Memorandum of Pennsylvania Law on Confessions

A Defense View

JUNE, 1977

Written and Prepared By:

JAMES B. CRUMMETT, ESQUIRE

Assisted By:

EDWARD D. OHLBAUM, ESQUIRE

Prepared For:

PUBLIC DEFENDER ASSOCIATION OF PENNSYLVANIA
1526 CHESTNUT STREET
PHILADELPHIA, PENNSYLVANIA 19102

MEMORANDUM OF PENNSYLVANIA LAW

ON CONFESSIONS

A DEFENSE VIEW

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Written and Prepared By:
JAMES B. CRUMMETT, ESQUIRE
1526 Chestnut Street
Philadelphia, Pennsylvania 19102

Assisted By:
EDWARD D. OHLBAUM, ESQUIRE
1526 Chestnut Street
Philadelphia, Pennsylvania
19102

For:
PUBLIC DEFENDER ASSOCIATION OF
PENNSYLVANIA
1526 Chestnut Street
Philadelphia, Pennsylvania 19102
215-568-3190

PUBLIC DEFENDER ASSOCIATION OF PENNSYLVANIA
Incorporated 1971

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to promote and preserve high standards for the representation of the indigent accused of crime or delinquency; to promote an interchange of ideas and experience concerning functions in the field of criminal defense throughout the Commonwealth of Pennsylvania; to provide information to the public relative thereto; to foster sound legislation in such field; to establish standards of personnel and work; to cooperate with the judiciary, the Bar and all organizations interested in the administration of justice; and to participate as amicus curiae in important criminal cases.

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I Introduction

Few, if any, of the active participants in the system euphemistically called Criminal Justice would disagree with Chief Justice Warren's description of a confession as "the most compelling possible evidence of guilt"[1]. The mere existence of a confession or critical admission[2] by the accused allows the police to definitively "close" the case, brings delight to hard-pressed prosecutors, and drives defense counsel to devious strategems, writ writing, frustration, and drink. This paper will seek to improve, at least minimally, the average tranquility and sobriety of this last group of souls by suggesting how Pennsylvania law and sound defense strategy and technique may well, in certain cases, transfer the trial and morning-after headaches back to the prosecutors.

Optimistic intentions aside, the writer will attempt to provide a comprehensive, somewhat objective, but certainly not exhaustive review of some of the major problems concerning the use of a defendant's statements against him at trial. Most cases referred to will be those of the Supreme Court of Pennsylvania, with recourse to those of the U.S. Supreme Court or the Superior Court of Pennsylvania only when the writer's research has failed to find the appropriate definitive case, if any, from our Supreme Court. The users of this paper are cautioned that further legal research will always be required to resolve any particular factual situation.

Disclaimers stated, it is now proper to mention that the outline of Contents (supra) is the author's own. The topic of "Miranda and Waiver" attempts to explore the myriad repercussions of that decision in the past dozen years. The topics "Voluntariness - A Traditional View" and "Voluntariness - A Modern View" address themselves more to possible approaches than to substance. The sections on Trial Issues are akin to the military's fall-back positions, i.e. even if the statement is somehow not suppressed, can a victory yet be won?

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1 Miranda v. Arizona, 384 U.S. 436, 466, 86 S. Ct. 1602, 1624 (1966).

2 Statements made by a criminal defendant, whether technically "confessions" or "admissions" will be referred to throughout this paper merely as "statements".

II DISCOVERY

Rule 310 Pa. R. Cr. Proc. provides, in pertinent part:

> The Court may order the attorney for the Commonwealth to permit the defendant or his attorney, and such persons as are necessary to assist him, to inspect and copy or photograph any written confessions and written statements made by the defendant. No other discovery or inspection shall be ordered except upon proof by the defendant, after hearing, of exceptional circumstances and compelling reasons.

This clear language would seem to generally allow defense access to so-called formal statements of a defendant, i.e. typed or handwritten statements signed by the defendant, while denying access to statements orally made by subsequently reduced to writing by, for example, a police detective. Similarly, a detective's notes from an interview, if not verbatim or unsigned, would arguably not be a "written statement" of the defendant. In Commonwealth v. Turra, 442 Pa. 192 (1971), the Court took this position but suggested that "exceptional circumstances" might exist to make such a statement discoverable. Id. at 196.

At least three separate approaches to this interpretation of Rule 310 should prove fruitful in obtaining discovery. The first, and most obvious, is that Rule 310's and Turra's distinction between a detective's notes and a signed statement is simply untenable. Can the police frustrate a clear policy determination in favor of discovery by simply not asking the accused to sign? Can the police tape record instead of type to defeat discovery? Can the police take copious notes - which are not "quite" verbatim - to defeat defense access? A frontal attack designed to make the phrase "written statement" meaningful and practical should succeed with both the average trial court and ultimately our Supreme Court[3].

The second approach takes advantage of the "exceptional circumstances" phrase of Rule 310 and Turra, blended with a touch of Brady v. Maryland, 373 U.S. 830 (1963). A defense assertion that the defendant denies making the unsigned statement - an extremely common situation - and the need to provide a copy of such statement to a defense expert, psychologist or psychiatrist, for evaluation and preparation of de-

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3. The Court has already decided that a witness's "statement" can take many forms. See Commonwealth v. Morris, 444 Pa. 364 (1971); Commonwealth v. Kontos, 442 Pa. 343 (1971); Commonwealth v. Smith, 417 Pa. 321 (1965); Commonwealth v. Swierczewski, 215 Pa. Super. 130 (1969); Commonwealth v. Kubacki, 208 Pa. Super. 523 (1966). See, also Commonwealth v. Lopez, 455 Pa. 353 (1974); Commonwealth v. Bowes, 233 Pa. Super. 71 (1975).

fense evidence may clearly show "exceptional circumstances". Prosecutorial failure to disclose would violate Brady. Since the Supreme Court has held that the refusal to admit such expert testimony is reversible error[4], the Commonwealth's failure to disclose such evidence in order to allow for the preparation and analysis of such evidence logically would also be reversible error[5].

The third approach, a properly drafted Motion to Suppress, should also succeed in obtaining pre-trial the non-formal statement. Depending on the facts of the case and the personal characteristics of the defendant, the content of the statement itself becomes probative on such issues as the intelligence, maturity, verbal skills, comprehension, or state of mind of the defendant[6]. Similarly, it has been held that the contents of the statement are relevant where a Futch or Davenport violation is argued[7].

In short, it is believed that any defendant's statement, regardless of form, can be obtained pre-trial by resourceful defense counsel[8]. It will surprise the Writer if, recognizing this fact, the Supreme Court does not reject a restrictive Rule 310 approach in redrafting its Discovery Rules in this area.

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4 Commonwealth v. Jones, 453 Pa. 62 (1974).

5 See also Lewis v. Lebanon County Court of Common Pleas, 436 Pa. 296 (1969).

6 See also Section III, D infra. In Commonwealth v. Goodwin, 460 Pa. 516 (1975) the Court significantly observed that "...his confession suggested that he was lucid, coherent, and quite capable of understanding the questions put to him". Id at 523.

7 Commonwealth v. Hill, 466 Pa. 442 , 353 A.2d 436 (1976).

8 The possibilities are certainly not limited by the three approaches suggested, but these three common methods should work in nearly all cases. Considerably more involved methods have been devised for special situations, but such a review becomes merely the recounting of "war stories".

III SUPRESSION ISSUES

With statement in hand (or soon to arrive), defense counsel can usually begin to formulate overall strategy and plan individual strategic maneuvers. The threshold question is, of course, "Should we attempt to supress the statement?" Failure to pause and carefully consider such a question has left many a defense lawyer - after successfully litigating his Motion to Supress - wondering at trial how to introduce in evidence the defendant's version of events, which in his suppressed statement was only partially inculpatory. Similarly, why should defense counsel seek to supress a statement if the likely alternative is that the over-confident prosecutor with the confession in his hand and knowing that victory is assured will probably fail to locate or bring in for trial the one witness necessary to properly establish the corpus delicti? On the other hand, defense counsel must determine whether the discovery obtained at the suppression hearing will be worth some risk-taking in terms of time and possible exclusion of defense-desired evidence[9].

9 The classic conflict is where the defense has a plausible "it-wasn't-me" identification defense theory and the statement admits to presence but not to criminality.

A. GENERAL PARAMETERS

Having decided upon the desirability of suppression, the next question is simply "Can we?" Rule 323 Pa. R. Crim. Proc. provides a single procedure for motions to suppress evidence "obtained in violation of the defendant's constitutional[10] rights". As the Note to Rule 323 states, the suppression remedy does not extend to "evidence simply because its introductions may be prejudicial or even may constitute harmful or plain error"[11]

In this context, it is obvious and normal for defense counsel to immediately examine the factual situation for any possible Fifth Amendment violation. Unfortunately, many counsel, not finding any such violation properly arguable, fail to apply the clear language of Rule 323 and search for any violation of any constitutional right. For example, a statement obtained without any real or arguable Fifth Amendment violation may nevertheless be properly suppressed as a direct product of an illegal arrest[12], illegal search[13], or other illegal or improper action by the police [the State][14]. Thus, any state action[15] violative of the defendant's Constitutional[16] rights which aids in the procurement of the defendant's statement can and should be the basis for a suppression motion.

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10 Although common practice has included procedural violations such as a violation of Rule 130 (Prompt Arraignment) under Rule 323, see Commonwealth v. Patterson, 236 Pa. Super. 131 (1975).

11 See Commonwealth v. Cunningham, 457 Pa. 397 (1974), Commonwealth v. Murphy, 459 Pa. 297 (1974).

12 Betrand Appeal , 451 Pa. 381 (1973). For full discussion of and cases concerning "fruits" see Section III, F infra.

13 Commonwealth v. Rowe, 445 Pa. 454 (1971). See Section III, F infra.

14 Commonwealth v. O'Shea, 456 Pa. 288 (1974). See Section III, F infra.

15 It is worth remembering that even gross illegality worked against the defendant by persons other than a "state" agent provides no grounds for relief. In Commonwealth v. Dingfelt, 227 Pa. Super. 380 (1974), a school principal obtained incriminatory physical evidence and the court, while deciding the case on Fourth Amendment grounds, repeatedly referred to Miranda and stated, in dicta, that school officials would not be required to comply with Miranda while conducting an investigation. See generally Commonwealth v. Dembo, 451 Pa. 1 (1973) for a discussion of "state action".

16 Generally violations of the Fourth, Fifth and Sixth Amendments to the United States Constitution and violations of Article 1, Section 9 of the Pennsylvania Constitution.

B. VOLUNTARINESS - A TRADITIONAL VIEW

Definition -

> **'vol·un·tary \'väl-ən-,ter-ē** *adj* **1 : done, made, or given freely and without compulsion ⟨a ~ sacrifice⟩ 2 : not accidental : INTENTIONAL ⟨a ~ slight⟩ 3 : of, relating to, or controlled by the will ⟨~ muscles⟩ 4 : having power of free choice ⟨man is a ~ agent⟩ 5 : supported by gifts rather than by the state ⟨~ churches⟩ syn** deliberate, willful, willing **— vol·un·tar·i·ly \,väl-ən-'ter-ə-lē** *adv*

The traditional view of what was "voluntary" employed concepts fundamentally equivalent to this basic definition and any statement which did not meet the four aspects of the definition was properly subject to suppression for two distinctly different reasons. First, such a statement was considered to be suspect as to its truthfulness and second, the state action, of whatever kind, that caused one or more of the definitional aspects to be lacking ran directly counter to the Fifth Amendment's proscriptions. Today, case after case in our courts is still decided on exactly this rationale. These cases usually fall into one or two categories; statements alleged by the Commonwealth to be "spontaneous" or statements alleged by the defense to have been in some manner "coerced".

In this traditional view, "spontaneous" statements are generally those made before Miranda warnings are legally required and are made either without any questioning or are responses to questions which are not likely to evoke incriminating responses from the defendant[17]. Thus, these types of statements fall within Webster's definition and are held to be voluntary.

Where some form of coercion is claimed, the traditional view of voluntariness asks:

> Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process . . . . The line of distinc-

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17 In Commonwealth v. Richard, 233 Pa. Super. 254, 266 (1975), the defendant responded to a question directed at the co-defendant and the Court held that "the facts and circumstances surrounding Richard's admission...justified...the conclusion that, with respect to Richard, the troopers' conduct was not likely to evoke such admission," even while such questioning was stated to be improper as to the co-defendant seated beside Richard. See also Commonwealth v. Brittain, 455 Pa. 562 (1974), Commonwealth v. Duval, 453 Pa. 205 (1973), and Commonwealth v. Yount, 455 Pa. 294 (1974).

> tion is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession[18].

Commonwealth v. Eiland, 450 Pa. 566 (1973), adopts this traditional view (and its corollaries) to find a statement involuntary as a matter of law even after finding no physical coercion, proper Miranda warnings, and that Futch issues had not been properly preserved. Instead, the court, citing to Culombe, Butler, and Commonwealth v. Baity, 428 Pa. 306 (1968), used the following language in further refining this view of voluntariness:

> "...all of the surrounding circumstances - the duration and conditions of detention..., the manifest attitude of the police toward him, his physical and mental state, the diverse pressures which sap or sustain his powers of resistence and self-control is relevant and may serve to render any statement or confession involuntary...[W]hen the questions in the voluntariness area have passed beyond the physical coercion stage to the much more difficult area of psychological coercion...a close analysis of all the surrounding circumstances is necessary,...[T]he test for an involuntary confession, must concern itself with those elements impinging upon a defendant's will. "The combination of all these factors...constituted a subtle but nonetheless powerful form of impermissible psychological coercion."[19].

This selection of quotations coupled with his own language make Justice Roberts' opinion in Eiland a succinct yet complete statement of the traditional view. The essential nature of this view is its focus on particular police activities that tend to "coerce" an otherwise unwilling defendant into incriminating himself.[20]

Although it is considerably more difficult for defense counsel to establish winning facts under the traditional voluntariness view than under the restrictive modern view presented infra, to successfully establish such facts under the traditional view provides the defense with a far stronger position before most trial courts. As a matter of approach or technique, defense counsel usually must establish two facts in his cross-examination of the interrogating officer(s): First, that the defendant was initially an unwilling confessor and second, that some form of coercion occurred to change the defendant's mind[21]. In order to establish these facts, detailed

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18 Commonwealth ex rel. Butler v. Rundle, 429 Pa. 141 (1968) quoting from Justice Frankfurter in Columbe v. Connecticut, 367 U.S. 568, 81 S. Ct. 1860 (1961).

19 450 Pa. at 573-574.

20 In Eiland, the Court clearly treated the defendant's initial, and for eleven hours, continued refusal to confess as critical to its decision. Id. at 574.

