area Transit Authority,* 690 F.2d 1133, 1140 (4th Cir. 1982); *Lively v. Cullinane,* 451 F. Supp. 1000, 1004-05 (D. D.C. 1978). Accordingly, when the police hold a respondent beyond the period prescribed by *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), as the limit of permissible

detention without a probable-cause determination (see § 4.28(a) *supra*), counsel can argue that the Fourth Amendment requires the suppression of any statements made by the respondent during the unlawfully protracted custody. *See, e.g.*, *State v. Huddleston*, 924 S.W.2d 666, 675-76 (Tenn. 1996) (suppressing a statement obtained by the police during a 72-hour period in which the defendant was held without a judicial determination of probable cause in violation of *Gerstein* and *County of Riverside v. McLaughlin*); *Norris v. Lester*, 545 Fed. Appx. 320, 321, 327 (6th Cir. 2013) ("appellate counsel was ineffective for failing to argue [under *County of Riverside v. McLaughlin*] that [Norris'] confession was obtained after the violation of his constitutional right to a prompt probable-cause determination"). The general Fourth Amendment rule excluding statements made in confinement following an unconstitutional arrest (§ 24.19 *infra*) supports this result. However, as the Supreme Court observed in *Powell v. Nevada*, 511 U.S. 79, 85 n.* (1994), that Court has not yet ruled on the specific question whether "a suppression remedy applies" to a *Gerstein* violation of "failure to obtain authorization from a magistrate for a significant period of pretrial detention."

§ 24.16 STATE COMMON-LAW DOCTRINES REQUIRING THE SUPPRESSION OF STATEMENTS AS INVOLUNTARY

In addition to the federal constitutional doctrine excluding coerced confessions, see §§ 24.03-24.06 *supra,* there are state common-law doctrines that may exclude a confession on the ground that it is "involuntary." *See Colorado v. Connelly,* 479 U.S. 157, 167 (1986); *Rogers v. Richmond,* 365 U.S. 534, 540-44 (1961); *State v. Kelly,* 61 N.J. 283, 290-93, 294 A.2d 41, 45-46 (1972). Although the issue under the federal Constitution (and many state constitutional self-incrimination and due process clauses) is whether the respondent's will was overborne, the issue under the state's common law is likely to be whether the confession was made in circumstances that render it untrustworthy or unreliable.

The distinction between the constitutional and common-law doctrines is highly significant in juvenile cases. Personal characteristics of the respondent, such as youth, low I.Q., and suggestibility, that are pertinent but not decisive in the constitutional analysis, see §§ 24.03, 24.05 *supra,* may alone render a statement so unreliable as to require its exclusion under state common law.

In addition, the common-law doctrine affords a basis for suppressing statements coerced by private citizens. Whereas coercive behavior by private citizens cannot supply the "state action" necessary for a due process violation, *see Colorado v. Connelly,* 479 U.S. at 165-67, it may render a respondent's statement unreliable and thus inadmissible under state common law. *See, e.g., State v. Kelly,* 61 N.J. at 292-94, 294 A.2d at 46-47 (holding a statement coerced by a private security guard inadmissible under state law because it was unreliable although not unconstitutionally involuntary).

The substantive details and procedural aspects of the common-law doctrine of involuntariness vary considerably among jurisdictions, and counsel must consult local statutes

and caselaw. In a number of jurisdictions, for example, the prosecutor must lay a foundation for the introduction of any statement of the respondent by showing that it was made "without the slightest hope of benefit" and "without the remotest fear of injury." *See*, *e.g.*, *State v. Ritter*, 268 Ga. 108, 109-10, 485 S.E.2d 492, 494 (1997) ("Under Georgia law, only voluntary incriminating statements are admissible against the accused at trial. OCGA § 24-3-50. When not made freely and voluntarily, a confession is presumed to be legally false and can not be the underlying basis of a conviction. . . . To make a confession admissible, it must have been made voluntarily, i.e., 'without being induced by another by the slightest hope of benefit or remotest fear of injury.' OCGA § 24-3-50. . . . A reward of lighter punishment is generally the 'hope of benefit' to which OCGA § 24-3-50 refers. . . . The State bears the burden of demonstrating the voluntariness of a confession by a preponderance of the evidence."); *State v. Crank*, 105 Utah 332, 142 P.2d 178, 184-85 (1943) ("When the state seeks to put the confession before the jury it must establish its competency to the court. To do this it must show that the confession was given by the accused as his voluntary act; as an expression of his independent and free will, uninfluenced by fear of punishment or by hope of reward; that it was not induced or influenced by any advantages or benefits that might accrue to him or those near or dear to him, nor was it given to lighten any penalties or punishments the law might impose on him if tried and convicted without confessing; and that it was not giver [*sic* in 142 P.2d at 184; spelled correctly as "given" in 105 Utah at 347] as a result of a desire to escape or avoid any misery, threats, acts, or conduct of any other person, having it in their power, or whom he believed had it in their power, to inflict upon him, or upon those whom it was his duty or privilege to protect.").

In cases in which the facts provide defense counsel with a viable state common-law challenge to a respondent's statement, counsel should ordinarily attempt to litigate that claim in a pretrial hearing even if the normal practice is to raise the issue by an evidentiary objection at trial. A mid-trial ruling excluding the statement as unreliable will come too late to prevent the trier of fact from hearing the contents of the statement in a bench trial; and even in a jury trial there is a risk of the jurors' getting wind that the question being litigated while they are sent out to wait involves a confession by the respondent. Accordingly, in jurisdictions that permit motions *in limine,* counsel will usually want to raise the common-law contention as an *in limine* matter and, if the statement is excluded, counsel should consider moving to recuse the motions judge from sitting as factfinder at a bench trial. See §§ 7.03, 20.05 *supra.* If the jurisdiction is one in which the court may entertain or decline to entertain motions *in limine* at its discretion, counsel will increase the likelihood of obtaining a pretrial adjudication of the common-law ground by joining it with a constitutional ground (see §§ 24.03-24.15 *supra* and §§ 24.19-24.20 *infra*) on which pretrial suppression motions are authorized by statute or court rule or which are customarily litigated on pretrial motions *in limine* under local practice. Since the facts bearing on the common-law and constitutional grounds will invariably overlap, counsel can present strong arguments of judicial convenience for hearing the two (or more) claims at the same time. (An exception to this strategy is the situation in which the suppression hearing will be conducted by a pro-prosecution judge and there is a realistic prospect that the trial judge will be more defense-friendly.)

§ 24.17 STATEMENTS OBTAINED BY EAVESDROPPING ON A CONVERSATION BETWEEN THE RESPONDENT AND DEFENSE COUNSEL

The Supreme Court has forbidden prosecutorial use of statements obtained by government agents through electronic eavesdropping on conversations between an accused and his or her lawyer. *Black v. United States,* 385 U.S. 26 (1966) (per curiam); *O'Brien v. United States,* 386 U.S. 345 (1967) (per curiam); *Roberts v. United States,* 389 U.S. 18 (1967) (per curiam); *see also Hoffa v. United States,* 385 U.S. 293, 306-09 (1966) (dictum). The lower courts also have steadfastly excluded evidence produced by eavesdropping that intrudes upon attorney-client communications. *See, e.g., State v. Beaupre,* 123 N.H. 155, 459 A.2d 233 (1983) (an officer was in the room with the suspect while he telephoned his attorney); *State v. Sugar,* 84 N.J. 1, 417 A.2d 474 (1980) (the police used an electronic device to listen in on a conversation between the suspect and counsel in an interrogation room). *See also State v. Lenarz*, 301 Conn. 417, 425, 22 A.3d 536, 542 (2011) (holding that a prosecution had to be dismissed because the contents of the defendant's computer, seized by police executing a valid search warrant in the course of their investigations and later transmitted to the forensics lab and the prosecutor, contained extensive information about defense strategy that was protected by attorney-client privilege: "[W]e conclude generally that prejudice may be presumed when the prosecutor has invaded the attorney-client privilege by reading privileged materials containing trial strategy, regardless of whether the invasion of the attorney-client privilege was intentional."); *Matter of Neary*, 84 N.E.3d 1194, 1197 (Ind. 2017) (imposing disciplinary sanctions for professional misconduct upon a prosecutor who monitored audio and video feeds of a stationhouse interview between one arrestee and his attorney and also viewed the DVD recording of another arrestee's discussions with defense counsel during a "break" in a negotiated statement-taking session; "the constitutional imperative of honoring and protecting the confidentiality of a defendant's communications with counsel is a principle '[w]e would have hoped . . . too obvious to mention.'").

Although the rule is clear, its doctrinal underpinnings are murky. In *Weatherford v. Bursey,* 429 U.S. 545 (1977), the Court characterized its *Black* and *O'Brien* decisions as grounded upon the Fourth Amendment, but in *United States v. Morrison,* 449 U.S. 361, 364-65 (1981) (dictum), it treated them as based upon the Sixth Amendment right to counsel. The Sixth Amendment analysis is complicated further by the subsequent holding in *Moran v. Burbine,* 475 U.S. 412 (1986), that the Sixth Amendment does not protect the attorney-client relationship prior to the attachment of the right to counsel at the first formal charging proceeding.

