CUSTODIAL INTERROGATION UNDER *MIRANDA*

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Miranda warnings are required when the defendant is subjected to custodial interrogation. But what does that mean? What follows is an attempt to sketch the general contours of the law, with an eye to those areas that may be useful to the criminal practitioner. For the juvenile practitioner, see, e.g., Farber, *The Role of the Parent/Guardian in Juvenile Custodial Interrogations: Friend or Foe?*, 41 Am. Crim. L. Rev. 1277 (2004).

CUSTODY

Definition: Custody means that law enforcement officers have deprived a person of his freedom of action in *any significant way*.[1] A person is in custody when a reasonable person in the defendant's position would believe that he is in custody or is not free to leave.[2] The Massachusetts Supreme Judicial Court analyzes custody by looking to four factors. They are: (1) the place of the interrogation; (2) whether the investigation has begun to focus on the suspect, including whether there is probable cause to arrest the suspect; (3) the nature of the interrogation, including whether the interview was aggressive or, instead, informal and influenced in its contours by the suspect; and (4) whether, at the time the incriminating statement was made, the suspect was free to end the interview by leaving the locus of the interrogation or by asking the interrogator to leave, as evidenced by whether the interview terminated with the defendant's arrest.[3]

Specific examples of defendants held to be in "custody" for *Miranda* purposes:

Commonwealth v. Coleman, 49 Mass. App. Ct. 150, 155-156 (2000): Although voices never raised, defendant aggressively interviewed in bedroom with two officers standing in front of the door. Police told defendant if he didn't confess to their supposedly sympathetic view of incident, they might charge more serious crimes.

Commonwealth v. Damiano, 422 Mass. 10 (1996): Defendant found in general vicinity of dead body, placed handcuffed in police cruiser at night on multi-lane highway.

Commonwealth v. Gallati, 40 Mass. App. Ct. 111 (1996): Defendant correctional officer interviewed in superior's office in locked building and aggressive questioning reduced him to tears, even though officer not arrested at completion of interview.

Commonwealth v. Gordon, 47 Mass. App. Ct. 825, 827 (1999): Defendant handcuffed and held in police cruiser for *Terry* threshold inquiry and asked what she was doing in the bushes next to a store that had just been robbed.

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[1] *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).
[2] *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984); *Commonwealth v. A Juvenile*, 402 Mass. 275, 277 (1988). *Commonwealth v. Damiano*, 422 Mass. 10, 13 (1996); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).
[3] *Commonwealth v. Gil*, 393 Mass. 204, 212 (1984); *Commonwealth v. Bryant*, 390 Mass. 729, 737 (1984); *Escobedo v. Illinois*, 378 U.S. 478, 490-491 (1964).

Commonwealth v. Magee, 423 Mass. 381 (1996): Defendant interrogated for seven hours, never told she could not leave, but told that she could not receive mental health assistance without first speaking to investigators.

Commonwealth v. Smith, 412 Mass. 823 (1992): Defendant voluntarily appeared at police station, co-defendant had implicated defendant prior to interview, police testified that he would have been arrested if he tried to leave.

Commonwealth v. Smith, 426 Mass. 76, 80 (1997): Defendant told police he had come to station to "confess" to murder of girl friend at particular address, would not have been free to leave where police were aware of details of murder but not identity of suspect.

Specific examples of defendants held not to be in "custody" for *Miranda* purposes:

Berkemer v. McCarty, 468 U.S. 420 (1984): Roadside questioning after traffic stop not custodial.

California v. Beheler, 463 U.S. 1121 (1983): Defendant who voluntarily came to police station for questioning as witness, was told he was not under arrest and was permitted to leave held not to be in custody. *See also Oregon v. Mathiason*, 429 U.S. 492 (1977).

Commonwealth v. Alicea, 376 Mass. 506 (1978): Defendant brought to police station as potential witness (and not suspect) not in custody until he made incriminating statements.
Commonwealth v. Larkin, 429 Mass. 426, 436 (1999): Incarcerated defendant questioned about unrelated charges. Defendant not restrained and told he could end the interview by signaling correctional officer.