21 Psychologically and often unconsciously, the trial court can be influenced by utilizing the same style or length of cross-examination which was used by the police during their interrogation process.

cross-examination is usually an absolute imperative since few police officers will readily admit to coercive tactics. Although defense counsel's personal style will dictate exact content and form, some general suggestions for cross-examination are offered.

First, counsel's questioning should work backwards chronologically from when the formal statement was signed (if one exists) or from the exact time the oral statement was reduced to writing. Counsel should then elicit and allow for the amount of time used for typing (writing). This process brings the officer to a specific point in time when he first obtained an admission[22]. Once that time is firmly established, the defense should establish the time of first contact[23]. The period from first contact to first admission must be the subject of intense and detailed cross-examination for it is this examination that will establish the needed defense facts. If the elapsed time is of any significant amount, establishing the defendant as an initially unwilling confessor is practically complete. To establish some form, any form, of physical or psychological coercion usually requires a repetitious "What did you say then?", "What did he respond?", "What did you say then?", "What did he respond?" type of questioning. This apparently non-offensive type of questioning typically will drive even a pure truth-telling officer to distraction, while the fabricator will rapidly exhaust his imagination and leave holes in his tale large enough for the proverbial truck. The real payoff is in the common human knowledge that something has to happen - or be said - to convince the defendant who had been protesting his innocence to suddenly confess - and for defense counsel to either find and demonstrate what that "something" was or, in the alternative, to show the officer to be completely unworthy of belief. What tricks, threats, inducements or promises were made? What physical or mental coercion was applied? What change occurred in environment? What was done, rather than said[24]?

All of these issues and more should be carefully explored to determine exactly why, in the police version, the defendant changed his mind and confessed. In Eiland, for example, the Court found it significant that the defendant was told he would get more

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22 If a formal statement followed an oral statement, this back-pedaling in time simply has to be repeated.

23 Although the Writer sees nothing unusual about confessing defendants, the immediate confessor appears to be rare. Where multiple interrogators are involved, the technique simply has to be repeated.

24 It is worth noting that exhaustive cross-examination covering this time period will also allow defense counsel to "set up" the interrogator by establishing his testimony on details which the defense can subsequently show to be untrue, without the interrogator recognizing the eventual significance of detailed questions asked of him.

lenient treatment and then immediately confessed. In Commonwealth v. Brown, 213 Pa. Super. 288 (1968), the Court found psychological coercion where the police threatened to charge the defendant's pregnant wife as an accessory despite a total lack of evidence against her.

In short, the "something" which caused the defendant to break down and confess will often be exactly the coercive action needed to establish a traditional involuntary confession.

C. MIRANDA AND WAIVER - POLICE CONDUCT

> To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him. Miranda v. Arizona, supra 384 U.S. 436, 478-479 (1966).

1. When Warnings Required:

In the plain language of Miranda, the requirement of warnings attaches whenever a defendant is subject to police[25] questioning and either custody or focus[26]. The Court defined custody in Commonwealth v. Marabel, 445 Pa. 435 (1971) as follows:

> Custody occurs if a suspect is led to believe, as a reasonable person, that he is being deprived or restricted of his freedom of action or movement under pressures of official authority.... The custody requirement of Miranda does not depend on the subjective intent of the law enforcement officer-interrogator, but upon whether the suspect is physically deprived of his freedom of action in any significant way or is placed in a situation in which he reasonably believes that his freedom of action or movement is restricted by such interrogation....[27]

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25 For "police" read "any state actions". See Commonwealth v. Simala, 434 Pa. 219 (1969), where Mayor questioned suspect, or Commonwealth v. McLaughlin, 231 Pa. Super. 129 (1974), where Deputy City Controller questioned suspect.

26 While Miranda itself only addresses "custodial interrogation", Pennsylvania accepts "focus" as an alternative requiring warnings. Commonwealth v. Feldman, 432 Pa. 428 (1968), Commonwealth v. D'Nicuola, 448 Pa. 54 (1972), Commonwealth v. McLaughlin, supra.

27 445 Pa. at 441-2 (emphasis added).

This Marabel test should be joined to the definition of "arrest" as contained in Commonwealth v. Bosurgi, 411 Pa. 56, 68 (1963):

> Officers are not required to make any formal declaration of arrest or use the word "arrest" (citations omitted) nor to apply manual force or exercise "such physical restraint as to be visible to the eye" in order to arrest a person (citation omitted). An arrest may be accomplished by "any act that indicates an intention to take [a person] into custody and that subjects him to the actual control and will of the person making the arrest.

Although "custody" can arguably exist without "arrest", if the elements of an "arrest" are present, "custody" exists. For defense counsel, establishing "custody" can occasionally be of paramount importance, as "custody" can often exist in the actual investigation of a crime long before that investigation has in fact focused on the defendant. Specific cross-examination questions such as, "Was the defendant free to leave?" should be avoided. Not only does such a question often provoke an "of course he was" answer, but it misdirects the trial court's attention from the critical issue which is the defendant's subjective belief based on the totality of circumstances that his "freedom of action or movement is restricted". Thus, "custody" can almost as easily occur in the defendant's local bar or his living room as in the confines of the police station if his reasonable perception is that he has no real freedom of action to avoid the police questioning[28]. Consequently, cross-examination should not particularly delve into the officer's subjective feelings or intent toward or about the defendant[29], but should deal with establishing the details of the perceived and objective physical and psychological environment in which the questioning occurred.

"Focus" is a more elusive concept, but equally valuable to defense counsel. In Escobedo, "focus" was said to occur "when the process shifts from investigatory to accusatory"[30].

In order to establish focus - if custody cannot reasonably be established - it is necessary on cross-examination to explore all evidence, tips, leads, or reasonable inferences held by the police prior to the questioning. It is not necessary to show that the

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28 Commonwealth v. Bordner, 432 Pa. 405 (1968) (in hospital), Commonwealth v. Sites, 427 Pa. 486 (1967) (in home).

29 Of course, if counsel knows in advance that the police testimony in these areas will be favorable to establish focus or custody, this suggestion should be disregarded.

30 Escobedo v. Illinois, 378 U.S. 478, 492, 84 S. Ct. 1758, 1766 (1964).

investigation had so focused on the defendant as to make him the only suspect. Rather, it is sufficient simply to show that he was a suspect[31].

In the area of "focus", unlike "custody", the police officer's subjective belief or intent can be relevant. For example, if a police officer has a "hunch" as to the defendant's involvement without a real foundation for his belief, and engages in conduct "calculated to, expected to, or likely to, evoke admissions", the officer's subjective belief and objective conduct combined would require Miranda warnings. By contrast, where an investigation has already focused on a defendant, but the interrogating officer is merely assigned "cold" by a superior to "go talk to this (defendant) and see what he knows", the officer's subjective intent or belief would be irrelevant[32].

Certain special situations require specific mention. For example, even if an investigation has clearly "focused" on the defendant, can the police, by using undercover officers or their equivalent, question the prospective defendant prior to his arrest without warnings?

The clear answer is yes[33]. Can the police act similarly post-arrest? The not-so-clear answer is no. In Commonwealth ex rel. Johnson v. Rundle, 440 Pa. 485 (1970), the Court held that such questioning violated the defendant's right to counsel in a post-preliminary hearing situation. Since our Supreme Court has subsequently held that in Pennsylvania the initiation point of the prosecutorial process is the "arrest"[34] where the right to counsel attaches as opposed to indictment, it would appear that any post-arrest questioning by the police or their agents would require Miranda warnings.

Another special situation is presented where the questioning concerns biographical or pedigree information. The Supreme Court of Pennsylvania has held that when this type of questioning is not designed to obtain admissions, but rather is purely administrative, Miranda warnings are not required[35].

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31 Commonwealth v. Romberger, 454 Pa. 279 (1973).

32 Commonwealth v. Romberger, supra.

33 See Hoffa v. United States, 385 U.S. 293, 87 S. Ct. 408 (1966); United States v. White, 401 U.S. 745, 91 S. Ct. 1122 (1971).

34 Commonwealth v. Richman, 458 Pa. 167 (1974).

35 In Commonwealth v. Duval, 453 Pa. 205, 221-22 (1973) the Court stated:

> We recognize the legitimate need of the police and of prison authorities to process even those persons who have claimed their rights under Miranda and hence we cannot and do not proscribe all police-prisoner contact or conversation. We have recognized, however, that subtle pressures - later said to have been "administrative" - can be applied to encourage or elicit incriminating statements, and we will look carefully to determine whether Miranda rights have been violated.

An interesting problem arises when, because of the peculiar fa[illegible] of the situation, the police need and know they need seemingly innocent information, su[illegible]he defendant's home address, nick-name, age or birth date, marital status or employer.

As a matter of defense technique, it is suggested that whenever biographical information given by the defendant may prove critical at trial, a properly drafted allegation should assert, in the formal Motion, that the police sought this information, not purely for administrative reasons, but in order to gain an admission[37]. At the hearing on the Motion, the police officer who testifies that his only purpose was administrative can be cross-examined as to what independent information he had to establish the needed fact. The odds are that he had nothing else and that his normal follow-up procedures would also not have produced the information. After all, if he or the District Attorney had such independent proof, they probably would concede that portion of the Motion.

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36 See United States ex rel. Hines v. LaVallee, 521 F. 2d 1109 (2d Cir. 1975) where the court stated:

> The admission of Hines' statement to the arresting officer to the effect that he had been married 11 years and had 2 children presents a more difficult question. That the information turned out to be incriminating can hardly be disputed being identical to that volunteered by Hines to the victim of the crime, it provided a basis for an inference that Hines was the perpetrator.... A person's name, age, address, marital status and similar data, while usually non-incriminatory in character, may in a particular context provide the missing link required to convict. Id at 1112.
>
> The Court held:
>
> ...that, since the answer furnished by Hines to the arresting officer in respect to his inquiry regarding Hines' marital status constituted merely basic indentification required for booking purposes, its admission was not barred because of the officer's failure to satisfy Miranda's warning-waiver procedure. Id at 1113.
>
> In a footnote, the Court severely limited its holding:
>
> > We recognize that this exception to Miranda lends itself to the possibility of abuse by police who might, under the guise of seeking pedigree data, elicit an incriminatory statement. However, as long as the exception is limited to simple identification information of the most basic sort (e.g. name, address, marital status) the risk is minimal. Id at 1113 N. 2.

37 Other obvious situations are firearms violations where the current name and address of the defendant are critical to his licensure status, or employment information where the Commonwealth will have difficulty proving non-employment (e.g., by a railroad) and therefore non-permission to have certain goods in his possession.

Another special category under the general topic of when warnings are required is the question of whether and how frequently the defendant must be rewarned. In Commonwealth v. Wideman, 460 Pa. 699 (1975) the Court reviewed Miranda extensively and stated that:

> The purpose of the procedural safeguards prescribed by Miranda therefore "is to assure that the individual's rights to choose between silence and speech remains unfettered throughout the interrogation process" (Emphasis added). Id at 469, 86 S. Ct. at 1625, 16 L.Ed.2d at 721. All that a warning given at the outset of the interrogation can do is "to insure that the individual knows he is free to exercise the privilege at that point in time" (Emphasis added). Id at 469, 86 S. Ct. at 1625, 16 L.Ed.2d at 720. It follows, however, that at some point in time during the interrogation process the pressures of that process will have seriously erroded the accused's awareness of his constitutional rights.... An accused, of course, need not be reinformed of his rights, and asked whether he wishes to assert them each time he is asked a question. On the other hand, we have held that the accused must be so reinformed, and given a new opportunity to assert constitutional rights when warranted by the circumstances. Id at 705, 706.

To determine exactly what "circumstances" require rewarning, the Court set forth five factors to be considered:

> ...Several "objective indicia" have been noted as significant in determining the issue: we have considered (1) the time lapse between the last Miranda warnings and the accused's statement; (2) interruptions in the continuity of the interrogation; (3) whether there was a change of location between the place where the last Miranda warnings were given and the place where the accused's statement was made; (4) whether the same officer who gave the warnings also conducted the interrogation resulting in the accused's statement; and (5) whether the statement elicited during the complained of interrogation differed significantly from the other statements which had been preceded by Miranda warnings.... Id at 706-707.

It should be specifically noted that Wideman presents "indicia" to be considered and not an exclusive test. It is therefore suggested that Counsel should attempt

to expand on Wideman by proving other similar circumstances tending to dissipate the effect of the initial warnings[38].

2. Content of Warning:

Miranda's requirements do not specify any magic words or incantation. Any language which conveys the basic concepts as clearly or more clearly than the Miranda language itself is in compliance with the requirement[39]. Whatever the wording, five concepts must be explained to the defendant (suspect).

1. The absolute right to remain silent and say nothing at all[40].
2. The fact that anything that is said can and will be used against him in court.
3. The right to consult his attorney before questioning and to have his attorney present during questioning.
4. The right to free counsel if he cannot afford counsel.
5. The crime about which the questioning is to be concerned.

Since most police departments now use standardized warning cards explaining these concepts and few police officers will testify that they did not read the standard version, this area will seldom assist the defense. However, a brief review of some of the cases and some suggestions may occasionally prove valuable.

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38 In a recent case, a Philadelphia Common Pleas Court found it significant that the "purpose" of the interview (polygraph examiner's post-test questions) was sufficiently different from the initial detective's interview as to constitute a sixth factor requiring rewarnings. See also Rewarning required: Commonwealth v. Wideman, supra (12 hours), Commonwealth v. Riggins, 451 Pa. 519 (1973) (17 hours). Rewarning not required: Commonwealth v. Abrams, 445 Pa. 8 (1971) (5 hours), Commonwealth v. Hoss, 445 Pa. 98 (1971), Commonwealth v. Ferguson, 444 Pa. 478 (1971), Commonwealth v. Parks, 453 Pa. 296 (1973).

39 See Commonwealth v. Scroggins, 451 Pa. 472 (1971); Commonwealth v. Spriggs, Pa. 344 A. 2d 880 (1975).

40 In Commonwealth v. Alston, [illegible]Pa. 128 (1974) the Court specifically held that there was no requirement that the d[illegible]t actually be told of his right to cut off questioning by invoking his right to si[illegible] right to counsel.

In Commonwealth v. Singleton, 439 Pa. 185 (1970), warnings were held to be ineffective where the officer warned Singleton that his statement could be used "for or against" him[41]. In Commonwealth v. Nathan, 445 Pa. 470 (1971) the Court reversed because the officer gratuitously advised the defendant that "sometimes it is good to give a statement and sometimes not".

In Commonwealth v. Marsh, 440 Pa. 590 (1970) warnings were held ineffective where Marsh was told that if he could not afford counsel, one would be "obtained" for him but did not clearly state that such ~~lawyer~~ would be free[42].

