COMMONWEALTH OF MASSACHUSETTS

BRISTOL COUNTY
No. 18-P-49

SUPREME JUDICIAL COURT
No. FAR-

COMMONWEALTH

V.

WILLIAM LAJOIE

DEFENDANT-APPELLEE'S APPLICATION FOR FURTHER APPELLATE REVIEW

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March, 2018

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Request to Obtain Further Appellate Review

This is simple case, with far-reaching consequences.

Over fifty years ago, *Miranda* established an "absolute prerequisite" that a suspect held for questioning "must be clearly informed that he has the right to consult with a lawyer and to have the lawyer present with him during interrogation." *Miranda v. Arizona*, 384 U.S. 436, 471 (1966). This so-called "third *Miranda* warning" need not be cited word for word, so long the police convey its "fully effective equivalent." *Id.* at 476.

Below, the Appeals Court purported to uphold the Commonwealth's obligation to convey *Miranda's* "essential information," *Florida v. Powell*, 559 U.S. 50, 60 (2010), in light of the warnings "as a whole." Add. 33.[1] But the effect of its opinion is to gut them. Because the Fall River police department's warning omitted the substance of the third *Miranda* warning, it does not meet constitutional muster. Contrary to the Appeals Court's view, post-*Miranda* precedent (including *Powell*) underscores (rather than undermines) the

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[1] The Appeals Court's opinion, and motion judge's memorandum and order, are attached. See Add. [#].

importance of this bedrock principle. The Appeals Court's further conclusion that the greater protections of the Declaration of Rights (and the more protective standard requiring waiver beyond a reasonable doubt) do not apply here is directly at odds with this Court's teaching.

Pursuant to Mass. R.A.P. 27.1, Mr. Lajoie applies for further appellate review.

Statement of Prior Proceedings

On March 14, 2013 a Bristol County grand jury indicted Mr. Lajoie for rape of a child with force, threatening to commit a crime, aggravated assault and battery by means of a dangerous weapon, assault and battery, assault with intent to rape, and violation of an abuse prevention order.

The defendant moved to suppress statements he made during questioning. A hearing was held on the motion before a judge of the Superior Court (Pasquale, J.) on March 24, 2016. On June 3, 2106, the judge issued a memorandum and order allowing the motion. Add. 34.

The Commonwealth filed an application for leave to appeal pursuant to Mass. R. Crim. P. 15 on June 19, 2016. On August 9, 2016, a single justice of this Court (Spina, J.) allowed the Commonwealth's

application and directed the appeal to proceed in the Appeals Court.

Oral argument was held before a panel of that court (Wolohojian, Lemire, & Englander JJ.) on September 10, 2018. On March 5, 2019, the court issued an opinion reversing the motion judge's order. Add. 21.

Statement of Relevant Facts

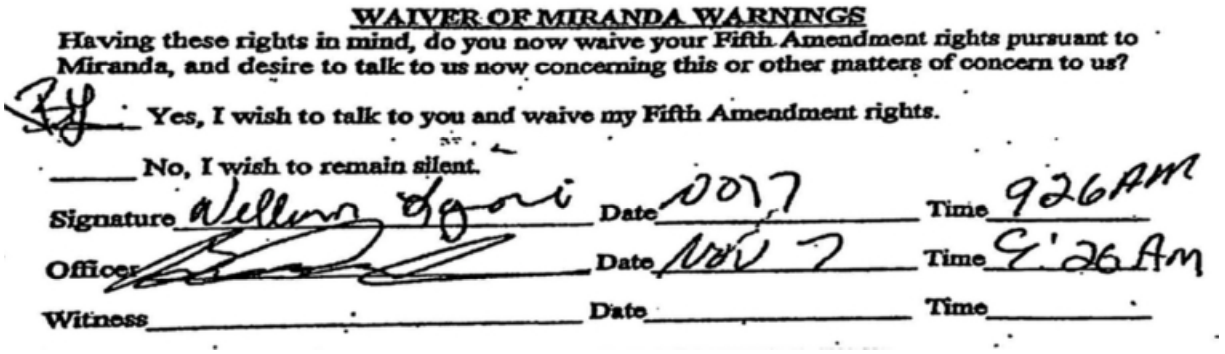
Mr. Lajoie was arrested on November 7, 2012 and transported to the Fall River Police Department. There, he was interviewed by Detective Brian Cordeiro about an incident involving sexual intercourse with a girl under the age of sixteen alleged to have occurred approximately fifteen years earlier. Prior to questioning, Detective Cordeiro read the following "**MIRANDA WARNINGS**" set out in the Fall River Police Department's waiver form:

MIRANDA WARNINGS

- You have the right to remain silent. Do you understand this right?
- Anything you say can be used against you at trial. Do you understand this right?.
- You have the right to an attorney. Do you understand this right?
- If you cannot afford an attorney, one will be appointed to you by the Commonwealth at no expense and prior to any questioning. Do you understand this right?
- If you decide to waive your Fifth Amendment rights pursuant to Miranda, you may stop answering questions at any time if you so desire. Do you understand this right?

As the motion judge found, these warnings "did not advise [Mr. Lajoie] that if he chose to have an attorney that the attorney could be

present during any questioning." Add. 35. Immediately below, on the "**WAIVER**" section of the form, Mr. Lajoie indicated he was willing to "to talk" to the officers and "waive [his] Fifth Amendment rights" (as described above):



WAIVER OF MIRANDA WARNINGS

Having these rights in mind, do you now waive your Fifth Amendment rights pursuant to Miranda, and desire to talk to us now concerning this or other matters of concern to us?

Yes, I wish to talk to you and waive my Fifth Amendment rights.

_____ No, I wish to remain silent.

Signature [signature] Date 2017 Time 926AM

Officer [signature] Date NOV 7 Time 9'26 AM

Witness _____ Date _____ Time _____

Issues Presented

(1) Whether a warning omitting any reference to the right to the presence of counsel during questioning satisfies *Miranda's* requirement that a suspect be informed of, and affirmatively waive, the so-called third *Miranda* right?

(2) Whether the warning in this case complied with the more protective requirements of art. 12, and the Commonwealth's burden, under state law, to establish a knowing and voluntary waiver of the *Miranda* rights beyond a reasonable doubt?

Argument

I. *Miranda* requires a clear warning of the right to the presence of counsel during questioning.

Miranda set out four warnings necessary to protect the Fifth Amendment right against self-incrimination:

> [A suspect] must be warned prior to any questioning [1] that he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed to him prior to any questioning.

