CUSTODY, WAIVER OF *MIRANDA* RIGHTS, AND COERCED CONFESSIONS

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I. CUSTODY

-"'[C]ustody' is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion." *Howes v. Field*, __ U.S. __, __, 182 L.Ed.2d 17, 27 (2012).

-Test: whether a formal arrest has occurred or restraints on freedom of movement to the degree associated with a formal arrest. *California v. Beheler*, 463 U.S. 1121, 1125, 77 L.Ed.2d 1275, 1279 (1983) (per curiam); *Oregon v. Mathiason*, 429 U.S. 492, 495, 50 L.Ed.2d 714, 719 (1977); *State v. Buchanan*, 353 N.C. 332, 339, 543 S.E.2d 823, 828 (2001).

-Test for determining if restraints rose to the degree associated with a formal arrest: whether a reasonable person in the suspect's position would have felt free to terminate the interview and leave. *Thompson v. Keohane*, 516 U.S. 99, 112, 133 L.Ed.2d 383, 394 (1995).

-When a juvenile is the subject of the interrogation, the hypothetical reasonable person is a reasonable juvenile. *J.D.B. v. North Carolina*, __ U.S. __, 180 L.Ed.2d 310 (2011).

-All objective circumstances must be considered in determining if suspect was in custody. *J.D.B. v. North Carolina*, __ U.S. __, __, 180 L.Ed.2d 310, 322 (2011); *Stansbury v. California*, 511 U.S. 318, 322, 128 L.Ed.2d 293, 298 (1994) (per curiam).

-No single factor is determinative. *State v. Barden*, 356 N.C. 316, 338, 572 S.E.2d 108, 124 (2002).

-Because custody is an objective test, the uncommunicated subjective assessment of the situation held by the officer or the suspect is not relevant. It does not matter whether the officer considered the person being interrogated to have been arrested or the defendant thought that he was in custody if those assessments were not communicated in some way. *Berkemer v. McCarty*, 468 U.S. 420, 82 L.Ed.2d 317 (1984).

-A custodial interrogation can occur anywhere, as no location mandates a finding that the defendant was or was not in custody. Interrogation in a police station, *Oregon*

v. Mathiason, 429 U.S. 492, 495, 50 L.Ed.2d 714, 719 (1977), or prison, *Howes v. Field*, __ U.S. __, __, 182 L.Ed.2d 17, 25 (2012), is not *per se* custodial. Interrogation in a home is not *per se* non-custodial. *Orozco v. Texas*, 394 U.S. 324, 22 L.Ed.2d 311 (1969).

-Factors to consider in determining custody include:

-location: *Maryland v. Shatzer*, 559 U.S. __, __, 175 L.Ed.2d 1045, 1054-1055 (2010).

-duration: *Berkemer v. McCarty*, 468 U.S. 420, 437-438, 82 L.Ed.2d 317, 333 (1984).

-statements made prior to or during the interrogation: *Stansbury v. California*, 511 U.S. 318, 324-325, 128 L.Ed.2d 293, 299-300 (1994) (per curiam); *Oregon v. Mathiason*, 429 U.S. 492, 495, 50 L.Ed.2d 714, 719 (1977).

-physical restraints such as handcuffs: *New York v. Quarles*, 467 U.S. 649, 655, 81 L.Ed.2d 550, 556 (1984); *State v. Buchanan*, 353 N.C. 332, 339, 543 S.E.2d 823, 828 (2001).

-police standing guard at the door or other security measures: *State v. Buchanan*, 353 N.C. 332, 339, 543 S.E.2d 823, 828 (2001).

-locked door: *State v. Buchanan*, 353 N.C. 332, 339, 543 S.E.2d 823, 828 (2001).

-being left unattended during breaks in questioning: *State v. Jones*, 153 N.C. App. 358, 365-366, 570 S.E.2d 128, 134 (2002); *In re Pittman*, 149 N.C. App. 756, 762, 561 S.E.2d 560, 565 (2002).

