Interrogation Scenarios

Scenario 1

Alice visited her local police station in response to Detective Barker's request that Alice meet with him at her convenience to discuss a series of burglaries that had occurred in a neighborhood near Alice's home. Though he suspected that Alice had committed the burglaries, Detective Barker explained that she was free to leave the station at any time; that she could take breaks from speaking with Barker whenever she wished; and that, regardless of what she said to Barker, Alice would not be arrested that day.

At the outset of her conversation with Barker, Alice repeatedly denied any involvement in the burglaries. In response, Barker truthfully told Alice that several pieces of physical evidence implicating her in the crimes had been collected from the burglarized residences, and questioned Alice about her whereabouts on the nights the burglaries occurred. Alice then asked Barker whether he could "get her a good deal" from the district attorney if she confessed her involvement in the crimes. Barker responded by stating that the district attorney was responsible for making decisions regarding potential charges or plea bargains, but that Barker believed that "honesty is always the best policy." Alice then proceeded to make incriminating statements regarding her participation in the burglaries.

Alice has filed a motion to suppress the statements she made at the station. Evaluate the following arguments advanced in her motion:

1. Alice argues that her incriminating statements should be suppressed on due process grounds because Barker's statement that "honesty is always the best policy" was an improper promise of leniency made to induce her confession and rendered her statements involuntary.

> Setting aside the particular facts at issue, Alice's argument identifies a possible basis for suppression.
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> "It is well established that a confession obtained as a result of an inducement of hope promising relief from the criminal charge to which the confession relates is involuntary and inadmissible." *State v. Hayes*, 314 N.C. 460, 476 (1985).
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> "The United States Supreme Court has long held that obtaining confessions involuntarily denies a defendant's fourteenth amendment due process rights." *State v. Jones*, 327 N.C. 439, 447 (1990). "Before a confession may be admitted into evidence over a defendant's motion to suppress, the State must show to the trial judge by a preponderance of the evidence that the confession was voluntary." *Id*. "In determining whether a confession was voluntary, the court must examine the totality of the circumstances." *Id*. Factors considered by the court include, but are not limited to:
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> > whether defendant was in custody, whether he was deceived, whether his *Miranda* rights were honored, whether he was held incommunicado, the length of the interrogation, whether there

> were physical threats or shows of violence, whether promises were made to obtain the confession, the familiarity of the declarant with the criminal justice system, and the mental condition of the declarant.

State v. Flood, __ N.C. App. __, 765 S.E.2d 65, 71 (2014) (quotation omitted). The critical question for a court is whether a defendant's confession is the product of free choice and thus is voluntary or whether a defendant's will has been overborne by an interrogator thus rendering the confession involuntary. *Id*. at 70 (citing U.S. Supreme Court precedent).

Though she has identified a valid legal basis for suppression, Alice's argument is weak under the facts of her case. Prior to making the statement about honesty, Barker specifically informed Alice that the district attorney was responsible for determining how to handle the case. In *State v. Bailey*, 145 N.C. App. 13 (2001), the court of appeals determined that the defendant's incriminating statements were voluntary and that there was no improper inducement where officers indicated to the defendant that "it would be better if he told the truth" but that the district attorney would ultimately decide how to handle the case. The officers in *Bailey* told the defendant that if he gave a truthful statement, "everything would probably have a little less consequence to it." 145 N.C. App. at 19. The court determined that this did not amount to an improper promise. *Id*.

In addition, the other circumstances surrounding Alice's interaction with Barker suggest that her confession was voluntary; Alice was not in custody and Barker did not employ deceptive tactics.

2. Suppose that instead of telling Alice that the district attorney was responsible for decisions regarding charges and plea bargains, Barker stated that, if she cooperated, he could "help her out" and would make a "recommendation" to the district attorney that Alice get a plea offer involving probation rather than jail time. How does this affect the analysis of Alice's voluntariness argument?

In this situation, Barker's statements may rise to the level of an improper promise. In *State v. Flood*, __ N.C. App. __, 765 S.E.2d 65, 72 (2014), the court of appeals determined that an SBI agent's indication that she would make favorable "recommendations" to the district attorney if the defendant confessed constituted an improper promise. The court noted that the best practice for law enforcement officers is to refrain from engaging in speculation of any form with regard to what may happen if a suspect confesses.