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41 In Singleton, the Court looked to Miranda and stated that "[e]ven though the Court failed to set forth a single permissible formulation of this warning, however, they clearly did indicate that deviation from the prescribed formulation of the various warnings would be permissible only when the offered version is more likely to give a suspect a better understanding of his constitutional rights and a heightened awareness of the seriousness of his situation. 439 Pa. at 190. See also Commonwealth v. Frambro, 230 Pa. Super. 220 (1974).

42 In Commonwealth v. Dixon, 432 Pa. 423 (1968) the Court stated:

> The Commonwealth argues that it was not necessary for Kontos to be told of his right to free counsel because it was known that he was already represented by an attorney. In Miranda, the Court noted that "[w]hile a warning that the indigent may have counsel appointed need not be given to the person who is known to have an attorney or is known to have ample funds to secure one, the expedient of giving a warning is too simple and the rights involved too important to engage in ex post facto inquiries into financial ability when there is any doubt at all on that score." 384 U.S. at 473 n. 43, 86 S. Ct. at 1627 n. 43. It is clear that this loophole is a narrow one which can be utilized only in the clearest of cases. 432 Pa. at 426.

See also Commonwealth v. Sites, 427 Pa. 486 (1967), Commonwealth v. Yount, 435 Pa. 276 (1969). But see Commonwealth v. Ponton, 450 Pa. 40 (1972).

In Commonwealth v. Collins, 436 Pa. 114, 121 (1969), the plurality[43] opinion stated that "an intelligent and understanding waiver of the right to counsel is impossible where the defendant has not been informed of the crime which is being investigated" and held inadmissible the defendant's statement because he had not been so informed.

If the warning officer testifies that he did not use a standard warning card, defense cross-examination technique is obvious. However, in the usual case where the officer claims to have read from his card which obviously meets the five Pennsylvania Miranda requirements, it is necessary for defense counsel to cross-examine as to the methodology used and the exact conversation held with the defendant. By example, defense counsel could ask:

1. Q. After you read him the (first, second, etc.) warning, did you ask him if he understood?

   A. Yes.

2. Q. And did he ask for any further explanation?

   A. Yes.

3. Q. And what did you explain to him?

If the answer to question 1 was "no", repetition for each warning might show that no effort was made to insure or confirm the defendant's understanding, which is certainly required for a knowing and intelligent waiver.

If the answer to question 2 was "no", there at least remains the possibility that a defense witness -- possibly the defendant, preferrably an expert -- could testify that the defendant simply did not know the meaning of certain words or phrases used and therefore, could not and did not really understand the formal warnings.

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43 This plurality holding has subsequently received a backing of a majority in Commonwealth v. Richman, supra. In Richman, the Court cites to Commonwealth v. McKinney, 453 Pa. 10, 306 A.2d 305 (1973); Commonwealth v. McIntyre, 451 Pa. 42, 301 A.2d (1973); Commonwealth v. Swint, 451 Pa. 54, 296 A.2d 777 (1972); Commonwealth v. Jacobs, 445 Pa. 364, 284 A.2d 717 (1971); Commonwealth v. Cooper, 444 Pa. 122, 278 A.2d 895 (1971); and states:

> These cases teach that while there is no need for the police to explain in detail all of the technicalities of the charges at issue, the accused in order to make a valid waiver of the right to counsel should at least know the general nature of the transaction giving rise to the charges. Commonwealth v. Richman, 458 Pa. 167, 175 (1974).

However, the Superior Court has recently limited Collins and Richman in Commonwealth v. Howe, _____ Pa. Super _____, 369 A.2d 783 , (1977), where the defendant confessed to a crime which the police were not even aware of having occurred. The Court reasoned that no affirmative duty to explain the criminal transaction could possibly be required in this situation and it was sufficient that the defendant knew that he was being questioned about the ownership of items found in his car.

If the officer agrees that he went beyond the card, clever leading cross-examination might well establish his use of proscribed deviations such as "for or against" or some other language which would mislead the defendant[44].

3. Tricks or Inducements:

While tricks can sometimes be employed after a Miranda waiver to induce the innocence-proclaiming defendant into confessing[45], no tricks or inducements are permissable in police efforts to obtain the waiver itself. In Commowealth v. Jones, 457 Pa. 423 (1974), an apparently valid Miranda waiver had been obtained but the defendant denied involvement. The interrogating officer then falsely informed the defendant that another suspect had confessed and implicated the defendant. To this situation the Court stated in pertinent part:

> ...In judging whether the use of artifice, deception or fraud will invalidate a confession, we must look to the basic rationale behind the exclusion of coerced confessions. Courts will, of course, invalidate confessions resulting from a subterfuge that is likely to produce an untrustworthy confession...(or)...where the subterfuge is so reprehensible as to offend basic societal notions of fairness, the confession obtained therefrom should be excluded...(or)... whether the subterfuge employed by the police precluded the accused from making a knowing and intelligent waiver.... Id at 434, 435.

Using the above quoted three-part test, the Court found the fabrication unlikely to "cause an untrustworthy confession" and not "so reprehensible...as offensive to basic notions of fairness". The Court then held:

> Nor do we believe that this subterfuge precluded the exercise of a knowing waiver. Of course, an accused must know the nature of his Constitutional rights and we caution that any misrepresentation which may cast doubt upon the accused's awareness of these rights would necessarily render the waiver suspect. However, in the case at bar, we are dealing not with a misrepresentation of rights, but with a misrepresentation concerning the amount of evidence against the accused. While we emphasize that we do not condone deliberate misrepresentation of facts supplied to an accused at a time when he must elect to waive a Constitutional right, we do not believe that a misrepresentation, even though intentional, as to the evidence available against him is the type of information that would so distort the factual situation confronting him as to render his waiver unknowing and unintelligent. Id at 435.

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44 Similarly, it is not unusual for the police to explain the availability of a "public defender". However, if the client has no prior criminal experience, his testimony that he did not understand that a P.D. was "free" is neither unusual nor incredible.

45 See also Commonwealth v. Baity, 428 Pa. 306 (1968).

Thus, any statement by the police which materially misleads the defendant or any threat or promise will operate to invalidate the waiver[46].

4. "Questioning" Defined:

"Questioning" for Miranda purposes has been defined as any police conduct...calculated to, expected to, or likely to, evoke admissions". Commonwealth v. Simala, 434 Pa. 219, 226 (1969). Employing this standard, police use of third persons has been held to be "police questioning" when parents were used[47] or when a co-defendant was used[48]. Similarly, the mere reading of the co-defendant's confession has been held to be "police questioning"[49].

By contrast, casual and/or non-inquisitorial remarks by police officers which in fact result in incriminating admissions, have often been held not to be "questioning"[50]. Similarly, simple questions posed for booking or other administrative needs have been held not to be "questioning" even when an inculpatory response is made[51]. Finally, direct questioning of a companion of the defendant has been held not to be "questioning" of the defendant even though the defendant made a direct response to the question asked[52].

In all of these situations the Simala test or its equivalent was employed along with a "totality of circumstances" standard. Defense counsel therefore must reconstruct the total factual and psychological situation to show that what otherwise might be considered "casual" or non-inquisitive was merely a subtle form of interrogation.

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46 Commonwealth v. Leaming, 432 Pa. 326 (1968), Commonwealth v. Brown, 213 Pa. Super. 288 (1968).

47 Commonwealth v. Bordner, 432 Pa. 405 (1968).

48 Commonwealth v. Hamilton, 445 Pa. 292 (1971).

49 Commonwealth v. Mercier, 451 Pa. 211 (1973).

50 See Commonwealth v. Brown, 438 Pa. 52 (1970). In Commonwealth ex rel. Vanderpool v. Russell, 426 Pa. 499 (1967), the defendant enlisted the assistance of the police to locate his "missing" wife. At a bus station, a police officer told the defendant, "you're holding back -- I want you to take a polygraph test". The defendant immediately confessed. The Court found no "police questioning" requiring Miranda, although the facts made it clear that some "focusing" has occurred.

51 See Commonwealth v. Duval, supra.

52 See Commonwealth v. Richard , supra. See also Haire v. Sarver, 437 F.2d, 1262 (8th Cir., 1971) where husband responded to question asked of wife, or Stone v. United States, 385 F.2d, 713 (10th Cir., 1967) where passenger responded to question asked of driver.

5. Non-Waiver followed by Alleged Waiver:

Miranda, supra, 384 U.S. at 473, 474, 86 S. Ct. at 1627, 1628:

> ...Once warnings have been given, the subsequent procedure is clear. 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. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent...

Michigan v. Mosley, 423 U.S. 96, 101; 103-104, 96 S. Ct. 321, at 325,326:

> ...This passage states that "the interrogation must cease" when the person in custody indicates that "he wishes to remain silent". It does not state under what circumstances, if any, a resumption of questioning is permissible...." The critical safeguard identified in the passage at issue is a person's "right to cut off questioning". Id at 474, 86 S. Ct. at 1627. Through the exercise of his option to terminate questioning, he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting. We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his "right to cut off questioning" was "scrupulously honored...".

Mosley was arrested for two separate robberies and refused to waive his Miranda rights as to those incidents. Two hours later, a different detective sought to question Mosley about a third - and apparently unrelated - robbery/murder case. Mosley was warned, waived and confessed. See, however, the dissent's statement of the facts.

If as Justice Brennan's dissent suggests, Mosley's "erosion" of Miranda "virtually empties Miranda of principle" and is a rejection of the "reality of life" of custodial detention and interrogation[53], where does Pennsylvania stand on this issue? Secondly, will Pennsylvania reject Mosley's erosion of Miranda and utilize State law and/or its supervisory powers as it has in the past[54]?

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53 Mosley, supra at 96 S. Ct. 333.

54 As Justice Brennan noted and clearly suggested,"...no State is precluded by the (Mosley) decision from adhering to higher standards under state law". See Commonwealth v. Ware, 446 Pa. 52(1971) cert. granted 405 U.S. 987, 92 S. Ct. 1254 (1972), cert. denied 406 U.S. 910, 92 S. Ct. 1606 (1972) where Pennsylvania held Miranda retroactive "as a matter of state law". In Commonwealth v. Campana, 455 Pa. 622 (1974), on remand from the United States Supreme Court, the Court held the same transaction test for double jeopardy to be a determination "pursuant to our supervisory powers". See also Commonwealth v. Triplett, Pa. 341 A.2d 62 (fully discussed in Section IV, C infra), Commonwealth v. Blackman, 446 Pa. 61 (1971), Commonwealth v. McIntyre, 417 Pa. 415 (1965), Commonwealth v. Richman, supra.

To answer, two separate groups of Pennsylvania cases need to be examined. In Commonwealth v. Grandison, 449 Pa. 231 (1972), the Supreme Court examined the same Miranda passage quoted supra and stated:

> ...Notwithstanding the express mandates of Miranda, we believe that there was a substantial change in circumstances which rendered further questioning by police permissible regardless of appellant's initial refusal to make a statement. There is no question that appellant's refusal to answer questions on the evening of August 4, 1971, with respect to alleged violations of the Vehicle Code precluded further questioning at that time concerning that subject. However, when the police learned of appellant's identity and of the additional charges pending against him it was proper for them to confront him with these matters..." 449 Pa. at 234.

This "change in circumstances" test, quite real in Grandison, was mostly illusory in Commonwealth v. Jefferson, 445 Pa. 1 (1971) where the only change was that the stabbing victim had died.

By contrast, the Court, more recently, in Commonwealth v. Mercier, 451 Pa. 211 (1973) set forth a different test:

> ...For a waiver to be effective, the reversal of the defendant's position must have been initiated by him. This is not a situation where a person in custody, after asserting his rights, indicated a desire to waive them without any further activity on the part of the police. Here, the police initiated the chain of events which culminated in appellant's inculpatory statement...[55] 451 Pa. at 216.

Under this factual test, the statements in Grandison, Jefferson and Mosley would all have been suppressed[56]. While Mercier may have sub silentio overruled Grandison on its facts, it is suggested that, at best, the future Pennsylvania test might be an "either/or" test utilizing Mercier and Grandison with Grandison limited to "significant" changes in circumstance.

6. Ambiguous Waivers:

> ...An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver... Miranda, supra, 434 U.S. at 475, 86 S. Ct. at 1628.

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55 See also Commonwealth v. Youngblood, 453 Pa. 225 (1973), Commonwealth v. Nahodil, 341 A.2d 91 (1975).

56 See also Commonwealth v. Franklin, 438 Pa. 411 (1970) where the Court held Miranda not to be violated, even though the defendant had asked for counsel, questioning had therefore ceased, and the defendant's change of mind had occurred five hours later as follows:

> ...I told him we didn't have to have a statement from him because witnesses had identified him but we would like to hear his side of the story. At this time he said "Take me back up and I will tell you what happened"... Id at 415-416.

The use of the word "could" by Miranda rather than "would", or any other more positive words, has created many legal/factual problems for the Courts. In Commonwealth v. Youngblood, 453 Pa. 225 (1973), the Court stated:

> ...In this case Youngblood, a 15 year old youth "of mildly defective intelligence", had been in police custody for several hours and was the prime suspect in the murder of his brother-in-law. He had already once elected to remain silent and to have his sister seek to find an attorney. When he suddenly changed his mind and exhibited a willingness to talk, the police should have been alert to the danger of accepting a statement without making as certain as possible that the suspect understood his rights and wished to waive them.... Whatever positive inference concerning appellant's comprehension of his rights can be drawn from his initial choice to remain silent and to seek the services of an attorney is undermined by the complete change of face which came only a few minutes later.... In concluding that the Commonwealth has not sustained its burden as to voluntariness, see Commonwealth v. Nathan, 445 Pa. 470, 477, 285 A.2d 175 (1971), we adopt the reasoning of the Court of Appeals for the Seventh Circuit, which held in an analogous situation that '...the defendant's refusal to sign the waiver form, followed by an apparent willingness to allow further questioning, should have alerted the agents that he was assuming seemingly contradictory positions with respect to his submission to interrogation. Instead of accepting the defendant's equivocal invitation, the agents should have inquired further of him before continuing the questioning to determine whether his apparent change of position was the product of intelligence and understanding or of ignorance and confusion. However, no further inquiry took place. In the absence of such an inquiry, we are compelled to conclude that the defendant's...responses to the questions asked him were not made after a knowing and intelligent waiver of his rights'... Id at 233, 234.

Only four months later, the Court again confronted ambiguous behavior in Commonwealth v. Canales, 454 Pa. 422 (1973) and the court stated:

> Apellant's statement, in this case, ... does not give rise to the inference that the appellant was unaware of the consequences of foregoing his right to speak. Appellant began his oral confession by saying: 'Look man, I am going to give you a statement from me to you only. I am not going to sign anything. I am not going to admit anything in the presence of anyone else, and it will be your word against mine'.... The appellant's statement gives rise to an inference that he knew the consequences of an oral confession and expected to prevail in the credibility contest when the oral confession was used against him. We must conclude, therefore, that the trial court did not err in finding a knowing, intelligent, and voluntary waiver by the appellant of his constitutional privilege to remain silent. (emphasis in original) Id at 425.