-release of the suspect at the end of questioning: *California v. Beheler*, 463 U.S. 1121, 1122, 77 L.Ed.2d 1275, 1277 (1983) (per curiam).

-Telling the suspect that he is not under arrest does not necessarily preclude a custody finding. When all other factors point to custody, the State cannot rely on police assertions that no arrest has occurred in order to conduct an "end run around *Miranda.*" *United States v. Colonna*, 511 F.3d 431 (4th Cir. 2007) (house was "inundated" with officers who directed the movements of everyone in the house).

-If the interrogation took place in a setting such as a school, prison, or workplace, determine if the school, prison, or workplace had written policies that affect the suspect's freedom of movement. For example, statements in a student handbook that a child is required to answer questions posed by adults and cannot walk away if an adult is speaking to them are factors supporting custody since a reasonable police officer knows, or reasonably should know, that schools impose restrictions on freedom of movement.

- *J.D.B.* is ripe for expansion to certain "frailties" that the police knew, or reasonably should have known, would affect how a reasonable person in the suspect's position would have felt about the degree of restraint. The United States Supreme Court rejected intoxication as a "frailty" that can be considered, likely because it is a fleeting condition and too many variables exist in determining the effect. Permanent conditions

that affect cognition that the police would or should be aware of, such as Down's Syndrome, are likely within the area courts will be willing to expand *J.D.B.*

II. WAIVER OF *MIRANDA* RIGHTS

-The State bears a heavy burden to establish a knowing, intelligent, and voluntary waiver of rights. *Maryland v. Shatzer*, __ U.S. __, __, 175 L.Ed.2d 1045, 1052 (2010); *North Carolina v. Butler*, 441 U.S. 369, 373, 60 L.Ed.2d 286, 292 (1979); *Miranda v. Arizona*, 384 U.S. 436, 475, 16 L.Ed.2d 694, 724 (1966).

-Every reasonable presumption against waiver must be indulged. *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L.Ed. 1461, 1466 (1938).

-A waiver must be both voluntary, in the sense that it is a free choice, and made with full awareness of the nature of the right being abandoned and the consequences of the decision to abandon it. *Moran v. Burbine*, 475 U.S. 412, 421, 89 L.Ed.2d 410, 420-421 (1986).

-Factors to consider include the defendant's age, experience, education, background, intelligence, capacity to understand the warnings, and capacity to understand the consequences of waiving rights. *Fare v. Michael C.*, 442 U.S. 707, 725, 61 L.Ed.2d 197, 212 (1979).

-Research supports that children 14 and younger do not understand *Miranda* warnings. Thomas Grisso et al, *Juvenile's Competence to Stand Trial: A Comparison of Adolescents and Adults' Capacities as Trial Defendants*, 27 L. & Hum. Behav. 333, 356 (2003). An adult who is functionally equivalent to a child, due to such factors as organic brain damage, mental retardation, or lack of understanding of the English language, should be viewed as equally incapable of understanding *Miranda* warnings.

-The assertion of *Miranda* rights must be unequivocal. *Davis v. United States*, 512 U.S. 452, 461-462, 129 L.Ed.2d 362, 373 (1994).

-Whether an assertion of *Miranda* rights has occurred is viewed objectively: whether a reasonable police officer in the circumstances would have understood defendant's statements to be a request for an attorney. *Davis v. United States*, 512 U.S. 452, 459, 129 L.Ed.2d 362, 371 (1994). Examples of ambiguous statements which did not invoke the right to counsel are:

-"Maybe I should talk to a lawyer." *Davis v. United States*, 512 U.S. 452, 129 L.Ed.2d 362 (1994).

-"Am I going to be able to get an attorney?" *United States v. Shabaz*, 579 F.3d 815 (7th Cir. 2009).

-"I think I would like to talk to a lawyer." *Clark v. Murphy*, 331 F.3d 1062 (9th Cir. 2002).

-"Do you think I need an attorney here?" *Burket v. Angelone*, 208 F.3d 172 (4th Cir. 2000).

-"If y'all are going to treat me this way, then I probably would want a lawyer." *State v. Boggess*, 358 N.C. 676, 600 S.E.2d 453 (2004).