Recall, however, that an analysis of voluntariness under principles of due process involves an evaluation of the totality of the circumstances. *Jones*, 327 N.C. at 447. Though Barker may have made an improper promise, this is only one of many factors bearing on voluntariness that a court must consider. In *Flood*, the court concluded that the defendant's statements were voluntary despite the agent's

improper promise. In reaching this conclusion, the court leaned on other factors relevant to an analysis of the totality of the circumstances; the court noted that the defendant was not in custody and was familiar with the criminal justice system because of his previous employment as a law enforcement officer. Note that there is no indication of Alice's experience with the criminal justice system in the provided facts.

Flood appears to be a very close case on the issue of voluntariness and improper promises. The court spent a considerable portion of its opinion carefully distinguishing the facts at hand from other cases where statements made in response to improper promises were held to be involuntary. A court should carefully evaluate the voluntariness of any statement made in response to an improper promise by an interrogator. As mentioned, the *Flood* court explicitly recognized that the officer's conduct "[fell] outside the best practices that law enforcement officers should follow when interviewing suspects." __ N.C. App. at __, 765 S.E.2d at 72. A court reasonably may find that Barker's suggestion that he could cause Alice to receive a plea offer that did not require jail time puts the facts of the hypothetical scenario beyond those of *Flood* and renders Alice's statement involuntary.

Other cases relevant to this issue include:

State v. Bailey, 145 N.C. App. 13, 18 (2001) (confession voluntary where investigators "indicated to defendant that it would be better if he told the truth, [but] there were no promises made to defendant, and it was made clear to defendant that the district attorney, rather than either [of the investigators], would ultimately determine how to handle the case")

State v. Williams, 67 N.C. App. 144, 148 (1984) (confession voluntary where investigator told defendant that, if defendant made a statement, investigator would "make a recommendation [to the district attorney] that [defendant] had cooperated and gave a statement"; nevertheless, the court cautioned:

> The better practice also would be for law enforcement officers to avoid entirely use of words such as "recommend" and "recommendation," which in some circumstances that we do not find present here could render a confession involuntary.)

State v. Fuqua, 269 N.C. 223, 228 (1967) (defendant's confession was involuntary where it was made while in custody and in response to interrogator's statement that interrogator would testify that defendant had talked and was cooperative; "This statement by a person in authority was a promise which gave defendant a hope for lighter punishment. It was made by the officer before the defendant made his confession, and the officer's statement was one from which defendant could gather some hope of benefit by confessing.")

State v. Williams, 33 N.C. App. 624, 627 (1977) (following *Fuqua* on similar facts)

3. Returning to the original factual scenario, suppose that Barker was not being truthful when he told Alice that several pieces of incriminating evidence had been discovered at the crime scenes. How does this affect the analysis of Alice's voluntariness argument?

As previously noted, whether a defendant was deceived during an interrogation is one of many factors that must be considered by the court when evaluating the voluntariness of a confession. In *State v. Jackson*, 308 N.C. 549, 574 (1983) the North Carolina Supreme Court confronted a situation where "[t]he basic [interrogation] technique used . . . was to tell the defendant that the police had recovered certain items of physical evidence which implicated him and then ask the defendant to explain this evidence. . . . [T]he officers made false statements in so doing and in using trickery with their presentation to the defendant." The court stated that "[t]he use of trickery by police officers in dealing with defendants is not illegal as a matter of law." The court continued by stating the "general rule" on this issue:

> The general rule in the United States, which this Court adopts, is that while deceptive methods or false statements by police officers are not commendable practices, standing alone they do not render a confession of guilt inadmissible. The admissibility of the confession must be decided by viewing the totality of the circumstances, one of which may be whether the means employed were calculated to procure an untrue confession.

4. Alice argues that her statements should be suppressed because Barker did not provide her with *Miranda* warnings at any point in their interaction. Is this a basis for suppression under the original facts?

Barker's failure to provide Alice with *Miranda* warnings likely is not a basis for suppression under the original facts. *Miranda* warnings are required when statements resulting from *custodial* interrogation are to be used against a defendant. The North Carolina Court of Appeals recently explained the analysis of whether a person is in custody for *Miranda* purposes as follows:

> The "definitive inquiry" in determining whether a person is "in custody" for *Miranda* purposes is whether, based on the totality of the circumstances, there was a "formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest." This determination involves "an objective test, based upon a reasonable person standard, and is to be applied on a case-by-case basis considering all the facts and circumstances." While "no single factor controls the determination of whether an individual is 'in custody' for purposes of *Miranda[,]*" our appellate courts have

> "considered such factors as whether a suspect is told he or she is free to leave, whether the suspect is handcuffed, whether the suspect is in the presence of uniformed officers, and the nature of any security around the suspect,"

State v. Davis, __ N.C. App. __, 763 S.E.2d 585, 590 (2014) (internal citations omitted).