Combining Youngblood and Canales, it would appear that ambiguous statements or conduct will require additional police inquiries to eliminate ambiguity unless it clearly appears of record that the defendant had a full and complete understanding

of his rights[57].

Defense counsel, faced with police testimony establishing some small ambiguity as to waiver, should be prepared to explore and exploit all other areas of possible ambiguity. Did the defendant sign the statement? Did you ask the defendant to sign? What conduct of the defendant supported the conclusion of waiver/non-waiver[58]?

7. Right to Have Known Counsel Notified:

In 1972, the Supreme Court directly addressed this issue and in a 4-3 decision held that notice to known counsel prior to a planned interrogation was not required. Commonwealth v. Hawkins, 448 Pa. 206 (1972)[59].

A careful review of the Hawkins opinions should lead defense counsel to several successful approaches[60]. However, two lessons for defense counsel are clear. First, never surrender a client who wishes to avoid interrogation without first providing, by witness or writing, a provable non-waiver[61]. Second, if prior counsel did not comply with the first "never" rule, be prepared to prove (with defense evidence or cross-examination) that your particular defendant "needed" or "expected" or "desired" counsel to be present.

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57 See Commonwealth v. Martin, Pa. 348 A. 2d 391 (1975) where a plurality opinion refused to apply a per se rule where the defendant orally waived but refused to sign a waiver form. N.B. Martin, was part of the Boyle-Yablonsky murder trials. In Commonwealth v. Cost, Pa. Super. 362 A. 2d 1027 (1976), a 4-3 split in the Superior Court resulted in a refusal to suppressa statement where the suspect, while placed in a patrol car, stated that he understood his rights, refused to sign a waiver form, and then made incriminating statements. In Cost, there was no on-the-record showing of an express oral waiver.

58 In Commonwealth v. Bullard, Pa. 350 A. 2d 797 (1976), the defendant surrendered himself to the custody of the Court because he feared police and was turned over by the Court to a District Attorney's detective with instructions by the Court not to question the defendant until his family located a lawyer. Disregarding these instructions, the police warned the defendant, he waived and confessed. Compare Commonwealth v. Hawkins, 448 Pa. 206 (1972) discussed infra. The Court held the waiver invalid.

59 As an historical curiosity, Chief Justice Burger, while sitting as a Circuit Judge, stated in Mathies v. United States, 374 F. 2d 312 (D.C. 1967) "The prospective application of Miranda...plainly will require that such interviews [interviews of defendants without notice to their then retained or appointed counsel] can be conducted only after counsel had been given an opportunity to be present." Id at 316, fn 3.

60 The Court on at least five occasions specifically refers to possible factual issues not raised at Hawkins' motion and trial, apparently suggesting that had one or more of these issues been present, the result might have been different.

61 Compare Commonwealth v. Bullard, supra. Is Bullard different than Hawkins only in that a Court is more credible than an attorney? In Hawkins, no specific credibility determination was made by trial Court's findings of fact as between attorney and District Attorney's detective. Or does Bullard sub silentio overrule Hawkins?

D. Miranda and Waiver - The Unusual Defendant:

1. Juveniles:

Since 1974, special Miranda rules have been developed by the Pennsylvania Supreme Court to deal specifically with the juvenile suspect. In Commonwealth v. Roane, 459 Pa. 389 (1974) the Court stated:

> An important factor in establishing that a juvenile's waiver of his constitutional rights was a knowing and intelligent one would be evidence that, before he made his decision to waive those rights, he had access to the advice of a parent, attorney, or other adult who was primarily interested in his welfare.... In our view, (the parent's) mere presence is not enough. In order to support a finding that (the juvenile's) waiver of his rights was knowing and intelligent, we believe that the record must indicate that (the parent) had an opportunity to give (the juvenile) the kind of helpful advice discussed in Gallegos, supra. Id at 394, 395 [62].

Subsequently, in Commonwealth v. Starkes, 461 Pa. 178 (1975), the Court expanded the Roane requirements and stated:

> ...where the adult is ignorant of the constitutional rights that surround a suspect in a criminal case and exerts his or her influence upon the minor in reaching the decision, it is clear that due process is offended. An uninformed adult present during custodial interrogation presents an even greater liability. The minor in such a situation is given the illusion of protection, but is in fact forced to rely upon one who is incapable of providing the advice and counsel needed in such a situation.
>
> Unless we require police officers to also advise parents, who are in the position to counsel minor suspects during custodial interrogation, we will not only fail to assure the full benefits sought to be attained by this type of counseling but we will also increase the likelihood that the suspect will be misinformed as to his rights. Id at 188.

Finally, in Commonwealth v. Webster, Pa. 353 A. 2d 372 (1976) the Court put an affirmative burden on the police by stating:

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62 The quoted portion of Gallegos v. Colorado, 370 U.S. 49, 54, 82 S. Ct. 1209, 1213 was:

> (The juvenile defendant) cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions. He would have no way of knowing what the consequences of his confession were without advice as to his rights -- from someone concerned with securing him those rights -- and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself. 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 advice against this inequality, a 14 year old boy would not be able to know, let alone assert, such constitutional rights as he had. To allow this conviction to stand would, in effect, be to treat him as if he had no constitutional rights.

> ...not only may the Commonwealth not interfere with the right of a minor suspect to consult with a parent or guardian throughout the interrogation process, more importantly, police officials must make a reasonable effort to provide an opportunity for the youthful accused to confer with and receive the benefit of counsel or an interested and informed adult guidance before permitting him to elect to waive these important constitutional rights. Id at 378.

In the development of these rules (over vigorous dissents)[63], the Court has repeatedly stated that the rules are not per se prohibitions but are simply of major importance in a totality of circumstance test. In practice, however, they have operated as per se requirements for juveniles 16 years old or less[64]. For 17 year olds, the Court has generally almost ignored these rules and applied the same standards and tests as

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63 Eagen, J. with Jones, C. J. and Pomeroy, J. dissenting in Roane. Same dissenters in Starkes. Pomeroy J.and Eagen, J. dissenting in Webster. In Webster, Pomeroy, J. dissenting, stated:

> The Court's decision today ordering the supression of appellant's confession, in my view, confounds all logic. On the one hand, the Court states that "we do not accept the thesis that all confessions of minor offenders elicited without the benefit of counsel or an adult confidant must necessarily be rejected"... Nonetheless, the sole reason for the Court's determination that appellant's waiver of his constitutional rights was not knowing and intelligent is the fact that appellant's mother was not advised of her son's constitutional rights prior to conferring with him before his interrogation. This ill-conceived per se rule was first promulgated by the Court in Commonwealth v. Starkes... It is, in my opinion, totally without basis in law or logic.... Id at 379.

64 Sixteen year olds: Commonwealth v. Roane, supra., Commonwealth v. Chaney, Pa. 350 A. 2d 829 (1975), Commonwealth v. Stanton, 351 A. 2d 663 (1976) but see pre-Roane sixteen year olds: Commonwealth v. Moses, 446 Pa. 350 (1971), Commonwealth v. Porter, 449 Pa. 153 (1972).

Fifteen year olds: Commonwealth v. McCutcheon, 463 Pa. 90 (1975), Commonwealth v. Riggs, 348 A. 2d 429 (1975), Commonwealth v. Smith, 350 A. 2d 410 (1976), Commonwealth v. Webster, supra.

Fourteen year olds: Commonwealth v. Jones, 459 Pa. 286 (1974), Commonwealth v. Starkes, supra. In Ruth Appeal, 239 Pa. Super. 453, 360 A.2d 922 (1976). Pre-Roane 14 year olds: Commonwealth v. Eden, 456 Pa. 1 (1974).

it would for waivers by adults[65]. However, in Commonwealth v. Hailey, ____Pa. ____, 368 A. 2d 1261 (1977), the Court easily found that the defendant, then 17 years old, had not effectively waived his Miranda rights. The Court restated its position as follows:

> The thrust of our decisions in the Chaney and McCutchen line of cases requires that before a juvenile may waive his fundamental constitutional rights and respond to police custodial interrogation, it must be established that he has at least been afforded access to counsel or parental or interested adult guidance.(13) The burden of proving, by a preponderance of the evidence, a valid waiver of a constitutional right is on the Commonwealth. Commonwealth v. Goodwin, 460 Pa. 516, 333 A. 2d 892 (1975); Commonwealth v. Fogan, 449 Pa. 552, 296 A.2d 755 (1972). The two requisite elements of proof of such a waiver on the part of a minor defendant are a showing that, 1) the accused had access to the advice of an attorney, parent or interested adult before an effective waiver may be established, see Commonwealth v. McCutchen, supra at 92-93, 343 A.2d at 670,(14) and 2) that the consulted adult was informed as to the constitutional rights available to the minor.

(footnotes in original) at 1272 and 1273.

(13) Under the facts of this case we need not consider whether there are any circumstances which would justify a finding of an uncounselled waiver by a juvenile defendant, particularly where the youth is approaching the age of majority. See Commonwealth v. Webster, 466 Pa. 314 , _____ n.5, 353 A. 2d 372, 78 n.5 (1976).

(14) See Commonwealth v. Webster, supra at 378.

> [5.6] It is clear from these cases that not only may the Commonwealth not interfere with the right of a minor suspect to consult with a parent or guardian throughout the interrogation process, more importantly, police officials must make a reasonable effort to provide an opportunity for the youthful accused to confer with and receive the benefit of counsel or an interested and informed adult guidance before permitting him to elect to waive these important constitutional rights. (footnote omitted).

In Commonwealth v. Barry Smith, ____ Pa. ____ , 372 A.2d 797 (April 20, 1977), a case involving a 17 year old juvenile, the Court fully discussed the special juvenile waiver rules and stated:

> ...the Commonwealth must establish on the record that the adult did in fact comprehend the rights possessed by the minors.... the minor [must] in fact [be] provided an opportunity for consultation.... These rights are personal to the accused and therefore may only be waived by him, not the adult. Id at 802.

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65 Seventeen year olds: Commonwealth v. Irvin, 462 Pa. 383 , 341 A. 2d 132 (1975), Commonwealth v. Fogan, 449 Pa. 552 (1975), Commonwealth v. Goodwin, 460 Pa. 516 (1975). In Re Miller, 352 A.2d 124 (Pa. Super. 1975).

Finally, in Smith the Court made it clear that the Roane requirement of advice by an "interested"adult was critical.

> ...It was never the intention to exclude the requirement of interest simply because the consulting adult was a parent of the minor.(9) To the contrary, it was assumed that the relationship would assure the requisite concern for the welfare of the minor. However, that assumption does not justify the creation of an irrebuttable presumption of interest by a parent. Where, as here, the disinterest of the parent is graphically demonstrated, it is clear that Mr. Miller was not the interested adult envisioned in the rule. If the adult is one who is not concerned with the interest of the minor, the protection sought to be afforded is illusory and the procedure fails to accomplish its purpose of offsetting the disadvantage occasioned by the immaturity. 372 A.2d at 801.

(Footnote in original) (9) It is not clear from the record the exact nature of the relationship between Mr. Miller and Barry Smith. Although he is referred to as the father, it is not clear whether he is the natural father, adoptive father or stepfather. In Mr. Miller's testimony, he merely stated that he was the father and that his wife, Mrs. Miller, was the stepmother. No explanation is given why Barry has a different name.

Defense counsel are cautioned, however, that because of the continuing split in the Supreme Court, each and every juvenile case, regardless of age, should be presented

and argued as if the totality of circumstances test were strictly applicable[66].

A completely different approach to the juvenile confession case is based on the express language and legislative history of the Juvenile Justice Act of December 6, 1972. Section 13(a) of the Act (11 P.S. §50-310(a)) states in pertinent part:

> A person taking a child into custody with all reasonable speed and without first taking the child elsewhere, shall... bring the child before the court or deliver him to a detention or shelter care facility designated by the Court[67].

Section 21(b) (11 P.S. §50-318(b)) further provides:

> An extrajudicial statement, if obtained in the course of violation of this act...shall not be used against him.

The Supreme Court has not yet addressed these problems. The Superior Court, however, in Anderson Appeal, 227 Pa. Super. 439 (1974), analogized §13(a) with Futch requirements and equated the "all reasonable speed" requirement of 13(a) with the "without

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66 It should be remembered that Commonwealth v. Moses, 446 Pa. 350 (1971) (16 year old co-defendant of Webster) and Commonwealth v. Darden, 441 Pa. 41 (1971) (15 year old) have never been specifically over-ruled.

67 The drafters of the Act apparently did not believe that the language of this section authorized any police questioning beyond that necessary for identification, location of parents or medical treatment. In Packel, A Guide to Pennsylvania Delinquency Law, 21 Villanova L. Rev. 1, 32, the author notes:

> ...If "taking into custody" has the same meaning as arrest, then the Act is rarely adhered to. A child is not normally taken into his home or to a detention or shelter care facility after apprehension, except when the policeman does not intend to charge the child. Instead, the child is normally taken "elsewhere" -- to the police station. At the station house, the police usually question the child to obtain identification and to gather the information necessary to notify the parent, guardian or custodian. The interrogation is authorized by Section 13(a)(3), (note)
>
> (note) -- See Pa. Stat. Ann. tit. 11, §50-310 (Supp. 1975-76). The drafters of the General Assembly of the Commonwealth of Pennsylvania Joint State Government Commission, Proposed Juvenile Act (1970) (hereinafter cited as Proposed Act) did not believe the language of this section authorized any police questioning beyond that necessary to satisfy the purposes of section 12. Proposed Act, supra note 52, §13, Comment. This would seem to rule out interrogation concerning the facts of the alleged offense.

unnecessary delay" standard of Rule 130. That analysis not only ignored the significant real language difference between the two concepts, but it also ignored the fact that the legislature passed the Juvenile Act after Futch was decided and was presumably aware of its requirements[68]. Additionally, Anderson ignores the conjunctive "and without taking the child elsewhere" phrase and never mentions that portion of Section 21(b) quoted supra. Assuming, however, that Anderson will remain viable on its facts, it is worth noting that the opinion limits its broader pronouncements by cautioning:

> A two to two and one-half hour delay might be unreasonable under some circumstances. These cases normally stand on their own peculiar facts. However, in this case, the police had a legitimate reason in detaining the defendant in the station house so that the defendant might identify other perpetrators of this crime when they were brought in. Id at 442.

