CONFESSIONS AND ADMISSIONS (HUMANE PRACTICE)

You have heard testimony about a statement allegedly made by the defendant concerning the offense which is charged in this case. Before you may consider any such statement, you are going to have to make a preliminary determination whether it can be considered as evidence or not. You may not consider any such statement in your deliberations unless, from all the evidence in the case, the Commonwealth has proved beyond a reasonable doubt that the defendant made the statement that he (she) is alleged to have made, and that he (she) made it voluntarily, freely and rationally.

At judge's option. **The reasons for this rule are probably obvious to all of you. Experience tells us that when a statement is involuntary, it is most often unreliable as well. Also, our society has long held a strong conviction that we should not take advantage of a person who is physically or mentally incapable of deciding freely whether or not to speak.**

Commonwealth v. Paszko, 391 Mass. 164, 177, 461 N.E.2d 222, 231 (1984), quoting from *Blackburn v. Alabama*, 361 U.S. 199, 207, 80 S.Ct. 274, 280 (1960).

Each juror must determine whether the Commonwealth has proved beyond a reasonable doubt that any statement that the defendant made about the offense was made voluntarily, freely and rationally. If any juror is not convinced beyond a reasonable doubt that the statement was voluntary, that juror may *not* use the statement as evidence in coming to his or her own conclusion about whether the Commonwealth has proved the charge beyond a reasonable doubt. If the Commonwealth *has* met that burden, then you may consider the defendant's statement, and rely on it as much, or as little, as you think proper, along with all the other evidence.

Massachusetts "humane" practice requires that when a defendant's confession or admission is offered in evidence, the judge must initially decide at a preliminary hearing in the absence of the jury whether the Commonwealth has proved beyond a reasonable doubt that the statement was voluntary. If not, the judge must exclude it. If the statement is admitted, the judge must then resubmit the issue of voluntariness to the jury by instructing that each juror is not to consider the defendant's statement unless, on all the evidence in the case, that juror is satisfied beyond a reasonable doubt that it was the defendant's free and voluntary act. The jury should not be told of the judge's preliminary determination of voluntariness. *Commonwealth v. Tavares*, 385 Mass. 140, 149-153, 430 N.E.2d 1198, 1204-1206, cert. denied, 457 U.S. 113 (1982); *Harris v. Commonwealth*, 371 Mass. 478, 481 n.3, 358 N.E.2d 991, 993 n.3 (1976). See also *Commonwealth v. Hunter,* 416 Mass. 831, 834, 626 N.E.2d 873, 876 (1994) (humane practice also applies to statements to private citizens); *Commonwealth v. Dyke*, 394 Mass. 32, 474 N.E.2d 172 (1985) (*Tavares* requirement that voluntariness be shown beyond a reasonable doubt is not retroactive); *Commonwealth v. Brown*, 386 Mass. 17, 31-32, 434 N.E.2d 973, 981-982 (1982). The judge's preliminary determination of voluntariness "must appear from the record with unmistakable clarity." *Sims v. Georgia*, 385 U.S. 538, 544, 87 S.Ct. 639, 643 (1967); *Johnson v. Denno*, 378 U.S. 368, 391-394, 84 S.Ct. 1774, 1788-1790 (1964).

Tavares does not require that the jury as a whole must agree unanimously beyond a reasonable

doubt that a defendant's statement is voluntary before it can be considered as evidence. The judge need only instruct that each juror individually should determine whether the statement was given voluntarily, and if a juror is not convinced beyond a reasonable doubt that the statement was voluntary, that juror should not use the statement as evidence in coming to his or her own conclusion as to whether the Commonwealth has proved the charged crimes beyond a reasonable doubt. *Commonwealth v. Watkins,* 425 Mass. 685, 691-692, 682 N.E.2d 859, 864 (1997).

If voluntariness is a live issue at trial, the judge must sua sponte conduct a preliminary hearing and then submit the question to the jury, even without a request from the defendant. *Commonwealth v. Parham*, 390 Mass. 833, 841-842, 460 N.E.2d 589, 595-596 (1984); *Commonwealth v. Cartagena*, 386 Mass. 285, 286-287, 435 N.E.2d 352, 354 (1982); *Commonwealth v. Van Melkebeke* 48 Mass. App. Ct. 364,367, 720 N.E.2d 834 (1999); *Commonwealth v. Bandy,* 38 Mass. App. Ct. 329, 331, 648 N.E. 2d 440 (1995). This sua sponte obligation applies only if voluntariness was a live issue before the jury, even if the judge heard conflicting evidence on voluntariness on voir dire. *Commonwealth v. Anderson,* 425 Mass. 685, 691-692, 682 N.E.2d 859, 864 (1997).

For a fuller discussion of humane practice and other issues related to confessions and admissions, see *Jury Trial Manual for Criminal Offenses Tried in the District Court* § 2.47.