Commonwealth v. Almonte, 444 Mass. 511, 518 (Mass. 2005): Defendant went to New York police station and told them there was a warrant for him for a shooting in Massachusetts. Police knew nothing about the case and asked for more information.

Commonwealth v. LaFleur, 58 Mass. App. Ct. 546 (Mass. App. Ct. 2003): Defendant injured in car accident physically restrained by EMTs for medical reasons while questioned by police. No police-dominated atmosphere found. *Accord Commonwealth v. Allen*, 395 Mass. 448, 454 (1985).

Commonwealth v. Podlaski, 377 Mass. 339 (1979): Police spoke to witness who recognized defendant accompanying the assailants, police located defendant nearby, and asked whether he knew anything about person lying in the street.

Michigan v. Summers, 452 U.S. 692, 702 (1981): Without more, suspect detained during execution of legal search warrant not in custody.

INTERROGATION

The defendant in custody must be advised of his *Miranda* rights prior to any interrogation. Further, interrogation must cease after the defendant has invoked his right under Miranda to not answer questions, to cut off questioning, or to have counsel.[4]

Definition: Interrogation is defined as express questioning or its functional equivalent. Police statements or actions are functionally equivalent to questioning when they should know that they are reasonably likely to elicit an incriminating response from the suspect.[5] This precludes, e.g., presenting a defendant who has invoked *Miranda* with the statement of his codefendant[6] or a wanted poster.[7] This also precludes "psychological ploys" likely to elicit such a response.[8] Note that it matters a great deal which of the *Miranda* rights the defendant invokes. The rules triggered by each are laid out below.

The "Edwards" rule: If the defendant invokes his right to counsel, the police may not interrogate him again[9] without counsel present[10] for any reason and for any offense.[11] They may only interrogate him again if the defendant initiates the exchange and the defendant voluntarily, knowingly, and intelligently waives his *Miranda* rights.[12]

The defendant's invocation of his right to counsel must be unambiguous.[13] Courts have frequently justified continued questioning upon the ground that the invocation of the right to counsel was ambiguous. This has lead to a confusing patchwork of cases, even in the Supreme Court. Compare the supposedly ambiguous request for counsel in *Davis v. United States* ("maybe I should get a lawyer"),[14] with the unambiguous request for counsel in *Smith v. Illinois* (when advised of right to counsel the defendant stated, "Uh, yeah. I'd like to do that").[15] But if the request is unambiguous, any post-request statements cannot be used to cast doubt on the clarity of the prior request.[16]

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[4] *Michigan v. Mosley*, 423 U.S. 96 (1975).
[5] *Commonwealth v. Larkin*, 429 Mass. 426, 432 (1999); *Rhode Island v. Innis*, 446 U.S. 291, 300-301 (1980)
[6] *Commonwealth v. Brant*, 380 Mass. 876, 882 (1980).
[7] *Commonwealth v. Taylor*, 374 Mass. 426, 433 (1978).
[8] *See Arizona v. Mauro*, 481 U.S. 520, 526 (1987).
[9] *Edwards v. Arizona*, 451 U.S. 477 (1981).
[10] *Minnick v. Mississippi*, 498 U.S. 146 (1990).
[11] *Arizona v. Roberson*, 486 U.S. 675 (1988).
[12] *Oregon v. Bradshaw*, 462 U.S. 1039, 1046 (1983); *See Wyrick v. Fields*, 459 U.S. 42 (1982).
[13] *Smith v. Illinois*, 469 U.S. 91 (1984); *Davis v. United States*, 512 U.S. 452, 461-462 (1994).
[14] *Davis*, 512 U.S. at 462.
[15] *Smith*, 469 U.S. 99-100.
[16] *Id.*