2. Mental Health Cases.

Two separate issues are presented by cases where the defendant suffers from a mental disease or defect. For the defendant suffering from mental illness, the test is essentially one of "competency"[69]. In Commonwealth v. Cannon, 453 Pa. 389 (1973) the Court stated:

> ...The evidentiary use of a defendant's incriminating statement violates due process if it can be shown that the statement obtained is not the product of a rational intellect and a free will. The determination of whether a confession is the product of a rational intellect necessitates our consideration of the totality of the circumstances. In this instance, while the appellant exhibits chronic paranoid schizophrenia, there is no evidence that his condition prevented

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68 In Geiger Appeal, 454 Pa. 51 (1973), the Court noted:

> ...the requirement of Pa. R. Crim. P. 118 that a person arrested without a warrant be taken without unnecessary delay before a magistrate is incorporated and amplified in the new Juvenile Act, §13, 11 P.S. §50-310. (emphasis added). Id at 56, fn. 8.

69 The "competency" standard to be used has never been specifically established. It is logical, however, to argue that the standards for competency to stand trial should be utilized as absolutely minimum standards. At trial, the mentally ill or defective defendant can be protected from himself by counsel. When asked to waive his Fifth and Sixth Amendment rights at the police station, who will protect him from himself? The police? For competency standards and tests see Commonwealth v. McQuaid 464 Pa. 499 , 347 A.2d (1975).

> him from understanding the significance of the inculpating statement he made to his interrogators. In addition, there is no evidence that police took unfair advantage of the appellant's condition. Nor that the appellant's third grade education kept him from appreciating the consequences of his confession. The totality of these circumstances supports the conclusion of the court below that the giving of appellant's statement was voluntary, knowing and intelligent, and not constitutionally infirm... (citations omitted)[70].

For the defendant suffering from a mental defect -- whether merely low intelligence or actual retardation -- the Court has employed a totality of circumstances test which clearly favors waiver. In Commonwealth v. Abrams, 443 Pa. 295 (1971) the defendant lacked a formal education, was illiterate and had an I.Q. of 69 but the Court simply stated that:

> ...There is no doubt that a person of below average mental ability can knowingly and intelligently waive a constitutional right...[71].

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70 Id at 393. The Court rarely has been presented with a "clearly" incompetent defendant on a waiver issue. In Commonwealth v. Ritter, 462 Pa. 202 (1975), the Court stated:

> In the facts of the instant case, appellant's will was not overborne by direct police conduct during the interrogation. However, the testimony of the interrogating officer himself established that appellant was in no condition to knowingly and voluntarily confess to a crime, since appellant was, in the officer's own opinion, in dire need of psychiatric help and exhausted... Under these facts, we are of the opinion that the mental and physical condition of appellant, which was known to the interrogating officer at the time appellant gave his confession, clearly evidenced that appellant was in no condition to knowingly and intelligently waive his Miranda warnings and thereafter confess to the police. Id at 204, 205.

Unfortunately, interrogating officers are seldom as helpful as the officer in Ritter. See Commonwealth v. Crosby, Pa. 346 A.2d 768 (1975) (defendant a psychopath), Commonwealth v. Daniels, 451 Pa. 163 (1973) (defendant had "some schizoid qualities"), Commonwealth v. Hawkins, supra (defendant of dull-normal intelligence and social judgment under stress "significantly impaired").

71 Id at 300. The Court has been exceptionally reluctant to find non-waiver based solely on low I.Q. See Commonwealth v. Daniels, supra (I.Q. 73), Commonwealth v. Fogan, 449 Pa. 552 (1975) (I.Q.84), Commonwealth v. Tucker, 461 Pa. 191 (1975) (I.Q. 75-79, reading level 2.7 grade)Commonwealth v. Darden, 441 Pa. 41 (1971)(I.Q. 71-76, mental age 8-11 1/2).

In either of the above situations, defense counsel should establish not only the fact of the mental disease or defect, but specifically establish a causal relationship between such problem and the waiver[72].

A completely separate issue is presented where, for the purpose of determining competency, the defendant is interviewed by a court psychiatrist[73]. §402 of the Mental Health Procedures Act (effective September 7, 1976) provides:

> (c) Application for Incompetency Examination. -- Application to the Court for an order directing an incompetency examination may be presented by an attorney for the Commonwealth, a person charged with a crime, his counsel, or the warden or other official in charge of the institution or place in which he is detained... (d) Hearing -- When required -- The Court either on application or on its own motion, may order an incompetency examination at any stage in the proceedings and may do so without a hearing unless the examination is objected to by the person charged with a crime or by his counsel. In such event, an examination shall be ordered only after determination upon a hearing that there is a prima facie question of incompetency....(e) Conduct of Examination; Report -- When ordered by the court, an incompetency examination shall take place under the following conditions....(2) it shall be conducted by at least one psychiatrist and MAY relate both to competency to proceed and to criminal responsibility for the crime charged. (3) The person

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72 In Commonwealth v. Abrams, supra, the defendant himself damaged the defense theory by his "coherent and responsive" testimony on the Motion, while in Commonwealth v. Scoggins, 451 Pa. 472 (1973), the defendant testified that he understood his Miranda rights. In Commonwealth v. Jones, supra, the defense attempted to call a psychiatrist to testify concerning the defendant's mental capacity at the time of the alleged confession. The Supreme Court held it was reversible error to exclude the testimony, stating:

> ...We see no reason why opinion testimony by a qualified psychiatrist that, because of his low intelligence, appellant was incapable of giving such a statement should not be admissible for that purpose, notwithstanding that he was not present when the confession was made and recorded... 459 Pa. at 68.

Using the same logic, psychiatric testimony to establish the nexus between the mental disease or defect and the ability to waive would clearly be admissible. Counsel should carefully consider whether it is desirable and necessary to call the defendant as a witness.

73 Because §402(E)(3) infra appears to contain an automatic waiver of counsel if defense counsel moves for or agrees to the examination and §402(E)(4) infra allows for "insanity" defense issues to be explored, defense counsel should be exceptionally careful -- on the record -- to limit his motion or agreement.

> shall be entitled to have counsel present with him and shall not be required to answer any questions or to perform tests unless he has moved for or agreed to the examination. Nothing said or done by such person during the examination may be used as evidence against him in any criminal proceedings on any issue other than that of his mental condition. (4) A report shall be submitted to the Court and to counsel and shall contain a description of the examination which shall include:
>
> (i) diagnosis of the person's mental condition;
> (ii) an opinion as to his capacity to understand the nature and object of the criminal proceedings against him and to assist in his defense;
> (iii) WHEN SO REQUESTED, an opinion as to his mental condition in relation to the standards for criminal responsibility as then provided by law if it appears that the facts concerning his mental condition may also be relevant to the question of legal responsibility; and
> (iv) when so requested, an opinion as to whether he had the capacity to have a particular state of mind, where such state of mine is a required element of the criminal charge....(Emphasis added).

The critical -- and not unusual -- problem arises when the defendant may be found competent to stand trial and an insanity defense is planned. In Commonwealth v. Pomponi, 447 Pa. 154 (1971), the Court stated:

> ...our Court has ruled that while a defendant raising the defense of insanity could be compelled to attend a psychiatric examination, he could not be "compelled to answer any questions propounded to him by those making the examination...."The Court...made clear that while "the personal characteristics and behavior of the defendant were open and observable to (the Commonwealth's) doctors during his incarceration", the defendant could remain silent during an examination.... We reaffirm... that the fifth amendment protects a defendant from being compelled to answer questions asked of him by the psychiatrist for the Commonwealth.... Id at 158, 162.

Defense counsel must be alert to avoid the prosecution's use of the Court psychiatrist by either (a) being present to assert the allegedly incompetent defendant's fifth amendment rights at the psychiatric interview or (b) by making sure that the Court's Order for the psychiatric examination limits the psychiatrist's inquiry and simultaneously orders that nothing resulting from the psychiatric interview can be used by the Commonwealth at trial.

In Commonwealth v. Glenn, 459 Pa. 545 (1974), the Court stated:

> Appellant first argues that his privilege against self-incrimination was violated when the Commonwealth was permitted to offer on rebuttal the testimony of Dr. Bowman, a staff psychiatrist for the Allegheny County Behavior Clinic. Dr. Bowman had interviewed appellant at the Behavior Clinic pursuant to a local rule of court and testified, contrary to the defense psychiatrist's testimony, that appellant was not psychotic at the time he murdered his father, this testimony being relevant on the issue of the degree of homicide. Appellant contends that this testimony was violative of our pronouncement in Commonwealth v. Pomponi, 447 Pa. 154, 284 A.2d 708 (1971). We do not agree.

> Appellant in the instant case was not compelled to anwwer the questions of the Commonwealth's psychiatrist and, in fact, refused to answer many questions, telling the psychiatrist that he had been informed by his lawyer not to answer any questions that might incriminate him. Under this set of facts, it becomes apparent that appellant was aware of his privilege against self-incrimination at the time he was questioned by the prosecution's psychiatrist and chose to answer those questions he thought would not incriminate him. Moreover, Dr. Bowman's testimony made no direct reference to answers given to him by appellant, nor did he testify to any damaging admissions. Under these circumstances, we fail to find a violation of appellant's right against self-incrimination. Id at 547, 548.

In this situation, the Court did not address the issue of whether or not the defendant should have been given Miranda warnings prior to the psychiatric interview[74].

In Commonwealth v. Hale, 467 Pa. 293, 356 A.2d 756 (1976), the Court suppressed the psychiatric testimony because Hale had not been "warned of his rights" and had been "misled" as to how the examination results would be used.

Hale, however, left unresolved whether Miranda warnings or some more limited form of warnings were required.

3. Medical Cases:

Typical medical cases easily can be divided into four categories; drug addicts, alcoholics, ordinary medical cases (epileptics, diabetics, etc.), and injury cases. Not surprisingly, the Courts, while saying that the same tests and standards apply to all four situations, seem to require much more defense oriented evidence in cases dealing with addicts[75].

For example, in Commonwealth v. Moore, 454 Pa. 337 (1973):

> Appellant, then complaining of stomach cramps and watering eyes, was examined by a police doctor. The doctor made a report in which he found that Moore was "suffering from acute withdrawal symptoms and is a manifestation of narcotic addiction." The report continued: "However, it is my opinion that he is quite alert and is lucid and fully capable of making a valid statement." Appellant then completed, read and signed his statement at 7:20 a.m. Two hours later the detectives took appellant to the Philadelphia General Hospital for treatment of the withdrawal symptoms. Id at 339, 340.

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74 See Commonwealth ex rel Finken v. Roop, 234 Pa. Super. 155 (1975), where the Court, in a plurality opinion, ruled that Miranda warnings were not required prior to a psychiatric examination for an involuntary civil commitment.

75 See Commonwealth v. Moore, infra, Commonwealth v. Biagiarelli, 454 Pa. 264 (1973).

In applying the Futch rationale to confession situations, distinct problem areas are encountered. First, what delay is "unnecessary"? In Futch , the Court adopted language by Judge, now Chief Justice, Burger who stated:

> Necessary delay can reasonably relate to time to administratively process an accused with booking, fingerprinting and other steps and sometimes even to make same (sic) limited preliminary investigation into his connection with the crime for which he was arrested, especially when it is directed to possible exculpation of the one arrested. Adams v. United States, 399 F.2d 574, 579 (D.C. Cir. 1968)(concurring opinion).[79]

Presumably, any other delay would be "unnecessary". Utilizing these standards, the Court has held delay to be "unnecessary" where the police argued that it was necessary in order to verify the defendant's "initial statements"[80] , or to review unsolved case files for other possible offenses by the defendant[81], or to gather additional evidence with which to confront the defendant[82] , or merely to continue the investigation based on the defendant's initial helpful but exculpatory statements[83] . On

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79. Futch supra at 392. In Commonwealth v. Williams, 455 Pa. 569 (1974) the Court stated:

> The Commonwealth has not advanced administrative considerations to excuse the twenty-seven hour delay in arraignment. Rather, we are urged to justify this delay on the ground that it was necessary because police needed to corroborate appellant's statement and apprehend other participants in the crime. It must be emphasized that pre-arraignment delay will always be unnecessary unless justified by administrative proceeding -- fingerprinting, photographing, and the like. Here no doubt about probable cause to arrest or to charge existed. We hold that a delay, otherwise "unnecessary" as this Court has defined that term, may not be excused because police utilize the delay to corroborate an accused's statement. Id at 573.

But in Commonwealth v. Whitson, 461 Pa. 101 (1975), the Court found:

> The record reveals that after appellant gave his initial statement to the police, in which he detailed his activities on the night of the murder, appellant was left alone and his story was checked by the police officers.... Under these facts, we conclude that appellant's delay in arraignment was caused by a necessary step in the police process, the checking of his story, a reason sanctioned by this court in our Futch decision. Id at 106.

80. Commonwealth v. Wilson, 458 Pa. 285 (1974), but compare Commonwealth v. Whitson, supra.

81. Commonwealth v. Hancock, 455 Pa. 583 (1974).

82. Commonwealth v. Showalter, 458 Pa. 659 (1974)

83. Commonwealth v. Cherry, 457 Pa. 201 (1974)

the other hand, the Court has held delay to be "necessary" to allow for the availability of a polygraph machine[84], or to finish an on-the-scene investigation before questioning the defendant[85], or to allow the defendant to assist the police in recovering evidence[86], or to allow for police shifts to change[87].

A second major problem area is in determining whether or not the defendant's statement is "reasonably related" to the delay[88]. The Court has consistently held that "reasonably related" is not a "but for" test or even one of causation or "proximate cause". Instead, the Court has recently evolved a totality of circumstances test which is functionally equivalent to a voluntariness approach. In Commonwealth v. Coley, 466 Pa. 53, 351 A.2d 617 (1976), the Court stated:

> In order for evidence to be suppressed under Futch there must be (1) an unnecessary delay, (2) evidence obtained from the accused which is a product of the delay, that is, there must be a "nexus" between the delay and the evidence and (3) the evidence must be prejudicial.... Our concern is not centered so much on the results under any particular branch of the three-pronged inquiry as it is with whether or not the purpose of Futch will or will not be advanced by its application in any given case. Both branches, that is, the delay and nexus branches, of the three-pronged inquiry aid in determining whether coercive circumstances exist in a sufficient degree such that the application of the Futch rule will effectuate its purpose. Just as the length of the delay aids in the determination of whether the delay is necessary, it also aids in the determination of whether a nexus exists. So too the circumstances surrounding a delay aid in the determination of whether a delay is necessary, just as they aid in determining if a nexus exists.... The mere fact that the police offer no excuse for a short delay does not lead to the conclusion that a delay was unnecessary and therefore sufficiently coercive to warrant the application of Futch. Ultimately, we look to the totality of the circumstances to determine coercive circumstances, including the length of a delay and the effect on the accused and then we evaluate the situation as a question of degree....

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84. Commonwealth v. Blagman, 458 Pa. 431 (1974). N.B.: The case has little precedential value as four justices concurred on the grounds that the issue was not properly preserved and a fifth justice merely concurred in the result.

85. Commonwealth v. Townsell, 457 Pa. 249 (1974). N.B.: Affirmance by an evenly divided court, with the opinion for affirmance treating the Futch violation as harmless error.