Evidence of the circumstances surrounding a confession is relevant to credibility as well as voluntariness, and therefore may not be excluded by the trial judge even where the judge has denied the defendant's motion to suppress his confession as involuntary, and the jurisdiction does not require humane practice. *Crane v. Kentucky*, 476 U.S. 683, 106 S.Ct. 2142 (1986).

SUPPLEMENTAL INSTRUCTIONS

1. *Relevant factors to consider.* **In determining whether or not any statement made by the defendant was voluntary, you may consider all of the surrounding circumstances. You can take into account the nature of any conversations that the police officers had with the defendant, and the duration of any questioning, if there was any. You may consider where the statement was made and when it was made. You may consider the defendant's physical and mental condition, his (her) intelligence, age, education, experience, and personality. Your**

decision does not turn on any one factor; you must consider the totality of the surrounding circumstances.

Commonwealth v. Lahti, 398 Mass. 829, 830-833, 501 N.E.2d 511, 511-513 (1986), cert. denied, 481 U.S. 1017 (1987) (false police promises of leniency rendered statement involuntary); *Commonwealth v. Wills*, 398 Mass. 768, 776-777, 500 N.E.2d 1341, 1346-1347 (1986) (defendant need not be told why being questioned for statement to be voluntary); *Parham*, 390 Mass. at 840, 460 N.E.2d at 595; *Commonwealth v. Garcia*, 379 Mass. 422, 399 N.E.2d 460 (1980) (language problem may render statement involuntary); *Commonwealth v. Meehan*, 377 Mass. 552, 564-565, 387 N.E.2d 527, 534 (1979), cert. dismissed, 445 U.S. 39 (1980) (police may promise to bring defendant's cooperation to attention of authorities, but direct or indirect assurance that cooperation will result in a lesser sentence renders statement involuntary).

It is not enough that the statement was voluntary in the sense that it was not forced or tricked out of the defendant by physical intimidation or psychological pressure. It must also have been made freely and rationally. Obviously, a person cannot give up a valuable right freely if his brain is so clouded that he is not thinking straight. If you conclude that (mental illness) (mental retardation) (extreme intoxication on drugs) (extreme intoxication with alcohol) (*[other relevant factor]*) had rendered the defendant incapable of understanding the meaning and effect of his (her) statement, or incapable of withholding it, then you must exclude the defendant's statement from your deliberations as being involuntarily given.

The "meaning and effect" terminology in the model instruction is taken from *Commonwealth v. Vasquez*, 387 Mass. 96, 100 n.8, 438 N.E.2d 856, 859 n.6 (1982). The "incapable of withholding" language is drawn from *Paszko, supra*.

Although the Supreme Court has held that a confession can be involuntary in a due process sense only if it was the product of police coercion, and not solely because of a defendant's mental condition, *Colorado v. Connelly*, 479 U.S. 157, 163-167, 107 S.Ct. 515, 519-522 (1987), Massachusetts law that the defendant's mental or physical condition alone can invalidate a confession is drawn from common law as well as Federal constitutional sources, and appears to have been affirmed subsequent to *Connelly*. *Commonwealth v. Waters*, 399 Mass. 708, 711-714, 506 N.E.2d 859, 863 (1987).

If there is evidence of intoxication or mental condition: **If it appears that the defendant had mental problems, or was under the influence of drugs or alcohol, you must take special care in determining whether any statement was the product of the defendant's rational intellect and free will. However, mental problems or intoxication do not automatically make an otherwise voluntary act involuntary. You must look to all the circumstances to determine whether any statement was made freely and rationally.**

Blackburn, supra; *Commonwealth v. Shipps*, 399 Mass. 820, 826, 507 N.E.2d 671, 676 (1987) ("special care" required where alcohol or drugs used, but no per se rule); *Paszko*, 391 Mass. at 175-178, 461 N.E.2d at 230-231 (drug withdrawal may render statement involuntary, but no per se rule); *Commonwealth v. Louraine*, 390 Mass. 28, 39, 453 N.E.2d 437, 445 (1983) (evidence of insanity required humane practice even for spontaneous pre-arrest statements); *Vasquez*, 387 Mass. at 100-101, 438 N.E.2d at 858-859 (statement by psychotic not involuntary per se unless it would not have been obtained but for the psychosis); *Commonwealth v. Cameron*, 385 Mass. 660, 665, 433 N.E.2d 878, 883 (1982) (some custodial interrogation constitutionally permissible for a normal adult may be impermissible for a mentally retarded person, though no per se rule); *Commonwealth v. Vick*, 381 Mass. 43, 46, 406 N.E.2d 1295, 1297 (1980) (humane practice required sua sponte even where evidence of insanity

offered after statement was introduced in evidence); *Commonwealth v. Brady*, 380 Mass. 44, 52, 410 N.E.2d 695, 699 (1980) (alcohol intoxication may render statement involuntary, but no per se rule); *Commonwealth v. Chung*, 378 Mass. 451, 457, 392 N.E.2d 1015, 1019 (1979) (any evidence of insanity at time of statement requires humane practice).