The facts of Alice's case suggest that she was not in custody during her interaction with Barker. Alice voluntarily visited the police station in response to Barker's request that she meet with him at her convenience. Barker told Alice that she was free to leave the station at any time, that she could take breaks from speaking with him whenever she wished, and that she would not be arrested that day. Additionally, there is no indication that Alice was handcuffed or otherwise restrained, nor is there any indication that there was a high degree of security around her. The Court of Appeals considered similar circumstances in the process of determining that the defendant in *Davis* was not in custody for purposes of Miranda. *See Davis* __ N.C. App. at __, 763 S.E.2d at 591-92 (defendant was not in custody for purposes of *Miranda*; in addition to fact that defendant was not threatened during interview and that defendant was not restrained, competent evidence supported trial court's findings of fact that: "(1) defendant voluntarily went to the police station for each of the four interviews; (2) she was allowed to leave at the end of the first three interviews; (3) the interview room door was closed but unlocked; (4) defendant was allowed to take multiple bathroom and cigarette breaks; (5) defendant was given food and drink; and (6) defendant was offered the opportunity to leave the fourth interview but refused.")

Scenario 2

Raleigh police officer Susan Carter was dispatched to a local musical instrument store at approximately 11:30 p.m. in response to a 911 call reporting "two suspicious men acting suspiciously" in the vicinity of the store. The store had been closed for business since 4:00 p.m. that day. Carter was driving her marked patrol car and was in uniform.

Upon arriving at the store, Carter observed two men wearing backpacks emerging from a side entrance of the building. Carter announced herself as a police officer and commanded the men to "freeze." The men immediately began running; Carter gave chase and eventually discovered one of the men, Jim Doyle, hiding behind the dumpster of a nearby business. Carter drew her Taser, began handcuffing Doyle, and asked him "why he was running." Doyle stated that he had been "stealing stuff from the store and didn't want to get caught."

A pat-down search of Doyle revealed a screwdriver, a pair of gloves, and numerous items of merchandise bearing price tags from the store. Carter then told Doyle that he was "under arrest," advised him of his *Miranda* rights, and placed him in the back of her patrol car. As she drove him to the police station for booking, Carter asked Doyle several questions about his activities at the store and Doyle responded with incriminating statements.

Doyle has filed a motion to suppress the statements he made while being handcuffed and the statements he made while being transported to the station. Evaluate the following arguments advanced in his motion:

1. Doyle argues that the statement he made while being handcuffed in response to Carter's question about "why he was running" should be suppressed because Carter had not yet given him *Miranda* warnings and Carter's question amounted to custodial interrogation.

    Miranda warnings are designed to protect a person's Fifth Amendment privilege against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436 (1966). The right to remain silent and the right to have counsel present during custodial interrogation are components of the Fifth Amendment privilege, and a person must be informed of these rights (and certain corresponding details) before he or she makes statements in response to custodial interrogation if those statements are to be used against him or her in court. *Id*. at 467-70.

    Doyle has identified a possible basis for suppression. As mentioned, *Miranda* warnings are required when statements resulting from custodial interrogation are to be used against a defendant. Deciding whether to suppress the statements requires a court to determine whether Doyle was in custody for *Miranda* purposes at the time of the statements and, if so, whether Doyle was subjected to interrogation while in custody.

    Custody

The North Carolina Court of Appeals recently explained the analysis of whether a person is in custody for *Miranda* purposes as follows:

> The "definitive inquiry" in determining whether a person is "in custody" for *Miranda* purposes is whether, based on the totality of the circumstances, there was a "formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest." This determination involves "an objective test, based upon a reasonable person standard, and is to be applied on a case-by-case basis considering all the facts and circumstances." While "no single factor controls the determination of whether an individual is 'in custody' for purposes of *Miranda[,]*" our appellate courts have "considered such factors as whether a suspect is told he or she is free to leave, whether the suspect is handcuffed, whether the suspect is in the presence of uniformed officers, and the nature of any security around the suspect,"

State v. Davis, __ N.C. App. __, 763 S.E.2d 585, 590 (2014) (internal citations omitted).

In *State v. Hemphill*, 219 N.C. App. 50, 58-59 (2012), the Court of Appeals held that a reasonable person in the defendant's position in that case would have felt that his or her freedom of movement had been restrained to a degree associated with a formal arrest, and thus was in custody for *Miranda* purposes. The facts of *Hemphill* are very similar to the facts presented in the hypothetical scenario. An officer was dispatched to investigate a report of suspicious activity, encountered individuals who fled upon seeing the officer, apprehended one of the suspects hiding behind a dumpster, drew his Taser, and asked the defendant why he was running while handcuffing him.