384 U.S. at 479 (emphasis added).

The third *Miranda* warning – the one at issue here – requires that "an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation." *Id.* at 471 (emphasis added). "This warning," the Supreme Court explained, "is an absolute prerequisite to interrogation." *Id.* Without it, a waiver of the defendant's constitutional right cannot be "knowing and intelligent." *Id.* at 492. Under Massachusetts law, the

Commonwealth must establish waiver "beyond a reasonable doubt." *Commonwealth v. Hoyt*, 461 Mass. 143, 152 (2011).[2]

"The four warnings required by *Miranda* are invariable, but [the] Court has not dictated the words in which the essential information must be conveyed." *Powell*, 559 U.S. at 60. An admissible statement must be preceded by the "warnings required and the waiver necessary" under *Miranda* or a "fully effective equivalent." *Miranda*, 384 U.S. at 476. Indeed, the *Miranda* Court explicitly and repeatedly cautioned that a suspect must be "clearly informed" of the right "to have the lawyer with him during interrogation." 384 U.S. at 471. See *Id*. at 469, 470, 479, 492. In short: a constitutionally-sufficient warning must "cover the right to appointed counsel . . . both before and during interrogation." 2 W.R. LaFave, Criminal Procedure § 6.8(a), at 886-887 (4th ed. 2015). See E.B. Cypher, Criminal Practice and Procedure § 7.42 at 735-736 (4th ed. 2014) (warnings must "specify that the

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[2] The federal standard, by contrast, is a preponderance of the evidence. *Hoyt*, 461 Mass. at 152-153. See infra 16.

defendant is entitled to have a lawyer present during the interrogation").

The only question in this case is whether the warnings given "clearly informed" Mr. Lajoie of his right to the presence of counsel during questioning. *Id.* at 471. The motion judge correctly held that they did not. The substance of the "essential information" in the third warning, *Powell*, 559 U.S. at 60, was entirely missing from Fall River's form.

The Appeals Court's conclusion to the contrary is founded on a basic misapprehension of federal precedent. It primarily suggests that a trilogy of Supreme Court opinions applying *Miranda* "teach[]" that "courts should focus on the totality of the warnings conveyed, rather than their precise form." Add. 29. True enough. But while the Appeals Court pays lip service to *Miranda's* "equivalent" standard, Add. 27, see *Miranda*, 384 U.S. at 476 (requiring "fully effective equivalent") its opinion, if upheld, would effectively dispense with the third *Miranda* warning in Massachusetts.

To be sure, the cases cited by the Appeals Court did approve warnings that "varied in some way from *Miranda's* formulation." Add.

26. The relevant constitutional question, however, is how. Unlike the Fall River form, those warnings clearly stated the right to counsel, not only as a general matter, but during the interrogation. The warning in *California v. Prysock,* 453 U.S. 355, 358 (1981), for example, included the right to "have [a lawyer] present with you while you are being questioned, and all during the questioning."[3] And in *Duckworth v. Eagan*, 492 U.S. 195, 198 (1989), the warning included the right "to have [a lawyer] with you during questioning."[4] Thus, while these cases teach that warnings are considered "in their totality," *id.* at 205, they do not dispense with the "essential message" of the third *Miranda* warning. *Powell*, 559 U.S. at 62, 64.

II. The Appeals Court misapprehended *Powell*.

Powell directly addresses the third *Miranda* warning, but the Appeals Court fundamentally misapprehends its lesson. In *Powell*, the substance of the third *Miranda* warning was delivered in two

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[3] The claim in *Prysock* was that other portions of the statement detracted from the warning. 453 U.S. at 359-360.

[4] The challenge in *Duckworth* was that a statement concerning the appointment of counsel "if and when you go to court" obfuscated the warning. 492 U.S. at 202-204.

statements: the defendant was first advised (1) that he had "the right to talk to a lawyer before answering any [] questions," and then (2) that he could invoke that "right[] at any time you want during this interview." 559 U.S. at 54 (emphasis added). These statements, taken together, satisfied *Miranda's* "invariable" requirements*, id.* at 60 – but only because they contained all the "information *Miranda* required [the police] to impart" including the "right to have an attorney present, not only at the outset of interrogation, but at all times." *Id.* at 62.

According to the Appeals Court, *Powell* "rejected the argument that advice of a right to counsel 'prior' to questioning is defective for not stating 'during.'" Add. 31 That is flatly incorrect. First, the warning in *Powell* did use the term "during." See *Id.* at 54. More importantly (and unlike the warning here), the warning in *Powell* was consistent with *Miranda* only because it included the substance of the third warning, regardless of the "words in which the essential information [was] conveyed." *Id.* at 60. As the *Powell* Court explained, the warnings explicitly informed the suspect (in the "second statement") of his right to "seek his attorney's advice . . . at any time during the interview." *Id.* at 63 (emphasis in original). Only this "second statement" "confirmed

that that he could exercise that right [to counsel] while the interrogation was underway." *Id.* at 62. And only this "second statement" made the warning "sufficiently comprehensive and comprehensible when given a commonsense reading." *Id.* at 63. See Cypher, supra § 7.42, at p.736 n.3 (explaining importance of this "catch-all provision").

The Appeals Court disregarded this critical language and seized instead on *Powell's* generic conclusion that the warning was "sufficiently comprehensible" under *Miranda*. See Add. 28, citing *Powell*, 559 U.S. at 63. It began by characterizing the statement (in the Fall River form) that "you have the right to an attorney," supra 6, as "unequivocal, and unqualified," "literally" warning of the "right to a lawyer . . . at any time – before, during, or after any questioning." Add. 30. It then reasoned that because the defendant "was also told of the right to have appointed counsel 'prior to any questioning'" the warnings "reasonably confirmed . . . the right to the presence of counsel" during questioning. Add. 30.

That analysis is fundamentally flawed. Neither of these statements (alone or together) establishes the crucial third *Miranda*

warning. A comparison between the *Powell* warnings and Fall River's form makes this deficiency clear. Both warn of the right to an attorney before questioning. See *Powell*, 559. U.S. at 62 ("the right to talk to a lawyer before answering any of [their] questions"); supra 6 (the right "to an attorney . . . prior to any questioning"). But that appears in the fourth *Miranda* warning, not the third *Miranda* warning missing in this case. *Miranda,* 384 U.S. at 479 (separately listing third and fourth *Miranda* rights).