-Merely remaining silent does not constitute an affirmative invocation of the right to remain silent. *Berghius v. Thompson*, __ U.S. __, 176 L.Ed.2d 1098 (2010).

-Even when rights are unequivocally asserted, our Court of Appeals is content to rule that rights were not asserted if the police officer claims he did not hear the defendant assert them. *State v. Daniels*, No. COA11-1032 (6 March 2012) (videotape documented defendant requested counsel and inquired how to obtain counsel).

-When rights are unequivocally asserted, interrogation must stop. Absent a break in the chain of events lasting 14 days, *Maryland v. Shatzer*, __ U.S. __, __, 175 L.Ed.2d 1045, 1057 (2010), interrogation can continue only if reinitiated by the suspect. *Edwards v. Arizona*, 451 U.S. 477, 484-485, 68 L.Ed.2d 378, 386 (1981). If police re-initiate interrogation after an unambiguous request for counsel, the statement is presumed involuntary. *McNeil v. Wisconsin*, 501 U.S. 171, 177, 115 L.Ed.2d 158, 167-168 (1991).

-When police delay the giving of *Miranda* rights to a custodial suspect to a point where they lack efficacy, a waiver is invalid. *Missouri v. Siebert*, 542 U.S. 600, 608, 159 L.Ed.2d 643, 652-653 (2004) (*Miranda* warnings not administered to custodial defendant until after a full confession was obtained).

III. COERCED CONFESSIONS

-It is a fundamental principle of our justice system that "men are not to be exploited for the information necessary to condemn them before the law[.]" *Culombe v. Connecticut*, 367 U.S. 568, 581, 6 L.Ed.2d 1037, 1046 (1961).

-A confession must have resulted from State coercion to be deemed involuntary. *Colorado v. Connelly*, 479 U.S. 157, 164, 93 L.Ed.2d 473, 482 (1986); *State v. Cummings*, 353 N.C. 281, 294, 543 S.E.2d 849, 857 (2001).

-To be voluntary, a confession must have been "the product of an essentially free and unconstrained choice by its maker." *Culombe v. Connecticut*, 367 U.S. 568, 602, 6 L.Ed.2d 1037, 1057 (1961).

-Burden is on the State to establish that a confession was voluntarily made. *Haynes v. Washington*, 373 U.S. 503, 10 L.Ed.2d 513 (1963); *State v. Corley*, 310 N.C. 40, 52, 311 S.E.2d 540, 547 (1984).

-Is a totality of the circumstances analysis that considers the characteristics of the accused and the details of the interrogation. *Schneckloth v. Bustamonte,* 412 U.S. 218, 226, 36 L.Ed.2d 854, 862 (1973); *State v. Jackson*, 308 N.C. 549, 581, 304 S.E.2d 134, 152 (1983).

-A court must view a juvenile's confession with extreme caution, as children are no match to police in an interrogation setting. *Gallegos v. Colorado*, 370 U.S. 49, 8 L.Ed.2d 325 (1962); *Haley v. Ohio*, 332 U.S. 596, 92 L.Ed. 224 (1948).

-Circumstances other than physical mistreatment "may combine to produce an effect just as impellingly coercive as the deliberate use of the third degree." *Reck v. Pate*, 367 U.S. 433, 441, 6 L.Ed.2d 948, 953 (1961).

-Insanity or incompetency preclude a finding of voluntariness. *Blackburn v. Alabama*, 361 U.S. 199, 207, 4 L.Ed.2d 242, 248 (1960); *State v. Ross*, 297 N.C. 137, 254 S.E.2d 10 (1979).

-Factors to consider include:

-age: *Reck v. Pate*, 367 U.S. 433, 435, 6 L.Ed.2d 948, 953 (1961); *State v. Gaines*, 345 N.C. 647, 664, 483 S.E.2d 396, 406 (1997); *State v. Chamberlain,* 263 N.C. 406, 409, 139 S.E.2d 620, 522 (1965).