One judge concurred in the result of the case (the majority ultimately decided that admission of the statements was error but was not prejudicial error) but concluded, in disagreement with the majority opinion, that the defendant was not in custody while being handcuffed. This disagreement highlights the fact-driven nature of the custody analysis.

Interrogation

Under a *Miranda* analysis, a court that finds a person to have been in custody at the time he or she made incriminating statements must also evaluate whether the person was subjected to interrogation while in custody. The United States Supreme Court has explained the term "interrogation" for *Miranda* purposes as follows:

> [T]he term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of

> the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.

Rhode Island v. Innis, 446 U.S. 291, 301-02 (1980) (footnotes omitted).

In *Hemphill*, the Court of Appeals held that asking the defendant, while in the process of handcuffing him, "why he was running" constituted an interrogation. 219 N.C. App at 59.

2. Suppose that Carter did not ask Doyle any questions while handcuffing him, and that Doyle angrily stated: "What are you doing? That other guy was breaking into the store; I was just walking by." How does this affect the analysis of whether the statement should be suppressed under *Miranda*?

In this situation, the analysis of whether Doyle was in custody remains the same as it was in the previous question. Under the changed facts, however, Doyle was not subjected to interrogation while being handcuffed. Rather, Doyle's statements were spontaneous and unsolicited, and, thus, were not the product of custodial interrogation. *See, e.g.*, *State v. Stover*, 200 N.C. App. 506 (2009) (determining that unsolicited statements regarding drug sales were not subject to suppression under *Miranda*).

Note that if Doyle's statement in this scenario *was* offered in response to interrogation, the fact that the statement is arguably exculpatory does not provide an independent basis for excepting the statement from suppression under *Miranda*. The United States Supreme Court stated in *Innis* that its use of the term "incriminating response" in defining "interrogation" was meant to include "any response—whether inculpatory or exculpatory—that the *prosecution* may seek to introduce at trial." 446 U.S. at 302 (noting that responses intended to be exculpatory by the defendant are often used by the prosecution for impeachment or other purposes).

3. Returning to the original facts, suppose that Carter did not ask Doyle any questions during their encounter. Instead, while handcuffing Doyle and prior to giving him *Miranda* warnings, Carter mused aloud: "When they find out that someone broke into their store, Anna and Bob are just going to be torn up. This is the last thing they need. Their boy is in the hospital and the store's had a rough few years since everybody buys stuff online these days. I hope whoever did this has the decency to step up and make things right." Doyle then stated: "I didn't want to do it. I've had a bad go of it myself. My buddy said that it would be easy and that the store was probably insured." Doyle argues that his statements should be suppressed as the product of an unwarned custodial interrogation. The State concedes the issue of custody but argues that there was no interrogation because Carter didn't ask any questions.

   The fact that Carter did not directly ask Doyle any questions is not dispositive in an analysis of whether a person has been subjected to interrogation. The United States Supreme Court has explained that "the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). The court has referred to words or actions that the police should know are reasonably likely to elicit an incriminating response as the "functional equivalent" of questioning. *Id*.

   In *Innis*, the Supreme Court determined that the defendant in that case was not subjected to interrogation where two officers appealed to defendant's conscience by discussing in the defendant's presence how an undiscovered weapon endangered the safety of handicapped children. *Id*. at 302-03.

4. Returning to the original facts, suppose that after he had been given *Miranda* warnings, Doyle stated "maybe I should get a lawyer." Carter then placed him in her patrol car and asked him questions about his activities at the store. Doyle gave incriminating responses. Doyle argues that he invoked his Fifth Amendment right to counsel with his statement about getting a lawyer and any statements he made in response to subsequent questioning by Carter should be suppressed.

   If a suspect invokes his or her Fifth Amendment right to counsel after receiving *Miranda* warnings, he or she "is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation." *Davis v. United States*, 512 U.S. 452, 458 (1994) (citing *Edwards v. Arizona*, 451 U.S. 477 (1981)). A court evaluating a motion to suppress must "determine whether the accused *actually invoked* his [or her] right to counsel." *Id.* (quotation omitted). The United States Supreme Court has explained the relevant analysis as follows:

   > To avoid difficulties of proof and to provide guidance to officers conducting interrogations, this is an objective inquiry. Invocation of the *Miranda* right to counsel requires, at a minimum, some statement that can reasonably be construed to be an expression of a

> desire for the assistance of an attorney. But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning.
>
> Rather, the suspect must unambiguously request counsel. As we have observed, "a statement either is such an assertion of the right to counsel or it is not." Although a suspect need not "speak with the discrimination of an Oxford don," he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, [the court's precedent] does not require that the officers stop questioning the suspect.