The warning in *Powell*, however, included a crucial "second statement" with no analogue in the Fall River form: "the right to use any of [his] rights at any time [he] want[ed] during th[e] interview." 559 U.S. at 62.[5] As the *Powell* court emphasized, "the second statement"

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[5] The Fall River form implied the opposite, presenting two choices: either (1) "talk [to the police] and waive my Fifth Amendment rights," or (2) "remain silent." Supra 6. While Mr. Lajoie initialed the first option, he was never informed that he could "talk to" to the police while exercising (rather than "waiv[ing]") his right to the presence of counsel during interrogation. Compare *Powell,* 559 U.S. at 63 ("Nothing . . . indicated that counsel's presence would be restricted after the questioning commenced"). See *Commonwealth v. Seng*, 436 Mass. 537, 547 (2002) (waiver invalid "where two sets of warnings are given and one is defective [and] defendant would be confused by the discrepancy"); 2 W.R. LaFave, Criminal Procedure § 6.8(c), at 905 (4th ed. 2015)

was necessary to "confirm[] that [the defendant] could exercise that right while the interrogation was underway." *Id.* By contrast, the Fall River form lacked such a "second statement," *Id.* at 63, or its "*fully* effective equivalent." *Miranda*, 384 U.S. at 476. And *Powell* expressly rejected the contention that a general (or "unqualified," Add. 30) warning would suffice. 559 U.S. at 62. Instead, only the combination of warnings concerning the right to an attorney and the right to exercise that right during questioning, together, met constitutional muster. That makes sense. For all that appeared in the warnings here, this lay defendant easily could have understood that he had a right to consult with an attorney "prior to any questioning," but that it would then be up to him to go it alone during the interrogation.

Such a misreading of precedent should not stand. And affirming *Miranda's* longstanding requirements will not unduly burden law enforcement. Indeed, as the motion judge explained, the "majority of courts who have considered" the issue have concluded that *Miranda*

(warnings insufficient where suspect "would be confused by the discrepancy"). The Appeals Court ignored this issue.

compels some express warning of the right to the presence of an attorney during interrogation. Add. 43. Recent state cases reach the same conclusion. See *People v. Mathews*, 324 Mich. App. 416, 429-441 (2018) (*Miranda* requires clear warning of the right to the presence of counsel during interrogation); *Coffey v. State*, 435 S.W.3d 834, 841-843 (Tex. App. 2014) (omission of third *Miranda* warning contrary to Fifth Amendment and state law).

The entire point of the *Miranda* warnings is to advise the suspect of his rights, and to do so "clearly." 384 U.S. at 471. It is not to see how obliquely those rights – like the right to the presence of counsel – can be inferred. That right was not stated clearly, or at all, in this case.

III. Article 12 requires a clear statement of the third *Miranda* warning.

The Appeals Court also disregarded the "broader interpretation" of the protection against self-incrimination under art. 12, *Commonwealth v. Mavredakis,* 430 Mass. 848, 858 (2000), based on its "texts, its history, and . . . prior interpretations." *Commonwealth v. Martin*, 444 Mass. 213, 219-220 (2005). Contrary to the Appeals Court's view, Add. 33, this Court has consistently declined to interpret art. 12 in lockstep with the 5th Amendment, particularly where the federal

constitution offers "shrinking protections." *Id.* at 221. See, e.g., *Commonwealth v. Jones,* 481 Mass. 540 (2019); *Commonwealth v. Clarke*, 461 Mass. 336, 352 (2012); *Mavredakis,* 430 Mass. at 864; *Commonwealth v. Smith*, 412 Mass. 823, 836 (1992).

Regardless of whether the Fall River warnings complied with the Fifth Amendment, requiring the police to clearly inform suspects of their right to the presence of an attorney (as set out in the *Miranda* opinion itself) is the minimum necessary to effectuate the "parallel but broader protections afforded Massachusetts citizens." *Martin,* 444 Mass. at 215. This commonsense rule deters police from ignoring the requirements of *Miranda* "in order to obtain an admissible statement," *Smith*, 412 Mass. at 823, or physical evidence, *Martin*, 444 Mass. at 213. It also avoids "fact-bound inquiries," *Smith*, 412 Mass. at 836-837, where (as here) any warning as to the right to the presence of counsel would require a lay defendant to piece together inferences. Finally (although the Appeals Court ignored this issue), it is the only standard consistent with the Commonwealth's heightened burden, under state law, to establish knowing and voluntary waiver of the *Miranda* rights "beyond a reasonable doubt." *Clarke*, 461 Mass. at 349.

Conclusion

For the foregoing reasons, this Court should allow further appellate review.

William Lajoie,

By his attorney,

/s/ Matthew Spurlock

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March, 2018

Certificate of Compliance

This application for further appellate review complies with the rules of court, including those specified in 27.1 of the Massachusetts Rules of Appellate Procedure. It complies with the type-volume limitation of Rule 27.1(b) because it contains 2,000 words, excluding portions of the application exempted by the rule. It complies with the type-style requirements of Rule 27.1 because it has been prepared in proportionally-spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

/s/ Matthew Spurlock

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March, 2018

Certificate of Service

I, Matthew Spurlock, counsel for the defendant herein, do hereby certify that on March 26, 2018, I served the foregoing Application for Further Appellate Review upon the Commonwealth by directing an electronic copy to:

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March, 2018

Addendum

18-P-49 Appeals Court

COMMONWEALTH vs. WILLIAM LAJOIE.

No. 18-P-49.

Bristol. September 10, 2018. - March 5, 2019.

Present: Wolohojian, Lemire, & Englander, JJ.

Constitutional Law, Admissions and confessions, Waiver of constitutional rights. Practice, Criminal, Admissions and confessions, Waiver, Motion to suppress. Waiver.

Indictments found and returned in the Superior Court Department on March 14, 2013.

A pretrial motion to suppress evidence was heard by Gregg J. Pasquale, J.

An application for leave to prosecute an interlocutory appeal was allowed by Francis X. Spina, J., in the Supreme Judicial Court for the county of Suffolk, and the appeal was reported by him to the Appeals Court.

Tara L. Johnston, Assistant District Attorney, for the Commonwealth.

Matthew Spurlock, Committee for Public Counsel Services, for the defendant.