In this unsettled state of the law, counsel is advised to advance alternative grounds for any motion to suppress statements obtained by police eavesdropping on attorney-client conversations. Counsel should urge that the statements must be suppressed under the Fourth Amendment (*see Weatherford v. Bursey, supra*; *Gennusa v. Canova*, 748 F.3d 1103, 1112-13 (11th Cir. 2014)), the Sixth Amendment (*see United States v. Morrison, supra*), state constitutional protections of the right to counsel (*see, e.g.*, *People v. Grice*, 100 N.Y.2d 318, 321, 794 N.E.2d 9, 10-11, 763 N.Y.S.2d 227, 229 (2003), summarized in § 24.13(a), concluding paragraph, *supra*)), state

constitutional protections against unreasonable searches and seizures, the statutory or common-law privilege for attorney-client communications (*see, e.g., State v. Beaupre,* 123 N.H. at 159, 459 A.2d at 236), and, in cases of electronic eavesdropping, the federal and state statutory restrictions upon electronic surveillance (*see, e.g.,* 18 U.S.C. §§ 2510-2520 (2022)). For a discussion of the interrelated protections provided the Sixth Amendment, attorney-client privilege, and work-product doctrine (discussed in § 18.13 *supra*) in the context of a search warrant for lawyer's files, *see In re Search Warrant Issued June 13, 2019*, 942 F.3d 159 (4th Cir. 2019.

§ 24.18 ELECTRONIC RECORDING OF INTERROGATIONS

In a number of jurisdictions, the police are required to electronically record interrogations, usually with video-recording equipment. In some jurisdictions, this requirement was established by a court decision (*see, e.g.*, *Stephan v. State*, 711 P.2d 1156, 1157 (Alaska 1986) ("we hold that an unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect's right to due process, under the Alaska Constitution, . . . and that any statement thus obtained is generally inadmissible"); *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994) (adopting the requirement by means of the court's "supervisory power to insure the fair administration of justice")); in others, it was established by a statute (*see, e.g.*, ILL. COMP. STAT. ANN. ch. 705, § 405/5-401.5 (2022); IND. CODE ANN. § 31-30.5-1-1(2) (2022); WIS. STAT. ANN. § 938.195 (2022)). Typically, the police are required to record "all custodial interrogation including any information about rights, any waiver of those rights, and all questioning." *State v. Scales*, 518 N.W.2d at 592. *See also Commonwealth v. Adonsoto*, 475 Mass. 497, 507-08 & n.9, 58 N.E.3d 305, 315-16 & n.9 (2016) (establishing "a new protocol" that, "where practicable, . . . all [police] interviews and interrogations using interpreter services will be recorded," and "[t]he defendant must be advised that the conversation is being recorded"; "The implementation of this protocol will provide significantly enhanced protections and assurances of reliability for defendants who speak through an interpreter. Reliability is an essential factor of due process to the defendant. . . . A recording allows defendants and judges to independently evaluate accuracy, and thus, the reliability of interpreter services."). There may be exceptions for situations in which recording is not feasible (*see, e.g.*, WIS. STAT. ANN. § 938.195(2)). Some statutes confer upon the prosecution a procedural benefit at the suppression hearing if a statement was electronically recorded; counsel should be alert to the possibility of challenging such provisions on constitutional grounds. *See, e.g.*, *State v. Barker*, 2016-Ohio-2708, 149 Ohio St. 3d 1, 73 N.E.3d 365 (2016) (holding that a statute on electronic recording of juveniles' custodial statements, which provided that statements "'are presumed to be voluntary if . . . electronically recorded'" (*id*. at 1, 73 N.E.3d at 368), "may not supersede the constitutional rule announced in *Miranda*" and therefore "cannot lessen the protections announced in *Miranda* by removing the state's burden of proving a suspect's knowing, intelligent, and voluntary waiver of rights prior to making a statement during a custodial interrogation" (*id*. at 8, 73 N.E.3d at 373); and holding further that such a statutory presumption, at least as applied to juveniles, violates due process, because the "[a]pplication of the statutory presumption would remove all consideration of the juvenile's unique characteristics

from the due-process analysis unless the juvenile introduced evidence to disprove voluntariness when the interrogation was electronically recorded" and "there is no rational relationship between the existence of an electronic recording and the voluntariness of a suspect's statement[,] . . . especially . . . where, as with R.C. 2933.81(B), the statute requires only that the *statement* sought to be admitted, not the entire interrogation, be recorded" (*id*. at 12, 73 N.E.3d at 377)).

Although video-recording provides a degree of protection against abusive police practices, it is not nearly as protective as proponents of this reform may believe. A crafty detective or officer can do an end-run around the recording requirement by making promises or threats (or engaging in other types of psychological manipulations of the respondent) before the video-camera is turned on. Moreover, if the interrogation is protracted, the police presumably will turn off the camera periodically to allow the respondent to use the bathroom or to take a break from interrogation. During these breaks, the police have additional opportunities to engage in off-camera manipulations of the respondent. As a result, the video the judge eventually sees at a suppression hearing (and that the jury may see at trial) is often a carefully stage-managed performance, with the police as both on-stage actors and behind-the-scenes directors. In such cases, the use of a recording actually may make things worse for the respondent because the video images provide the judge and jury with a compelling – but dangerously false – appearance of careful, responsible police work.

Accordingly, defense attorneys in jurisdictions with electronic recording of interrogations need to be alert to the possibility that police improprieties took place off-camera. Counsel should interview the client carefully about what the police said and did before the video camera was turned on and during all breaks in the recording. Although litigation about such off-camera statements and actions of the police will usually come down to the respondent's word against the officers', counsel can at least use the police reports and the time counters in the video to document all of the opportunities the police had to apply pressure on the respondent off-camera (*e.g.*, at the scene of the arrest, in the police car on the way to the station, during booking, in the interrogation room before the camera was turned on, and during breaks in the interrogation). Naturally, counsel should also watch for any indications of alterations in the video. Some state statutes prescribe safeguards against alterations (*see, e.g.*, ILL. COMP. STAT. ANN. ch. 705, § 405/5-401.5(b)(2)).

§ 24.19 STATEMENTS OBTAINED THROUGH VIOLATION OF THE RESPONDENT'S FOURTH AMENDMENT RIGHTS OR ILLEGAL EAVESDROPPING

The derivative-evidence principle described in §§ 23.37-23.40 *supra* requires the suppression of statements that are the "fruits" of a Fourth Amendment violation. *See Wong Sun v. United States,* 371 U.S. 471 (1963). Potential fruits include:

(a) statements obtained from an accused following his or her unconstitutional arrest or detention, *e.g., Brown v. Illinois,* 422 U.S. 590 (1975); *Dunaway v. New York,* 442 U.S. 200 (1979); *Lanier v. South Carolina,* 474 U.S. 25 (1985) (per curiam);

Kaupp v. Texas, 538 U.S. 626, 632-33 (2003) (per curiam); *Perez Cruz v. Barr*, 926 F.3d 1128, 1135-37, 1145-46 (9th Cir. 2019); *United States v. Segoviano*, 30 F.4th 613 (7th Cir. 2022); *but cf. New York v. Harris*, 495 U.S. 14, 21 (1990) (summarized in § 23.37 *supra*);

(b) statements obtained by means of eavesdropping following an unlawful entry into protected premises, *e.g., Berger v. New York,* 388 U.S. 41 (1967); see § 23.16 *supra*;

(c) statements obtained by means of electronic eavesdropping in violation of the constitutional doctrines governing electronic surveillance, *e.g., Katz v. United States,* 389 U.S. 347 (1967); and

(d) statements made in response to being told of illegally seized evidence or in response to being confronted with the evidence itself, *e.g., Commonwealth v. Goncalves-Mendez*, 484 Mass. 80, 138 N.E.3d 1038 (2020); *Ruiz v. Craven,* 425 F.2d 235 (9th Cir. 1970); *State v. Blair,* 691 S.W.2d 259 (Mo. 1985); *cf. Fahy v. Connecticut,* 375 U.S. 85 (1963).

The aspect of the principle most frequently encountered in juvenile cases is the one concerning statements made in police custody following an unconstitutional arrest or *Terry* stop. These statements are inadmissible unless "intervening events break the causal connection between the illegal arrest [or stop] and the confession so that the confession is '"sufficiently an act of free will to purge the primary taint."'" *Taylor v. Alabama,* 457 U.S. 687, 690 (1982); *accord*, *Kaupp v. Texas*, 538 U.S. at 632-33; *compare Rawlings v. Kentucky,* 448 U.S. 98, 106-10 (1980). In determining whether the prosecution has met its burden of showing a break in the connection (see § 23.38 *supra*), "[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, . . . and, particularly, the purpose and flagrancy of the official misconduct are all relevant." *Brown v. Illinois,* 422 U.S. 590, 603-04 (1975). *Accord*, *Kaupp v. Texas*, 538 U.S. at 632-33. More particularly, the Supreme Court has recognized that illegal detentions "designed to provide an opportunity for interrogation [are] . . . likely to have coercive aspects likely to induce self-incrimination." *Michigan v. Summers,* 452 U.S. 692, 702 n.15 (1981) (dictum). The relevant Fourth Amendment restrictions on arrest and investigative detention are discussed in §§ 23.04-23.14 *supra.* See also § 23.37 *supra.*

Statements obtained by electronic eavesdropping in violation of some, but not all, of the statutory regulations codified in 18 U.S.C. §§ 2510-2520 (2022) must also be suppressed. *Compare United States v. Chavez,* 416 U.S. 562 (1974), *and United States v. Giordano,* 416 U.S. 505 (1974), *with United States v. Donovan,* 429 U.S. 413 (1977). *See, e.g.*, *United States v. North*, 735 F.3d 212 (5th Cir. 2013).