Id. at 458-59 (internal citation and quotation omitted). The court went on to hold that "after a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney." *Id*. at 461. The court then applied this holding to the defendant's statement, "maybe I should talk to a lawyer." The court determined that this was not a request for counsel and that there was no basis for suppressing defendant's subsequent statements.

5. On the same facts as those presented in prompt 4, immediately above, Doyle makes the additional argument that the fact that he responded to Carter's questions is insufficient to establish a waiver of his Fifth Amendment rights. Doyle claims that it was necessary for Carter to secure a written waiver. Is this correct?

   The North Carolina Court of Appeals confronted a similar argument in *State v. Cureton*, 223 N.C. App. 274 (2012). In *Cureton*, the defendant had been presented with a "Waiver of Rights" form during an interrogation, but he never signed the form. The Court rejected the defendant's argument and explained as follows:

   > As evidence that defendant did not knowingly and intelligently waive his right to counsel, defendant first points out that he never signed the "Waiver of Rights" form that was presented to him during the interrogation. This evidence does little, if anything to indicate that defendant did not validly waive his rights. As was explained by the United States Supreme Court in *North Carolina v. Butler*, although "[a]n express written or oral statement of waiver ... of the right to counsel is usually strong proof of the validity of that waiver," it is neither sufficient, nor necessary for establishing waiver.

223 N.C. App. at 283 (2012) (citation omitted). Thus, Doyle's claim that it was necessary that he execute a written waiver lacks merit.

Beyond the issue of the necessity of a written waiver, in *North Carolina v. Butler* the United States Supreme court made clear that it is not necessary that a defendant waive his or her *Miranda* rights by way of an explicit statement of waiver (whether written or oral); an implicit waiver may suffice in certain circumstances. 441 U.S. at 376.

In determining whether a defendant has implicitly waived his or her rights, a court must evaluate the totality of the circumstances of a given case "including the background, experience, and conduct of the accused." *Id*. at 375 (quotation omitted). In *State v. Connley*, for example, the defendant refused to sign a waiver form but "freely and voluntarily chose to talk with the [interrogator]." 297 N.C. at 588. The North Carolina Supreme Court determined that "[a]lthough [the defendant] did not expressly waive his rights, waiver can clearly be inferred from his actions and words." *Id*. (quotation omitted).

Regardless of the foregoing, however, a court should be mindful that "[t]he prosecution bears the heavy burden of showing that the [*Miranda*] waiver was knowingly, intelligently, and voluntarily made. *Id*. at 282.

6. Returning to the original facts, suppose that after he had been given *Miranda* warnings, Doyle stated "I don't want to talk." Carter then placed him in her patrol car and asked him questions about his activities at the store. Doyle remained silent throughout most of Carter's questioning but eventually gave incriminating responses to a few questions Carter asked as she pulled into the station. Doyle argues that he invoked his Fifth Amendment right to remain silent and any statements he made in response to subsequent questioning by Carter should be suppressed.

A similar rule to the *Davis* requirement of a clear request for an attorney applies to a person's invocation of his or her Fifth Amendment right to remain silent. In *Berghuis v. Thompkins*, 560 U.S. 370 (2010), the United States Supreme Court explained:

> The Court has not yet stated whether an invocation of the right to remain silent can be ambiguous or equivocal, but there is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel at issue in *Davis*. Both protect the privilege against compulsory self-incrimination, by requiring an interrogation to cease when either right is invoked.
>
> There is good reason to require an accused who wants to invoke his or her right to remain silent to do so unambiguously. A requirement of an unambiguous invocation of *Miranda* rights

> results in an objective inquiry that "avoid[s] difficulties of proof and ... provide[s] guidance to officers" on how to proceed in the face of ambiguity. If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression "if they guess wrong."

560 U.S. at 381-82 (internal citation omitted). Carter's statement "I don't want to talk" is likely an unambiguous invocation of his right to remain silent.