ENGLANDER, J. Prior to a custodial interrogation, the defendant was read Miranda warnings[1] from a written form that did not comport in all particulars with the language employed by the United States Supreme Court. As a result the motion judge ruled that although the defendant was advised of his "right to an attorney," he was not explicitly advised of his right to have an attorney present "during questioning." The defendant's videotaped statements were accordingly suppressed. We reverse, because rote adherence to the exact language of Miranda is not required, and because in this case the warnings "in their totality, satisfied Miranda." Duckworth v. Eagan, 492 U.S. 195, 205 (1989).

Background.[2] On November 7, 2012, the defendant was taken into custody at the Fall River police station, where he was interviewed by Detective Brian Cordiero about an incident that had occurred fifteen years earlier, involving sexual intercourse with a girl under the age of sixteen. The interview was audio and video recorded. The defendant admitted to having sexual intercourse with the girl but stated that she told him that she was nineteen, and that the sexual intercourse was consensual.

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[1] See Miranda v. Arizona, 384 U.S. 436, 479 (1966).

[2] The facts are taken from the findings of the Superior Court judge. They are not contested.

When asked if he was the father of the woman's now fifteen year old son, the defendant stated that his name was on the birth certificate but that he was not certain he was the father.

Prior to conducting the interview, Cordiero advised the defendant of his rights, which he read to the defendant from a form that the defendant later signed. Cordiero advised the defendant:

> "[1] You have the right to remain silent.
>
> "[2] Anything you say can be used against you at trial.
>
> "[3] You have the right to an attorney.
>
> "[4] If you cannot afford an attorney, one will be appointed to you by the Commonwealth at no expense and prior to any questioning.
>
> "[5] If you decide to waive your Fifth Amendment rights pursuant to Miranda, you may stop answering questions at any time if you so desire."

After reading each right, Cordiero asked the defendant if he understood the right, and the defendant answered that he did. Cordiero thereafter read a series of "presentment warnings," which informed the defendant of various additional rights including, for example, prompt presentment in court and the right to a bail hearing. The motion judge found that "[t]he defendant stated that he understood all of the rights that were provided to him by Cordiero. The defendant further stated that he wished to waive his Fifth Amendment rights and speak with

Cordiero." Thereafter the defendant signed the written form containing the rights that had been read to him. His signature appears under the heading "WAIVER OF MIRANDA WARNINGS."

The interview lasted thirty-one minutes. The motion judge found that Cordiero was pleasant and courteous "at all times." The judge also found that Cordiero engaged in no conduct such as intimidation, trickery, or promises of leniency. At one point Cordiero asked whether the defendant would consent to a buccal swab; the defendant stated that he would need to speak to his lawyer about whether to submit to the swab, but after Cordiero left the room the defendant almost immediately called Cordiero back in and consented.[3]

The defendant was indicted in March of 2013 on charges of, among other things, rape of a child with force, aggravated assault and battery by means of a dangerous weapon, assault with intent to rape, and violation of an abuse prevention order. The defendant moved to suppress the statements made during the videotaped interview, arguing in particular that the Miranda warnings he was given were defective. The motion judge held an evidentiary hearing and thereafter allowed the motion. Relevant

[3] Cordiero also testified that he had previously encountered the defendant in connection with an unrelated matter, and that on that prior occasion the defendant declined to speak with the police, "instead choosing to speak to his attorney."

here, the judge canvassed the Federal case law, and concluded that Miranda required that a suspect be "explicitly warned" that he had the right to counsel "during questioning," and that the warning at issue did not provide such an explicit warning. The judge also opined that such a result was consistent with the case law under the Massachusetts Declaration of Rights.

Discussion. The question is whether the warnings given to the defendant orally and in writing were fatally defective under Miranda. The Miranda opinion summarizes the warnings to be given as follows:

> "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."

Miranda v. Arizona, 384 U.S. 436, 479 (1966).

The motion judge's decision concludes that the warnings here "did not convey the right to the presence of an attorney during questioning." It is not entirely clear, however, what portion of the warnings the judge considered defective. At one point the decision seems to focus on the statement: "[i]f you cannot afford an attorney, one will be appointed to you by the Commonwealth at no expense and prior to any questioning." The implication is that the judge considered this warning defective because the right to a lawyer "prior to" any questioning does

not explicitly include "during."[4] In this court, however, the defendant emphasizes a different portion of the warnings. He argues that the defect arises because he was not given what is known as Miranda's third warning; that warning is "that he has the right to the presence of an attorney." The third warning given to the defendant here was "you have the right to an attorney." The difference the defendant focuses on is the omission of the three words -- "the presence of." The contention is that being told "you have the right to an attorney," and that if you cannot afford an attorney, one will be appointed "prior to any questioning," is not sufficient to advise of the right to an attorney during questioning.

Contrary to defendant's argument, however, the United States Supreme Court has made clear that Miranda does not require that its warnings be given in "precise formulation." California v. Prysock, 453 U.S. 355, 359 (1981). Indeed, the Supreme Court has three times addressed contentions that a particular set of Miranda warnings was inadequate, and each time it has held that warnings that varied in some way from Miranda's formulation were nevertheless adequate. In Prysock, for example, the California Court of Appeals had held that the

[4] Note that this portion of the defendant's warning was nearly identical to the language in the Miranda opinion.

warning "you have the right to have a lawyer appointed to represent you at no cost to yourself" was defective because it failed to advise of the right to appointed counsel "before further questioning." The Court reversed. It rejected the notion that a "talismanic incantation" was required, emphasizing that Miranda itself contemplated that "equivalent" warnings would suffice.[5] Id. at 359-360.

The Court next addressed the adequacy of particular warnings in Duckworth, 492 U.S. at 198. Once again, the contention was that the warnings given in Duckworth about the right to appointed counsel did not convey that the suspect had that right prior to being questioned, because although the warnings stated "[y]ou have a right to talk to a lawyer for advice before we ask you any questions," the warnings later stated that "[w]e have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court" (emphasis omitted). Id. The argument was that these warnings, taken together, implied that "only those accused who can afford an attorney have a right to have one present before

[5] In Prysock, the Court relied on other portions of the warnings given in that case. Those other portions were more detailed than the language of Miranda, and advised of "the right to talk to a lawyer before you are questioned, have him present with you while you are questioned, and all during the questioning." 453 U.S. at 358.

answering any questions." Id. at 203. The Court again found the warnings sufficient. It emphasized that courts "need not examine Miranda warnings as if construing a will or defining the terms of easement." Id. Viewed "in their totality," the warnings in Duckworth satisfied Miranda, where one of the warnings described the right to counsel before being questioned, and another stated the suspect's right to stop answering "until [he] talk[ed] to a lawyer." Id. at 205, quoting Eagan v. Duckworth, 843 F.2d 1554, 1555-1556 (1988).