The "Mosley" rule: If the defendant invokes his right to remain silent or to cut off questioning, the police must "scrupulously honor" that choice.[17] What constitutes "scrupulously honoring" depends on the nature of the defendant's invocation and the circumstances of any further questioning. In *Michigan v. Mosley*, the Supreme Court permitted further questioning of a defendant who had invoked his *Miranda* rights because questioning resumed "only after the passage of a significant period of time and the provision of a fresh set of warnings," and the second interrogation was restricted "to a crime that had not been a subject of the earlier interrogation."[18] Thus, the police cannot scrupulously honor the defendant's rights by merely restating the *Miranda* rights and then continuing on with questioning when a defendant invokes his right to silence or to counsel.[19]

The "booking exception": Questions normally attendant to booking such as age, address, identifying information, and employment are interrogation but they do not require *Miranda* warnings.[20] But where the police can reasonably expect such questions to produce incriminatory responses *Miranda* warnings are required.[21] Therefore, the SJC has held that "where an arrestee's employment status may prove incriminatory, the police must give Miranda warnings before asking questions about employment."[22] The SJC has also suggested that questions directed to mental status require prior *Miranda* warnings where it is clear that the defendant's mental status is at issue.[23] Further, the First Circuit has suggested that

> asking a person's name might reasonably be expected to elicit an incriminating response if the individual were under arrest for impersonating a law enforcement officer or for some comparable offense focused on identity; likewise, asking an individual's date of birth might be expected to elicit an incriminating response if the individual were in custody on charges of underage drinking; and questions about an individual's Social Security number might be likely to elicit an incriminating response where the person is charged with Social Security fraud. In such scenarios, the requested information is so clearly and directly linked to the suspected offense that we would expect a reasonable officer to foresee that his questions might elicit an incriminating response from the individual being questioned.[24]

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[17] *Michigan v. Mosley*, 423 U.S. 96 (1975).
[18] *Mosley*, 423 U.S. at 106.
[19] *Commonwealth v. Gore*, 20 Mass. App. Ct. 960, 960-961 (1985).
[20] *Pennsylvania v. Muniz*, 496 U.S. 582, 600-02 (1990).
[21] *Commonwealth v. Woods*, 419 Mass. 366, 373-374 (1995).
[22] *Commonwealth v. Woods*, 419 Mass. 366, 372 (1995); *see also Commonwealth v. Franklin*, 2007 Mass. Super. LEXIS 380, 11-12 (Mass. Super. Ct. 2007).
[23] *Commonwealth v. Sheriff*, 425 Mass. 186, 199 (1997)
[24] *United States v. Reyes*, 225 F.3d 71, 77 (1st Cir. 2000).

The booking exception presents an unusual analysis for the *Miranda* context. The subjective intention of the police is normally not relevant.[25] Here, it is relevant to determining whether the questions were designed to elicit incriminating information.

The public safety exception: Police may question a suspect in custody without giving *Miranda* warnings where they have an immediate concern for public safety, such as locating a gun discarded in the middle of a busy supermarket.[26]

Specific examples held to be interrogation:

Commonwealth v. Gallant, 381 Mass. 465, 466 (1980): Handing the defendant an accusatory statement made by his co-defendant held to be interrogation.

Commonwealth v. Gordon, 47 Mass. App. Ct. 825, 828-829 (1999): *Terry* threshold inquiry of what defendant was doing in the bushes next to store that had just been robbed likely to elicit incriminating response.

Commonwealth v. Haskell, 438 Mass. 790 (2003): Interrogation occurred where the defendant, stopped pursuant to *Terry*, was asked whether he had a license for the firearm found by the police. Order to produce license would have been permissible.

Commonwealth v. Hilton, 443 Mass. 597, 618-619 (2005): Court officer's reflexive response to defendant's spontaneous statement regarding crime permissible, but follow-up questions impermissible.

Pennsylvania v. Muniz, 496 U.S. 582, 598-599 (1990): Request that OUI defendant state the date of his sixth birthday held to be interrogation requiring *Miranda* warnings.