The *Miranda* court explained that "if [an] individual indicates . . . that [he or she] wishes to remain silent, the interrogation must cease. . . . 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." 384 U.S. at 473-74. In *Michigan v. Mosley*, 423 U.S. 96 (1975), the Supreme Court clarified that "the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether [the person's] right to cut off questioning was scrupulously honored." 423 U.S. at 104 (internal quotation omitted). Carter did not scrupulously honor Doyle's right to cut off questioning – Doyle clearly stated that he didn't want to talk, yet Carter proceeded to question him immediately after placing him in her patrol car.

In *Maryland v. Shatzer*, 559 U.S. 98 (2010), the United States Supreme Court ruled that after a person has been out of custody for 14 days, an officer may again seek a waiver of his or her *Miranda* rights in cases where the person previously invoked the rights. Thus, if Doyle was released from custody after being booked at the station, Carter could re-approach Doyle after 14 days had elapsed and subject him to custodial interrogation provided that Carter re-administered *Miranda* warnings and Doyle made a valid waiver of his rights.

7. Returning to the original facts, suppose that after giving Doyle *Miranda* warnings but before asking him questions during the drive to the station Carter stated: "You know Jim, if you'll just tell me what happened I can talk to the district attorney about getting you a good deal." Doyle then confessed his involvement in the crime. Doyle argues that Carter's statement was an improper promise of leniency made to induce his confession and rendered his statements involuntary. Is this a valid argument in light of the fact that Doyle was given *Miranda* warnings?

> Doyle's argument potentially is valid. Being properly advised of *Miranda* rights, does not automatically render a person's subsequent confession voluntary. As discussed in Scenario 1, a voluntariness analysis takes account of the totality of

the circumstances surrounding a confession. One of the factors that a court may consider is whether a defendant's *Miranda* rights were honored. *See State v. Martin*, __ N.C. App. __, 746 S.E.2d 307, 310 (2013). As discussed, another factor bearing on voluntariness is whether a person is in custody.

Under the hypothetical facts, while there is no indication that Carter failed to honor Doyle's *Miranda* rights, she arguably did make an improper promise of leniency by suggesting that she could secure a favorable plea bargain for Doyle if he confessed. A court may find that, in the totality of the circumstances, Carter's improper promise rendered Doyle's confession involuntary. In *State v. Bordeaux*, 207 N.C. App. 645, 654 (2010), the Court of Appeals determined that the defendant's post-*Miranda*-warning confession was involuntary where detectives made improper promises of leniency and used deceptive interrogation tactics.

8. Returning to the original facts, suppose that Doyle is a thirteen-year-old juvenile. How does this affect the analysis?

In *J.D.B. v. North Carolina*, __ U.S. __, 131 S. Ct. 2394, 2406 (2011), the Supreme Court held that "so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test." In other words, in some circumstances "a child's age properly informs the *Miranda* custody analysis." *Id*. at 2399.

The court noted that age may not be a "determinative, or even a significant, factor in every case," but that it is not a factor courts could "simply ignore." *Id*. at 2406. The court's opinion in *J.D.B.* makes reference to the perception and experience of a "reasonable child subjected to police questioning." *Id*. at 2403. The opinion, however, does not provide a substantial amount of guidance on the characteristics of a "reasonable child" beyond a recurring recognition that a reasonable child may be less willing or able than a reasonable adult to disengage from police questioning. *Id.* at 2403, 2404-05 ("[A] reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go."; "[E]vents that would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens." (internal quotation omitted)).

The *J.D.B.* opinion notes that "the effect of the schoolhouse setting" is often relevant in cases involving juveniles. 131 S. Ct. at 2405. The court recognized that "[a] student—whose presence at school is compulsory and whose disobedience at school is cause for disciplinary action—is in a far different position than" various adults who may be present on school grounds.

Courts have recognized that juveniles may be more intimidated than adults by police stations. *See United States v. IMM*, 747 F.3d 754, 765 (9th Cir. 2014) (stating that juveniles are "more likely [than adults] to be overwhelmed by entry

into a police station staffed by armed, uniformed officers"). Note, however, that the coercive influence of the stationhouse environment may be less significant where a juvenile is approaching the age of majority. *See, e.g.*, *Com. v. Bermudez*, 980 N.E.2d 462, 468 (Mass. App. Ct. 2012) (interrogation of a seventeen-year-old juvenile defendant was not custodial though the interrogation occurred at a police station; the court noted that "defendant's age, a few months shy of his eighteenth birthday, placed him on the cusp of majority, and far removed from the tender years of early adolescence").