§ 24.20 STATEMENTS TAINTED BY PRIOR ONES THAT WERE UNLAWFULLY OBTAINED: THE "CAT OUT OF THE BAG" DOCTRINE

Prior to *Oregon v. Elstad,* 470 U.S. 298 (1985), the finding that an incriminating statement had been taken from an accused in violation of either the Due Process requirement of voluntariness or the *Miranda* rules commonly led to the suppression of any subsequent statement of the accused on the same subject before consulting a lawyer. This result was not commanded by any majority opinion of the Supreme Court of the United States but appeared to be required by the Court's *per curiam* decision in *Robinson v. Tennessee,* 392 U.S. 666 (1968), approving Justice Harlan's concurring opinion in *Darwin v. Connecticut,* 391 U.S. 346, 349-51 (1968). Justice Harlan there reasoned that once an accused has given the police a confession, his or her subsequent statements to them about the crime are more likely to be the products of a belief that the "cat is out of the bag" than of an independent choice to commit a fresh act of self-incrimination. Thus if the first confession was constitutionally inadmissible, it taints all later statements made by the accused without the legal advice necessary to place the first confession in perspective.

In *Elstad,* the Court rejected similar reasoning as the basis for an argument that "an initial failure of law enforcement officers to administer the warnings required by *Miranda* . . ., without more, 'taints' subsequent admissions made after a suspect has been fully advised of and has waived his *Miranda* rights." 470 U.S. at 300. *Elstad* holds that if the only illegality in obtaining a first incriminating statement is a *Miranda* violation, "a careful and thorough administration of *Miranda* warnings serves to cure the condition that rendered the unwarned statement inadmissible." *Id*. at 310-11. Thus, the "admissibility of any subsequent statement . . . turn[s] . . . solely on whether it is knowingly and voluntarily made." *Id.* at 309.

As a result of the analysis in *Elstad* and later Supreme Court decisions elaborating *Elstad*, the federal scope-of-taint rule to be applied in successive-statement situations now turns upon the reason the first statement is found to be unconstitutional.

§ 24.20(a) Statements Tainted by a Prior Statement Taken in Violation of the Due Process Clause and the Self-Incrimination Clause of the Fifth Amendment

In *Elstad*, the Supreme Court recognized that "[t]here is a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means calculated to break the suspect's will and the uncertain consequences of disclosure of a 'guilty secret' freely given in response to an unwarned but noncoercive question . . . ." 470 U.S. at 312. Accordingly, *Elstad*'s repudiation of the concept of presumptive taint is limited to *Miranda* violations (§§ 24.07-24.12 *supra*) and does not extend to involuntary confessions (§§ 24.03-24.06 *supra*). *E.g.*, *United States v. Lopez*, 437 F.3d 1059, 1066-67 & n.4 (10th Cir. 2006); *Shelton v. State,* 287 Ark. 322, 699 S.W.2d 728 (1985). The *Elstad* opinion says that "[w]hen a prior statement is actually coerced" (470 U.S. at 310), or perhaps even when it is simply "obtained through overtly or inherently coercive methods which raise serious Fifth Amendment and Due Process concerns" (*id.* at 312 n.3), "the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators

all bear on whether that coercion has carried over into the second confession" (*id.* at 310); and the admissibility of the second confession is subject to a "requirement of a break in the stream of events" (*id.,* citing *Westover v. United States,* decided with *Miranda v. Arizona,* 384 U.S. 436 (1966)). *See also Brown v. Illinois,* 422 U.S. 590, 605 n.12 (1975); *cf. Clewis v. Texas,* 386 U.S. 707, 710 (1967) (requiring the exclusion of a third incriminating statement made after two earlier ones where there was "no break in the stream of events . . . sufficient to insulate the [later] statement from the effect of all that went before"). In these Due Process cases, a second confession must be shown to be "an act independent of the [previous] confession," *Reck v. Pate,* 367 U.S. 433, 444 (1961), and the prosecution plainly bears the burden of proof on that issue, *Nix v. Williams,* 467 U.S. 431 (1984) (dealing with the exclusionary consequences of a confession obtained in violation of the Sixth Amendment and suggesting that the prosecution's burden of proving the dissipation of taint – "by a preponderance of the evidence" (467 U.S. at 444) – is the same in Fifth Amendment cases (*see id*. at 442 & n.3) (discussed in § 23.38 *supra*). *See, e.g.*, *People v. Guilford*, 21 N.Y.3d 205, 209, 213, 991 N.E.2d 204, 206, 209, 969 N.Y.S.2d 430, 432, 435 (2013) (suppressing a statement as the fruit of an earlier involuntary statement because the prosecution failed to prove that the defendant had been "restored to the status of one no longer under the influence" of the coercion that tainted the earlier statement "so as to render plausible the characterization of [the] subsequent admission as voluntary." Although the 49½-hour interrogation that produced the involuntary first statement was followed by an "eight-hour 'break,'" during which the defendant was arraigned and had an opportunity to confer with counsel, these circumstances could not "attenuate[ ] the taint of the wrongful interrogation" and "transform [the defendant's] coerced capitulation into a voluntary disclosure."); *United States v. Anderson*, 929 F.2d 96, 102 (2d Cir. 1991) ("[A]gent Valentine coerced Anderson's first confession with improper tactics. Moreover, nothing in the record suggests that the taint clinging to the first confession was dissipated. No significant time elapsed between the first questioning by agent Valentine and when Anderson made his statement to agent Moorin. The suspect was at all times in custody and under close police supervision with the same agents present on both occasions. Agent Moorin made no effort to dispel the original threat. In fact, his statement that Anderson 'could only help himself by cooperating' only reaffirmed agent Valentine's earlier coercive statements [that if Anderson exercised his *Miranda* rights, he could not thereafter cooperate with the Government and gain the benefits of cooperation]. The district court correctly found a continuing presumption of compulsion applied to the second statement. Hence, Anderson's waiver, tainted by the earlier, coerced confession, was also involuntary and should be suppressed. Moreover, suppression of the second statement here also serves the objectives of deterrence and trustworthiness. It operates as a disincentive for police to coerce a confession by threatening a defendant with false and/or misleading statements. The fact-finding process is also enhanced since a confession obtained in the manner this one was may be untrustworthy.").

§ 24.20(b) Statements Tainted by a Prior Statement Taken in Violation of *Miranda*

Although *Elstad* rejected a general rule of presumptive taint in the *Miranda* context, a violation of *Miranda* in the taking of one statement may nonetheless provide a basis for suppressing a subsequent statement as a fruit of the earlier violation in certain circumstances. *See*

State v. Alexander, 2019-01664 (La. 12/20/19), 285 So.3d 1091, 1091-92 (La. 2019) ("This Court previously ordered the suppression of a statement defendant made after a detective assured him anything he said would stay in the interrogation room, finding this guarantee to have subverted the *Miranda* warning that anything defendant might say would be used against him in a court of law. . . . ¶ The State now seeks to introduce a subsequent statement defendant made to his mother outside of the detective's presence but after the detective's direction that defendant 'apologize to his mother for what he did' and representation to defendant's mother that 'nobody needs to know the specifics of what we talk about in here.' This second statement is closely related in time, circumstance, and content to the one previously ordered suppressed, and there were no intervening factors to break the chain between the two. . . . Importantly, the second statement occurred in the very interrogation room in which the detective promised defendant his statements would remain confidential. Thus, it, too, is inadmissible. Further, while defendant's mother was not a state actor, the statement defendant made to her was the direct result of state action sufficient to render it involuntary and inadmissible."); *State v. Carrion*, 249 N.J. 253, 260, 265 A.3d 115, 119 (2021) (applying a state-law ruling implementing *Miranda* in cases in which "a confession, given after *Miranda* warnings, . . . [is proffered by the prosecution] when the suspect has previously been subjected to unwarned questioning in which he confessed" (*id*. at 275, 265 A.3d at 128.) and holding such a confession inadmissible in the case at bar; "In [*State v.*] *O'Neill*, [193 N.J. 148, 936 A.2d 438 (2007),] we expressed our view that the key concern is whether the warnings provided in the second interrogation 'function[ ] effectively,' so as to limit the potential psychological burdens that the previous confession may have placed on the defendant and that could otherwise affect the voluntariness of the defendant's waiver. . . . We stated that, to assess how effectively the warnings in the second interrogation functioned, ¶ [']courts should consider all relevant factors, including: (1) the extent of questioning and the nature of any admissions made by defendant before being informed of his Miranda rights; (2) the proximity in time and place between the pre- and post-warning questioning; (3) whether the same law enforcement officers conducted both the unwarned and warned interrogations; (4) whether the officers informed defendant that his pre-warning statements could not be used against him; and (5) the degree to which the post-warning questioning is a continuation of the pre-warning questioning.'" *Id*. at 276, 265 A.3d at 129.).

The Court in *Elstad* distinguished the case before it from cases "concerning suspects whose invocation of their rights to remain silent and to have counsel present were flatly ignored while police subjected them to continued interrogation." 470 U.S. at 313 n.3. Thus, as Justice Brennan observed in his dissenting opinion in *Elstad,* "the Court concedes that its new analysis does *not* apply where the authorities have ignored the accused's actual invocation of his *Miranda* rights to remain silent or to consult with counsel. . . . In such circumstances, courts should continue to apply the traditional presumption of tainted connection." 470 U.S. at 346 n.28 (emphasis in original). *See, e.g., State v. Hartley,* 103 N.J. 252, 511 A.2d 80 (1986) (concluding that the "cat out of the bag" doctrine has continuing vitality in cases in which the initial statement is suppressed on grounds of police failure to scrupulously honor a suspect's invocation of the rights to counsel or to remain silent).