Finally, in Florida v. Powell, 559 U.S. 50 (2010), the Court addressed the warning "[y]ou have the right to talk to a lawyer before answering any of our questions," coupled with the statement "[y]ou have the right to use any of these rights any time you want during this interview." Id. at 54. As in this case, the warnings in Powell were challenged because they did not explicitly state that the suspect's right to consult with counsel continued during questioning. See id. Once again, the Court rejected the contention that the warnings were fatally defective: "Although the warnings were not the clearest possible formulation of Miranda's right-to-counsel advisement, they were sufficiently comprehensive and comprehensible when given a commonsense reading." Id. at 63.

Prysock, Duckworth, and Powell support the conclusion that the warnings given here were adequate to satisfy Miranda. Most

critically, those cases warn against the kind of overly technical review that the defendant employs here. Many different formulations of the warnings have been found adequate, as long as they convey the "equivalent" of Miranda's warnings.

No doubt, one could parse the warnings given in Prysock, Duckworth, and Powell and argue that the warnings in those cases contained more specific language regarding the right to counsel than the warning given in this case. But to do so would miss the most important teaching of those cases, which is that courts should focus on the totality of the warnings conveyed, rather than their precise form. That teaching can be derived from Miranda itself. It is true that the Miranda opinion emphasizes the importance of the ability to have a lawyer present "during any questioning." Miranda, 384 U.S. at 470. But when it came time to summarize what a suspect needed to be told, the Miranda opinion did not formulate the warning in terms of a right to counsel "during questioning"; rather, Miranda used the language, the "right to the presence of an attorney," without any temporal component. Id. at 479. No doubt, the Court saw the two formulations as equivalent. Thus, Miranda itself evidences no talismanic adherence to the "during questioning" formulation.

Applying these principles, we conclude that the warnings given here, in their totality, adequately conveyed the Miranda warnings, including the ability to have a lawyer present during

questioning. First, the warning stated "you have the right to an attorney." That warning is unequivocal, and unqualified. Read literally, it states a right to a lawyer, and therefore a right to legal advice, at any time -- before, during, and after any questioning. True, it does not include the three words from Miranda -- "the presence of." But one might reasonably question how much those words add to the unequivocal, "you have the right to an attorney."[6] And this is particularly so, where other portions of the warnings contain additional advice regarding the right to counsel.

In this case, we need not rest our conclusion solely on the warning, "you have the right to an attorney." Here the defendant was also told of the right to have appointed counsel "prior to any questioning." That statement reasonably confirmed to the defendant that his right to an attorney, previously stated, included both the right to the presence of counsel, and the right to consult with counsel about any questioning in advance. Such is the import of the warnings themselves: the suspect has a right to a lawyer; that right obtains prior to any

[6] Indeed, were those three words not specifically included in the Miranda opinion one could envision a defendant arguing that a warning containing "the presence of" was itself defective, and claiming that advising of the right to the "presence" of an attorney did not adequately convey the right to consult with the attorney.

questioning. The warnings did not also need to say: "your right to a lawyer includes the right to consult with a lawyer before, during, and after questioning and to have the lawyer physically present at all times." Miranda did not require a parsing out of all subspecies of the right to counsel. Moreover, the Supreme Court in Powell has already rejected the argument that advice of a right to counsel "prior to" questioning is defective for not stating "during."

In sum, viewed in their totality we believe the warnings adequately advised the defendant of his right to an attorney, including his right to consult with counsel and to have him or her present before, during and after questioning. In so holding we note, as the Supreme Court did in Powell, that we are not sanctioning a retreat from Miranda; rather we find the warning adequate "because it communicated just what Miranda prescribed." Powell, 559 U.S. at 62 n.5. While not the "clearest possible"

formulation, it conveyed the equivalent of the warnings required.[7,8] Id. at 63.

We acknowledge that, in Commonwealth v. Miranda, 37 Mass. App. Ct. 939 (1994), we concluded that a Miranda warning was inadequate where the defendant was never "informed that he had the right to the presence of an attorney, either retained or appointed, during any interrogation." Id. at 940. The warning recited in Commonwealth v. Miranda differed materially from the warning at issue here, because although there the defendant was advised of his "right to an attorney," he was not also advised (as the defendant was here) of his right to appointed counsel "prior to any questioning." Moreover, we reached our conclusion in Commonwealth v. Miranda without examining whether, despite the missing language, the warnings as a whole reasonably conveyed to the defendant the protections to which he was

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[7] There are several United States Courts of Appeals decisions that address warnings similar but not identical to those at issue here, and that arguably reach conflicting results. See United States v. Frankston, 83 F.3d 79 (4th Cir. 1996) (no Miranda violation); United States v. Caldwell, 954 F.2d 496 (8th Cir. 1992) (no Miranda violation); United States v. Noti, 731 F.2d 610 (9th Cir. 1984) (finding Miranda violation); Windsor v. United States, 389 F.2d 530 (5th Cir. 1968) (finding violation). These cases do not point to a particular result in this case. They are not directly on point, and predate at least the Powell decision.

[8] We note, approvingly, that we were advised at oral argument that since the events at issue the Fall River police department has revised the form at issue, so that it now conforms to the language of the warnings in Miranda.

entitled. Subsequent to our decision in Miranda, the Supreme Court decided Powell, which made clear that a deficiency in the language of the warnings is not necessarily dispositive, but that the reasonable meaning of the warnings as a whole must be considered. See 559 U.S. at 63. We have taken that approach here.

The Supreme Judicial Court has not held that more precision is required under the Massachusetts Declaration of Rights than is required by the Federal Constitution, and we decline the defendant's invitation to extend beyond the Federal requirements here. See Commonwealth v. The Ngoc Tran, 471 Mass. 179, 185 (2015) (citing and following standards from Powell, Duckworth and Prysock, and confirming that Miranda warnings need not be given word for word). The Miranda warnings are directed to preserving the right of an accused against compelled self-incrimination. In terms of the formulations of those warnings, the Federal case law has established the parameters, and has shown how to enforce their use. Certainly the facts of this case evidence none of the concerns of overbearing custodial interrogation that led to Miranda's requirements. The statements at issue should not have been suppressed.