86. Commonwealth v. Wilson, 463 Pa. 1 (1975). N.B.: Affirmance by an evenly divided court, only two justices giving the opinion for the affirmance.

87. Commonwealth v. Rowe, 459 Pa. 163 (1974).

88. Commonwealth v. Dreuitt, 457 Pa. 345 (1974), Commonwealth v. Rowe, supra.

> Thus, with the view that the necessity of a delay and the nexus between a delay and confession are interrelated, we turn to the question of a nexus. The nexus between the delay and confession is established only where the accused proves that the confession was a product of the delay, that is, the delay is shown to be a contributing factor in obtaining the confession...(citations omitted).... Again, the totality of the circumstances must be examined to determine the degree of coercion in order to make this determination....[89]

After Davenport, however, it would appear that even pre-Davenport cases will be examined by the Court without recourse to the "voluntariness" analysis described in Coley. In at least two such cases, Commonwealth v. Benjamin Smith, ___Pa.___, ___A.2d (April 28, 1977) 1977) and Commonwealth v. Eaddy, ____Pa.____, 372 A.2d 759 (April 28, 1977), the Court reversed on Futch grounds and pointedly noted:

> Because the statements at issue here were obtained by police prior to our announcement in Commonwealth v. Davenport, ___ Pa.____, 370 A.2d 301 (1977) of a supervisory rule prohibiting the use at trial of any statement made more than six hours after arrest, that case is not controlling here. As was stated in Davenport, however, "...[i]in no case have we held that a delay of six hours or more was not an 'unnecessary delay.'" (Same quote in both cases).

For post-Davenport cases, several specific problem areas are anticipated by the author as the police attempt to circumvent the clear mandate of the Court. In order of concern, these problem areas are:

1. Can Davenport rights be waived by a suspect/defendant? With police having devised waiver forms (and oral waivers) for Miranda rights, Wade rights, consent searches, etc., are we about to be confronted by police testimony that the defendant was explicitly informed of his right to be promptly taken for a preliminary arraignment but waived that right because he desired to "tell his story" to the police?

2. Will we hear police testimony that a defendant was taken into custody, interrogated for a period of hours, and then released "because we wanted to confirm his story", only to have him subsequently arrested and then promptly arraigned with no apparent Davenport violation? After all, even partially exculpatory statements are often

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89. Coley, 351 A.2d at 621, 622. Although Coley is only a plurality opinion, two additional Justices, Nix and Pomeroy, concurred in the result. Justice Roberts, dissenting, noted that the plurality opinion "incorrectly described the analysis used by the Court in Futch and subsequent cases". See the even more recent case of Commonwealth v. Odom, 467 Pa. 395 , 357 A.2d 150 (1976) which does not utilize the Coley analysis but which also is a plurality opinion.

critical to conviction.

3. How often will we hear testimony of post-arraignment confessions? Since no Rule of Criminal Procedure appears to clearly prohibit post-arraignment interrogation, will we hear police officers testify that "after leaving the Judge, the defendant turned to me and said he would like to tell me his side of the story"? If Hawkins, supra, remains good law, the police could arraign the defendant promptly and if bail is not immediately posted, interrogate the defendant without notice to counsel. (See note 61 at page 23, supra.)

In all of the above areas and in numerous others where experience indicates that zealous police officers could develop loopholes in the Davenport rule, the Courts will have to be particularly sensitive to the "spirit" of Davenport and the clear intention of the Court to reduce police/defendant swearing contests as well as to deter violations of the prom arraignment requirement and to ensure that the protections afforded at preliminary arraignment are made available without unnecessary delay.

F. "Fruit" of Other Illegality:

> We need not hold that all evidence is fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting the establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint'. Wong Sun v. United States, 371 U.S. 471, 487-88, S.Ct. 407, 417 (1963).

The Pennsylvania Courts have consistently held that the determination of whether or not "exploitation" is present requires an examination of the totality of circumstances of each case with the burden of proof on the Commonwealth to show non-exploitation[90].

The three most common situations occur when the defendant makes a statement following: (1) an illegal arrest, (2) an illegal search or, (3) a prior suppressable statement. To resolve each of these situations, the Court has devised specialized guidelines.

"Fruit" of Illegal Arrest --

In Commonwealth v. Bishop, 425 Pa. 175 (1967), the Court stated:

> ...if the connection between the arrest and the confession is shown to be so vague or tenuous 'as to dissipate the taint' or 'sufficiently an act of free will', the confession is admissible, despite the illegality of the arrest. By 'sufficiently an act of free will', we mean that not only was the confession truly voluntary, but also free of any element of coerciveness due to the unlawful arrest. Id at 183.[91].

Utilizing this test, the Court has also consistently held that proper Miranda warnings will not purge the taint of an illegal arrest[92] . Similarly, the Court has

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90. Adopted in Betrand Appeal, 451 Pa. 381, 389 (1973) as follows:
> It should also be noted that once the primary illegality -- here the illegal arrest -- is established, the burden is on the Commonwealth to establish that the confession has been come at "by means sufficiently distinguishable to be purged of the primary taint" rather than "by exploitation of that illegality".

91. This passage was subsequently fully quoted in Commonwealth v. Brown, 451 Pa. 395 (1973) and Commonwealth v. Daniels, 455 Pa. 552 (1974).

92. In Commonwealth v. Brown, supra, the Court stated:
> The Commonwealth argues that the fact that appellant was given his proper Miranda warnings before confessing should be enough to purge the taint of the illegal arrest. To accept such an argument would be to permit the Commonwealth in the course of its investigation to arrest an unlimited number of individuals and to confine them all illegally, hoping that one of their number would voluntarily confess to the crime. This we will not permit. Id at 403.

has held that a mere lapse of time from illegal arrest to statement will not dissipate the taint.[93]

By contrast, the Court has held that where a defendant is in custody as a result of an illegal arrest and is confronted by an accusing co-defendant or such co-defendant's confession, that such confrontation was a sufficient intervening act to purge the taint of the illegal arrest.[94] Similarly, an illegal arrest will not taint a statement if it clearly appears that the statement was truly an act of free will.[95]

"Fruit" of Illegal Search

In Commonwealth v. Rowe, 445 Pa. 454 (1971), police illegally seized (warrant constitutionally infirm) a gun and confronted the defendant with the fact that "we have the gun". The defendant then confessed. After reviewing the facts, the Court stated:

> Although the present case involves the use of illegally seized evidence to procure a confession rather than an illegal arrest, the Wong Sun principles should and do apply with equal force in such circumstances. Here the evidence clearly shows that the illegally seized weapon was shown to the appellee while he was giving his written statement and that he had been told prior to that time that the police had the gun. Thus, the causal connection was shown and the Commonwealth had the burden of proving that the primary taint had been dissipated or that the confession was not only "truly voluntary, but also free of any element of coerciveness" due to the use of the illegally seized weapon.
>
> The Court below found factually that the weapon was used to help motivate the appellee to speak. Considering the proximity of the use of the weapon to the confession and the lack of any intervening

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93. In Commonwealth v. Jackson, 459 Pa. 669 (1975), the Court stated:

> Lapse of time in itself cannot make a confession independent of an illegal arrest.... Were the law otherwise the Commonwealth could indiscriminately arrest an individual, hold him for a judicially prescribed length of time, and then proceed to interrogate him certain that any voluntary confession would be admissible. Of course, other factors can purge evidence of any prior illegality. Id at 676.

94. See Commonwealth v. Wright, 460 Pa. 247 (1975)(Jackson's, supra, co-defendant) and Commonwealth v. Fogan, 449 Pa. 552 (1972).

95. In Commonwealth v. Davis, 462 Pa. 27 (1975), the Court found from the defendant's own words that his sense of remorse -- not the illegal arrest -- motivated the confession. See also Commonwealth v. Moody, 429 Pa. 39 (1968).

> independent circumstances to motivate the confession we cannot say that the Court below erred in suppressing this written confession as being tainted. Id at 459, 460.[96]

"Fruit" of Prior Statement

> ...after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first...[97]

In spite of the Bayer language, the operative test is whether or not the police in any way exploited or utilized the prior suppressable statement to obtain the challenged statement. In Commonwealth v. Whitaker, 461 Pa. 407 (1975), the Court reasoned as follows:

> Various factors have been considered by this Court in determining whether a challenged confession, although made after a waiver of constitutional rights, has been obtained through exploitation of prior constitutional violations. Among them are whether the police induced the confession by a manipulation of the prior illegality... and whether the accused previously made illegally obtained inculpatory admissions which created a psychological pressure upon him to confess.... We think these two factors were present in the case at bar.
>
> By revealing to Detective Ross on November 22 that he had been with Barton at the time of the stabbing, Whitaker had made a partially inculpatory admission. This statement, while it did not amount to a confession of guilt, nevertheless exposed to the police enough damaging information to increase Whitaker's vulnerability during subsequent questioning by the same interrogator.... It was against this background that Detective Grose first told appellant that Barton had made a full confession which directly implicated him and then asked appellant if he wanted to confess, and warned him anew of his rights. In view of the psychological pressure implicit in this situation, it is not surprising that appellant signed a waiver of his rights and confessed. This sort of use of unconstitutionally-obtained evidence in order to induce a confession is the very kind of "exploitation" that is condemned. Id at 417, 418.

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96. In Commonwealth v. Johnson, 229 Pa. Super. 182 (1974), the police searched pursuant to a defective warrant, recovered physical evidence of gambling activity, arrested Johnson and others, and obtained an incriminating statement from Johnson. The Court ordered all evidence including the statement suppressed under Wong Sun. An interesting sidelight is that Johnson attempted to bribe the arresting officers while on the way to the station. This bribe "statement" was not suppressed.

97. United States v. Bayer, 331 U.S. 532, 540, 67 S.Ct. 1394, 1398 (1947).

This Whitaker analysis is completely consistent with the Court's early pronouncements. In two 1968 cases[98], the Court set forth the simple standard that:

> ...a statement or confession made subsequent to another confession or incirminating admission obtained absent a required warning of constitutional rights may not be used as evidence, unless it is first established that the last statement or confession was not the exploitation of the original illegality and was obtained under circumstances sufficiently distinguishing to purge it of the original taint.[99]

In Commonwealth v. O'Shea, 456 Pa. 288 (1974), the Court found the following situation:

> Here appellant was asked questions to which the police already knew the answers. The police conduct was not an innocent attempt to gather information, because they already had this information. It was instead "likely to", and if not "calculated to" or "expected to" evoke admissions and develop contradictions.... As events developed the police authorities were eminently successful and there is little question that this preliminary examination in which the appellant made these statements, which were immediately shattered by the information in the possession of the police, was the reason for the subsequent inculpatory statement that was introduced against him at trial.... Under these circumstances the failure to advise appellant of his constitutional rights at the initiation of the interrogation tainted the subsequent confession and it was error to allow its admission into evidence. Id at 292, 293.

In all of these situations, the Court looked not only at the inherent psychological coercion discussed in Bayer, but specifically looked to police conduct or other circumstances which increased that basic coercive force.[100]

The "Poison Fruit" analysis has been utilized in situations other than the ordinary Fourth and Fifth Amendment context. For example, in Commonwealth v. Field, 231 Pa. Super. 53 (1974), the Court employed a "Poison Fruits" analysis in quashing indictments resulting from unwarned Grand Jury Testimony[101].

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98. Commonwealth v. Moody, 429 Pa. 39 (1968), Commonwealth v. Banks, 429 Pa. 53 (1968). Both cases, with contrary results,were decided on March 15, 1968 in opinions by Eagen, J.

99. Commonwealth v. Banks, supra at 59. See also Commonwealth v. Ware, 438 Pa. 517 (1970), Commonwealth v. Bordner, 432 Pa. 405 (1968).

100. See also Commonwealth v. Greene, 456 Pa. 195 (1974) (plurality opinion) holding second statement not "fruit" of unwarned prior admission.

101. See full discussion in Section IV, infra.

Similarly, in Commonwealth v. Horner, 453 Pa. 435 (1973), the Court ordered a new trial where the Commonwealth utilized the defendant's uncounseled preliminary hearing testimony in cross-examination to impeach his trial testimony.

Defense Counsel should be constantly alert to discover the exact sequence in which tips, leads, and evidence were obtained by the police to ensure that a "Fruits" issue is not overlooked.[102]

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102. See Commonwealth v. Nicholson, ____Pa. Super.____361, A.2d 724 (1976). Allocatur denied.

G. VOLUNTARINESS - A MODERN VIEW

vol·un·tary \'välən,terē, -ri\ *adj* [ME, fr. L *voluntarius*, fr. *voluntas* will, choice (fr. *vol-*, stem of *velle* to will, wish) + *-arius* -ary — more at WILL] **1 a** : proceeding from the will : produced in or by an act of choice ⟨~ action⟩ **b** : performed, made, or given of one's own free will ⟨a ~ task⟩ ⟨~ services⟩ ⟨~ contributions⟩ ⟨~ efforts⟩ **c** *obs* : READY, WILLING **d** : done by design or intention : not accidental : INTENTIONAL, INTENDED ⟨~ manslaughter⟩ **e** : acting of oneself : not constrained, impelled, or influenced by another : SPONTANEOUS, FREE ⟨~ worker⟩ ⟨~ or forced labor⟩ **f** *obs* : growing spontaneously **g** : acting or done of one's own free will without valuable consideration : acting or done without any present legal obligation to do the thing done or any such obligation that can accrue from the existing state of affairs **2** : of or relating to the will : subject to or regulated by the will ⟨~ behavior⟩ ⟨~ control⟩ ⟨~ motions⟩ **3** : able to will ⟨man is a ~ agent⟩ **4 a** : provided or supported by voluntary action or support ⟨the hospital is a ~ one with 400 beds —*Science*⟩ ⟨the importance of ~ societies in a democracy⟩ **b** : of or relating to voluntarism ⟨sell blanket insurance policies covering medical, dental, and hospital care to the public on a ~ basis —*Current Biog.*⟩

syn VOLUNTARY, INTENTIONAL, DELIBERATE, WILLFUL, and WILLING can agree in meaning done, made, brought about, and so on, of one's own free will. VOLUNTARY implies freedom from any compulsion that could constrain one's choice; often it suggests merely spontaneity, or, in contrast with *involuntary*, stresses the control of the will ⟨a *voluntary* confession of guilt⟩ ⟨a *voluntary* taking of life⟩ ⟨*voluntary* muscle movements⟩ INTENTIONAL contrasts with *accidental* and *inadvertent* in specifying an intention and purpose ⟨an *intentional* insult⟩ ⟨any injury to bystanders at an auto race cannot be considered *intentional*⟩ DELIBERATE carries the idea of full knowledge or full consciousness of the nature of an intended action ⟨a *deliberate* lie⟩ ⟨*deliberate* acts of vandalism⟩ ⟨an organized and *deliberate* attack — carefully planned and calculated —*N.Y. Times*⟩ WILLFUL adds to DELIBERATE the idea of a refusal to be advised or directed in any way and an obstinate determination to act despite all wiser opposing forces or considerations ⟨a *willful* disobedience⟩ ⟨a gigantic glorification of vice and crime, a *willful* inversion of all normal ethical standards —Joseph Frank⟩ WILLING implies such qualities as agreeableness or openmindedness that make one ready or eager to accede to others' wishes or effect an end pleasing to them ⟨my most *willing* activity is listening to my secretary —O. W. Holmes †1935⟩ ⟨no aspect of the world of science to which we cannot find *willing* and thrilling guidance —G.T.Schwartz⟩

Whereas the traditional view of voluntariness used a relatively simplistic free choice/coercion definition, a modern view goes beyond such simple definitional aspects to the various subtleties of definition. By so doing, the modern view realistically determines if Justice Frankfurter's test of voluntariness is satisfied in the real-life context of a police interrogation.[110]

Additionally, the modern view of voluntariness is premised on the proposition that defense counsel can often show a pattern of police conduct which, in combination with a particular defendant's personal characteristics, operates to create an intense situation for the defendant which, in any real sense, is substantially equivalent to overt coercion.