In *Missouri v. Seibert*, 542 U.S. 600 (2004), the Court addressed the applicability of *Elstad* to a situation in which police officers question a suspect without *Miranda* warnings and then administer the warnings and re-question the suspect for the purpose of obtaining an admissible, *Mirandized* statement. A majority of the Court ruled that, in at least some circumstances, such a sequence of interrogations renders *Elstad* inapplicable and requires the suppression of the second statement as a fruit of the *Miranda* violation in obtaining the first statement. A four-Justice plurality concluded that the admissibility of the subsequent *Mirandized* statement turns on "whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires." 542 U.S. at 611-12. The inquiry into effectiveness involves the questions whether "the warnings [could] effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture" and whether the warnings could "reasonably convey that [the suspect] could choose to stop talking even if he had talked earlier." *Id*. at 612. Relevant factors include "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." *Id*. at 615. It is also a plausible reading of the *Seibert* plurality opinion that *Miranda* warnings and other corrective procedures administered after a suspect has made initial admissions in violation of *Miranda* cannot "function 'effectively' as *Miranda* requires" (*id*. at 611-12) if they do not inform the suspect that those earlier admissions cannot be used in evidence against him or her, so that the suspect is no longer laboring under the impression that "what he has just said will be used, with subsequent silence being of no avail." *Id*. at 613. On the facts of the *Seibert* case itself, the plurality concluded that the midstream *Miranda* warnings were ineffective because "[t]he warned phase of questioning proceeded after a pause of only 15 to 20 minutes, in the same place as the unwarned segment," with "the same officer" doing the questioning; "he said nothing to counter the probable misimpression that the advice that anything Seibert said could be used against her also applied to the details of the inculpatory statement previously elicited"; and "[i]n particular, the police did not advise . . . [Seibert] that her prior statement could not be used." *Id*. at 616. (A footnote to the sentence making the latter point says: "We do not hold that a formal addendum warning that a previous statement could not be used would be sufficient to change the character of the question-first procedure to the point of rendering an ensuing statement admissible, but its absence is clearly a factor that blunts the efficacy of the warnings and points to a continuing, not a new, interrogation." *Id*. at 616 n.7.) Justice Kennedy concurred in the judgment in *Seibert*, providing the fifth vote for suppression of Seibert's statement, on the narrower ground that "in the infrequent case, such as we have here, in which the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning" (*id*. at 622), "postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made . . . to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver" (*id*.), and "[n]o curative steps were taken in this case" (*id*.). Under Justice Kennedy's approach, "a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the

interrogation has taken a new turn. . . .; [a]lternatively, an additional warning that explains the likely inadmissibility of the prewarning custodial statement may be sufficient" (*id*.). *See also Bobby v. Dixon*, 565 U.S. 23, 32 (2011) (per curiam) ("the effectiveness of th[e] [*Miranda*] warnings was not impaired by the sort of 'two-step interrogation technique' condemned in *Seibert*" because "there was simply 'no nexus' between Dixon's unwarned admission to forgery and his later, warned confession to murder" and there was a "significant break in time and dramatic change in circumstances" between the two interrogations, "creat[ing] 'a new and distinct experience'" and "ensuring that Dixon's prior unwarned interrogation did not undermine the effectiveness of the *Miranda* warnings he received before confessing to Hammer's murder"). *Compare Reyes v. Lewis*, 833 F.3d 1001 (9th Cir. 2016) ("Reyes's postwarning confession should have been suppressed" because the "police officers deliberately employed a two-step interrogation technique, and . . . they did not take appropriate 'curative measures,' in violation of [*Missouri v.*] *Seibert*" (*id*. at 1033); during the administration of the *Miranda* warnings, Detective Brandt "played down their importance," saying he "wanted 'just to clarify stuff,' [and] suggesting by his use of the word 'clarify' that the 'stuff' had already been conveyed in the earlier interview, and that the only purpose of the later interview was clarification. Brandt then said he wanted to 'read you your rights' because 'you've been sitting in that room and the door was locked and you're not free to leave.' An experienced officer in Brandt's position would have known that to a reasonable person not trained in the law, let alone a fifteen-year-old high school freshman, these stated reasons were hardly an effective means of conveying the fact that the warning he was about to give could mean the difference between serving life in prison and going home that night." (*id*. at 1032); "After Brandt read the *Miranda* warnings, he said, 'Do you understand each of these rights that I've explained to you? Yeah? OK. Can we talk about the stuff we talked about earlier today? Is that a yes?' While giving the *Miranda* warnings, Brandt did not pause to ask 'Is that a yes?' after asking if Reyes understood 'each of the rights' listed. Only after the *Miranda* warnings had been completed and after Brandt asked whether 'we [can] talk about the stuff we talked about earlier today' did Brandt finally ask 'Is that a yes?' and wait for a response. In contrast to the interrogation in *Seibert*, Brandt did not ask Reyes for a signed waiver of rights or a signed acknowledgment of having read and understood the *Miranda* warnings. ¶ The psychological, spatial, and temporal break between the unwarned and warned interrogations was not enough to cure the violation. Perhaps most important, Brandt had been a continuous presence throughout." *Id*.); *United States v. Barnes*, 713 F.3d 1200, 1203, 1205-07 (9th Cir. 2013) (per curiam) ("the interrogation was a 'deliberate two-step' approach in contravention of *Missouri v. Seibert*" because the "evidence reflects that the agents deliberately employed the two-step interrogation tactic," "[t]here was no break or dividing point in the interrogation," "[t]he agents treated the second round of interrogation as continuous with the first," and "the agents took no curative measures to mitigate their error" such as "tak[ing] a substantial time break in the interrogation or warn[ing] Barnes that what he had said before the warnings could not be used against him."); *United States v. Capers*, 627 F.3d 470, 477, 483, 485 (2d Cir. 2010) (resolving an issue that "Justice Kennedy had no reason to explore" – "how a court should determine when a two-step interrogation had been executed deliberately" – by "hold[ing] that the burden rests on the prosecution to disprove deliberateness"; and applying this rule to require suppression of the defendant's second (post-warning) confession is required

because "the Government has failed to meet its burden of demonstrating that Capers was not subjected to a [deliberate] two-step interrogation" and because "there were no curative measures to ensure that the defendant was not misled with regard to his rights prior to his second confession"); *Kelly v. State*, 997 N.E.2d 1045, 1053-55 (Ind. 2013) (post-warning statements were the "product of the 'question-first' interrogation practice disapproved of in *Seibert* and therefore inadmissible" because the pre-warning and post-warning statements "concern the same subject . . . [and] were made in the same location, mere minutes apart, in response to the same officer. Most significantly, however, Chief Kiphart and another officer referred to Kelly's pre-warning admission three times during the post-warning interrogation. . . . Such references, we believe, inevitably diluted the potency of the *Miranda* warning such that it was powerless to cure the initial failure to warn, even if that failure was a product of good-faith mistake."); *State v. Navy*, 386 S.C. 294, 303-04, 688 S.E.2d 838, 842 (2010) (*Seibert* requires suppression of two postwarning statements, given the absence of "the curative measures suggested by Justice Kennedy," even though the record does not show that this was a case of a "deliberate" police use of a "'question first' strategy"); *Martinez v. State*, 272 S.W.3d 615, 626-27 (Tex. Crim. App. 2008) (applying Justice Kennedy's analysis in *Seibert* to suppress a videotaped statement obtained with a "deliberate two-step strategy" because "the officers did not apprise appellant of his *Miranda* rights when they began custodial interrogation and failed to apply any curative measures in order to ameliorate the harm caused by the *Miranda* violation").

Elstad does not govern cases in which a respondent testifies at trial in order to rebut or explain an incriminating pretrial statement that was erroneously admitted in violation of *Miranda*. That situation continues to be governed by the exclusionary rule of *Harrison v. United States*, 392 U.S. 219 (1968). *See Lujan v. Garcia*, 734 F.3d 917, 924-30 (9th Cir. 2013) (in *Harrison* the "Court held that if Harrison had testified 'in order to overcome the impact of confessions illegally obtained and hence improperly introduced, then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible,'" *id. at* 925; "*Harrison* outlines a clear exclusionary rule that applies to the States," *id. at* 927; "The opinions of *Elstad* and *Harrison* should not be conflated to create ambiguity where there is none. *Harrison* sets forth a clearly established rule that has not been undermined by *Elstad*. ¶ Under the *Harrison* exclusionary rule, when a criminal defendant's trial testimony is induced by the erroneous admission of his out-of-court confession into evidence as part of the government's case-in-chief, that trial testimony cannot be introduced in a subsequent prosecution, nor can it be used to support the initial conviction on harmless error review, because to do so would perpetuate the underlying constitutional error." *Id*. at 930.).