Another factor often considered by courts while evaluating the expectations of a reasonable juvenile is the identity of the participants in an encounter other than the juvenile and the interrogating officer. The court's opinion in *J.D.B.* makes brief reference to this factor by noting that, regardless of whether age was taken into account, one circumstance bearing on the custody analysis was the effect on a suspect of "being encouraged by his assistant principal to 'do the right thing.'" 131 S. Ct. at 2405.

A court ruling on a suppression motion from a thirteen-year-old juvenile would have to determine whether the juvenile's age would have been objectively apparent to a reasonable officer or whether the juvenile's age was in fact known to the officer who conducted the interrogation. If either of those circumstances obtain, the court must take the juvenile's age into account when conducting the custody analysis described above in prompt 1 of this scenario.

9. Returning to the original facts, suppose that the caller who reported the suspicious activity also told the 911 operator that the men "appeared to be carrying pistols." The facts are otherwise the same as in the original scenario except that in the process of handcuffing him, Carter observed an empty pistol holster in Doyle's waistband and asked him "where's the gun?" Doyle nodded towards some nearby shrubbery and said "in the bushes." Doyle argues that a pistol Carter recovered from the shrubs as well as his statement identifying its location should be suppressed because Carter did not give him *Miranda* warnings prior to asking about the gun.

Doyle's argument is weak under the facts described. In *New York v. Quarles*, 467 U.S. 649, 655-56 (1984), the Supreme Court held that in certain situations, "there is a 'public safety' exception to the requirement that Miranda warnings be given before a suspect's answer may be admitted into evidence." The court reasoned that "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic [Miranda] rule protecting the Fifth Amendment's privilege against self-incrimination." *Id*. at 657.

The facts in *Quarles* were generally similar to the facts of this prompt. A woman reported to police that she had been raped, explained the whereabouts of the perpetrator, and said that he was carrying a gun. The suspect ran upon seeing police officers, was apprehended, was observed with an empty holster, and was asked about the location of the gun. The court concluded that the public safety

exception applied and that it was not necessary to suppress the suspect's statement about the location of the gun nor was it necessary to suppress the gun itself.

Scenario 3

A few days after the conversation between Alice and Detective Barker described above in Scenario 1, the District Attorney decides to charge Alice with one count of second-degree burglary. Barker arrests Alice and takes her before a magistrate who orders that Alice be held in the local jail on a secured bond which she is unable to meet. Shortly thereafter, Alice is brought before a district court judge for a first appearance. At the first appearance, Alice asserts that she is indigent and requests that counsel be appointed. The district court judge appoints the Office of the Public Defender to represent Alice and also modifies her bond from secured to unsecured. Upon being released from jail on the unsecured bond, Alice stops by her attorney's office for a brief intake interview before returning home.

A week later, Barker's continued investigation of the burglary for which Alice has been charged has caused him to develop some additional questions about the crime. Barker drives to Alice's home and asks Alice if she would mind "clearing some things up for him." Alice responds by stating that "her lawyer said not to talk to the cops without him." Barker then states: "I just want to know if anybody else was involved; you don't want to take the fall for this thing if it was somebody else's idea." Alice then proceeds to make incriminating statements.

Alice has filed a motion to suppress the statements she made to Barker. Evaluate the following arguments advanced in her motion:

1. Alice argues that Barker's questioning violated her Sixth Amendment right to counsel which attached when she was taken before the magistrate and which she invoked by requesting appointed counsel at her appearance before the district court judge.

    Alice's Sixth Amendment argument is potentially valid, but the facts of this scenario implicate unsettled areas of law.

    "[O]nce the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the the right to have counsel present at all 'critical' stages of the criminal proceedings." *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009). In cases where a defendant is arrested for a felony, the right attaches at the defendant's initial appearance before a judicial officer. *Rothgery v. Gillespie County*, 554 U.S. 191, 213 (2008). "[C]ounsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself." *Id*. at 212. A defendant may waive the Sixth Amendment right "so long as relinquishment of the right is voluntary, knowing, and intelligent." *Montejo*, 556 U.S. at 786.

    In the scenario, Alice's Sixth Amendment right to counsel attached when she was taken before the magistrate. Assuming that the relevant state statutory procedures were properly followed, the district court judge's appointment of counsel likely occurred within a reasonable time of the attachment of the right. It is difficult, however, to say with certainty whether Barker's questioning violated Alice's Sixth Amendment right.