Thus, the modern view proposal herein operates on the assumption that multiple factors -- none in themselves sufficient to show coercion under a traditional voluntariness test -- can create by catalytic reaction with each other in the pressure-cooker of the police station interrogation room, sufficient force to trip the pressure valve on the defendant's will and produce a statement which shall be held involuntary as a matter of law. Critical to this analysis is not merely the "totality" of circumstances" often examined, but the interaction between the various circumstances contained in the totality.

Without specifically so stating, the Pennsylvania Courts have often engaged in this type of analysis. For example, in the area of juvenile Miranda waivers (see Section III, D. 1 supra), the underlying rationale for the special requirements on the police was not premised upon the fact that the police were acting improperly per se but rather that even

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110. See page 6 & 7 supra. The Frankfurter test is worth repeating here:

> Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process . . . . The line of distinction is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession.

scrupulously proper police conduct would overwhelm the average juvenile.[111] Similarly, the Court has looked directly to the interaction between the police conduct and the unusual defendant (see Section III, D. 2 and 3, supra) and without finding the "conduct" impermissable, has nonetheless found that the defendant's interaction with such conduct created an involuntary confession.[112] In short, whereas the traditional view looks

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111. In Commonwealth v. Starkes, 461 Pa. 178 (1975), the Court stated:

> The plight of a juvenile suspect was graphically depicted by Mr. Justice Douglas in the case of Haley v. Ohio, 332 U.S. 596, 68 S. Ct. 302, 92 L.Ed. 224 (1948):
>
> "Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces.... But we cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him." Id at 599-560, 68 S.Ct. at 304.

112. In Commonwealth v. Holton, 432 Pa. 11 (1968), the Court stated that:

> ...the accused's physical and mental condition must be considered, for sickness or ill health may well influence his will to resist and make him prone to overbearing and improper questioning. For the inquiry as to the voluntariness of a defendant's incriminating statements cannot be narrowed to a consideration of whether or not the police resorted to physical abuse in procuring them; equally relevant on the issue of voluntariness is the determination of whether or not the accused's will was overborne at the time he made the statements.
>
> After a careful consideration of all the relevant circumstances disclosed by this record, particularly the unchallenged facts related before, we unhesitatingly conclude that Holton's incriminating statement should have been excluded. These words of Mr. Justice Roberts, speaking for a unanimous Court, in Commonwealth ex rel. Gaito v. Maroney, supra, at 179 are most apt: "Our judgment is based not only on the lack of a rational choice on the part of appellant but also on 'a strong conviction that our system of law enforcement should not operate so as to take advantage of a person in this fashion.'" 432 Pa. at 17-18.

Thus, the Court recognized a type of "coercion" not based on specific forbidden police conduct, but strictly on the defendant's reaction to the situation.

almost exclusively to police conduct, the modern view substantially increases the focus on the defendant and his reactions.

Before specifically addressing individual factors previously mentioned by the Court as relevant, defense counsel is urged to consider one other critically important legal doctrine -- the proper scope of appellate review.

In Commonwealth ex rel. Butler v. Rundel, 429 Pa. 141 (1968), the Court stated:

> ...Our task on review, like that of the United States Supreme Court, is to consider only "the evidence of the prosecution's witnesses and so much of the evidence for the defense as, fairly read in the context of the record as a whole, remains uncontradicted. 429 Pa. at 149-50.

In Commonwealth v. Taper, 434 Pa. 71 (1969), the Court stated:

> We have carefully reviewed the record and, while the question is a very close one and Judge Keim's decision was a conclusion, as distinguished from a true finding of fact, we cannot say that the Order of the Court below was based upon a capricious disbelief of the evidence or upon an error of law or was a palpable abuse of discretion. 434 Pa. at 78.

Finally, in Commonwealth v. Santana, 333 A.2d 876, the Court stated:

> ...It would appear from the undisputed facts that the door to the second floor apartment had been secured by a dead lock; that although allegedly within the unobstructed view of the officers, appellant was not seen closing the door, fastening the lock, or discarding the key. Further, no key was found when he was searched, nor was any key recovered from the area. We thus conclude that the statement of the officer that appellant was observed actually leaving the room, should have been rejected by the triers of fact.
>
> > "It is settled law in Pennsylvania that testimony in conflict with the incontrovertible physical facts and contrary to human experience and the laws of nature must be rejected..." Colna v. Northern Metal Co., 242 F.2d 546, 549 (3rd Cir. 1957). Id at 878.

In combination, these standards set forth the test that requires the Motions Court

to accept as true the uncontradicted defense evidence[113] and to reject as false that portion of the Commonwealth's evidence which is contrary to incontrovertible physical facts or contrary to human experience. Because the actual litigation and decision on the Motion to Suppress is controlled by these same principles, the only effective difference between the Motions Court and the Supreme Court is the Motions Court's ability to make "reasonable" decisions on credibility issue, in actual practice, the Motions Court can often be presented with uncontradicted evidence supporting suppression.

Two actual case examples are presented to demonstrate the proposed approach.

CASE I

Police testimony established that the defendant, then 17 years of age, was arrested in the company of his mother, warned consulted his mother, and was transported to the police station for questioning. He was again fully warned of his Miranda rights, waived his rights, and gave a statement denying knowledge or involvement. After an hour of interrogation in which the defendant did not respond to the questioning but merely "stared into space", the interrogating officer called the defendant's mother to inquire about his mental health. Assured that he had no history of mental problems, both interrogation and staring into space resumed for a second hour.

Deciding that a different detective might be more effective, the interrogation was turned over to a second interrogator who obtained similar non-responses for approximately an hour. At that time, the defendant finally "blurted out" an inculpatory statement and then proceeded to assist the police in an attempt to arrest a fugitive co-defendant.

The defense relied on a multiple factor approach which included the defendant's intelligence and education as shown by school records, the defendant's response to authority figures as shown by psychiatric reports, the attitude of the police as shown by the 1) failure to invite or bring along the concerned parent, 2) the persistence of the interrogators in the face of silence, 3) the failure of the police to even start the paper work for processing and arraignment until after the admissions were obtained, 4) the use by the police of "best interest" type language that fell just short of the forbidden and 5) the failure to notify juvenile authorities of the arrest. Additionally, the defendant's multiple prior contacts with the police showed a pattern of either immediate non-waiver of Miranda or immediate confession. The defendant did not testify on the Motion.

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113. Of course the Court can reject the defendant's own testimony or testimony of a defense witness where the Court can legitimately argue it to be incredible on the face or the product of motive, bias, etc. Such a finding would not be a "capricious disbelief".

The Motion Court rejected the Commonwealth's position, stated that no credibility determinations were required and that the enumerated factors, in combination and interaction with each other, overcame the defendant's will, and held the confession involuntary as a matter of law.

CASE 2

Police testimony established that the defendant, a 20 year old of apparently average intelligence, was arrested along with anohter person who was attempting to pawn a watch stolen in a recent gang rape/robbery. The interrogating detective further established that Miranda warnings had been given and a written waiver obtained. The defendant immediately confessed and implicated five others who were arrested and interrogated within the next several hours. After obtaining confessions from all parties, the several assigned detectives conferred, compared notes, and concluded that the defendant was not involved and was falsely confessing for some reason. The defendant was confronted with these facts, persisted in his confession of guilt even after being directly confronted with a co-defendant who exculpated him, and agreed to take a polygraph examination. This examination indicated deception on all his answers claiming involvement. Confronted with these results, he again insisted on his guilt and stated that he wanted to go to jail with his friends. Approximately seven hours elapsed in this process.

Attempting to oblige the defendant's desire to go to jail, the police went to their unsolved rape files and confronted the defendant with an unsolved case which had occurred in his neighborhood. No additional warnings were given because the defendant stated that he knew his rights and desired to confess to his misdeeds. After the police summarized the information on this rape, the defendant admitted his guilt and named a co-perpetrator. The police never charged the defendant with the crime for which he was arrested but instead charged him with rape No. 2.

Defense evidence on the Motion to Suppress consisted of a social worker who testified to the defendant's abysmal home life and his desire to escape his home and responsibility, a psychiatrist who testified to the defendant's passivity and pathological desire to please authority figures, and various other evidence showing the physical interrotion setting. The defendant testified that he was generally well treated, although

quite tired, depressed, that he had been drinking earlier, that he falsely confessed to both crimes because he wanted to go to jail with his friends and that he wanted to please the interrogating detective. He further testified that because his only prior police experiences were for trivial offenses as a juvenile, he had no idea of the seriousness of his action in waiving his rights and confessing. The psychiatrist provided corroborating testimony on this point. Finally, defense counsel presented evidence without contradiction that the details of his confession were at a variance from the victim's details and that the victim could not indentify the defendant as the perpetrator[114].

Accepting the defense argument that the police should not have been so eager to "clean their books" after they were on notice that the defendant's behavior was somewhat bizarre, the Court concluded that the confession was involuntary because the Commonwealth had failed to establish by a preponderance that the defendant's statement was the product of a"knowing and intelligent" relinquishment of rights nor was the confession a deliberate act in the sense of the detailed definition quoted supra.

In both of the above case examples, a traditional voluntariness analysis would probably have failed to result in suppression. In Case 1, actual interrogation only took three hours with several breaks. In Case 2, the defendant's own testimony established traditional voluntariness. However, in both cases the defense technique of looking at the individuals involved and considerating their separate interests, motives, and peculiarities, as well as the way in which they interacted within the interrogation process, made clear to the motions court that the defendant's confession occurred, in Justice Frankfurter's phrase, after "governing self-direction [was] lost".

In Commonwealth v. James Smith, Jr., ____ Pa. ____ , (Jan. 28, 1977) the Court looked at the interaction of the defendant with the police and the interrogation environment and stated:

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114. Although such evidence was arguably irrelevant on the motion, its impact in assessing the defendant's state of mind was obviously helpful. After all, the Court would prefer to believe that it suppressed an "unreliable" confession.

"Instantly, the conditions of detention included a minimum of eight hours of being handcuffed to a chair and isolated from other persons with the exception of limited encounters with police. Smith's physical and psychological state was obviously deteriorated as evidenced by his attempts at suicide, his recent discharge from the hospital, and the police recommendation that he be hospitalized following the detention for interrogation purposes.

Further, while the element of continuous interrogation is not present so that the length of time between arrest and the obtaining of the statements in itself is not sufficient to warrant reversing the court's determination of voluntariness, Commonwealth v. Johnson, supra. at, 354 A.2d at 890-91, the length of detention, some eight hours, must instantly be considered in connection with Smith's obviously impaired mental state. Moreover, five of the eight hours must be viewed as having occurred subsequent to Smith having expressed a desire to remain silent[3]. That Smith's will was impaired by his mental condition is further evidenced by the fact that even without prolonged detention he acted against his own best interests when he discharged himself from the hospital on July 2 against the advice of medical personnel.

Thus, considering the length of detention, the circumstance of isolation and being handcuffed to a chair, Smith's knowledge that his wife was in custody and being questioned, and very importantly, Smith's mental state as evidenced by his attempts at suicide and need for medical attention, we hold that evidentiary use of the statements should not have been permitted at trial because the Commonwealth failed to establish they were voluntarily given.

(Footnote in original.) 3. The testimony at the supression hearing clearly established this, supra. n.2 and accompanying text, and our standard of review presents a serious barrier to considering the additional testimony provided at trial in explanation of what was said at 4:00 a.m. But we need not now determine if we should consider the further explanation provided at trial because, even assuming we should or would, we would still consider the confession involuntary under the totality of the circumstances involved herein."

This is the "Modern View" at work.

IV GRAND JURY TESTIMONY

In Commonwealth v. McCloskey, 443 Pa. 117 (1971), the Court held:

> ...In seeking to balance society's interest in the grand jury's freedom of orderly inquiry and a witness's right to exercise his privilege against self incrimination knowingly and intelligently, we believe that proper procedure is for the court supervising the investigating grand jury to instruct a witness when administering the oath that while he may consult with counsel prior to and after his appearance, he cannot consult with counsel while he is giving testimony. However, the witness should also be informed that should a problem arise while he is being interrogated, or should he be doubtful as to whether he can properly refuse to answer a particular question, the witness can come before the Court accompanied by counsel and obtain a ruling as to whether he should answer the question.
>
> Such a warning gives full recognition to the delicate position of a witness before an investigating grand jury. He has been summoned to testify, and he is subject to contempt proceedings should he refuse to testify without justification. The question of when a witness has "reasonable cause to apprehend danger" and hence can exercise his right against self incrimination is not always clear.
>
> Determining what is an incriminating statement is not always clear to a layman. We thus conclude that a subpoenaed witness who has given testimony before an investigating grand jury without the above warning has been denied his right against self incrimination...[103]

Three years later in Commonwealth v. Columbia Inv. Corp., 457 Pa. 353 (1974), the Court re-affirmed McCloskey and specifically stated:

> It must be concluded that a grand jury witness, virtual defendant or otherwise, does not have the right to refuse to appear before a grand jury and, once there, does not have an unqualified right to remain silent. Requiring Miranda warnings to be administered to grand jury witnesses would not only be a unprecedented and unwarranted extension

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103. Commonwealth v. McCloskey, supra at 143-4. Opinion by Roberts, J., Eagen, J., and Jones, C.J. dissenting.