Even in cases in which a respondent's second statement is not subject to federal constitutional suppression as the fruit of an earlier *Miranda* violation because of the rule of *Elstad* and the limitations of *Seibert*, counsel can urge the state courts to reject *Elstad* as a matter of state constitutional law and to preserve the "cat out of the bag" doctrine in its entirety. *See, e.g., State v. O'Neill*, 193 N.J. 148, 180-81, 936 A.2d 438, 457 (2007); *People v. Bethea,* 67 N.Y.2d 364, 493 N.E.2d 937, 502 N.Y.S.2d 713 (1986); *State v. Aguirre*, 301 Kan. 950, 961-62, 349 P.3d 1245, 1252 (2015) ("In *State v. Matson*, 260 Kan. 366, 374, 921 P.2d 790 (1996), this

court said that the validity of a *Miranda* waiver, after a suspect has previously invoked those rights, depends on whether 'the accused (a) initiated further discussions with the police and (b) knowingly and intelligently waived the previously asserted right.' . . . The State failed the *Matson* test by reinitiating the second interrogation. ¶ Consequently, the taint of the *Miranda* rights violation in the first interview was not sufficiently attenuated to validate the rights waiver for the second interview, and the statements obtained in the second interview should have been suppressed, as well."); *In the Matter of Daniel H.*, 15 N.Y.3d 883, 885-87, 938 N.E.2d 966, 968-69, 912 N.Y.S.2d 533, 535-36 (2010) (Ciparick, J., dissenting from the dismissal of an appeal on jurisdictional grounds) (expressing the view that, under the state constitutional standard for analyzing *Seibert* issues, which resembles the *Seibert* plurality's approach, a juvenile's "age should be a factor in considering whether his *Mirandized* statement was sufficiently attenuated from his prior, unwarned statement" because the "risk that *Miranda* warnings might be ineffective is heightened where, as here, the suspect is a juvenile" and thus "is less likely than an adult to perceive any given period spent in constant police custody as a 'break,'" "is more likely to feel compelled to continue answering questions posed by the same officers who conducted the unwarned interrogation," and "is less likely to comprehend the meaning of *Miranda* warnings read shortly following a confession and understand that he can remain silent"); and see generally § 7.09 *supra.*

§ 24.20(c) Statements Tainted by a Prior Statement Taken in Violation of the Sixth Amendment

The Supreme Court has expressly reserved the question "whether the rationale of *Elstad* applies when a suspect makes incriminating statements after a knowing and voluntary waiver of his right to counsel notwithstanding earlier police questioning in violation of [the] Sixth Amendment standards" discussed in § 24.13. *See Fellers v. United States*, 540 U.S. 519, 525 (2004). The analytic approach the Court used in *Elstad* to reject the concept of presumptive taint for fruits of a *Miranda* violation and to distinguish the situation of a coerced confession (see § 24.20(a) *supra*) would seem to render *Elstad* inapplicable when the interests at stake are those protected by the Sixth Amendment's right to counsel. As in the due process context, the prosecution bears the burden of proving that a Sixth Amendment violation in taking the previous statement did not taint the subsequent statement. *See Nix v. Williams*, 467 U.S. 431, 441-48 (1984).

§ 24.20(d) Statements Tainted by a Prior Statement Taken in Violation of the Fourth Amendment

The reasoning of *Elstad* and the distinction that it drew between *Miranda* violations and coercion in violation of the Due Process Clause (see § 24.20(a) *supra*) also suggest that *Elstad* does not limit the pre-*Elstad* caselaw governing suppression of a second statement following a previous statement obtained in violation of the Fourth Amendment (*see Dunaway v. New York*, 442 U.S. 200, 218 n.20 (1979) (dealing with "subsequent statements . . . which . . . were 'clearly the result and the fruit of the first'" where an initial statement was the product of an arrest

without probable cause). As in the other contexts discussed in §§ 24.20(a) and 24.20(c) *supra*, the prosecution bears the burden of proving dissipation of taint. *See Nix v. Williams*, 467 U.S. at 441-48 (addressing the prosecutorial burden of disproving taint in the Sixth Amendment context and suggesting that the same rule applies in Fourth Amendment cases (*id*. at 442)).

§ 24.20(e) Potential Implications of *Elstad* for Physical Fruits of an Unconstitutionally Obtained Statement

The principles discussed in the preceding subparts have to do with suppression of *statements* as the fruits of a constitutional violation in obtaining a previous statement. In *United States v. Patane*, 542 U.S. 630 (2004), a plurality of three Justices, joined by two other Justices on narrower reasoning, employed the rationale of *Elstad* to conclude that a *Miranda* violation in obtaining a statement does not provide a basis for suppressing "the physical fruits of the suspect's unwarned but voluntary statements." *Id*. at 634, 636 (plurality opinion). *Accord*, *id*. at 644-45 (Justice Kennedy, concurring in the judgment, joined by Justice O'Connor). Here again, the Court limited its analysis to *Miranda* violations, distinguishing them from the situation of a coerced statement. *See id*. at 634 (plurality opinion); *id*. at 645 (Justice Kennedy, concurring in the judgment). *See, e.g.*, *Dye v. Commonwealth*, 411 S.W.3d 227, 236-38 (Ky. 2013) (suppression of the defendant's statement as involuntary in violation of Due Process also required the suppression of the physical "evidence seized pursuant to the . . . search warrant . . . which was issued upon information contained in his involuntary confession"). Even with respect to *Miranda* violations, counsel can seek a more protective rule on state constitutional grounds. *See, e.g.*, *State v. Farris*, 2006-Ohio-3255, 109 Ohio St. 3d 519, 529, 849 N.E.2d 985, 996 (2006) ("We . . . join the other states that have already determined after *Patane* that their state constitutions' protections against self-incrimination extend to physical evidence seized as a result of pre-*Miranda* statements"); *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 89, 130, 700 N.W.2d 899, 901, 921 (Wis. 2005) (after the Supreme Court's *vacatur* and remand of the state supreme court's previous decision in light of *United States v. Patane*, the Wisconsin Supreme Court relies on the state constitution to reinstate its previous result that physical evidence had to be suppressed as a fruit of a *Miranda* violation); *State v. Peterson*, 2007 VT 24, 181 Vt. 436, 446-47, 923 A.2d 585, 592-93 (2007) ("agree[ing] with" decisions of the Massachusetts Supreme Judicial Court, Ohio Supreme Court, and Wisconsin Supreme Court that rejected *United States v. Patane* on state constitutional grounds, and construing "the Vermont Constitution and our exclusionary rule" to hold that "[p]hysical evidence gained from statements obtained under circumstances that violate *Miranda* is inadmissible in criminal proceedings as fruit of the poisonous tree"); and see generally § 7.09 *supra*.

Part E. Trial Issues in Cases Involving Incriminating Statements by the Respondent

§ 24.21 PROSECUTORIAL PROOF OF *CORPUS DELICTI*

In some jurisdictions, a trial judge can refuse to admit a confession into evidence before the prosecution has presented a *prima facie* case of the commission of the offense charged. This

preliminary showing is commonly called the *corpus delicti. See*, *e.g.*, *State v. Curlew*, 459 A.2d 160, 163-64 (Me. 1983) ("Maine case law . . . leaves the order of proof within the sound judicial discretion of the trial judge. . . . [T]he exercise of discretion . . . should be guided by a strong preference for proof of the corpus delicti prior to admitting in evidence a confession or admission of the defendant."). The *corpus delicti* needs not include proof of the identity of the respondent (although, of course, it is possible that some of the evidence comprising the *corpus delicti* will *also* tend to identify the respondent). *See*, *e.g.*, *Stano v. State*, 473 So.2d 1282, 1287 (Fla. 1985) ("There are three elements to the corpus delicti of a homicide: 1) The fact of death; 2) the criminal agency of another; and 3) the identity of the victim."). In other jurisdictions the term "*corpus delicti*" simply expresses the near-universal rule that a respondent's confession must be corroborated in order to make a submissible case for the prosecution; *corpus delicti* analysis relates to the standard of proof for a directed verdict and does not control the order of proof. *See*, *e.g.*, *Allen v. Commonwealth*, 287 Va. 68, 752 S.E.2d 856 (2014); §§ 35.02, 35.04 *infra.*

Jurisdictions that do enforce the *corpus delicti* principle as regulating the order of proof ordinarily give the trial judge discretion to permit the prosecutor to vary the order and to prove the confession prior to the *corpus,* subject to "connecting up." *See, e.g.*, *State v. Hendrickson*, 140 Wash. App. 913, 921-24, 168 P.3d 42, 424-26 (2007). Defense counsel should object to the confession and resist any variance in the order of proof. Frequently the prosecution's case on *corpus delicti* is borderline, and a judge who has heard the details of a confession will tend to lean somewhat against the accused in determining whether the *corpus* has been proved.