-experience with law enforcement: *Lynumm v. Illinois*, 372 U.S. 528, 534, 9 L.Ed.2d 922, 926 (1963); *Spano v. New York*, 360 U.S. 315, 321, 3 L.Ed.2d 1265, 1271 (1959); *State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994).

-custody: *State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994).

-lack of education: *Payne v. Arkansas*, 356 U.S. 560, 562 n.4, 2 L.Ed.2d 975, 978 n.4 (1958).

-intelligence: *Payne v. Arkansas*, 356 U.S. 560, 562 n.4, 2 L.Ed.2d 975, 978 n.4 (1958); *State v. White*, 291 N.C. 118, 123, 229 S.E.2d 152, 155 (1976).

-bizarre statements by suspect or illogic in the confession: *State v. Pittman*, 332 N.C. 244, 259-260, 420 S.E.2d 437, 446 (1992).

-use of relays of officers: *Ashcraft v. Tennessee*, 322 U.S. 143, 153, 88 L.Ed. 1192, 1199 (1944).

-composition of the confession by the police: *Blackburn v. Alabama*, 361 U.S. 199, 207-208, 4 L.Ed.2d 242, 248-249 (1960).

-duration of interrogation: *State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994).

-deprivation of food or sleep: *Reck v. Pate*, 367 U.S. 433, 441, 6 L.Ed.2d 948, 954 (1961); *State v. Gaines*, 354 N.C. 647, 664, 483 S.E.2d 396, 406 (1997).

-held incommunicado: *State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994).

-not promptly presented to a magistrate: *Fikes v. Alabama*, 352 U.S. 191, 196-197, 1 L.Ed.2d 246, 250-251 (1957).

-repeated denials of guilt: *Arizona v. Fulminante*, 499 U.S. 279, 283, 113 L.Ed.2d 302, 313-314 (1991).

-trickery and deceit: *Frazier v. Cupp*, 394 U.S. 731, 739, 22 L.Ed.2d 684, 693 (1969); *State v. Jackson*, 308 N.C. 549, 582, 304 S.E.2d 134, 152 (1983).

-false statements by police as to nature of the crime or possible punishment: *State v. Bordeaux*, __ N.C. App. __, __, 701 S.E.2d 272, 277-278 (2010).

-promises by law enforcement to testify on suspect's behalf: *State v. Fuqua*, 269 N.C. 222, 228, 152 S.E.2d 68, 72 (1967); *State v. Bordeaux*, __ N.C. __, __, 701 S.E.2d 272, 277-278 (2010); *State v. Williams*, 33 N.C. App. 624, 627, 235 S.E.2d 869, 871 (1977).

-promises by law enforcement of relief from the charges: *State v. Pruitt*, 286 N.C. 442, 458, 212 S.E.2d 92, 102 (1975).

-promises by law enforcement that suspect might be charged with a lesser offense. *State v. Fox*, 274 N.C. 277, 293, 163 S.E.2d 492, 503 (1968).

-assertions by law enforcement that they have more than enough evidence to convict: *State v. Stevenson*, 212 N.C. 648, 194 S.E. 81 (1937).

-statements by law enforcement that things will be harder on the suspect if he does not cooperate. *State v. Pruitt*, 286 N.C. 442, 458, 212 S.E.2d 92, 102 (1975).

-accusations that the suspect is lying: *State v. Pruitt*, 286 N.C. 442, 458, 212 S.E.2d 92, 102 (1975).

-undeviating intent to extract a confession: *Haynes v. Washington*, 373 U.S. 503, 511 n.8, 10 L.Ed.2d 513, 519 n.8 (1963); *Spano v. New York*, 360 U.S. 315, 323-324, 3 L.Ed.2d 1265, 1272 (1959).

-use of family member to extract a confession: *Culombe v. Connecticut*, 367 U.S. 568, 628-631, 6 L.Ed.2d 1067, 1071-1074 (1961).

-use of friend to extract a confession: *Spano v. New York*, 360 U.S. 315, 323, 3 L.Ed.2d 1265, 1271 (1959).