> of Miranda, it would be illogical and confusing because it would erroneously imply the existence of two nonexistent rights -- the unqualified right to remain silent and the right to have counsel present in the grand jury room. The instructions required by Commonwealth v. McCloskey, here administered to appellees in the presence of counsel prior to appellees testifying, completely appraise any grand jury witness, "virtual defendant", or otherwise, of the Fifth and Sixth Amendment rights available to him...[104]

In Commonwealth v. Field, 231 Pa. Super. 53 (1974), the Court applied McCloskey and quashed the indictments stating:

> ...The McCloskey rule states that if the indictments are "in any way based" upon the impermissible testimony they must be quashed. We cannot interpret this rule to require that the grand jury must quote a witness's testimony or state in the presentment that the testimony supplied the basis for the charge. Where it appears that testimony given in the absence of the warnings influenced the decision, the "in any way based" standard of McCloskey has been satisfied...[105]

An interesting problem arises when the witness -- now a defendant -- was either named in the petition for the calling of the investigating grand jury or was a "virtual defendant" or real defendant at the time of his grand jury testimony. This situation becomes particularly troublesome for two separate reasons. First, the Court in Columbia specifically declined to over-rule Commonwealth v. Kilgallen, 379 Pa. 315 (1954) and Manko Appeal, 168 Pa. Super. 177 (1951)[106], took pains to distinguish a Federal District court case where the witness had already been "formally charged"[107], and made efforts to show that the defendants were not "in the status of accused persons".[108]

The second reason for trouble in this area is the unclear position of former Chief Justice Jones. Justices Roberts, O'Brien and Pomeroy joined the majority in McCloskey and Columbia. Justices Eagen, Nix and Mandarino made their dissenting positions clear in Columbia. Chief Justice Jones, however, joined the dissenters in McCloskey and the majority in Columbia. But the real holding of Columbia is best stated in the majority's concluding paragraph -- which easily could have been a per curiam opinion:

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104. Commonwealth v. Columbia Invt. Corp., supra at 366. Opinion by Roberts, J. Eagen, J.; Jones, C.J. dissenting.

105. Commonwealth v. Field, supra at 62.

106. Commonwealth v. Columbia Invt. Corp., supra, note 8, pp. 362-3.

107. Id.

108. Id. at 366-7.

> ...Review of the record satisfies us that appellees were in no sense prejudiced by their appearance before the investigating grand jury. The supervising judge, immediately prior to their entering the grand jury room, fully informed them in the presence of their counsel of their constitutional rights before the grand jury. No objection to these instructions was interposed. Although appellees testified, they do not allege that they were compelled to or did answer any incriminating questions. The record fails to indicate any basis for quashing the indictments...[109]

What is the view of today's Court?

109. Id at 372.

V TRIAL ISSUES

A. In General

Assuming that by some misfortune of facts or judicial misinterpretation defense counse has lost the Motion to Suppress, the district attorney will soon discover that he has merely won the first skirmish and that the battle rages on. Rule 323 only mandates trial admissibility over Constitutional objections;all evidentiary objections remain. In addition, most Motions issues can be relitigated to the Jury. This section will attempt, therefore, to explore in some depth two of the most common problem areas; Corpus Delicti and Jury Issues. Additionally, a few paragraphs are offered herein on more narrow trial issues.

An obvious condition precedent to admission of an alledged statement by a defendant is its genuineness. Where the Commonwealth cannot make a prima facie showing of genuineness[115] the rules of evidence prohibit the admission of the testimony. In the more common situation, the police will testify that the defendant made a statement which the defendant denies making. In this situation, the defense is entitled to a jury charge that the statement must be disregarded unless each juror individually first finds as fact that the defendant did make the statement.[116] It would seem logical that the defense would always be entitled to such a charge absent a concession by the defendant that the statement was his.

Another common problem arises when the Commonwealth attempts to use the statement not as direct evidence, but to impeach the testifying defendant or a witness. In this connection it should first be noted that if the statement was suppressed for any reason, it cannot be used for impeachment in Pennsylvania. Commonwealth v. Triplett, 462 Pa. 244, 341 A.2d 62 (1975) specifically rejected the rule of Harris v. New York, 401 U.S. 222, 91 S.Ct. 643 (1971). Assuming that no Triplett problem exists, the general rule is that the defendant can, of course, be impeached by any prior inconsistent statement. However, that assertion only puts the rabbit in the hat because evidence rules (not the subject of this paper)provide detailed

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115. Typical of this type of situation is the apparent admission in a telephone conversation with no proper voice identifications, as in "Well, your Honor, the man called and said he was (the defendant) and he then said to me.....".

116. See Commonwealth v. Giovanetti, 34 Pa. 345 (1941).

standards applicable to any witness and to whether or not the inconsistency is significant, relevant, and material[117]. Of course, a defendant may always be impeached by a confession or admission which the Commonwealth chose not to use in its direct proof[118]. A defense witness may also be impeached with the defendant's statement where that witness testifies differently from such statement[119].

Competency can always be raised at trial to challenge the admissibility of a defendant's statement[120]. If declared admissible, the defense also should logically be entitled to a jury instruction similar to the charge on genuineness if the facts concerning the defendant's mental state are put before the jury. To disallow such a requested instruction would take from the jury the critical issue of the defendant's mental condition at the time of the statement as it reflects on the statement's inherent trustworthiness.

Finally, it should be mentioned that privileges, whether marital, priest-penitant, doctor-patient, or others, can often be invoked to deny admissibility to the Commonwealth's evidence. Each of these privileges is well documented and such discussions are best left to the Evidence texts. Counsel are cautioned, however, to be constantly aware of these privileges and the variations thereon[121].

B. Corpus Delicti

In 1974, Justice Roberts clearly explained the corpus delicti rules and rationale in Commonwealth v. Ware, 459 Pa. 334, 329 A.2d 258 (1974).

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117. See generally McCormick on Evidence, Sections 34-39, West Publishing Co., (1972). See also, Commonwealth v. Robinson, 229 Pa. Super 131 (1974).

118. Commonwealth v. Hickman, 453 Pa. 427 (1973).

119. Commonwealth v. Tervalon, 463 Pa. 581, 345 A.2d 671 (1975)

120. See Commonwealth v. Cunningham, 457 Pa. 397 (1974) and Commonwealth v. Murphy, 459 Pa. 297 (1974).

121. For example, are the admissions of a defendant to the inmate/staff member of the prison Law Clinic covered by a privilege? Should they be?

...We have followed Professor Wigmore's analysis that a crime conceptually consists of three elements: "first, the occurrence of the specific kind of injury or loss...; secondly, somebody's criminality (in contrast, e.g., to accident) as the source of the loss. -- these two together involving the commission of a crime by somebody; and, thirdly, the accused's identity as the doer of the crime." See Commonwealth v. May, 451 Pa. 31 (1973). Corpus delecti, meaning "body of the crime", consists of the first two elements. Commonwealth v. May, supra; Commonwealth v. Rhoads, 225 Pa. Super. 208, 213 (1973). Specifically, "[t]he corpus delicti [in a murder prosecution] consists of proof that a human being is dead and that such death took place under circumstances which indicate criminal means or the commission of a felonious act." Commonwealth v. Milliken, 450 Pa. 310, 317 (1973), quoting Commonwealth v. Frazier, 411 Pa. 195, 202 (1963).

Appellant invokes the rule that a criminal conviction may not be based on the extra-judicial confession or admission of the defendant unless it is corroborated by independent evidence establishing the corpus delicti. See Commonwealth v. May, supra; Commonwealth v. Leamer, 449 Pa. 76 (1972); Commonwealth v. Palmer, 448 Pa. 282, 285 (1972). This rule is rooted in a hesitancy to convict one of crime on the basis of his own statements only.

> The grounds on which the rule rests are the hasty and unguarded character which is often attached to confessions and admissions and the consequent danger of a conviction where no crime has in fact been committed...

Commonwealth v. Turza, 340 Pa. 128, 134 (1940). Therefore, the rule requires that the prosecution introduce evidence independent of the defendant's statements which establishes that a crime has in fact occurred.[41]

(Footnote in original)

41. The rule is frequently articulated in terms of a condition on the admissibility of the defendant's statements; see e.g., Commonwealth v. Palmer, 448 Pa. 282, 285 (1972). "Because of the trial court's discretion over the order of proof, however, it is for practical purposes not a condition of admissibility but rather...a formulation of the required proof to take the case to the trier of fact or to sustain a finding of guilt". McCormick's Handbook of the Law of Evidence §158, at 347 (2d ed. E.Cleary 1972); see Commonwealth v. Burns, 409 Pa. 619, 637 (1963); Commonwealth v. Lettrich, 346 Pa. 497, 498 (1943); Commonwealth v. Ferguson, 162 Pa. Super. 199, 202 (1948).

> The first element, that a human being is in fact dead, rarely presents difficulty.[42] But proof of the second element -- that death "occurred through a criminal agency", Commonwealth v. May, supra, at 32 -- frequently is disputed. Often the circumstances of death are such that homicide cannot be established absent the statements of the accused as the cause of death to the exclusion of the accident or suicide. Accordingly, we have held that the corroboration policy is satisfied if the independent evidence "points to an unlawful killing, although it may indicate as well accident or suicide," Commonwealth v. Coontz, 288 Pa. 74, 79 (1927), or "where the circumstances attending the death are consistent with crime, though they may also be consistent with accident... or suicide." Commonwealth v. Turza, supra, at 135. Although corroboration is insufficient if the independent evidence is equally consistent with accident or criminality, Commonwealth v. Leslie, 424 Pa. 331 (1967), "the prosecution has no duty to affirmatively exclude the possibility of accident or suicide in order to establish the corpus delicti." Commonwealth v. May, supra, at 33.[43] Commonwealth v. Ware, supra, 459 Pa. at 365-366.
>
> (Footnote in original)
> 43. We do not lose sight of the distinction between the requirement of corroboration of the statements of the accused and the Commonwealth's ultimate burden of proof. The former merely requires that the trial court be satisfied that a conviction will not result from a confession or admission when no crime has in fact been committed by anyone. Ultimately the Commonwealth must prove beyond a reasonable doubt that a crime has in fact been committed. Commonwealth v. May, 451 Pa. 31, 33 n.2 (1973); Commonwealth v. Maybee, 429 Pa. 222, 223 (1968); see generally Commonwealth v. Rose, 457 Pa. 380 , 321 A.2d 880 (1974). Commonwealth v. Maybee, supra, and Commonwealth v. Deyell, 399 Pa. 563 (1960), are examples of the Commonwealth's failure to finally prove beyond a reasonable doubt that a crime had in fact been committed.

For defense counsel, the most fertile area of these rules is the emphasized portion. Cross-examination at trial of the early "fact" witnesses can often create the "equally consistent" situation and deny admissibility to the defendant's statement. This is particularly true in cases where the Commonwealth is missing a witness to some apparently insignificant ("after all, we do have the confession") fact which must be shown to establish either "injury" or "criminal agency".

If the Trial Court rules the statement admissible it becomes time to turn to the jury. Upon request, the defense is entitled to an instruction that they must disregard the defendant's statement unless they are convinced beyond a reasonable doubt by the other evidence that the crime charged was committed by someone.[122]

122. See cases cited by Roberts, Jr. in Ware, supra.

Needless to say, this instruction is not very helpful to the defense with a typical jury ("but, he did confess, it was not accident") unless the defense has presented at least some evidence to show the statement untrustworthy. A simultaneous attack on voluntariness (discussed, infra) or genuineness or some explanation from the defendant (or his psychiatrist) as to why he would confess to a crime that never occurred is therefore mandatory as a practical matter.

C. Voluntariness and Other Jury Issues.

In addition to the jury issues mentioned above, the defense, upon request, is always entitled to an instruction that the jury should not consider the defendant's statement unless it finds that such statement was made "voluntarily". As with the voluntariness issue for suppression purposes, the Court has moved significantly from a traditional free choice/coercion approach to a much broader totality of circumstances and subjective characteristics approach.

It is the Writer's (un-confirmed) belief that each and every possible ground for suppression can be re-raised at trial and if raised the Trial Court is (will be) required to instruct the jury as to the applicable legal standard on police conduct (e.g. prompt arraignment, legal arrest) and then the Court must also instruct the jury that if they find that the police violated the defendant's rights in any way, the jury should consider such violation as a relevant factor in determining voluntariness.[123]

Additionally, of course, the basic voluntariness standards applicable to suppression motions are completely available as jury instructions.

Even with such instructions, however, experience teaches that it is indeed a rare jury that will in fact disregard such a statement. The only way to win, therefore, even assuming a "couldn't be better" charge, is to again combine the voluntariness issue with genuineness, competency, corpus, or any other facts which will cause the jury to believe the statement untrustworthy.

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123. See Commonwealth v. Coach, ___ Pa. ___, 370 A. 2d 358 (1977), and Commonwealth v. Motley, ___ Pa. ___, 372 A.2d 764 (1977).

Although various methods have been devised to deal with particular fact patterns, the writer has obtained maximum results by combining voluntariness and genuineness.

The trial technique is based on exhaustive cross-examination of the detective who allegedly obtained the statement. First, but the order is not critical, the detective is questioned with leading questions so that he affirmatively testifies to what a good, nice, considerate, and proper gentleman he is and how well he treated your defendant and all defendants. He never gets emotionally involved, doesn't really care if the defendant confesses, doesn't think about promotions or commendations, and is in all ways a"good scout." This testimony has now prepared the jury to disbelieve every subsequent word he utters.

Second, the detective is cross-examined exhaustively to determine exactly what he know or was told before he interviewed the defendant[124].

Third, the detective is questioned concerning his knowledge that, "Yes, I know the defendant claims police brutality", to show his motive and bias. This is critical if the defendant cannot himself testify.

Fourth, and particularly effective with short oral statements, but applicable to formal statements as well, the detective is questioned about the taking of the statement itself and its contents. This examination is designed to show that there is absolutely nothing of significance to the crime itself that the detective didn't already know and that not included are several critical facts that only the perpetrator could know, or if included, didn't ultimately check out after further investigation[125].

As a fifth and final area, especially when the defendant's version is that "he typed it up and made me sign it", it is critical to cross-examine the detective as to the exact time he was doing each task. If the investigation was not exceptionally simple, adequate time when the detective "doesn't remember" what he was doing always exists in which he could have typed the statement.

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124. It is typical police practice in most departments to interview the suspect last so that he can be presented with and led by the evidence against him.

125. Of course, when your client's statement says the stolen goods are in the third trashcan in Alley "A" and the police subsequently go and retrieve the items, forget the preceding paragraphs.

After this cross-examination, defense evidence on voluntariness or genuineness will be heard by a receptive jury. As a caveat, it must be mentioned that the detective should never be asked direct questions concerning omissions, "doesn't remember" time, or "But you already knew that, didn't you?" Save it for summation, when the detective cannot explain, the district attorney cannot go beyond the facts in evidence, and defense counsel can explain it all like Sherlock Holmes unraveling the tangled mystery.

Finally, it should always be remembered that the best appellate record for the defense is a not guilty verdict. Good luck.

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