§ 24.22 THE RIGHT OF THE DEFENSE TO SHOW THE CIRCUMSTANCES UNDER WHICH THE STATEMENT WAS MADE

When a defense motion to suppress an incriminating statement of the respondent has been denied and the prosecution introduces the statement at trial, the defense will frequently want to show the coercive circumstances that prompted the statement, so as to persuade the trier of fact that the statement should be accorded little weight in the assessment of guilt or innocence. In *Crane v. Kentucky,* 476 U.S. 683 (1986), the Court made clear that a respondent cannot be precluded from presenting evidence of this sort at trial despite the denial of a pretrial motion challenging the confession as involuntary on the basis of the same evidence. The Court explained that the guarantees of "procedural fairness" embodied in the Sixth and Fourteenth Amendments (*id.* at 689-90) require that the defense be permitted to present evidence at trial concerning "the physical and psychological environment that yielded the confession . . . regardless of whether the defendant marshaled the same evidence earlier in support of an unsuccessful motion to suppress, and entirely independent of any question of voluntariness." *Id.* at 689. *See also People v. Bedessie*, 19 N.Y.3d 147, 149, 161, 970 N.E.2d 380, 381, 388-89, 947 N.Y.S.2d 357, 358, 365-66 (2012) (recognizing that, "in a proper case," the accused is entitled to present "expert testimony [at trial] on the phenomenon of false confessions" because "there is no doubt that experts in such disciplines as psychiatry and psychology or the social sciences may offer valuable testimony to educate a jury about those factors of personality and situation that the relevant scientific community considers to be associated with false confessions"); *State v. Perea*, 2013

UT 68, 322 P.3d 624, 640-41 (Utah 2013) ("expert testimony regarding the phenomenon of false confessions should be admitted so long as it meets the standards set out in rule 702 of the Utah Rules of Evidence and it is relevant to the facts of the specific case": "False confessions are an unsettling and unfortunate reality of our criminal justice system"; "expert testimony about factors leading to a false confession assists a 'trier of fact to understand the evidence or to determine a fact in issue'"; "[r]ecent laboratory-based studies have identified several factors that increase the likelihood of false confessions"; and "[t]o require a defendant to testify regarding the factors that contributed to his alleged false confession, rather than allow the use of an expert witness, opens the defendant up to cross-examination and impinges on his constitutionally guaranteed right against self-incrimination."); *and see* the Cutler, Neuschatz & Honts article cited in § 11.01 subdivision 14 *supra*. The Cutler & Leo articles cited in the penultimate paragraph of § 24.04(d) *supra* provide information and insights that will be helpful to defense counsel in arguing that the trier of fact should discredit incriminating statements produced by commonplace police interrogation tactics as unreliable. *See also* Richard A. Leo, *Interrogation and Confessions*, in ERIK LUNA, ed., REFORMING CRIMINAL JUSTICE, Vol. 2: POLICING, pp. 233-58 (Academy for Justice 2017), *available at* https://law.asu.edu/sites/default/files/pdf/academy_for_justice/Reforming-Criminal-Justice_Vol_2.pdf; Richard A. Leo, Report on Sedley Alley, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3791645&dgcid=ejournal_htmlemail_evidence:evidentiary:procedure:ejournal_abstractlink; JAMES L. TRAINUM, HOW THE POLICE GENERATE FALSE CONFESSIONS: AN INSIDE LOOK AT THE INTERROGATION ROOM (2016); KYLE C. SCHERR & ALLISON D. REDLICH, CUMULATIVE DISADVANTAGE: A PSYCHOLOGICAL FRAMEWORK FOR UNDERSTANDING HOW INNOCENCE CAN LEAD TO CONFESSION, WRONGFUL CONVICTION, AND BEYOND (2020).

In arguing that the circumstances surrounding the making of a statement vitiate its credibility, counsel should point out that, as the Supreme Court has recognized, "authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children." *In re Gault,* 387 U.S. 1, 52 (1967). "[C]onfessions of juveniles require special caution" (*id.* at 45), and "the greatest care must be taken to assure that the admission . . . was not the product of . . . adolescent fantasy, fright or despair" (*id.* at 55). *See also J.D.B. v. North Carolina*, 564 U.S. 261, 269 (2011) ("[T]he pressure of custodial interrogation is so immense that it 'can induce a frighteningly high percentage of people to confess to crimes they never committed.' . . . That risk is all the more troubling – and recent studies suggest, all the more acute – when the subject of custodial interrogation is a juvenile."). See generally § 24.05(a) (discussing empirical findings on false confessions by juvenile suspects); and the discussion of an interrogator's trickery in obtaining a confession as a factor undermining its credibility in *Aleman v. Village of Hanover Park*, 662 F.3d 897 (7th Cir. 2011), summarized in § 24.04(d).

§ 24.23 THE PROSECUTOR'S POWER TO USE A SUPPRESSED OR SUPPRESSIBLE STATEMENT FOR IMPEACHMENT

The rules governing prosecutorial use of suppressed or suppressible statements to

impeach a respondent's trial testimony vary, depending upon the constitutional doctrine under which the statement was suppressed.

If a statement is suppressed or suppressible on grounds of involuntariness (§§ 24.03-24.06 *supra*), then the statement is inadmissible for impeachment or any other purpose at trial. *Mincey v. Arizona,* 437 U.S. 385, 397-98, 402 (1978); *see New Jersey v. Portash,* 440 U.S. 450, 458-60 (1979); *Kansas v. Ventris*, 556 U.S. 586, 590 (2009) (dictum); *Vega v. Tekoh*, 142 S. Ct. 2095, 2103 (2022) (dictum).

If a statement is suppressed or suppressible on *Miranda* grounds (§§ 24.07-24.12 *supra*) but was not found involuntary, federal constitutional law does not forbid the prosecutor to use that statement for impeachment of the respondent's inconsistent testimony at trial. *Harris v. New York,* 401 U.S. 222 (1971); *Oregon v. Hass,* 420 U.S. 714 (1975); *Vega v. Tekoh*, 142 S. Ct. at 2103 (dictum).

Statements suppressed or suppressible on Sixth Amendment grounds (§ 24.13 *supra*) may be used by the prosecution to impeach a respondent's inconsistent testimony at trial. In *Kansas v. Ventris*, 556 U.S. 586 (2009), the Court held that a statement which had been deliberately elicited by a jailhouse informant acting as an agent for law enforcement officers and which had not been preceded by a valid waiver of the right to counsel was "concededly elicited in violation of the Sixth Amendment" but "was admissible to challenge [the defendant's] . . . inconsistent testimony at trial." *Id*. at 594.

Statements suppressed on Fourth Amendment grounds (§ 23.37 subdivision (c) *supra*) also may be used to impeach a defendant's inconsistent testimony at trial (*United States v. Havens*, 446 U.S. 620 (1980), subject to the meager restrictions spelled out in § 39.10 subdivision (H) *infra*.

So far as federal constitutional law is concerned, the only suppressed or suppressible matters that are inadmissible even for impeachment of a defendant's testimony are his or her involuntary admissions (*Mincey v. Arizona,* 437 U.S. 385 (1978)) and statements compelled under a grant of immunity (*New Jersey v. Portash,* 440 U.S. 450 (1979)), uncounseled prior convictions (*Loper v. Beto*, 405 U.S. 473 (1972)) and possibly other unconstitutionally obtained priors (see § 14.29(b) subdivisions (a), (d), (g) *supra*; *cf*. § 48.9 third paragraph *infra*), and any out-of-court testimonial statements by other persons which are rendered inadmissible by the Sixth Amendment right to confrontation (*Hemphill v. New York*, 142 S. Ct. 681 (2022)).

State courts may take a dim view of the prosecutor's use of illegally obtained statements for impeachment, and counsel should argue that the state constitution prohibits prosecutors from using statements suppressed on *Miranda* or Sixth Amendment grounds for any purpose at trial. *See, e.g., People v. Disbrow,* 16 Cal. 3d 101, 113, 545 P.2d 272, 280, 127 Cal. Rptr. 360, 368 (1976) (abrogated by a subsequent initiative constitutional amendment); *State v. Santiago,* 53 Hawai'i 254, 265-66, 492 P.2d 657, 664 (1971); *see also State v. Brunelle*, 148 Vt. 347, 351-55,

534 A.2d 198, 202-04 (1987) (construing the state constitution's explicit guarantee of "the right to testify on one's own behalf" and the state constitution's due process clause to "hold that previously suppressed evidence is unavailable to the State for impeachment purposes except when it is clear that the defendant has testified during direct examination" to "facts contradicted by previously suppressed evidence bearing directly on the crime charged"; "We believe this rule will achieve a fair balance between defendant's right to testify on his or her own behalf and the State's interest in preventing perjury. To permit the use of suppressed evidence to impeach testimony first brought out on cross-examination would upset this balance and impose an untenable chilling effect on defendant's right to testify."); and see generally § 7.09 *supra.*

Even under the federal constitutional rule permitting statements obtained in violation of *Miranda* and the Sixth Amendment to be used for impeachment of the respondent, they cannot be used to impeach defense witnesses other than the respondent. *See, e.g., James v. Illinois,* 493 U.S. 307 (1990) (state court erred in "expanding the scope of the impeachment exception to permit prosecutors to use illegally obtained evidence to impeach the credibility of defense witnesses" (*id.* at 313); the "impeachment exception [is] limited to the testimony of [the] defendant[ ]" (*id.* at 320)); *Smiley v. Thurmer*, 542 F.3d 574, 579 n.2 (7th Cir. 2008); ("[t]he Supreme Court has limited the impeachment exception to *Miranda*, first articulated in *Harris v. New York*, . . . to situations in which the defendant elects to testify at trial"); *and see Kuntz v. McCaughtry*, 806 F. Supp. 1373 (E.D. Wis. 1992) (holding it constitutional error – albeit harmless error on the record of the case at bar – to permit the prosecution to impeach one of its own witnesses with the defendant's statement taken in violation of *Miranda* and *Edwards v. Arizona* (*see* § 24.11(c) *supra*): "If impeachment of other *defense* witnesses by use of an illegally obtained statement is prohibited, as it is under *James*, use of the statement to impeach *prosecution* witnesses is foreclosed *a fortiori*. The Court's concern in *James* was the chilling effect on presentation of other defense witnesses. That concern about a fair trial is magnified in regard to prosecution witnesses. Allowing the prosecution to use the illegal statement during the presentation of its case – even if used to impeach its own witness – would virtually negate the exclusionary rule altogether. The prosecution would have free reign to present witnesses just for their impeachment value in order to get the illegal statement before the jury. Although defendants should not be able to '"pervert" the exclusion of illegally obtained evidence into a shield for perjury, . . . it seems no more appropriate for the State to brandish such evidence as a sword . . . .'" *Id*. at 1380.).