Prior to 2009, Barker's questioning likely would have constituted a Sixth Amendment violation. Under *Michigan v. Jackson*, 475 U.S. 625 (1986), police-initiated questioning of a defendant whose Sixth Amendment right had attached often constituted a violation of the right to counsel. This was because the *Jackson* court had held that, after a defendant has invoked his or her right to counsel in the criminal proceeding, "any waiver of the defendant's right to counsel for . . . police-initiated interrogation is invalid." *Id*. at 636. In 2009, however, the Supreme Court overruled *Jackson* in *Montejo v. Louisiana*, 556 U.S. 778 (2009). Consequently, unanswered questions have emerged regarding the applicability of the Sixth Amendment in situations such as those described in this factual scenario. *See, e.g.*, Jeff Welty, *Montejo v. Louisiana*, N.C. CRIM. LAW. BLOG (May 27, 2009), http://nccriminallaw.sog.unc.edu/montejo-v-louisiana/.

Under *Montejo*, it appears that officers may now approach a represented defendant outside of the presence of counsel and seek to question him or her after obtaining a waiver of his or her Sixth Amendment right to counsel. Under the facts of the hypothetical scenario, Alice is likely to argue that her statement about her attorney's advice to not talk to the cops constituted an invocation of her Sixth Amendment right; that, notwithstanding her statement about her attorney's advice at the time of the interaction with Barker, she certainly invoked her right to counsel at her first appearance before the district court judge; and that Barker's subsequent questioning was illegal in that it amounted to a failure to scrupulously honor Alice's invoked right. The State is likely to argue that Alice's statement was not a clear and unambiguous invocation of her right to counsel, and that her subsequent incriminating response to Barker's question is evidence that Alice intended to waive her right. The proper resolution of these competing arguments is not entirely clear given the current state of Sixth Amendment law.

2. Suppose that when Barker approached Alice about "clearing some things up," Alice confidently stated: "I know my rights, I want my attorney here if you're going to ask me questions." Undeterred, Barker proceeds as described in the original facts and Alice ultimately makes an incriminating statement. Alice argues that Barker's questioning violated her Sixth Amendment right to counsel.

Under the changed facts, Alice arguably made an unambiguous request for counsel and invoked her Sixth Amendment right. Barker's subsequent questioning may be impermissible. Recall that in the context of *Miranda* and the Fifth Amendment right to counsel, a suspect who invokes his or her right to counsel "is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation." *Davis v. United States*, 512 U.S. 452, 458 (1994). It is not entirely clear how a court should resolve this scenario given that *Miranda* cases which may serve as useful points of analogy often involve a suspect who is in custody.

3. Returning to the original facts, suppose that Alice had not been released on unsecured bond and that her interaction with Barker occurred while she was still detained pretrial at the local jail. Prior to asking her any questions, Barker properly advised Alice of her *Miranda* rights. In response, Alice makes the same statement as in the original facts regarding her lawyer's advice about talking to the cops. The facts are otherwise the same as in the original scenario. Alice argues that Barker's questioning violated her Sixth Amendment right to counsel. How do the changed facts affect the analysis?

   Under the changed facts, the structure of the Sixth Amendment analysis is clearer than under the original facts. In *Montejo*, the court stated that the right to have counsel during custodial interrogation is protected by both the Fifth and Sixth Amendments, and that "doctrines ensuring voluntariness of the Fifth Amendment waiver simultaneously ensure the voluntariness of the Sixth Amendment waiver." *Montejo v. Louisiana*, 556 U.S. at 795 (2009). Thus, the question for a court evaluating Alice's motion would be whether her statement about her lawyer's advice constituted an unambiguous request for counsel (recall that this is the analysis for purposes determining whether a person has invoked his or her right to counsel for purposes of the Fifth Amendment-based *Miranda* rule). If so, then Barker's subsequent questioning would violate both the Fifth and the Sixth Amendments; if not, then the subsequent questioning would be permissible.

4. Returning to the original facts, suppose that the purpose of Barker's visit to Alice's home is not to question her about the burglary for which she has been charged but rather is to question her about an unrelated, unsolved, and uncharged armed robbery. During the course of their interaction, Barker's questions relate solely to the armed robbery. Alice argues that Barker violated her Sixth Amendment right to counsel which attached when she was taken before the magistrate and which she invoked by requesting appointed counsel at her appearance before the district court judge.

   Alice's argument under the changed facts lacks merit. The Sixth Amendment right to counsel is "offense specific and attaches only at . . . the initiation of adversary judicial criminal proceedings." *State v. Williams*, 209 N.C. App. 441, 447 (internal quotation and citation omitted). Because Alice had not been charged with the armed robbery, she had no Sixth Amendment right to counsel with respect to that crime.