Specific examples held not to be interrogation requiring prior *Miranda* warnings:

Commonwealth v. Ferrer, 68 Mass. App. Ct. 544, 545 (2007): Defendant arrested for trespassing blurted out, "Your boys are dumb. They could have me for seven or eight years instead of this trespassing bullshit." Officer responded that the police were smart. The defendant responded, "They'll never find it. . . . I could be out doing sticks [i.e. robberies]." Defendant's statement was spontaneous and officer's response did not call for defendant's response.

Rhode Island v. Innis, 446 U.S. 291 (1980): No interrogation where defendant overheard conversation between arresting officers suggesting murder weapon could be found by handicapped children. Police had no knowledge that defendant was peculiarly susceptible to such an appeal to his conscience. *But see, e.g.,Commonwealth v. Starkweather*, 2006 Mass. Super. LEXIS 290 (Mass. Super. Ct. 2006), where Justice Agnes held that the

[25] *Innis*, 446 U.S. at 301.
[26] *New York v. Quarles*, 467 U.S. 649 (1984).

police deliberately exploited the defendant's susceptibility regarding concern for his marriage and family.

Vanhouton v. Commonwealth, 424 Mass. 327 (1997): Request that English-speaking defendant recite alphabet not interrogation.

PRACTICE TIPS

Booking: Obtain the booking form. Is it a specialized booking form particularized to the offense that the defendant is charged with? If so, that suggests a design to elicit incriminating information. Even if it is not specialized, some booking questions should require prior *Miranda* warnings. For example, defendants arrested for failure to register as a sex offender should receive *Miranda* warnings before being asked their address or their employer. Further, booking questions should receive special scrutiny if the booking officer was also the arresting officer. This makes it less likely that the booking questions are unrelated to the police's record-keeping function and more likely that the questions are investigatory, i.e., interrogation.

Finally, the logic of the SJC's decision in *Woods* (that employment questions asked of defendants charged with drug offenses require prior *Miranda* warnings) is easily extended to other crimes. Just as a lack of employment would incriminate someone charged with drug dealing, so it would incriminate someone charged with robbery, burglary, receiving stolen property or larceny.

Suppressing tainted evidence:Under Massachusetts law, any statements[27] or physical evidence[28] obtained as a result of a statement elicited in violation of *Miranda* is presumptively tainted and suppressible. This is not true under federal law.[29] Further, evidence obtained in violation of *Miranda* may not be considered in search warrant applications in Massachusetts.[30]

Voluntariness of the waiver: Even if the Miranda warnings were given and waived, the waiver may not have been voluntary. Issues that should be considered regarding voluntariness include: mental health issues, language and translation issues, intoxication / withdrawal, cultural issues (fear of police, etc.), injuries, and oppressive circumstances (time of day, armed officers, size of officers, size of room, size or vulnerability of defendant).

Exculpatory statements: Note that facially exculpatory statements are still subject to *Miranda* suppression if the prosecution might seek to use them against the defendant.[31]

Preservation: A *Miranda* issue is properly preserved by litigating it prior to trial. Because it is a constitutional issue, there is no need to object again at trial.[32] However, even if counsel only pursues the issue as a motion in limine at trial, the court should ordinarily stop the trial and conduct the required hearing.[33]

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[27] *Commonwealth v. Smith*, 412 Mass. 823, 836, 593 N.E.2d 1288 (1992)
[28] *Commonwealth v. Martin*, 444 Mass. 213 (2005).
[29] *United States v. Patane*, 542 U.S. 630 (2004).
[30] *Commonwealth v. White*, 374 Mass. 132, 138-139 (1977), aff'd, 439 U.S. 280 (1978).
[31] *Commonwealth v. Torres*, 424 Mass. 792, 796-797 (1997).
[32] *Commonwealth v. Whelton*, 428 Mass. 24, 25-26 (1998).
[33] *Commonwealth v. Adams*, 389 Mass. 265, 269-270 (1983); *Commonwealth v. Woods*, 419 Mass. 366, 370 & n.7 (1995); *Commonwealth v. Rubio*, 27 Mass. App. Ct. 506, 511-512 (1989).