§ 24.24 ADMISSIBILITY OF EVIDENCE OF THE RESPONDENT'S PRE- OR POST-ARREST SILENCE

Prosecutors commonly offer evidence of a respondent's pretrial failure to avow innocence or to deny guilt in either of two contexts. First, proof that the respondent failed to deny accusations made in his or her presence by police or private citizens may be offered (usually in the prosecution's case-in-chief) as "adoptive admissions," or "tacit admissions." Evidence of silence for this purpose is admissible only if some accusatory assertion has been directed to the respondent, and the only use that can be made of the evidence is as the basis for an inference that

the respondent admitted the accusation. *See Trigg v. Commonwealth*, 460 S.W.3d 322, 330-32 (Ky. 2015); *State v. Ervin B.*, 202 Conn. App. 1, 12-13, 243 A.3d 799, 806-07 (2020). Second, proof that the respondent did not tell the police – or did not tell anyone before trial – the exculpatory story that s/he relates in his or her trial testimony may be offered (usually on cross-examination of the respondent, but sometimes through prosecution witnesses called in rebuttal) to impeach the respondent's testimony as a "recent fabrication."

Common-law rules of evidence regarding these two kinds of proof vary considerably from State to State. Some States have precluded prosecutorial use of an accused's pretrial silence because the evidence has low probative value (given that the accused's taciturnity may have been motivated by an awareness of the right to silence or of the risks of responding to police questioning, by distrust of the police, or by any of a host of other factors) and there is a high risk that the introduction of the evidence will prejudice the accused. *See, e.g.*, *People v. Williams*, 25 N.Y.3d 185, 190-93, 31 N.E.3d 103, 105-08, 8 N.Y.S.3d 641, 643-46 (2015); *and see State v. Easter*, 130 Wash. 2d 228, 235 n.5, 922 P.2d 1285, 1289 n.5 (1996) (citing caselaw from other States in which the courts "ruled on evidentiary grounds [that] pre-arrest silence is not admissible because of its low probative value and high potential for undue prejudice"); *Weitzel v. State*, 384 Md. 451, 456, 461, 863 A.2d 999, 1002, 1005 (2004) ("We think the better view is that . . . evidence is too ambiguous to be probative when the 'pre-arrest silence' is in the presence of a police officer, and join the increasing number of jurisdictions that have so held. . . . ¶ . . . We hold that pre-arrest silence in police presence is not admissible as substantive evidence of guilt under Maryland evidence law."). *Cf. State v. Rutherford*, 2019 ME 128, 214 A.3d 27, 29, 33 (Me. 2019) (the trial court violated state rules of evidence by "admitt[ing] the [out-of-court] statement of the [defendant's] friend" – in which the friend said to a police officer at the scene of a car accident, in Rutherford's presence, that Rutherford "had missed the turn, thus indicating that Rutherford had been driving" – "as an admission adopted by Rutherford" because "Rutherford had been standing two feet away from his friend when they were both questioned . . . [and] had not disputed her representation that he was the driver": "At the time of his friend's statement, Rutherford had not waived his right to remain silent. . . . Accordingly, Rutherford's silence, which he had the right to maintain when his friend spoke, cannot be construed as an adoption of the friend's statement. Conduct or words manifesting adoption of the statement were required, and the State did not offer evidence of such conduct or words of adoption by Rutherford. The friend's statement should not have been admitted as an adoptive admission, *see* M.R. Evid. 801(d)(2)(B); it remained inadmissible hearsay, *see* M.R. Evid. 801(c), 802.").

Apart from the complexities of these common-law evidentiary doctrines, proof of the respondent's silence to show an "adoptive admission" or "recent fabrication" raises state and federal constitutional issues. The constitutional analysis is affected by whether the silence that the prosecutor seeks to prove occurred (1) before or after arrest and (2) before or after administration of the *Miranda* warnings described in § 24.09 *supra.*

In *Doyle v. Ohio,* 426 U.S. 610, 619 (1976), the Supreme Court squarely held that an accused's "silence, at the time of arrest and after receiving *Miranda* warnings" is constitutionally

inadmissible against him or her, even for the purpose of impeaching the accused's trial testimony as a recent fabrication. The reasoning of *Doyle* is that the *Miranda* warnings implicitly assure the person to whom they are given that s/he may remain silent with impunity, and it is fundamentally unfair and a violation of due process to use the person's subsequent silence as incriminating evidence, 426 U.S. at 617-19, particularly inasmuch as the silence is "insolubly ambiguous because of what the State is required to advise the person arrested," *id.* at 617. *See also Vega v. Tekoh*, 142 S. Ct. 2095, 2104 (2022) (dictum); *Portuondo v. Agard*, 529 U.S. 61, 74-75 (2000) (dictum); *Brecht v. Abrahamson*, 507 U.S. 619, 628 (1993) (dictum); *Hurd v. Terhune*, 619 F.3d 1080, 1088-89 (9th Cir. 2010); *People v. Shafier*, 483 Mich. 205, 218-19, 768 N.W.2d 305, 313 (2009); *People v. Clary*, 494 Mich. 260, 833 N.W.2d 308 (2013); *State v. Brooks*, 304 S.W.3d 130, 133-34 (Mo. 2010). The *Doyle* doctrine prohibits the state from "mak[ing] use of the defendant's exercise of [his] . . . rights [to remain silent] in obtaining his conviction," *Wainwright v. Greenfield,* 474 U.S. 284, 292 (1986), and thus bars not only the use of silence to impeach the accused but also any use of the accused's assertion of his *Miranda* rights as proof of sanity in a case in which an insanity defense is asserted. *Id.* at 295. *See also Engle v. Lumpkin*, 33 F.4th 783, 791, 792-93 (5th Cir. 2022) (in a trial in which the defendant presented a defense of temporary insanity due to involuntary intoxication, the prosecutor violated the Due Process Clause by "elicit[ing] testimony that Engle had invoked his [state statutory] right to terminate police interrogation after being advised of this right" and by "argu[ing] to the jury during his summation that Engle's termination of the interview was evidence that Engle was sane at the time of the offense"; the court rejects the state's attempt to distinguish *Doyle v. Ohio* on the ground that it involved "the warnings required by *Miranda*, whereas Engle invoked his right to terminate police questioning in reliance on a warning required by Article 38.22 of the Texas Code of Criminal Procedure": "It makes no difference whether the assurance given to the defendant was required by the federal Constitution or instead by statute, as in this case; it is the defendant's *frustrated reliance* on an official assurance that violates the Constitution.").

In *Greer v. Miller,* 483 U.S. 756 (1987), the Court held that *Doyle* did not require the invalidation of a conviction when the prosecutor asked a single impermissible question touching on the defendant's silence after *Miranda* warnings and the trial court immediately sustained a defense objection and gave a curative instruction. *Greer* illustrates the desirability of filing a pretrial motion for an order *in limine* forbidding the prosecutor's use or attempted use of evidence that is inadmissible under *Doyle.* See § 7.03 *supra* regarding the utility of such motions, at least in jurisdictions where the respondent is entitled to a jury trial and those in which it is possible to litigate motions *in limine* before a judge other than the one who will sit at a bench trial of the issue of guilt or innocence (§ 20.05 *supra*).

Doyle concerned the implications of the administration of *Miranda* warnings and thus does not govern prosecutorial evidence of either a respondent's pre-arrest silence (*Jenkins v. Anderson*, 447 U.S. 231, 239-40 (1980)), or post-arrest silence when no *Miranda* warnings were given (*Fletcher v. Weir*, 455 U.S. 603, 606-07 (1982) (per curiam). In *Jenkins* and *Fletcher*, the Court rejected Fifth and Fourteenth Amendment challenges to the prosecution's use of un-*Mirandized* defendants' silence to cross-examine them at trial. Significantly, the defendants in

Jenkins and *Fletcher* had not combined their silence with an explicit invocation of the Fifth Amendment privilege against self-incrimination. Moreover, because the prosecutorial use of silence in both cases occurred during the cross-examination of a testifying defendant at trial, the cases fit within the principle that once an accused has chosen to abandon his or her position of silence by testifying, the prosecution has an overriding interest in being permitted to test the accused's story for veracity through "'the traditional truth-testing devices of the adversary process.'" *Jenkins v. Anderson,* 447 U.S. at 238. "The majority of federal courts considering the issue have ruled pre-arrest silence cannot be used in the state's case in chief. . . . ¶ Courts in Utah, Nebraska, Wyoming, and Wisconsin have also found the use of pre-arrest silence violates the Fifth Amendment. . . . ¶ The Fifth Amendment right to silence extends to situations prior to the arrest of the accused. An accused's right to remain silent and to decline to assist the State in the preparation of its criminal case may not be eroded by permitting the State in its case in chief to call to the attention of the trier of fact the accused's pre-arrest silence to imply guilt." *State v. Easter*, *supra*, 130 Wash. 2d at 239-40, 243, 922 P.2d at 1291, 1293. *See also*, *e.g.*, *State v. Tsujimura*, 140 Hawai'i 299, 312, 400 P.3d 500, 513 (2017) ("[w]e agree with the federal circuit courts of appeals and the several States that have held as unconstitutional the use of prearrest silence as substantive evidence of guilt"); *State v. Moore*, 131 Idaho 814, 820, 965 P.2d 174, 180 (Idaho 1998) (dictum) ("[w]e believe the better rule is that which holds that the defendants' Fifth Amendment right not to have their silence used against them in a court proceeding is applicable pre-arrest and pre-*Miranda* warnings").

