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in partnership with

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## January 2012 Bulletin

### ***Invoking the right to silence under Miranda***

Invoke. *v.* To call upon (a higher power) for assistance. To appeal to; to petition. To call for earnestly. To use or apply. *American Heritage Dictionary* (Office Edition).

***In Massachusetts, police must honor a suspect's pre-waiver attempt to invoke his right to remain silent.***

- **Facts.** *Comm. v. Clarke*, SJC-10816 (January 13, 2012). Detectives Christopher Ahlborg and Audrina Lyles of the MBTA Transit Police arrested Brandon Clarke for indecent assault and battery on the subway. Ahlborg and Lyles placed Clarke in an interrogation room, telling him that their conversation would be videotaped.<sup>1</sup>

Ahlborg provided Clarke with a *Miranda* waiver. Clarke immediately began to sign it. Ahlborg stopped him, informing him that he first wanted to review it. After verbally reciting the rights, Ahlborg asked Clarke whether he wanted to discuss the charges. The following exchange occurred:

Defendant: “[Do I have to] speak with you?”

Ahlborg: “Nope, you don’t have to speak with me at all if you don’t want to. It’s completely up to you.”

Defendant: “What happens if I don’t speak with you?”

Ahlborg: “Nothing.”

Defendant: “I just want to go home.”

Ahlborg: “You just want to go home? So you don’t want to speak?”

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<sup>1</sup> Good move on the part of the detectives. The police do not need to ask for permission to video and/or audio tape an interrogation. They simply need to notify the suspect prior to the conversation.

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Brandon Clarke “shook his head back and forth in a negative fashion.” Ahlborg responded to this head motion by saying, “Okay.” Later in court, Ahlborg testified that he interpreted the defendant’s head motion to mean that “he didn’t want to speak.”

Audrina Lyles interpreted the headshake differently, and began to correct what she thought might be confusion. When Ahlborg told Clarke that “nothing” would happen to him if he did not speak, Lyles thought that he misunderstood that statement to mean he would be free to leave. So she added:

Lyles: “But that ‘nothing’ does not exclude you [from] still being charged and us detaining you here. You’ll either be bailed, or you’ll have to go to court in the morning to answer to what you’re being charged with. So it doesn’t mean you’ll get to walk up out of here and go home right now.”

Lyles did not reiterate that Clarke would not suffer any negative consequences from refusing to speak (which is what Ahlborg had meant by his earlier response that “nothing” would happen).<sup>2</sup>

Later on, Clarke commented on his confusion -- at different times saying: “I don’t know what’s going on. I’m really lost about what’s going on”; “I just wanna know what’s going on”; and “I’m just really scared.” The defendant also cried. Then this exchange took place:

Lyles: “Well we can’t talk to you about anything until you make a decision.”

Defendant: “Like yeah, I want to talk about it, but I’m just not sure what it is about.”

Ahlborg: “Ok, so you want to talk to us?”

Defendant: “Yeah.”

Ahlborg: “You do. Ok. If you want to talk to us, sign the paper and indicate that you do want to talk to us.”

Clarke signed and dated the *Miranda* waiver, but did not give the detectives permission to record the rest of his interrogation. During this unrecorded portion, the defendant admitted that he had repeatedly brushed his hand against a man in the subway.

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<sup>2</sup> Of course, in our justice system, any defendant is not penalized for invoking his right to remain silent. It typically cannot be mentioned during a trial.

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- **Motion to suppress.** After a hearing, the judge held that the defendant had invoked his right to remain silent when he “shook his head back and forth in a negative fashion” in response to the question, “You don’t want to speak with us?” The judge also based his decision on the defendant’s over-all reluctance to speak with detectives, as demonstrated by questions such as “Do I have to speak with you?” and “What will happen if I don’t speak to you?” The defendant was a young man in his early twenties with no prior experience in the criminal justice system.
- **Analysis.** *Miranda* warnings were designed as a safeguard against “the possibility of coercion [during] custodial interrogations.” Unless law enforcement can prove a voluntary, knowing, and intelligent waiver, any statement by the accused is inadmissible.

Here, the shake of his head communicated that the defendant did not want to be questioned. A suspect’s nonverbal conduct may invoke his right to silence. In fact, the original *Miranda* decision mentioned that this right may be asserted “in any manner . . .”

The SJC commended these detectives for being “very patient with the defendant in explaining his rights.” At the same time, the court suppressed Clarke’s confession because the detectives did not “scrupulously honor” his right to remain silent.

This ruling is governed by Article 12<sup>3</sup>, which provides greater protection to suspects than the 5<sup>th</sup> Amendment.

Article 12 distinguishes between a pre-waiver and a post-waiver invocation.

- **Post-waiver assertion must be more definite.** It makes sense to expect *heightened clarity* from a suspect who wants to change course and cease interrogation after having *already* submitted to questioning by waiving his rights.
- **Pre-waiver invocation may be less definite.** On the other hand, when a suspect has yet to exercise the choice between speech and silence that underlies *Miranda*, it would be unfair to expect him to invoke his right to remain silent with the utmost clarity. The *Miranda* decision acknowledged that silence is the most important right protected, which is why Article 12 does not impose a heightened standard of clarity for pre-waiver invocation.

There are a number of reasons suspects might speak imprecisely: “A substantial percentage . . . lack anything like a confident command of the English language, . . . many are ‘woefully ignorant,’ . . . and many more will be sufficiently intimidated by the interrogation process or overwhelmed by the uncertainty of their predicament that the ability to speak assertively will abandon them”

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<sup>3</sup> Article 12 provides: “No subject shall . . . be compelled to accuse, or furnish evidence against himself.”

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In addition, discrete segments of the population — particularly women and ethnic minorities — are far more likely to adopt “indirect speech patterns.”

If his initial statement is ignored, a suspect may not try to reassert his rights again: “When a suspect understands his expressed wishes [were overlooked] . . . in contravention of the ‘rights’ just read to him by his interrogator, he may well see further objection as futile and confession (true or not) as the only way to end his interrogation.” This is exactly what pre-interrogation *Miranda* warnings were meant to prevent.

On the other hand, if a suspect makes “an ambiguous statement or engages in conduct that creates uncertainty about his intent to invoke his right, police can simply ask for clarification.”

However, “the police may not create ambiguity in a defendant’s desire by continuing to question him or her about it.” A suspect’s response to a request for clarification may not “be used to cast retrospective doubt on the clarity of the initial request itself.”

The clarification process may not be converted into “‘badger[ing]’ or ‘overreaching’ — explicit or subtle, deliberate or unintentional — [that] might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request [to remain silent].”

In Brendan Clarke’s case, the MBTA detectives did not seek to clarify what his head shaking gesture meant. Rather than ask -- “I saw you shake your head, does that mean you do not want to talk to us?” -- Detective Lyles instead told the defendant he was going to be charged and detained. Ahlborg added: “If you don’t want to speak to me, we’re going to end this and put you back in the cell.” These statements clarified what consequences might be in store for the defendant, but they did not clarify the meaning of his headshake.

Hope this bulletin helps you on the street . . . *John Sofis Scheft*