Order allowing motion to suppress reversed.

(#33) 34

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

SUPERIOR COURT
CRIMINAL ACTION
No. 2013-00400

COMMONWEALTH

vs.

WILLIAM LAJOIE

FINDINGS OF FACT, RULINGS OF LAW, AND ORDER ON DEFENDANT'S MOTION TO SUPPRESS

On March 14, 2013, a Bristol County grand jury indicted the defendant, William Lajoie ("Lajoie" or "defendant"), on one count of rape of a child with force, one count of threatening to commit a crime, one count of aggravated assault and battery with a dangerous weapon, one count of assault and battery, one count of assault with intent to rape, and one count of violating of an abuse prevention order. Lajoie has moved to suppress statements that he made during a custodial interrogation. A hearing on this matter was held on March 24, 2016. Detective Brian Cordeiro ("Cordeiro") of the Fall River Police Department testified at the hearing. A total of three exhibits were introduced including a video and audio recording of the interview of the defendant by Cordeiro. After considering the testimony and exhibits and after review of the recorded interview as well as the parties' written submissions, for the following reasons, the defendant's motion to suppress is **ALLOWED**.

FINDINGS OF FACT

Based on the credible evidence adduced at the hearing on this matter as well as the reasonable inferences therefrom, the Court finds the following facts:

On November 7, 2012, Lajoie was taken into custody at the Fall River Police Station and interviewed by Cordeiro. The interview was audio and video recorded. Prior to conducting the interview, Cordeiro advised the defendant that he had the right to remain silent. Cordeiro then asked the defendant if he understood that right. The defendant responded in the affirmative. Cordeiro then advised the defendant that anything he said "can" be used against him at trial. Cordeiro asked the defendant if he understood this right and the defendant responded in the affirmative. Cordeiro next informed the defendant that he had the right to an attorney. When asked by Cordeiro if he understood this right, the defendant again responded in the affirmative. Cordeiro went on to advise the defendant that if he could not afford an attorney that "one will be appointed to you by the Commonwealth at no expense and prior to any questioning." Again, after Cordeiro asked the defendant if he understood this right, the defendant confirmed that he did. Cordeiro did not advise the defendant that if he chose to have an attorney that the attorney could be present during any questioning by Cordeiro. Cordeiro did advise the defendant that if he waived his "Fifth Amendment rights pursuant to Miranda," that he could stop answering questions at any time. Cordeiro asked the defendant if he understood this right and the defendant answered in the affirmative.

Cordeiro also gave the defendant what he described as "Presentment Warnings." In essence, these "Presentment Warnings" informed the defendant of various rights concerning prompt presentment to a court, his right to have an attorney at that proceeding, the right to a bail hearing if bail is requested and his right to a judicial determination of probable cause for his arrest within twenty-four hours if he has been arrested without a warrant. The defendant stated that he understood all of the rights that were provided to him by Cordeiro. The defendant further stated that he wished to waive his Fifth Amendment rights and speak with Cordeiro. The rights

provided to the defendant appeared on Exhibit 2 that was introduced at the hearing. Exhibit 2 also contains the defendant's written waiver.

Cordeiro interviewed the defendant for approximately thirty-one minutes. At all times, Cordeiro was pleasant and courteous. At no time during the questioning did Cordeiro engage in any trickery or deceit. At no time during the questioning did Cordeiro threaten, intimidate or make offers of leniency to the defendant in exchange for the defendant answering Cordeiro's questions.

From the outset of the questioning, the defendant appeared to be holding a paper towel to his head to dab what the defendant described as an abscess. Cordeiro offered the defendant another paper towel. However, the defendant did not appear to be in any significant pain during the encounter with Cordeiro. The defendant also appeared to be alert and not under the influence of any drugs or alcohol.

During the interview, Cordeiro informed the defendant that he was under investigation for an incident involving sexual intercourse with a girl under the age of sixteen that had occurred approximately fifteen years earlier. The defendant admitted to having sexual intercourse with the girl but stated that she told him that she was nineteen and that the sexual intercourse was consensual. Cordeiro asked the defendant if he was the father of the woman's now fifteen-year-old son. The defendant stated that his name was on the birth certificate but that he had never undergone a paternity test. He further stated that he felt that the child's father was either himself or one other person.

Cordeiro asked the defendant if he would consent to a buccal swab that would be used to determine whether he was the child's father. The defendant paused and stated that he would need to speak to his lawyer about whether to submit to the swab. Cordeiro stated that he

understood and left the room. Within a minute, the defendant called the detective back into the room and said that he would consent to the test. Subsequently, detective Raul Camara ("Camara") entered the room in order to take a buccal swab. Camara informed the defendant of his rights as set forth above.

At the hearing, Cordeiro testified that his interaction with the defendant on November 7 was not his first encounter with the defendant. Cordeiro testified that he went to the defendant's home in March of 2014 to interview him concerning another incident. Cordeiro testified that the defendant declined to speak with him about the other incident, instead choosing to speak with his attorney prior to speaking to the police. Cordeiro respected the defendant's wishes and left his home without conducting an interview.

RULINGS OF LAW

A. Custody

The constitutional safeguards established by the United States Supreme Court in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), apply only to custodial interrogations. *Commonwealth* v. *Molina*, 467 Mass. 65, 72 (2014). "In assessing whether a defendant was in 'custody' for purposes of the *Miranda* requirements, the crucial question is whether, considering all the circumstances, a reasonable person in the defendant's position would have believed that he was in custody." *Commonwealth* v. *Thomas*, 469 Mass. 531, 539-540 (2014), quoting *Commonwealth* v. *Hilton*, 443 Mass. 597, 609 (2005) (alterations added). The Supreme Judicial Court "has set forth four indicia of custody: (1) the place of the interrogation; (2) whether the officers have conveyed to the person being questioned any belief or opinion that the person is a suspect; (3) the nature of the interrogation, i.e., whether the interview was aggressive or, instead, informal; and (4) whether, at the time the incriminating statement or statements were made, the

suspect was free to end the interview by leaving the place of the interrogation or by asking the interrogator to leave, or, alternatively, whether the interview terminated with the defendant's arrest." *Commonwealth* v. *Sneed*, 440 Mass. 216, 220 (2003). "There is no specific formula for weighing the relevant factors, . . . but rarely is any single factor conclusive." *Id.* (citations omitted). There is no question that the defendant was in custody at the time that Cordeiro questioned him.