In *Salinas v. Texas*, 570 U.S. 178 (2013), the Court granted *certiorari* on the question "[w]hether or under what circumstances the Fifth Amendment's Self-Incrimination Clause protects a defendant's refusal to answer law enforcement questioning before he has been arrested or read his *Miranda* rights." *See* Petition for a Writ of *Certiorari* at i, Salinas v. Texas, (No. 12-246), 2012 WL 3645103, at *i. *Salinas* once again involved a defendant who did not expressly invoke his Fifth Amendment privilege against self-incrimination, but the case differed from *Jenkins* and *Fletcher* in that the prosecutor used the defendant's prearrest, non-*Mirandized* silence in the prosecution's case in chief. In a 5-4 decision, the Court rejected the defendant's Fifth Amendment claim, but the majority was unable to agree on a rationale. A plurality opinion, authored by Justice Alito and joined by Chief Justice Roberts and Justice Kennedy, concluded that Salinas's "Fifth Amendment claim fails because he did not expressly invoke the privilege against self-incrimination in response to the officer's question." *Salinas*, 570 U.S. at 181 (plurality opinion). Justices Thomas and Scalia concurred in the judgment on the broader rationale that "Salinas' claim would fail even if he had invoked the privilege because the prosecutor's comments regarding his precustodial silence did not compel him to give self-incriminating testimony." *Id*. at 192 (Thomas J., concurring in the judgment, joined by Scalia, J., arguing for the overruling of the entire jurisprudence of *Griffin v. California* and its progeny (see § 33.05 *infra*)). The four dissenting Justices concluded that even when there has been no express invocation of the Fifth Amendment Privilege, use of an accused's silence in the prosecution's case-in-chief is nonetheless barred if "an exercise of the Fifth Amendment's privilege" can be "fairly infer[red] from an individual's silence and surrounding circumstances." *Id*. at 203 (Breyer J., dissenting, joined by Ginsburg, Sotomayor, and Kagan, JJ.).

In the wake of *Salinas*, it seems readily apparent that a suspect's explicit invocation of the Fifth Amendment privilege against self-incrimination *will* bar the prosecution from using the suspect's silence as evidence in its case in chief at trial. *See, e.g.*, *United States v. Okatan*, 728 F.3d 111 (2d Cir. 2013) (Okatan, seated in his automobile, was approached by a border patrol agent who questioned Okatan about his reasons for being in the area, then "warned Okatan that lying to a federal officer is a criminal act and asked whether he was there to pick someone up. Okatan said that he wanted a lawyer" and the agent then arrested him (*id*. at 114). "[E]ven when an individual is not in custody, because of 'the unique role the lawyer plays in the adversary system of criminal justice in this country,' . . . a request for a lawyer in response to law enforcement questioning suffices to put an officer on notice that the individual means to invoke the privilege [against self-incrimination]" (*id*. at 119). "[W]e conclude that where, as here, an individual is interrogated by an officer, even prior to arrest, his invocation of the privilege against self-incrimination and his subsequent silence cannot be used by the government in its case in chief as substantive evidence of guilt." *Id*. at 120.). Although Justice Alito's plurality opinion in *Salinas* only addresses the question of what happens when a suspect fails to invoke the Privilege explicitly, the opinion's wording and reasoning convey that the plurality surely would have reached the opposite result if the Privilege *had* been invoked explicitly. Moreover, even if only a single member of the plurality were to support a bar to the use of silence in such a situation, that single vote would combine with the four *Salinas* dissenters' votes to create a majority in favor of a prohibitory rule.

The prosecution should also be barred from using a suspect's silence in its case in chief if the suspect explicitly invoked the right to counsel. *State v. Lovejoy*, 2014 ME 48, 89 A.3d 1066, 1074 (Me. 2014) ("We distinguish the factual context before us from that which arises when, as in *Salinas*, . . . a defendant is voluntarily speaking with law enforcement officers and then simply ceases speaking without any clear indication of an intention to exercise the right not to be a witness against himself. . . . In contrast to those facts, Lovejoy specifically terminated communication by first telling the investigating detective during a telephone conversation that he wanted to speak with a lawyer and then remaining silent by not returning the detective's telephone calls."). When an individual understands that s/he has a right to a lawyer's help and explicitly claims that right, his or her refusal to speak to authorities in the absence of counsel should command the protections of the *Doyle* exclusionary rule because the prosecution's use of silence under these circumstances would work the same type of unfairness that was condemned in *Doyle*. And even when an accused has not claimed any privilege, *Salinas* does not justify the admission of evidence of his or her silence after s/he has been taken into "custody" within the meaning of § 24.08(a) *supra. See State v. Pinson,* 183 Wash. App. 411, 418-19, 333 P.3d 528, 532 (2014) ("*Salinas* does not apply here. Although Deputy Nault testified that Pinson allowed the officers to talk with him, Pinson testified that at the time of the interview he had been handcuffed and taken to the front porch. As a result, Pinson's interrogation was custodial rather than voluntary. . . . The Court stated in *Salinas* that 'a suspect who is subjected to the "inherently compelling pressures" of an unwarned custodial interrogation need not invoke the privilege.' *Salinas*, . . . [citing Justice Alito's plurality opinion].").

In any event, this is another area in which state constitutional guarantees may offer more protection than their federal parallels. See § 7.09 *supra*. Some state courts have concluded that their respective constitutions bar prosecutorial use of a suspect's pretrial silence, either categorically (*see Commonwealth v. Molina*, 628 Pa. 465, 502, 104 A.3d 430, 452 (Pa. 2014) (the state constitution "is violated when the prosecution uses a defendant's silence whether pre or post-arrest as substantive evidence of guilt"); *People v. Pavone*, 26 N.Y.3d 629, 47 N.E.3d 56, 26 N.Y.S.3d 728 (2015) (dictum) (holding that the prosecution's use of the defendant's pretrial silence violates the state constitution's due process guarantee, "whether the People use defendant's silence as part of the case-in-chief or for impeachment purposes" (*id*. at 641, 47 N.E.3d at 66, 26 N.Y.S.3d at 738) and "reject[ing] the People's artificial distinction between defendants who are arrested and remain silent before *Miranda* warnings have been provided, and those who remain silent afterwards" (*id*. at 642, 47 N.E.3d at 67, 26 N.Y.S.3d at 739): "[I]ndeed this Court has even held that *pre-arrest* silence cannot be used against a defendant in the People's case-in-chief." *Id*.); *State v. Horwitz*, 191 So.3d 429, 441-42 (Fla. 2016) ("We decline to apply the reasoning of the plurality in *Salinas* to whether a non-testifying defendant's privilege against self-incrimination under the Florida Constitution is violated by the State's use of his or her pre-arrest, pre-*Miranda* silence as substantive evidence of the defendant's guilt. . . . ¶ . . . [T]o allow the State to introduce evidence of and comment on a defendant's pre-arrest, pre-*Miranda* silence burdens the defendant's privilege against self-incrimination *at trial.* Particularly, when a defendant exercises the privilege against self-incrimination at trial by not taking the stand, the defendant may be doing so, in part, to prevent the State from having the opportunity for impeachment. Allowing the defendant's previous silence to be used as substantive evidence of consciousness of guilt would penalize the defendant for exercising that right at trial. The defendant should not be compelled to make the choice between testifying – with the possibility that his or her earlier silence might be used to impeach him or her – and not testifying – thereby, under the State's view, allowing the State to use the defendant's earlier silence as substantive evidence of the defendant's guilt. . . . ¶ . . . [W]e conclude that a defendant's privilege against self-incrimination guaranteed under article I, section 9 of the Florida Constitution is violated when his or her pre-arrest, pre-*Miranda* silence is used against the defendant at trial as substantive evidence of the defendant's consciousness of guilt.")), or at least if it took place after arrest (*State v. Hoggins*, 718 So.2d 761 (Fla. 1998) (the state constitutional privilege against self-incrimination forbids the use of a defendant's silence at the time of arrest but before receipt of *Miranda* warnings to impeach his or her trial testimony); *State v. Davis,* 38 Wash. App. 600, 686 P.2d 1143 (1984) (the state Due Process Clause forbids use of a defendant's post-arrest silence as substantive evidence of guilt)) or "'at or near' the time of arrest, during official interrogation, or while in police custody" (*State v. Muhammad*, 182 N.J. 551, 569, 868 A.2d 302, 312 (2005) (the state constitutional privilege against self-incrimination forbids use of silence under these circumstances, either as substantive evidence of guilt or for impeachment)); *accord*, *State v. Irizarry*, 2017 WL 2535950 (N.J. App. 2017)).

Concerning evidence that prior to the defendant's arrest s/he retained counsel and refused to cooperate with the police investigation, see *State v. Angel T.*, 292 Conn. 262, 973 A.2d 1207 (2009), summarized in § 36.11(a) *infra*.

§ 24.25 STATEMENTS TAKEN THROUGH AN INTERPRETER

Interrogating officers who do not speak a suspect's or an arrestee's language often take a statement through an interpreter. If the prosecution offers the statement at trial only through the interrogator and does not tender the interpreter, hearsay and confrontation issues arise that are the subject of conflicting decisions among the state and lower federal courts. These are summarized in Zachary C. Bolitho, *The Hearsay and Confrontation Clause Problems Caused by Admitting What a Non-Testifying Interpreter Said the Criminal Defendant Said*, 49 NEW MEXICO L. REV. 193 (2019).