2. *Relevance of Miranda warnings.* **When the police take a person into custody, they must give him certain warnings before any statements he makes in response to interrogation will be admissible in evidence. You have probably heard of them; they are called Miranda warnings, after the name of the case in which the Supreme Court held that such warnings are required. They are relevant here because you may consider whether the Miranda warnings were given and understood, as part of your determination of whether any statement the defendant made was voluntary. There are four such warnings – a person must be advised: [1] that he has a right to remain silent; [2] that anything he says can be used as evidence against him in court; [3] that he has the right to the presence of an attorney during questioning; and [4] that if he wants an attorney but cannot afford one, the state will provide an attorney for him at no cost. The police may give a fifth warning, which is optional: that if the**

person decides to answer any questions, he has the right to stop the questioning at any time.

In determining whether a statement was voluntary, you may consider whether these warnings were given and understood, along with the other factors I have mentioned.

Here instruct on "Unrecorded Custodial Interrogation" (Instruction 3.820) if the issue is raised by the defendant and supported by the evidence.

The "fifth Miranda warning" regarding termination of questioning at any time is good police practice but not required. *Commonwealth v. Lewis*, 374 Mass. 203, 205, 371 N.E.2d 775, 776-777 (1978).

Initially, compliance with *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966), is a prerequisite for admissibility and a question of law for the judge, who must be convinced beyond a reasonable doubt that the defendant received and waived Miranda rights before any statements in response to custodial interrogation may be admitted in evidence. *Tavares, supra*; *Commonwealth v. Day*, 387 Mass. 915, 923, 444 N.E.2d 384, 388 (1983); *Garcia*, 379 Mass. at 431, 399 N.E.2d at 466 (valid waiver does not require that in hindsight the defendant would still speak with police, only that police procedures must scrupulously respect defendant's free choice made with actual knowledge of rights); *Commonwealth v. Dustin*, 373 Mass. 612, 616, 368 N.E.2d 1388, 1391 (1980) (statements not in compliance with *Miranda* must be excluded even if voluntary and reliable).

Contested questions of *Miranda* compliance are not to be submitted to the jury for decision, but evidence on whether the warnings were given and whether rights were validly waived is relevant to the jury's overall determination of voluntariness. *Tavares*, 385 Mass. at 153 n.19, 430 N.E.2d at 1206 n.19. Where Miranda warnings were given but were not required, it is within the judge's discretion whether to permit evidence of the warnings to be considered by the jury on the issue of voluntariness. *Commonwealth v. Nadworny*, 396 Mass. 342, 368-370, 486 N.E.2d 675, 691, cert. denied, 477 U.S. 904 (1986).

4. *Impeachment of defendant by otherwise inadmissible statement.* **You have heard some evidence that in the past the defendant may have made a statement which is alleged to be inconsistent with the**

testimony he (she) has given in this case. If it has been proved to you that the defendant made such a statement voluntarily, you may consider it solely to assist you in evaluating the defendant's credibility as a witness in this trial.

When you evaluate how reliable any witness is, you may take into account whether that witness made any earlier statement that differs in any significant way from his present testimony at trial. It is for you to say how significant any difference is.

You may not consider any such statement as any evidence of the defendant's guilt. You may not take any such statement as positive evidence of any fact that is mentioned in it, and you must not draw any inference of guilt against the defendant if you find that he (she) made such a statement. The prior statement is relevant only as to your determination of whether to believe the defendant's present testimony in court.

This supplemental instruction may be used when the defendant's confession or admission was suppressed for lack of *Miranda* compliance and therefore was not introduced in the Commonwealth's case-in-chief, the defendant then testified in his or her own behalf, and the Commonwealth seeks in rebuttal to impeach the defendant's testimony by offering the otherwise inadmissible confession or admission as a prior inconsistent statement. *Commonwealth v. Britt*, 358 Mass. 767,

770, 267 N.E.2d 223, 225 (1971); *Commonwealth v. Simpson*, 300 Mass. 45, 55-56, 13 N.E.2d 939, 944-945 (1938), cert. denied, 304 U.S. 565 (1940).

This supplemental instruction should *not* be used when the defendant's confession or admission is introduced as substantive evidence.

A defendant may be impeached with a prior inconsistent statement that was not obtained in compliance with *Miranda* if it is voluntary and otherwise trustworthy. *Harris v. New York*, 401 U.S. 222, 224, 91 S.Ct. 643, 645 (1971); *Commonwealth v. Harris*, 364 Mass. 236, 238-241, 303 N.E.2d 115, 117-118 (1973). But an involuntary statement may not be introduced even for impeachment purposes. *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408 (1978). It is an open question whether the judge must sua sponte conduct a voir dire as to voluntariness when a statement is offered only for impeachment purposes. *Commonwealth v. Nicholson*, 20 Mass. App. Ct. 9, 14, 477 N.E.2d 1038, 1042 (1985).