B. Waiver

When *Miranda* warnings are required, a suspect must knowingly, intelligently, and voluntarily waive his or her rights before a statement is admissible in court. *Commonwealth* v. *Bryant*, 390 Mass. 729, 736 (1984). See *Commonwealth* v. *Magee*, 423 Mass. 381, 386 (1996) (Commonwealth bears the burden of proving a valid waiver of *Miranda* rights beyond a reasonable doubt). Courts may consider several factors to determine the validity of a waiver, including promises or other inducements; the defendant's conduct, the defendant's age, intelligence, emotional stability, and education; the defendant's experience with the criminal justice system; the defendant's physical and mental condition, and the details of the interrogation, including the *Miranda* warnings. See *Commonwealth* v. *Edwards*, 420 Mass. 666, 673-675 (1995); *Commonwealth* v. *Mandile*, 397 Mass. 410, 413 (1986). See also *Commonwealth* v. *Jackson*, 432 Mass. 82, 86 (2000); *Commonwealth* v. *St. Peter*, 48 Mass. App. Ct. 517, 517-520 (2000).

Prior to a custodial interrogation, a suspect must be advised "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." *Miranda*, 384 U.S. at 479. In the present case,

Lajoie argues that the *Miranda* waiver form that he signed was constitutionally defective. According to Lajoie, the portion of the waiver stating "[a]nything you say can be used against you" is invalid for its failure to state that anything he said "will" be used against him. Lajoie additionally argues that the portion of the waiver which stated "[i]f you cannot afford an attorney, one will be appointed to you by the Commonwealth at no expense and prior to any questioning," is defective because it did not convey that he had the right to the presence of an attorney *during* questioning.

The United States Supreme Court has "never insisted that *Miranda* warnings be given in the exact form described in that decision." *Duckworth* v. *Eagan*, 492 U.S. 195, 202 (1989). Nonetheless, Lajoie's waiver is constitutionally defective if the warnings he received were not "a fully effective equivalent." See *id.*, citing *Miranda*, 384 U.S. at 476 (emphasis omitted). The court will discuss the constitutional validity of each of the challenged warnings, in turn, below.

i. Right to Remain Silent

"The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make [the suspect] aware not only of the privilege, but also of the consequences of foregoing it." *Miranda*, 384 U.S. at 469. Here, the wavier form signed by Lajoie informed him he had the right to remain silent and stated that "[a]nything you say can be used against you." The form did not, however, state that anything Lajoie said "will" be used against him. The omission of this language is of no consequence.

In *Duckworth* v. *Eagan*, 492 U.S. 195, 198 (1989), the U.S. Supreme Court considered the adequacy of a *Miranda* warning, which, like the warning at issue in the case at bar, did not state that the defendant's statements "will" be used against him. The Court nonetheless found

that the warning was valid because it "touched all of the bases required by *Miranda*." *Id.* at 203. Indeed, a warning that a suspect's statements "could" be used against him is in essence a warning that the Commonwealth is permitted to use his statements against him. *Miranda*, 384 U.S. at 469. Notwithstanding the omission of language that his statements "will" be used against him, such warning is sufficient to apprise the suspect "of the consequences of foregoing" his right to remain silent. See *Commonwealth* v. *Ashley*, 82 Mass. App. Ct. 748, 751 n.3 (2012) (case where court analyzed the constitutional validity of *Miranda* warnings, but did not discuss any defects resulting from omission of warning that statements *will* be used against suspect). Accordingly, the language in Lajoie's waiver form stating "[a]nything you say can be used against you" was constitutionally valid.

ii. Right to an Attorney

"[T]he need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires." *Miranda*, 384 U.S. at 470. "[A]n individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation . . . ." *Id.* at 471. "The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most often subjected to interrogation—the knowledge that he too has a right to have counsel present. . . . only by effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it." *Id.* at 473. Here, Lajoie argues that the portion of the waiver that stated "[i]f you cannot afford an attorney, one will be appointed to you by the Commonwealth at no expense and prior to any questioning," is defective because it did not convey the right to the presence of an attorney *during* questioning. Lajoie is correct.

Many federal courts of appeal have discussed the constitutionality of right to counsel warnings in the context of failure to specify applicable time frames, implication of a temporal limit, and placing conditions on its applicability. See e.g., *United States* v. *Tillman*, 963 F.2d 137, 141 (6th Cir. 1992) (warnings inadequate where "police failed to convey to defendant that he had the right to an attorney both before, during and after questioning"); *United States* v. *Bland*, 908 F.2d 471, 474 (9th Cir. 1990) (informing defendant of right to counsel *before* questioning was inadequate in absence of warning of right to counsel *during* questioning); *United States* v. *Contreras*, 667 F.2d 976, 979 (11th Cir.1982) (warning adequate where suspect advised of "right to consult with an attorney prior to questioning, to have an attorney present during questioning, and to have counsel appointed"); *United States* v. *Anthon*, 648 F.2d 669, 673 (10th Cir. 1981) ("In order to be able to use statements obtained during custodial interrogation of the accused, the State must warn the accused prior to such questioning of his right to . . . have counsel . . . present during interrogation."); *United States* v. *Stewart*, 576 F.2d 50, 54 (5th Cir. 1978) (recognizing Fifth Circuit's "long line of cases" in which convictions were reversed where defendant was informed of right to counsel, but not to have counsel present during interrogation).

Subsequently, in 2010, the United States Supreme Court spoke in *Florida* v. *Powell*, 559 U.S. 50, 54 (2010) on the issue of the adequacy of warnings that informed the defendant, in relevant part:

> You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.

Deeming the warning constitutionally valid, the Court found that "[t]he first statement communicated that [the defendant] could consult with a lawyer before answering any particular

question, and the second statement confirmed that he could exercise that right while the interrogation was underway. In combination, the two warnings reasonably conveyed [the defendant's] right to have an attorney present, not only at the outset of interrogation, but at all times." *Id.* at 62. Unlike the warning at issue in *Powell*, the warning Lajoie received did not contain any additional statements confirming that he could exercise his right to consult with an attorney while the interrogation was underway.

Despite the plethora of federal case law addressing whether *Miranda* requires a suspect to be explicitly warned that he may have counsel present during questioning, there is no direct and binding precedent in Massachusetts that speaks to this issue. The Commonwealth points to *Commonwealth* v. *Johnston*, 60 Mass. App. Ct. 13, 16-17 (2003), in which a defendant challenged the adequacy of a waiver form that contained warnings identical to those on the form signed by Lajoie. The Appeals Court noted that advising the defendant "'he had the right to an attorney' could reasonably be interpreted to mean that the defendant had the right to counsel during questioning,'" but that this interpretation was "not the only possible interpretation of the form." *Id.* at 17 n.3. The Appeals Court nonetheless declined to consider whether the warning was defective as a matter of law with respect to informing the defendant of his right to counsel because the defendant had not preserved his right to challenge the adequacy of the warnings on appeal.[1] *Id.* at 17.

The Commonwealth also points to *Commonwealth* v. *Gatta*, 2013 Mass. App. Unpub. LEXIS 1065 at *7 n.3 (Nov. 6, 2013), a Rule 1:28 decision of the Appeals Court which stated in

[1] The Appeals Court considered this issue again with respect to the same defendant's motion for new trial in *Commonwealth* v. *Johnston*, 2008 Mass. App. Unpub. LEXIS 253 (Aug. 6, 2008) (decision pursuant to Rule 1:28) (hereinafter, *Johnston II*). In that decision, the Appeals Court emphasized that "[w]hile the defendant could certainly have interpreted . . . the warning to mean that he had the right to counsel's presence during, questioning, that was not the only permissible inference." *Johnston II*, 2008 Mass. App. Unpub. at *7. Assuming, *arguendo*, that the defect in the warning "constituted an imperfection," the court denied the defendant's new trial motion, holding that the defect was harmless error in light of the "overwhelming evidence against the defendant . . . ." *Id.* at *10.

dicta that warning the defendant she had a right to an attorney, and that if she could not afford an attorney one would be appointed prior to questioning "was sufficient to inform the defendant of her right to have an attorney present *during* questioning." (Emphasis added.). Because *Gatta* was a Rule 1:28 decision, and because the ruling on the warning of the right to was dictum, *Gatta* does not represent binding precedent. See *Lyons* v. *Labor Rel. Comm'n*, 19 Mass. App. Ct. 562, 566 & n.7 (1985) (decisions issued pursuant to Rule 1:28 "are not to be relied upon or cited as authority in unrelated cases").

The Supreme Judicial Court's ("SJC") decision in *Commonwealth* v. *Simon*, 456 Mass. 280, 289 (2010), which considered whether the presence of an attorney during questioning is an adequate substitute for *Miranda* warnings, offers some guidance as to how the SJC might assess the validity of a warning like the one provided to Lajoie. The SJC's holding in *Simon* that the presence of an attorney and a suspect's ability to consult with him or her during an interrogation served the purposes of *Miranda* was informed by the majority of courts in other jurisdictions who had considered the same issue, see *id.* at 289, and the SJC's desire "to preserve bright-line rules in the Miranda context." *Id.* at 294.

Applying a similar analysis to the warning at issue here, the majority of courts who have considered *Miranda* warnings that did not explicitly state the suspect had a right to counsel during questioning have held that those warnings were inadequate. See *United States* v. *Caldwell*, 954 F.2d 496, 506-507 (8th Cir. 1992) (C.J. Lay, dissenting), and cases cited (majority holding that *Miranda* warning that did not explicitly inform suspect of right to counsel during interrogation was adequate was "contrary to specific holdings of the Supreme Court . . . and the overwhelming majority of the court of appeals of this country").

"The ability to understand verbal communication, of course, varies among individuals."

Commonwealth v. *Fisher*, 354 Mass. 549, 554 (1968). However, a determination as to whether an individual understood that his right to counsel *prior* to questioning meant that he also had the right to the presence of counsel *during* questioning is an inquiry that is heavily reliant on a defendant's credibility. In contrast, no credibility determination is necessary where, for example, a defendant spoke English well enough to have understood and intelligently waived his rights, see *Commonwealth* v. *Iglesias*, 426 Mass. 574, 577 (1998) (valid waiver where defendant gave statement in English, never asked officers to explain any English words to him, and trial counsel stated he had never had difficulty communicating with defendant), or where the departure from the standard *Miranda* language was *de minimus*. See e.g., *Colby*, 422 Mass. at 418 (warning valid where suspect told "if he could not afford an attorney, the Commonwealth *would attempt* to provide one for him") (emphasis added); *Fisher*, 354 Mass. at 554 (valid warning where defendant told "he was entitled to be *represented at all times* by counsel") (emphasis added). Cf. *Commonwealth* v. *Wilbur*, 353 Mass. 376, 383 (1967) (failure to warn suspect that if he could not afford a lawyer one would be appointed for him harmless error where suspect was a law enforcement official and "[t]here was no reasonable basis for suspecting that [suspect] was indigent and every affirmative indication [suggested] that he was in a position to employ counsel if he wanted an attorney"). Thus, deeming the failure to explicitly warn a suspect of his or her right to counsel during questioning constitutionally invalid, furthers the SJC's prerogative "to avoid fact bound inquiries into the voluntariness of confessions, where police officers are generally more credible witnesses than criminal defendants." *Commonwealth* v. *Smith*, 412 Mass. 823, 836-837 (1992).

Further to the above, the SJC has "consistently held that art. 12 requires a broader interpretation [of the right against self-incrimination] than that of the Fifth Amendment," *Simon*,

456 Mass. at 291, quoting *Commonwealth* v. *Mavredakis*, 430 Mass. 848, 858-859 (2000). Consistent with that interpretation, the SJC has issued a number of decisions granting suspects greater protections of the right against self-incrimination than those afforded by federal law. See *Simon*, 456 Mass. at 291-292; *Smith*, 412 Mass. at 829-837 (pre-*Miranda* questioning presumptively taints subsequent statements); *Mavredakis*, 430 Mass. at 859-860 (holding art. 12 requires police to inform suspect of attorney's attempt to provide legal advice, even where suspect has not requested it); *Commonwealth* v. *Martin*, 444 Mass. 213, 218-219 (2005) (art. 12 prohibits use of product of voluntary, but unwarned, statement). A finding that the failure to warn Lajoie of his right to counsel *during* questioning was constitutionally invalid comports with the spirit of this line of cases.

For these reasons, the defendant's motion to suppress is **ALLOWED**.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the defendant's motion to suppress is **ALLOWED**.

Date: June 3rd, 2016

Gregg J. Pasquale
Justice of the Superior Court